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Letter to the Editor

December 21, 1976

Editor, JURIS
Duquesne University School of Law
600 Forbes Avenue
Pittsburgh, Pennsylvania 15219

Dear Sir:

My frequent past courtroom adversary Samuel J. Reich has posed an interesting thesis regarding the right against self-incrimination (“The Fifth Amendment: A View From the Eye of the Storm,” December, 1976).

However my copy of the Constitution continues to read:

“No person shall be compelled in any criminal case to be a witness against himself.”

not, as Mr. Reich would apparently have it (page 12)

“No person shall be compelled in any criminal case to be a witness if [his] attorney cannot see advantages which substantially outweigh the risks.”

Very truly yours,

RICHARD L. THORNBURGH
Assistant Attorney General
Criminal Division
U.S. Department of Justice

Dean's Note

Much has been written about the lack of employment opportunities for law school graduates. Pictures of law school graduates driving cabs, washing dishes, teaching school fill our screens and our newspapers. In the local bar association and in the American Bar Association resolutions are introduced to suggest that law school enrollment should be curtailed. In fact, the federal government has gotten into the act through the Bureau of Labor Statistics forecasting — 16,000 jobs for 50,000 graduates. The message is clear. Law School is not where the action is.

Added to that is the whole problem of law school enrollment. Law School applications are still at record levels. Private institutions thrusting for glamour, prestige, and money are quickly putting together programs to establish law schools. State institutions in their thrust for glamour and prestige are pointing out to the legislatures the inability of their constituents to get into current law schools within the state and thus the need for State Law School U. Thus on the one hand we have students in record numbers clamoring for law school admission, and on the other, the bar, the Bureau of Labor Statistics, the media, who suggest that law school or being a law school graduate is no longer where the action is.

Is it proper for us to continue to accept a large class if there will not be jobs when they graduate? Should we as many members of the bar restrict our enrollment? These are questions which face all law school administrations. I think that it would be instructive, however, to remember the nature of the American economy over the last several years which in fact parallels the explosion in law school enrollment. Our economy has been bad. When times are bad many individuals who would have otherwise taken jobs can’t find them and thus, go to law school. It is instructive to remember that the last major explosion of law school enrollments (discounting the postponed enrollments which occurred right after the Second World War) occurred during the depression. Thus, when people cannot find a job they stay in school.

The National Council on Law School Placement did a study of those individuals in the Class of 1975 to determine what the placement market was like. It discovered that within a six month period over ninety percent of the Class of 1975 had obtained a law related job. Thus, the scare tactics of some members of the bar and some members of the media, just are not supported by the facts. However, if you are a part of that nearly ten percent of the Class of 1975 who has not as yet obtained a law related job, for you, you have 100 percent of the problem. My guess is that as our economy improves the clamor for law school will decline. However, we will continue to maintain a large and competitive law school enrollment because the law is now an acceptable career for women.

In a depressed economy, there are depressed opportunities. As the economy improves, opportunities will improve. Even in this economy lawyers are busier than ever. It is easy for us who are already a part of the profession to point out the alleged lack of jobs to discourage others from joining us. But there are jobs for those who are aggressive, imaginative, and flexible. Students are still clamoring for admission because they know and appreciate the opportunities we of the legal profession have.
The Tribal Barriers of America

by David W. Craig

I. Suburban Exclusion

In many American residential suburbs, the inhabitants today are demanding that their local officials surround the community with a legal stockade and slam the gates shut.

An example is Fox Chapel Borough — a high-income suburb of Allegheny County, Pennsylvania — where some residents, when they heard that a developer was going to build homes in an adjoining municipality, recently prevailed on their officials to vacate the only road connection to the adjoining municipality. (Their action displayed some ingratitude; the same developer had just built and paid for the road and given it to the borough).

A little earlier, a local judge had held that Fox Chapel's zoning ordinance is illegally exclusionary because it allows only single-family dwellings on very large lots.

The spreading of Fox Chapel's brand of xenophobia has prompted one anthropologist to characterize the growing exclusionary attitudes of American suburbs as tribal in nature, a huddling of neighborhoods based upon economic parity rather than ethnic kinship, to turn away any newcomers who would bring more or different dwellings.

Replacing a family in an existing dwelling with a like family is, of course, quite acceptable, but there is no Welcome Wagon if you want to build an additional house.

The environmental movement frequently provides a cover for exclusion. In one suburb where most of the present homes are on half-acre lots, the proposed development of just 40 single-family residences on two-acre lots is being loudly opposed, partly on the claim that the drainage environment would be disrupted, an argument commonly heard.

Not long ago, at a public hearing, a lady resident from an outer suburb came up to a developer making a proposal, and, with tears in her eyes, said, "We moved from the city a few miles out, and it became all built up, and so we moved again, and now you are following us even here."

The security of the retreat to the tribal stockade is clung to, even when it is illusory. Although crime is now increasing in the suburbs at a faster rate than in the cities, some local officials warp the statistics to minimize the appearance of crime. Young felons are dealt with locally, and auto thefts are written off as joy-riding instead of being counted as a major index crime, as the FBI prescribes. That statistical white lie has a financial cost, at least in states where the index crime rate is a plus factor in apportioning Federal Safe Streets grants to a municipality.

II. Encouragement and Evasion

Because some municipalities have had success in imposing moratoria upon development to prevent the influx of newcomers, the exclusionists have been encouraged. In the Town of Ramapo, New York, where new development can be delayed for as long as 18 years if it cannot acquire a required number of infrastructure rating points, the New York Court of Appeals has given its blessing to Ramapo's growth control scheme. The United States Court of Appeals has declined to stop Petaluma, California — best known as

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the wrist-wrestling capitol of the world — from imposing a five-year quota of not more than 500 new units of housing development, reversing a district court which felt that such moratorium infringed upon the citizen’s constitutional right to travel.

However, the exclusion of newcomers — no-growth as distinguished from slow growth — has been declared unlawful by Pennsylvania and New Jersey courts, the appellate judiciary in both states declaring that every municipality must allow a variety of housing types and accept its “fair share” of housing needed in a region.

Thus, as was true with respect to school segregation, the judges have taken some action where the legislators have been loath to move.

Attempts to evade the doctrine against exclusion have been struck down. In feigned compliance with the doctrine, O’Hara Township, near Pittsburgh, adopted a planned multi-family district, but then rejected applications for actual development in it; however, two appellate court decisions forced it to approve proposals which comply.

At the edge of the same metropolitan area is Pine Township, whose purported compliance with the requirement for a multi-family option consisted of one district where office buildings and highrise apartments — not less than 10 stories high — were allowed. The theory apparently was that there would be no market for highrises. Wiser heads prevailed there, and that provision, under attack, was replaced by a more reasonable variety.

Another suburb, after being required to issue permits for a townhouse development in accordance with its own ordinances, suddenly discovered the need to slap a weight limit on the only road leading to the construction in progress — a weight limit too low to permit concrete trucks and other necessary deliveries. Only some plain lawyer talk produced a construction exemption.

The legal battles have produced some strange-bedfellow alliances among big law firms representing developers, young poverty law attorneys and lawyers for black civil rights organizations. When such a mixed bag of legal talent gathered at an O’Hare Airport hotel last year to exchange ideas, they were a little surprised to discover their common causes.

III. Race, Religion and Mobilehomes

Although the direction of exodus has been away from the black neighborhoods in the central cities, the suburban tribal attitude is not overtly racist, at least in the plush enclaves where the well-off black professional is tolerated because he can pay his mortgage dues. Although teenagers in some working class suburbs still break windows and vandalize the cars of new black families, the discrimination is more quantitative than qualitative. The tribes oppose the addition of more people of any kind, not just blacks or the poor.

The absence of explicit racial bias in the exclusion has permitted the Burger lineup of the U.S. Supreme Court recently to announce, in Village of Arlington Heights v. Metropolitan Housing Development Corporation, Slip Opinion No. 75-616 (1976), that zoning will not be invalidated because of racially-disproportionate exclusionary impact, in the absence of evidence of discriminatory intent. That decision, although it does not upset the Pennsylvania and New Jersey anti-exclusion doctrines, will undoubtedly also encourage the exclusionists, who usually deny being racist.

Expressions of ethnic open-mindedness can be found. In the Pittsburgh suburb of Penn Hills, a group of Asian Indians recently applied for approval to erect a genuine Hindu temple. One dear lady arose to protest on the ground that ours is a Christian nation, that an alien religion should not be fostered, and that a tiny group of just fifty Hindus might let the building fall into disrepair. The chairman quietly reminded her that her Jesus began with a group of just 13 followers, and the governing body swiftly approved the proposal, while the other citizens present applauded and rose in greeting to the new worshipers.

Indeed, the most fierce opposition is not launched against race or religion, but against mobilehome parks. Such opposition has some national significance because inflated housing costs are now causing mobilehomes to exceed 35% of the new home market. Although some states have eliminated the building code obstacles, the real deterrent to modular housing aggregations continues to be zoning area requirements. Even the effective and hard-working Pennsylvania Commonwealth Court, which has pioneered in striking down barriers, is still permitting mobilehome park exclusion by thus far approving half-acre minimum mobilehome lot requirements, which make mobilehome parks economically unfeasible.

Mobilehomes, of course, are seen as bringing social degradation, as well as economic and aesthetic threats. In public hearings, the incumbent residents often characterize mobilehome dwellers as unstable persons, seemingly too transient even for our mobile society. In this half century, mobilehome dwellers are viewed by many communities as gypsies were regarded some decades ago.

IV. Allies of Exclusion

The tribal stockade is also raised against commercial development. As exemplified by Monroeville Borough in Allegheny County, even where tracts have long been zoned commercial, complying applicants have had to resort to the courts again and again to obtain building permits. No more commercial development is wanted — not even where the town plan says yes.

Interestingly, exclusion of commercial and industrial development is encouraged by the state school reimbursement formulae in some states. Although non-residential development adds no new pupils and enhances the tax base, much of the revenue benefit can be wiped out because an enlarged tax base, in the denominator of the Pennsylvania reimbursement formula, for example, will reduce state school reimbursement dollar totals.

The home-rule movement is also an ally of exclusion. Freedom from state standards gives exclusion more strength.

A Jacksonian upsurge of initiative and referendum devices is often coupled with home-rule charters. The Burger Court, in City of Eastlake v. Forest City Enterprises, 96 S. Ct. 2356 (1976), has approved subjecting zoning amendments to veto by referendum. Thus land-use decisions are subjected to mob-rule in place of community planning considerations, or, alternatively, to the possibility
that massive media expenditures could sway the public’s mind on a zoning referendum.

In arguing that a bad referendum decision may still be struck down as unconstitutional, the Burger Court ignores the fact that the sheer time delay required for a referendum will be enough to kill a needed housing project because of the inevitable loss of financing commitments. Indeed, H.U.D. has often jerked subsidies away when such delays—however unjust—have been interposed.

Lack of federal sympathy is nothing new. Congress has made sure that the Housing Act requires an official municipal consent before a federally-subsidized project can be admitted.

V. Exclusion in the Central City

Attributing the characteristics of tribal exclusion to the suburbs alone would not be fair. City neighborhoods, black and white, recognized in the 1960’s that they had less home rule than outlying suburbs which were no bigger. Through the development of neighborhood councils, little city halls, and other neighborhood home-rule devices, the inner city is getting its own tribal characteristics.

Currently, the major resistance in the city is to group homes for persons disabled by physical handicaps, mental retardation or delinquency—the community-living movement, for social rehabilitation which seeks to get disabled persons out of massive institutions into family-like settings in residential neighborhoods.

In cities like Pittsburgh, where the city administration prefers the middle-class voter to the disadvantaged, the group home barriers are strong, despite a more open-minded city council and planning commission. Amazingly, the City of Pittsburgh, within its fifty-some square miles, has no zoning authorization for non-institutional group residences.

In the City of Meadville, Pennsylvania, the zoning hearing board recently denied a group home application because “use of the property by eight mentally-retarded men would be injurious to the neighborhood”, but that ignorant decision was reversed by the Common Pleas Court.

Again the Burger Court is consistent in support of the reactionary view. The decision in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), approved a zoning definition of “family” to require relationship by blood or marriage as a tool to exclude student communes and group residences. Justice Douglas’ majority opinion confirms his liberalism as the pro-regulation brand rather than the humane kind.

VI. Exclusion’s Impacts

It would be useful research to attempt to isolate and identify the effect of housing development opposition, nationwide, upon the depressed number of housing starts.

The hypothesis that the gross national product is suffering because of housing barriers deserves exploration.

There is a need to measure the effect of the attitudes which prevent and delay the replacement of decayed housing, the legislation which zones out low and moderate income housing, and the specifications which thwart modular building techniques.

However, more important than the economic waste and detriment is the divisiveness among economic and age groups which is being fostered by the tribe-like barriers which the highest court in the land seems to be condoning.

The unremitting callousness of the Burger Court toward the housing interests of the poor and disadvantaged, together with the hopelessness of expecting aid from legislatures and Congress, seems certain to stimulate bitterness and frustration.

If our sense of national community, battered by political distrust and the Vietnam hypocrisy and racial tensions, is chopped up even more by neighborhood barriers, varied segments of the population can be infected with deep senses of alienation.

No great gift of prophecy is required to see that the clumping of American city and suburban neighborhoods into tribal stockades is moving us closer to the situation of those African nations where loyalty to tribe prevails over the national welfare.

De facto tribal circles provide the basis, ultimately, for tribal warfare. The bloodshed of the Northern Ireland Protestant and Catholic enclaves, and the inter-tribal slaughter of African countries, provide disturbing parallels.

We have had samples of guerrilla warfare in San Francisco, Detroit and other cities. We already have terrorists killing police officers and slaughtering both whites and blacks who were guilty only of violation of some imaginary territorial imperative. Dismissal of these incidents as isolated is self-deceiving. Their mounting frequency signifies a trend.

All that is required for catastrophe is adaptation of the insane political logic of the Irish extremists and the Arab terrorists to the balkanized metropolitan areas of America.
The Public Employee Relations Act - Marbury v. Madison All Over Again

By The Honorable Francis A. Barry

The average trial judge when confronted with problems arising under the Public Employee Relations Act, the Act of July 25, 1970, P.L. 563, No. 195, 43 P.S. §1101.101, et seq., certainly must feel like the Pope in his confrontation with Premier Joseph Stalin, who cynically asked how many divisions the Pontiff had to enforce his decrees. As the case of Montour School District v. Montour Education Association, et al., (Court of Common Pleas, Allegheny County) No. GD 76-23274 put it:

There must be a better way of handling disputes when communities become battlefields, when there are threats and more than threats to defy courts even if injunctions are granted and when many problems become nasty and insoluble as the result of the bitterness engendered.

The author, sitting as a Chancellor in Equity in that case, was talking about a dispute involving school teachers. Another area of litigation which resulted from this unfortunate statute and which must make the Court feel like the frail, legionless Pontiff involves the courts in a confrontation with the executive power. The result is another delicate constitutional confrontation similar to that in which the country has reveled from the days of Marbury v. Madison, President James Madison, 1 Cranch 137, 2 LEd. 60 (1803), to the days of U.S. v. Nixon, 418 U.S. 683 (1973).

Article V of the Pennsylvania Constitution adopted by the electorate in April of 1968 enunciates the existence of the judicial power of the Commonwealth vested in a unified judicial system. In the Supreme Court, the highest Court of the Commonwealth, is reposed the supreme judicial power of the Commonwealth. The Supreme Court created a Judicial Council under the Rules of Judicial Administration which under Rule 313 has, inter alia, the following powers:

Subject to any inconsistent order or general rule of the Supreme Court, the Judicial Council, upon the request of the Court Administrator, shall have the power by order in specific cases to define the relative administrative powers, duties and responsibilities of the Court Administrator, district court administrators, president judges, administrative judges of divisions, and other system and related personnel. The Council under this rule may specify who shall exercise the power of appointment and removal of the several classes of personnel of the system.

"Personnel of the system" was defined under definitions in Rule 102 to include the following:

Judges and other judicial officers, their personal staff, the administrative staff of courts and justices of the peace, and the staff of the Administrative Office and other central staff.

The following illuminating note to Rule 314 is contained in the Rules of Judicial Administration:

Under the doctrine of separation of powers the 'Judicial Branch' (an undefined term employed in Article V, §10 (c) of the Constitution and which may or may not be synonymous with 'unified judicial system') and the unified judicial system are entitled to at least the same powers of internal housekeeping as the General Assembly has seen fit to confer upon the Executive Branch. The rule recognizes this fact without attempting to catalogue those 'housekeeping' powers. The membership of the Chief Justice and one other justice of the Supreme Court on the Judicial Council is a direct parallel to the membership of the Governor on the Executive Board.

The recital of the rules may be dull but not to those who see the conflict inherent in the propositions enunciated. As Jim R. Carrigan, Esq., stated in his pamphlet "Inherent Powers of the Court" published by the National College Of The State Judiciary:

Today, as never before, courts are caught in a financial squeeze. Growing caseloads demand more courtrooms, equipment and personnel. Expenses of maintaining even the existing level of court operations mount daily. Yet the primary sources of court funds - local taxing units - are already overburdened with the conflicting financial demands of education and local government services.

All too often, in allocating priorities among the many meritorious demands upon tax resources, those

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who control the public 'purse strings' have slighted justice to fund roads, sewers or a new jailhouse rather than a courthouse.

Typically, funds to pay state court expenses, other than judges' salaries, are controlled by an elected local board which combines both legislative and executive functions at the county government level. They have generally been manned by local potentates elected on campaign promises of cutting expenditures and thus saving the taxpayers' hard-earned money. While nobody quarrels with that worthy goal there is sometimes disagreement regarding which branch of government should be the prime target for the budget cutters' meat axe.

All too often the judicial budget is the prime target, for judges wield little political power and are afflicted with a self-effacing attitude of judicial self-restraint. Traditionally, the court system has been the 'nonsqueaky wheel' of local public finance. Thus, local boards often assume that, in deference to separation of powers, judges will lean over backward to avoid encroaching on the legislative branch's 'power of the purse' – even if the 'purse strings' are drawn so taut as to strangle the court's efficiency.

However, the separation of powers doctrine, properly understood, imposes on the judicial branch not merely a negative duty not to interfere with the executive or legislative branches, but a positive responsibility to perform its own job efficiently. This positive aspect of separation of powers imposes on courts affirmative obligations to assert and fully exercise their powers, to operate efficiently by modern standards, to protect their independent status, and to fend off legislative or executive attempts to encroach upon judicial prerogatives. From that responsibility arises an inherent power of courts to require that they be reasonably financed.

The fundamental meaning of separation of powers is that the three great branches of government must be separate, coordinate, and equal. Each branch in its own sphere must be free to govern, manage, and administer its business without restriction, supervision, or interference by the other two branches. To the extent that any branch becomes subservient to another, the capacity of the subservient branch to function as a 'check and balance' against the dominant branch is curtailed. This is particularly true where the legislative branch makes the judiciary its supplicant by unreasonably curtailing judicial appropriations.

To preserve the judiciary's independence against the threat of budgetary starvation, courts in recent years have increasingly invoked the 'inherent powers' doctrine.

From the case law can be gleaned this working definition: Inherent powers consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court is, therefore it has the powers reasonably required to act as an efficient court.

Inherent judicial powers derive not from legislative grant or specific constitutional provision, but from the fact it is a court which has been created, and to be a court requires certain incidental powers in the nature of things.

Even before Act 195 raised its own peculiar problems, the Pennsylvania Supreme Court had already decided two cases which have been widely discussed to support the concept of inherent powers of the courts. One of these cases was decided before and one after the 1968 Constitutional Amendments. In the first case, Leahey v. Farrell, 362 Pa. 52, 66 A.2d 577 (1949), the court agreed that the legislature had the power to regulate, within reasonable limits, the compensation of court stenographers, criers, tipstaves, and other court employees. The court, however, drew a chalk line and warned:

... when a board acts arbitrarily or capriciously and refuses or neglects to comply with the reasonably necessary requirements of the court, whereby the administration of justice may be impaired or destroyed, that under the inherent power of the court, orders like that now complained of may be enforced by mandamus.

The case of Commonwealth ex. rel. Carroll v. Tate, 442 Pa. 45 (1971), involved an action of mandamus to compel the Mayor and City Council of Philadelphia to appropriate additional funds requested for the Court of Common Pleas of Philadelphia. The court made several statements about the concept of inherent powers:

It is a basic precept of our Constitutional form of Republican Government that the Judiciary is an independent and co-equal Branch of Government, along with the Executive and Legislative Branches. ... The line of separation or demarcation between the Executive, the Legislative and the Judicial, and their respective jurisdiction and powers, has never been definitely and specifically defined, and perhaps
no clear line of distinction can ever be drawn. However, we must, of necessity, from time to time examine and define some of the respective powers within these undefined boundaries. Id. at p. 51. 

Because of the basic functions and inherent powers of the three co-equal Branches of Government, the co-equal independent Judiciary must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof. (Citations omitted).

Expressed in other words, the Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government. Id. at p. 52.

The confidence, reliance and trust in our Courts and in our Judicial system on the part of the Bench and the Bar, as well as the general public, has been seriously eroded. We cannot permit this to continue. In order to improve and expedite Justice, it is both important and imperative that we re-examine and re-evaluate our Courts and their administration, our Judicial processes and our entire Judicial system.

The demands upon our Judicial system have increased tremendously in the last decade, especially in the criminal field. Violent crimes have increased 10% or more every year. The increase in criminal and civil trials, and the number of required pretrial, presentencing and post-trial hearings have virtually swamped the Courts of this Commonwealth, particularly in Philadelphia. New programs, techniques, facilities and expanded personnel have been and will continue to be necessary to meet the mandate of providing and administering a more efficient Judicial system and making Justice for all speedier and more certain. Id. at pp. 55, 56.

The Court does not have unlimited power to obtain from the City whatever sums it would like or believes it needs for its proper functioning or adequate administration. Its wants and needs must be proved by it to be "reasonably necessary" for its proper functioning and administration, and this is always subject to Court review.

Mr. Chief Justice Marshall said in McCulloch v. Maryland, 17 U.S. 316, 431, "the power to tax involves the power to destroy;... A Legislature has the power of life and death over all the Courts and over the entire Judicial system. Unless the Legislature can be compelled by the Courts to provide the money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated, and the Legislature could make a mockery of our form of Government with its three co-equal branches -- the Executive, the Legislative and the Judicial. Id. at p. 57.

Of further interest are the comments of Mr. Justice Jones (later Chief Justice Jones) who is joined by Mr. Justice Egan in a concurring opinion which states in part as follows:

The majority fails to realize the full import of its standard. If this Court holds that funds must be afforded the Judiciary if 'reasonably necessary,' could a future majority, while stressing the fundamental co-equality of all three branches of government, logically deny this same standard to the Executive branch of government (the Legislative branch already controlling the power of the purse)? Unless that majority is prepared to nominate the Judiciary for a primus inter pares status, this question must be answered in the negative. Id. at p. 58.

This comment thus mirrors the paraphrase of George Orwell made by Frank R. Strong in the Summer 1974 issue of the American Bar Association Journal, "President, Congress, Judiciary: One Is More Equal Than The Others." Apparently this question was decisively answered by Chief Justice Burger in U. S. v. Nixon, supra, where he stated the following:

Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. Powell v. McCormack, 395 U.S. 486 (1969), at p. 549, and in Baker v. Carr, 369 U.S., at p. 211, the Court stated: 'Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.' Id. at p. 704.

Act 195 became the source of the next Pennsylvania confrontation between the Executive and the Judiciary after Leachey and Carroll. In the case of Sweet v. Pennsylvania Labor Relations Board, 12 Pa. Commw. Ct. 358, 316 A. 2d 665, decided March 5, 1974, the Pennsylvania Labor
Relations Board had concluded that Washington County was the public employer of the court-related employees of that County, within the meaning of Act 195. The Commonwealth Court by a 4-3 vote affirmed the Board. Judge Bowman discusses both Leahey and Carroll and concludes that Act 195 is not an impermissible legislative encroachment upon the judicial branch of government in violation of Article V §1 of the Constitution. Judge Bowman points to the creation of county salary boards by the Act of August 9, 1955, P.L. 323, 16 P.S. §1622, §1625, wherein salary boards, although outnumbering the courts, nevertheless have not been considered unconstitutional creations. This observation is particularly interesting in view of the so-called "Monday Morning Massacre" case in which a majority of the Allegheny County Salary Board has abolished positions in the various offices of the row officers of Allegheny County. A case on the validity of this action has been filed in the Court of Common Pleas of Allegheny County. Judge Bowman, in his opinion, admits that "who is the public employer of court related employees of the judicial system at the county level as measured by judicial criteria determining who is an 'employer' or is within the meaning of 'public employer' under the Act may well soon have to be re-examined." Id. at pp. 365-367.

The dissenting opinion by Judge Mencer, concurred in by Judges Crumlish and Kramer, characterizes salary board legislation as a "traumatic departure from the previous practice under which the judges all determined and fixed compensation for their employees and so, understandably, the judiciary initially resisted the implementation of these sections of the County Code with the result that Leahey v. Farrell, 362 Pa. 52, 66 A.2d 577 (1949), was decided." Again, Judge Mencer notes (and no doubt the judges who held to the majority opinion would not disagree):

I respectfully conclude that our decision today places the judiciary and the executive branch of government at the county level on a foreseeable collision course.

If I shared the opinion of the majority that the public employer here is the County of Washington, acting through its County Commissioners, then I would find the Act unconstitutional as it pertains to court-related employees because of its encroachment upon the inherent power of the judiciary to preside over its courtrooms and control court-related employees. See Article V of the Pennsylvania Constitution and Carroll v. Tate, 442 Pa. 45, 274 A. 2d 193 (1971). It must remain a basic precept of our constitutional form of government that the judiciary is an independent and coequal branch of government." Id. at p. 372.

On appeal the Supreme Court reversed at 457 Pa. 456. The court held that the judges were the employer at least of some of the court-related employees which the union sought to represent and, therefore, the bargaining unit was not an appropriate one. The court recites Leahey v. Farrell, supra, and, in addition, quotes the following language of Judge Maxey, later Chief Justice of the Supreme Court, in In Re Surcharge of County Commissioners, 12 Pa. D & C 471 (Lack. C.P. 1928):

The power to appoint necessary attendants upon the court is inherent in the court in order to enable it to perform properly the duties delegated to it by the constitution and it cannot be done as a judicial power. That judicial power includes the authority to select persons whose services may be required in judicial proceedings or who may be required to act as the assistants of the judges in the performance of their judicial functions. Id. at pp. 462, 463.

The opinion of the court was unanimous but Justice Roberts filed a concurring opinion joined in by Justice Nix, the entire text of which is as follows:

I agree that the orders of the Commonwealth Court and the Pennsylvania Labor Relations Board should be reversed. In my view, Act 195 does not include within its scope those persons appointed, directed, or under the supervision of the judges of the various courts of this Commonwealth. If it did, that Act would impermissibly intrude upon the functioning of our independent Judiciary. I am unwilling to attribute such an unconstitutional purpose to Act 195. Id. at p. 464.


In reversing this Court by declining to determine whether the Judges of Washington County are the sole or joint employers of at least some of the

1. This Act does not apply to Allegheny County which is governed by a similar statute, however. (The Act of July 28, 1953, P.L. 723, 16 P.S. 3101).

2. This is the name applied by the metropolitan newspapers in January of 1977 to the Salary Board's abolition of many positions in the row offices.
employees in the PLRB certified bargaining unit, the scenario was written for the litigation which followed and the present confusion, uncertainty and inconsistencies that exist throughout the judicial districts of the Commonwealth with respect to appropriate bargaining units, the identity of the public employer and the vitality and legality of innumerable collective bargaining agreements negotiated before and after Sweet. (Emphasis in opinion)

The Supreme Court continued to exercise what some might consider judicial restraint in cases involving the functioning of the courts in the case of Costigan v. Philadelphia Finance Department Employees Local No. 696, 462 Pa. 425, 341 A.2d 456. In that case, the Register of Wills of Philadelphia brought an action to enjoin arbitration under a collective bargaining agreement entered into by his predecessor and the collective bargaining agent for the employees of the Register. He contended that the City of Philadelphia was a joint employer of the employees in question and since the City was not a party to the agreement the agreement was void. The Supreme Court agreed and reversed the finding of the lower court holding specifically that the agreement was not authorized by the Public Employee Relations Act and was therefore void. The Act was, therefore, considered again and upheld.

In County of Washington, et al. v. Pennsylvania Labor Relations Board, et al., and other allied cases, 364 A.2d 519 (Pa. Commw. Ct.), decided September 10, 1976, the court concluded that the judges of the 27th Judicial District (Washington County) were joint employers of the County Commissioners for court-related employees and not sole employers. Despite the fact that the Court Administrator of Pennsylvania and the judges of Washington County and other judges as amici curiae strongly urged the court to declare Act 195 unconstitutional, the court refused to do so. The original opinion in Sweet was cited and the court was unanimous in concluding that Act 195 was intended to apply to court-related employees as well as other public employees.

The Supreme Court of Pennsylvania on December 22, 1976, granted allocator in these cases at 76 March Term, 1977. It appears unlikely at this juncture that Act 195 will be declared unconstitutional. It appears likely, also, that the executive and judicial branches will continue to be considered co-employers of court-related employees. The delicate statutory and constitutional problems raised by this type of litigation will continue to plague us. The spectators of the melee will continue to be titillated. Constitutional struggles are to the United States what revolutions are to Latin America. May we continue to argue. No quarrels, however, please.

Clinical Education at Duquesne University School of Law

by Leone Paradise

The birth and growth of clinical education at Duquesne Law School has been the occasion of considerable comment, some controversy, and strong interest on the part of both the faculty and the students. The comment has been focused on the value of the specific programs, the controversy on whether the programs should exist at all, and the interest in the new dimension that clinical education brings to a traditional law school curriculum.

The accompanying table, Clinical Education Programs at Duquesne University School of Law, indicates the chronology, the number of students enrolled, the requirements, and the contents of each program. Last year, in 1976, four new clinical programs were initiated, and the time has come to take a good look at where we came from, where we are, and where we might wish to be in a few years.

Prior to 1973, Independent Research and the Family Court Project were the only clinical programs at Duquesne, and clinical only in the sense that they were not strictly within the bounds of an academic classroom situation. In 1974 the District Attorney's Clinical Program enrolled some 30 students and the word was out from the seniors to the first and second year students, "Be sure to take the D.A. Clinic." Then, in 1976, the Neighborhood Legal Services Program began, the District Attorney's Program

Editor's Note: Leone Paradise is a Duquesne University law student who will graduate in June. She chairs the Committee on Clinical Education.
was restructured to provide a more organized and demanding experience for only 15 seniors. The Federal District Court and the Criminal Defense Program were initiated.

The arrival of clinical education has, historically, come late to Duquesne. In the late 1960's, under the banner of relevance, graduate schools all over the country instituted soft-core, clinically-oriented programs which often lowered academic standards. These courses did get the students out into the "real world," but there are many who feel, myself included, that some of these courses offered an opportunity for teachers not to teach and for students not to study. Duquesne Law School did not go this route. The curriculum has remained hard-core academic. However, this year there are over 50 students enrolled in clinical education programs, whereas only four years ago there were probably five. If you are inclined to play with numbers, that is a 250% increase in programs and a 900% increase in the number of participating students. In any event, it is clear that something clinical is happening at Duquesne, and happening significantly enough to influence the nature of the law school. The question then becomes, is this something we want to happen? Does the development of clinical education programs mean a more vital and absorbing law school education or is it a break with traditional legal education that will result in a lowering of academic standards and an intellectually diluted scholastic experience?

People have ideas on these questions. Professor Sheldon H. Nahmod, Chairman of the Clinical Legal Education Committee, feels that the Duquesne faculty has proceeded cautiously, on a case-by-case basis, in introducing clinical programs — programs designed to have as significant educational benefit as any other course in the curriculum. These programs have been adopted on an experimental basis, subject to review and evaluation at year end. Professor Nahmod believes that clinical education offers students components of law practice, like interviewing clients, drafting legal documents and engaging in real life trial and appellate work, not otherwise taught in law school. Since many Duquesne students go into practice for themselves shortly after graduation, these practical skills have great utility. Also, legal concepts often become alive when the students recognize the real problems and develop a deeper appreciation for these concepts as they relate to people's lives.

Further, Professor Nahmod suggested that law school becomes a more exciting place when students are involved in educational experiences outside the traditional classroom environment. By the third year, the case method has lost much of its challenge and interest, and the diversity introduced into the curriculum by clinical programs serves to revive and restore lagging interest.

Dean Davenport said that while he has "never been a big fan of clinical programs" which have been initiated mainly "in response to student desires," he supports the programs currently existing. The problem, as the Dean sees it, is that the "quality of the programs is so uneven" and the Law School's need to maintain standards is "at the mercy of outside institutions." The Dean feels the programs "can work, but, for the most part, they don't," and that the addition of one or two professors of clinical education to the faculty would go a long way to solving the problem.

In the future the Dean hopes to improve in-house clinical activities. He envisions, for example, that once in the new building, the law school will have electronic equipment that can be used to tape students working in trial tactics and client counseling. The tapes will give the student an opportunity to see himself in action and hear immediate analysis and comment on his individual performance.

The concern for some faculty members about the impact of clinical programs on the academic curriculum was expressed by Associate Dean John J. Sciullo, who feels that the limit for non-academic programs has been reached. Dean Sciullo's concern centers on the difficulty of evaluation, the effect of the clinical programs on in-house activities of the law school, and the true benefit to the student.

Dean Sciullo points out that the clinical programs are difficult to evaluate because they are not under the direct supervision of a full-time faculty member, and, therefore, the law school is without some continuing method of quality control. Also, there are certain things the law school is able to do well, such as Trial Tactics, Legal Research and Writing and Appellate Moot Court, which are clinical in orientation. The Dean feels that since time and energy are ultimately limited, the effort directed toward the clinical programs diverts attention and resources from the activities which the law school has traditionally supported.

Dean Sciullo indicated that some of his thoughts on the eventual value of clinical education are strictly personal to his own experience. In retrospect the Dean feels that, for example, the ideas that remain with him from his course in Federal Courts are more meaningful to this very day than the knowledge he gained working for Legal Aid.

While no one can predict how students currently enrolled in clinical programs will assess their experience in the future, there is no doubt about the present opinion of those I interviewed. Discussions with these students revealed a uniformly enthusiastic response, balanced on occasion by a critical comment. While the opinions I heard from participating students may have been only the luck of the draw since I interviewed on a haphazard basis, I feel their comments are worth reporting for the insights they offer into student reaction and thinking. Three of the students responded with an identical first comment: "It was the best course I ever had in law school." One student, a two-year participant in the District Attorney's Program, acknowledged that it was "going to take awhile to get all the bugs out" and that she would "like to see the program continue because it is one thing to learn something in a theoretical sense, in the classroom, but when you are actually involved you really learn it." This theme of the benefits to be derived from actual experience ran through the student interviews. One student in the Neighborhood Legal Services Program went so far as to state that it was the "best course I have or will have in law school, without a doubt, because it is the only place you can use what you have learned outside of a bluebook. The experience is unbelievable for anyone who wants to be a general practitioner. It's probably the single best experience they'll have in law school: how to interview; following a case all the way through, that's what it's all about."

Another student spoke about a benefit more amorphous, but not on that account less telling. He said, "It's a good
experience because it’s outside of the school building. It satisfies a little of the anxiety, particularly near graduation. I’m a little tired of school, perhaps a little overeager to get out of school and do something that most people would describe as ‘real.’” He added that he “wouldn’t take two clinical programs. This is the only chance you get to take advantage of classroom work,” and one “should take advantage of it now. It is hard to break away once you start to practice.” He felt that “the law school curriculum does have some relation to reality” although he “didn’t know how many people would be willing to admit it.”

There were few negative comments by the students on the clinical programs and these were focused mainly on failures in communications within the programs. For instance, a student in the Federal Court program said, “At first they didn’t tell us when briefs were due,” and this caused him some harried moments. A student in the District Attorney’s program said: “we need someone in the school who acts as a go-between” and the students “should go in with the attitude and understanding that attorneys in the District Attorney’s office are there to do their jobs and students should initiate, and not sit around and expect to be taught. The students really have to take the initiative.”

The Criminal Defense clinical program, which began in September, 1976, received a consistently thoughtful and enthusiastic response. This course is taught by Adjunct Professor Sam Reich, who said, “I have a feeling the program is successful.” Professor Reich’s students have the same feeling. There appears to be a consensus among them that the program is an especially worthwhile experience, and for that reason, I would like to review in some detail the reasons for the enthusiasm. One student said, “The key is there is one person who has taken the responsibility to see that all of us learn,” and “the class is small enough — there are three of us to a case so you get a lot of experience; we start with the beginning of the criminal process and go, step-by-step to the end. We evaluate what we did and what we would do differently the next time around.” Another student said Professor Reich “included the class in everything: going to jail for the initial interview, going to the judge’s chambers, seeing the jury selected.” One other member of the class stressed that “everything is always explained,” that “there is as much student participation as possible,” and that Professor Reich “always introduces all the class to everyone and never makes you feel stupid because you don’t know something. He gives a lot of himself.”

Overall, the common elements of success as illuminated by these comments, as well as the comments of students participating in other clinical programs, are a center of course responsibility, small class size, work continuity, student involvement, and considerate treatment of the class. These elements can serve as guidelines to structure and evaluate new and existing programs.

In considering the development of clinical education at Duquesne in the light of faculty and student response, a course for the future emerges. Given the rapid growth in the number of programs and the number of students involved in these programs, a period of improvement and consolidation is in order. Implicit in many of the comments is the need for a stable institutional framework for the clinical programs within the law school. A full-time professor of clinical education would best fulfill this need. He would provide supervision and enhance communication; everyone involved in the programs — faculty, students and clinical supervisors — would benefit from on-going evaluation and the continuous interchange of thoughts, expectations, and criticisms. The faculty would be informed of the day-to-day operation of the programs, and in a better position to maintain high standards. The students would have a professor with whom to discuss ideas and options; the clinical supervisors would have a faculty member with whom to plan clinical programs that would adequately meet the needs of all involved. With proper supervision and planning the clinical education programs can maintain a high standard of achievement as well as broadening the legal experience of the students within the structure of a traditional academic education.
<table>
<thead>
<tr>
<th>Name</th>
<th>Year Initiated</th>
<th>Number of Students</th>
<th>Requirements</th>
<th>Course Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family Court Clinical Program</td>
<td>1973</td>
<td>5</td>
<td>Limited to five students who completed Family Law</td>
<td>Participation in the juvenile justice system; familiarity with Court facilities and procedures.</td>
</tr>
<tr>
<td>Independent Research Program</td>
<td>1973</td>
<td></td>
<td>Good standing beyond first year; topic approved by a full-time faculty member; amount of work should be no less than that required for a two credit seminar.</td>
<td>Independent research on a legal topic chosen by the student; submission of a substantial paper.</td>
</tr>
<tr>
<td>Dist. Attorney's Clinical Program</td>
<td>1974</td>
<td>15</td>
<td>Seniors; must qualify for certification under Rule 11; 8 hrs. per week.</td>
<td>Interviewing; case evaluation; work with prosecutor during preliminary hearing; present cases at “Probation Without Verdict” hearings; aid in trial preparation, including research and drafting answers to pre-and post-trial sessions; appellate work; field trips to Crime Lab., Morgue, County Jail, Juvenile Court, and Western Penitentiary.</td>
</tr>
<tr>
<td>Third Circuit Clerkship</td>
<td>1975</td>
<td>8</td>
<td>Students beyond first year of law school; screened by Faculty Clinical Education Committee; 10 hrs. per week.</td>
<td>Work directly with the judge and his law clerk; research; reading and analyzing briefs; drafts opinions; assist the judge with rulings during trial.</td>
</tr>
<tr>
<td>Neighborhood Legal Services Clinical Program (Experimental)</td>
<td>1976</td>
<td>15</td>
<td>Seniors; 8 hours per week with 6 hours minimum in one day in neighborhood office.</td>
<td>Client interviewing; intake procedures; research; drafting complaints; working in the litigation process; client counseling.</td>
</tr>
<tr>
<td>Criminal Defense Clinical Course (Experimental)</td>
<td>1976</td>
<td>10</td>
<td>Seniors; 8 hrs. per week.</td>
<td>Participate in actual cases beginning with the client interview through the preliminary hearing, the trial, and in some cases, the appeal; weekly meetings for group discussions of phases of criminal trials, for simulation exercises, and guest speakers.</td>
</tr>
<tr>
<td>Federal District Court Clerkship (Experimental)</td>
<td>1976</td>
<td>2</td>
<td>One senior and one second year day or third year evening student; screened by Faculty Clinical Education Committee; 8 hrs. per week.</td>
<td>Work directly with the judge and his law clerk; research; reading and analyzing briefs; drafts opinions; assist the judge with rulings during trial.</td>
</tr>
</tbody>
</table>
Alumni profile . . .

Commissioner Jake Myers

by

Carl Harvison

To a law student, big pressure may be having five exams in 12 days; to a lawyer, it may be arguing a million dollar decision; but to Jake Myers, it is being a part of the first Democratic majority on the Cumberland County Commissioners in 40 years. Being under the watchful eye of the County's mostly Republican citizens, Myers finds the job challenging but satisfying.

According to Myers, 35, the biggest key to the accomplishment of his task is "a spirit of cooperation." He has to know how to get along with others, Myers insists, because without this cooperation, nothing will be accomplished.

The things that must be accomplished are the mandated responsibilities of the three County Commissioners. They include:

- participating in setting the rate of taxation and real estate assessments;
- running the 350-bed County Home for the Aged;
- conducting and supervising elections in the County;
- sitting on the Prison Board with five other County officials, which has the responsibility of running the County Jail;
- sitting on the county Salary Board.

Myers said the Commissioners represent the chief executive branch of the County. They adopt the budgets of all County agencies, and work extensively with County courts and the state government. The Commissioners must act as a go-between with the state and local governments. The County is empowered by the state legislature — it has not adopted home rule — and in emergency situations comes to the aid of local governments in procuring quick assistance. The Commissioners coordinate activities and help settle disputes between local governments and agencies.

Myers said that to him, the most unique part of the job is sitting on the salary board. The Commissioners help also in the hiring process by sitting with the heads of the agencies that need personnel and coming to decisions with the agency heads. Myers noted there are many possible troublespots here, and the spirit of cooperation is a much needed commodity.

Since taking office in January of 1976, Myers' most satisfying accomplishments have been the commission's work with the County Historical Society to preserve records found in the attic of the County Court House and working on real estate reassessment.

"We won election on the issue of re-assessment," Myers claimed. "The County had just had a re-assessment and there was much dissatisfaction with it. We have tried to bring in more business-like practices into the running of county government."

The Commissioners have also been instrumental in the County's adoption of a 911 emergency telephone system. Myers was graduated from Duquesne Law School in 1971. Oddly, despite his history of activity with community government, Myers did not take the Municipal Corporations course offered at Duquesne.

"But you won't get me to say anything bad about Duquesne Law School," Myers explained. "Law school should get you to think like a lawyer. Past the basic elements, procedure can be learned on the job." While at Duquesne, Myers was active as S.B.A. President.

During his summers in law school, Myers worked in Harrisburg, two summers for the Department of Community Affairs and one summer for the State Justice Department. Following graduation, he worked as Legislative Assistant for the Pennsylvania Secretary of Commerce and from January of 1973 to January of 1976, as legal counsel to the House of Representatives Consumer Protection Committee.

This summer, Myers was a delegate to the Democratic National Convention, pledged to President Jimmy Carter. While there, he used the opportunity to work on his hobby, collecting political campaign buttons, something he started in 1973. He now has several thousand buttons, including many hard-to-find buttons from the 19th Century. Right now he is concentrating on collecting Carter buttons from the recent election. He now has over 500 different ones but is still short of his goal — to collect one of every Carter button printed. In the spring he helped design and produce a Carter button for Cumberland County, many of which he took to the convention and used as trade bait.

The 1967 Political Science graduate from Dickinson College was married in 1975 and has an 11 month old daughter.
DEAN DAVENPORT

Dean Ronald Davenport's You and The Law is shown Saturday and Sunday mornings at 7:00 A.M. on Channel 2, KDKA television. The show which consists of 65 different topics will also be shown at 6:30 A.M. weekdays. You and The Law is also scheduled for syndication on all Group W television stations.

PHI ALPHA DELTA

On Thursday, March 31st, Egan Chapter will hold its Annual Spring Banquet at Poli's Restaurant in Squirrel Hill. The new Chapter Officers will be initiated at this time. This year State Senator Jeannette Reibman will be inducted as an Honorary Member of Phi Alpha Delta. Invitations for honorary membership have also been extended to the Honorable William Cercone and Attorney General Robert Kane. Tickets are $10 per person which includes dinner and drinks. They will go on sale March 14th.

"KAREN ANN"

"Karen Ann," a KDKA television production was aired on January 16th. The program, produced by Lee Cox, was filmed in the Moot Court Room. The show dramatized the Karen Ann Quinlan trial.

ADMINISTRATION OFFICE

Virginia Shuey is the new Student Organization secretary. Virginia, who is also a first year evening student, was previously with Duquesne University Relations.

Congratulations to Marilyn Dolan, Dean Sciolio's former secretary, on the birth of Michael Taylor Dolan.

Juris welcomes Jan Perry to the Duquesne Law School Administration Office.

PATENT LAWYERS

Congratulations to Bonnie Deppenbrock, 4E, and Arthur Morgenstern, 3E on their passing of the Patent Bar.

SENIOR DINNER

The Senior Dinner will be held on June 3, 1977 and graduation on Sunday, June 5 at 11:00 A.M. There will be a brunch following graduation in the Ballroom of the Duquesne Union.

PROFESSOR BROUGHTON

Professor Robert Broughton has rewritten Measure of Property Rights, which Boxwood Press of Pacific Grove, California will publish. Professor Broughton considers the book a "semi­hornbook." Previously a handout in Property class, the book will now contain more historical background and an in-depth discussion of the Rule Against Perpetuities.

JURIS STAFF

Juris will soon be accepting applications for positions on next year's staff and Editorial Board.

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Alumni News

ALUMNI DINNER

This year's alumni dinner will be held on May 6, 1977 at the William Penn Hotel Ballroom.

REPRESENTATIVE WARNER

Stephen James Warner, L'72, was elected to the Florida State House of Representatives. He is also chairman of the Broward County Democratic Party's task force on Consumer Affairs, and chairman of the joint task force on Nursing Home Care. Warner's chief legislative interests are in the fields of health care, insurance, utilities, the cost of home ownership and rental, tax reform, and economic development of Florida's job market. In his recent narrow victory, Warner refused to accept campaign contributions from any powerful special interest groups.

RECENT APPOINTEE

Kenneth P. Davie, L'68, was recently appointed attorney for the Board of Education for Kearny, New Jersey. He recently opened his own office for the general practice of law in Kearny.

HELP!

Juris encourages all alumni, especially those outside of the Pittsburgh area, to keep the Duquesne community informed of events happening in their lives. Please send short news releases describing recent happenings that would be of interest to the readers of our news magazine. Without your cooperation, Juris cannot serve as a vehicle by which alumni can communicate with each other. The scarcity of alumni news items on this page reflects our need for your help. A simple message will suffice. We will do the rest.

The Duquesne University Law Alumni will hold a seminar on "Comparative Negligence" on Saturday, April 23, 1977 from 9:30 A.M. until 12:30 P.M. in the Mellon Hall Auditorium.

In Memoriam

Lewis D. Brown, L'26, of Bethlehem, Pennsylvania, died on October 14, 1976.

Samuel A. Weiss, L'27, of Pittsburgh, died on February 1, 1977 after a lengthy illness. Weiss received both his undergraduate and law degrees at Duquesne University, and was a member of the Board of Directors. He was a state legislator, United States Congressman, and Court of Common Pleas judge during his career of almost a half century.