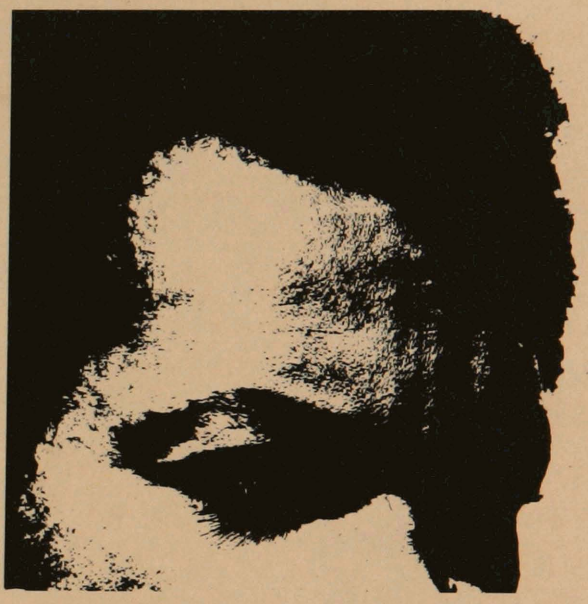
Law Quadrangle Notes

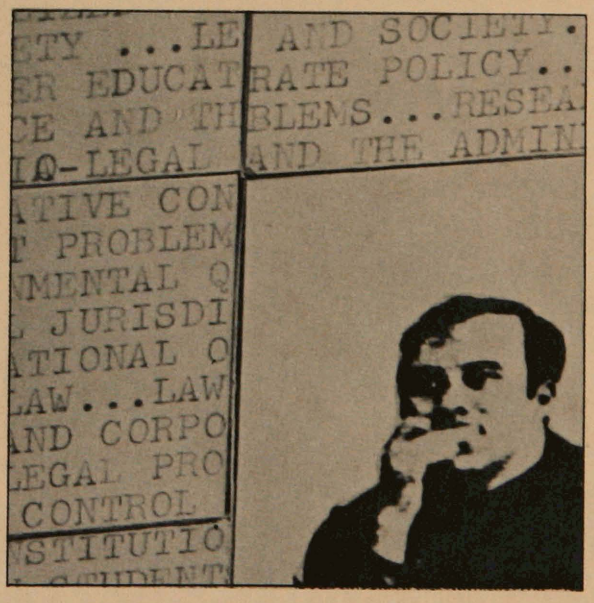
The University of Michigan Law School

Volume 16, Number 3, Spring 1972

Chambers on the Insanity Defense



Edwards on Minority Placement



Carrington on Training for the Law

Sax on the Amnesty Problem

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Publications Chairman: Professor Yale Kamisar, The University of Michigan Law School; ***Managing Editor***: Harley Schwadron, The University of Michigan Information Services; ***Contributors***: Andy Marks, Laurence Lau, Ron Platner, Law Students; ***Designed*** and ***edited*** in the University Publications Office.

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Meredith, Fisher Win 1972 Campbell Competition

John T. Meredith of Farmington, Mich., and Ned L. Fisher of Waukegan, Ill., were declared winners of the 1972 Henry M. Campbell Moot Court Competition at the University of Michigan Law School.

The two second-year law students, working as a team, argued a hypothetical court case March 9 before a distinguished bench that included U.S. Supreme Court Justice Harry A. Blackmun. They were named winners at a U-M Case Club banquet that evening.

Runners-up in the competition were Donald W. Anderson of Windsor, Ontario, and Herbert E. Sloan of Ann Arbor, also second-year law students.

The names of all four finalists will be engraved on a plaque at the Law School. The winners received a cash prize of $200 each while the runners-up received $150.

In addition to Justice Blackmun, judges in the competition were Judge John Minor Wisdom of the U.S. Court of Appeals in New Orleans, Judge Noel P. Fox of the U.S. District Court for Western Michigan, Dean Theodore J. St. Antoine, and Prof. Harry T. Edwards.

In the moot case, the winning team represented employes of a hypothetical metals company who claimed that their civil rights were violated when they were fired for not working on a religious holiday. The other two students represented the company.

Seated, from left: U.S. Supreme Court Justice Harry A. Blackmun (foreground), Prof. Harry T. Edwards and Dean Theodore J. St. Antoine of the U-M Law School, Judge Noel P. Fox of the U.S. District Court for Western Michigan, and Judge John Minor Wisdom of the U.S. Court of Appeals in New Orleans. Standing from the left, are the four student finalists Donald W. Anderson, John T. Meredith, Herbert E. Sloan, and Ned L. Fisher.

The hypothetical case was based on an actual case—*Dewey v. the Reynolds Metals Co.*—which was heard by the U.S. Supreme Court in 1970. The high court ended in a 4-4 deadlock, thereby upholding the decision of a lower court which had ruled in favor of the employes.

All U-M Law School freshmen are assigned to case clubs and engage in legal research, analysis, writing, and appellate argumentation. The top 32 are selected to compete in the Campbell Competition during their junior year.

Following two elimination rounds, four finalists are selected to argue before a distinguished bench.

Prof. Blasi Completes Press Subpoena Study

Based on a survey of more than 1,000 newsmen and an analysis of constitutional law and subpoena practices, a University of Michigan legal scholar concludes that newsmen should be granted "absolute" and "unconditional" immunity from subpoenas issued by grand juries, legislative bodies, and administrative agencies.

In an exhaustive study of the press subpoena controversy, Prof. Vincent A. Blasi also notes that many newsmen feel "the most serious problem with press subpoenas is that they are issued in unnecessary circumstances"—when the reporter has no important information to contribute.

The U-M professor suggests, however, that if—under certain circumstances—subpoenas were restricted to civil and criminal cases in which reporters can offer significant information, "the adverse effect on the news flow would be quite minimal and quite tolerable."

Blasi's 292-page report is the result of a 17-month investigation undertaken at the request of the Reporters Committee for Freedom of the Press, an organization of newsmen formed in March 1970 in response to increased government demands for information from journalists. The study was funded through a $27,000 grant from the Field Foundation of New York.

In releasing the report, the Reporters Committee noted that Blasi's study was a "wholly independent effort" carried out without intervention by the committee at any stage of the research or writing.

Noting the importance of newsmen developing confidential relationships with sources as a means of gaining information for in-depth, interpretive news coverage, Prof. Blasi writes:

"Reporters are deeply concerned about being subpoenaed primarily because the possibility of their involvement in investigative and adjudicative proceedings can 'poison the atmosphere' of their source relationships . . . The prime concern is that the subpoena threat can cause sources to tighten up and behave in a more self-conscious fashion."

At the same time, Blasi notes, there is a "longstanding tradition" of press cooperation with law-enforcement efforts. "The prevalent attitude of newsmen concerning the subpoena issue is not that of indifference to their civic obligations—far from it—but rather a vehement belief that the journalism profession, not the legal profession, should resolve these questions of conflicting ethical obligations to sources and to society."

Blasi's study included a survey of more than 1,000 newsmen and editors from all media; a scholarly analysis of cases and circumstances under which subpoenas are served on newsmen; and Blasi's conclusions and recommendations on how the constitutional rights of the press can best be protected, in view of the government's claim of its constitutional right to subpoena newsmen.

In the survey of newsmen, which was carried out in collaboration with Richard Baker of the Columbia University School of Journalism, Prof. Blasi found that more than half the respondents said they rely on regular confidential sources for at least 10 per cent of their news stories. The survey also showed that almost one-seventh of the reporters rely on regular confidential sources in more than 50 per cent of their stories.

In terms of the effect of the subpoena threat on news coverage, newsmen responding to the survey said the possibility of being subpoenaed had adversely affected their news coverage in the past 18 months in the following categories: trial coverage (37 per cent of the reporters); investigative reporting (27 per cent); reportage about radical-militant groups (34 per cent) and minority groups (28 per cent); police reporting (30 per cent); and financial reporting (20 per cent).

Blasi's study offered these specific recommendations:

—There should be an "absolute" and "unqualified" privilege under the

First Amendment giving newsmen immunity from grand jury subpoenas. (Thirteen states have already passed statutes giving newsmen an immunity to protect the identities of their anonymous sources.)

—There should be an "absolute" and "unqualified" privilege for newsmen against subpoenas issued by legislative bodies and administrative agencies.

—Newsmen should not be required to disclose confidential sources in civil trials unless: the information sought is "substantially different in quality or import from any other evidence admitted at the trial"; the source was not given a specific promise of confidentiality; and disclosure of the source's identity would not cause "irreparable harm" to the newsman's professional relationships.

—In criminal trials, newsmen should be required to disclose confidential information only if: they have evidence concerning criminal behavior (not the "victimless variety, such as drug use, homosexuality, gambling or prostitution") to which they were eyewitness or in which they actually participated; or if the defendent invokes his sixth amendment right to call witnesses in his favor and makes a showing of reasonable grounds to believe that a newsman has information relevant to the case.

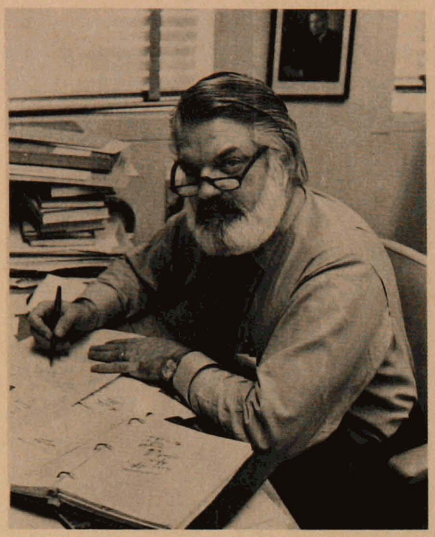
—Newsmen claiming a constitutional privilege should be full-time employes of an established news medium, or have contributed at least three items published in an established medium.

Dr. Watson's Specialty: Psychiatry and the Law

What is a psychiatrist doing on the Law School faculty?

Dr. Andrew S. Watson, who has held a joint appointment in the University of Michigan Law and Medical Schools since 1959, sees the situation as a natural one. His joint appointment—an example of the increasing interdisciplinary character of modern legal education—allows him to study his favorite subject—the legal profession—and gives him an opportunity for teaching assignments in courses as diverse as criminal law and torts.

A licensed doctor of medicine and psychiatry in Michigan, Dr. Watson divides his time between the Law School and the U-M Children's Psychiatric Hospital.



Dr. Andrew S. Watson

At the Law School he is regularly invited to teach sessions in criminal law, where issues of personality, legal capacity, and motivation parallel concepts in the behavioral sciences. He has also team taught courses in family law, and is a lecturer in juvenile law, civil procedure, and torts. He conducts his own class in law and psychiatry, where the focus is on contemporary psychiatric theory and its relationship to the law.

Dr. Watson is currently preparing to research problems relating to the "over-litigious client"—one who is likely to hire one attorney after another in a never-ending tangle with judges and courts. The research will attempt to determine ways to prepare lawyers and tribunals to handle this distinct brand of litigation and counseling.

Dr. Watson has also been a consultant to the National Conference of Commissioners on Uniform State Laws, and has conducted clinics for the Association of American Law Professors.

The U-M professor hopes that his contributions to legal education will stir more than a passing interest in the behavioral sciences among lawyers. After all, he points out, members of the legal profession are expected to deal fairly and efficiently with the widest range of human affairs.

A serious critic of some forms of legal education, he says the traditional direction of professional legal studies may, in a sense, be "leading the lambs to the slaughter." Often, he contends, graduates with traditional legal training have an easy time dealing with conceptual problems, but have little background in handling the "sticky" problems of human affairs. Dr. Watson examines this problem in a recent *Cincinnati Law Review* article entitled "The Quest for Professional Competence: Psychological Aspects of Legal Education."

Dr. Watson also maintains that many law students find it difficult to make the transition from laymen to lawyers. This comes as the result, he says, of an educational process that exposes students to brilliant professors, but leaves them without professional models to emulate for their careers.

And Dr. Watson believes that the ordinary lawyer's distaste for divorce litigation should come as no surprise. He points out that most lawyers are ill-prepared to meet the demands of individuals who cannot separate their legal quarrel from more general family problems and psychological difficulties. Thus, he says, the average member of the legal profession shies away from involvement in this area, leaving divorce cases to marginal members of the bar.

To remedy the situation, Dr. Watson recommends professional training in interviewing techniques and formal study of human behavior. As part of his Psychiatry and Law course, he draws on his own clinical training and experience to instruct students in the human aspects of being a lawyer and a professional.

"Though there have been impressive exhortations about lawyer behavior, the simple fact is that many American practitioners act as if they are quite impervious to these statements," Dr. Watson says.

"The bar's cynicism about professionalism could too easily be accepted at face value. I believe that it primarily reflects the necessary adaptive response of individuals who are sent into a demanding situation without the necessary skills.

"Few human beings have a more difficult task to perform than the lawyer who must simultaneously protect his client's interests, be an officer of the court, and make his own living."

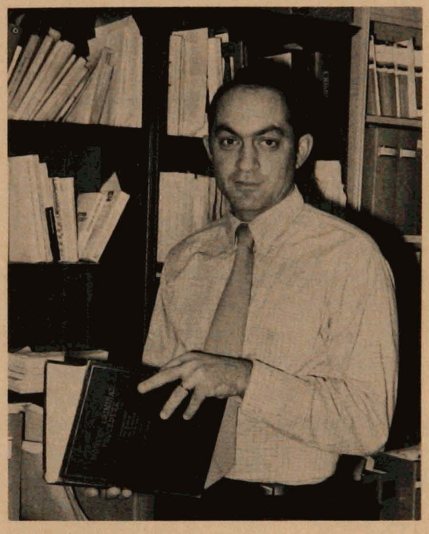
Clinical Law Program Finds a New Home

When a fire gutted Ann Arbor's Municipal Court Building this winter, the University of Michigan's new clinical law program found itself without a home for several weeks. Now settled

into new downtown headquarters, the program also appears to have found a secure place in the Law School's expanding curriculum.

Begun last year on a $77,000 grant from the New York-based Council on Legal Education for Professional Responsibility (a Ford Foundation affiliate), the program enables law students to work in a legal aid setting where they receive first-hand experience in juvenile law, divorce cases, and welfare and consumer problems.

Law Prof. Jerold H. Israel, supervising faculty member for the fall term, notes that student case loads have ranged from 7 to 20 cases through a term and have covered a wide range of subjects.



Professor Jerold H. Israel

The program attempts to avoid the problem faced by many legal aid clinics, where students may become disheartened by the demands of divorce cases. Students in the U-M program generally handle no more than four divorce cases per term.

In addition, about two-thirds of the students have worked on juvenile cases, either individually or on a team with other students, and nearly all the students have worked on a criminal misdemeanor case. During the fall term several of these cases went to trial. But a majority of the program's case files are closed by negotiations.

"Even in criminal and juvenile cases, much of our emphasis is on negotiations, primarily with respect to either dismissing or lowering the charges," Prof. Israel notes. "Most criminal cases, although eventually settled, involve exhaustive preparation, since hard negotiation usually occurs only shortly before the trial date."

All of the student participants make court appearances of one kind or another under the supervision of a faculty member.

Students are required to spend at least 20 hours a week on the program, including nine at the clinic headquarters, to receive seven credits on a pass-fail basis. Prof. Israel estimates, however, that most of the students wind up working as much as 40 to 50 hours a week on some occasions.

For the students and supervising faculty, a substantial amount of time is spent discussing pleadings and briefs before they are filed, and conducting seminars on related course problems.

The program was supervised in the winter term by Prof. Whitmore Gray. This summer it will be supervised by Prof. James J. White.

Prof. White laid the groundwork for the project four summers ago when he conducted an experimental class in which students spent part of their time working in a similar legal aid arrangement.

The Law School's current program may be unique among the growing number of similar experiments across the country. The fact that only regular faculty members are used as instructors, for example, is an essential feature of the U-M program, Prof. Israel points out. He notes that this ensures first-class supervision and promotes the development of new faculty teaching skills.

Prof. Israel also believes the program provides students with skills that aren't often emphasized in the classroom situation.

"Self discipline, the ability to be punctual, responsible, and get the job done on time are elementary legal lessons most students bring away from the course," he says. "In addition, there is an enhanced appreciation for negotiating skills and tactics, for marshalling facts for legal analysis, and for learning how to handle a client."

The course has some drawbacks, however. Profs. Israel and Gray describe the demands of the program on faculty time as heavy, keeping them away from other classroom assignments for an entire term and leaving them little time for research interests.

Also, to some extent, the program may duplicate the educational role performed by firms which provide training programs for new associates, they note.

Robert Kass Serves As ABA Liaison

Robert E. Kass, a third year law student at The University of Michigan, is serving as liaison from the student division of the American Bar Association to the ABA's Section of International and Comparative Law.

Appointed to the post for one year, Kass will supervise student participation in the section's activities. Upcoming events include a national conference on "Legal Aspects of Doing Business in the Far East," which will be held in the spring in New York City.

Before entering the U-M, Kass received his B.A. degree, ***magna cum laude,*** from Wayne State University. He is currently vice-president of the Law School's International Law Society.

Cooper and Green to Join Law Faculty

Edward H. Cooper, a member of the University of Minnesota Law Faculty since 1967, and Thomas A. Green, who received a Ph.D. in history from Harvard in 1970 and is presently a third year student at the Harvard Law School, will join the U-M law faculty this fall.

Cooper, who graduated ***summa cum laude*** from both Dartmouth ('61) and the Harvard Law School ('64), served as a law clerk to Judge Clifford O'Sullivan of the U.S. Court of Appeals for the Sixth Circuit and was associated for two years with the law firm of Beaumont, Smith and Harris in Detroit. While practicing in Detroit, he was an adjunct professor at Wayne State Law School. Cooper's main interests are in civil procedure and antitrust.

In announcing his appointment, U-M law Dean Theodore J. St. Antoine noted that Cooper has been extremely productive since entering teaching on a full-time basis and that assessments of Cooper's published work "both by members of this faculty and procedure teachers elsewhere" have been "uniformly laudatory." "Several experts," the Dean said, "have rated Cooper's writing as probably the best of any young proceduralist in the country."

Although Professor Green's doctoral work and dissertation involved medieval history, he has more recently turned to later English and American

legal history. "Thus," pointed out Dean St. Antoine, "his appointment will provide both students and faculty with an important resource in an area in which this Law School has a distinguished past, but in which we currently lack expertise." The faculty, added the Dean, shares Green's desire that he teach traditional law school courses as well as legal history in order to achieve "a more effective fusion between law and history."

Green graduated *magna cum laude* from Columbia College in 1961 and received an A.M. in history from Harvard in 1967. For two years he served as an assistant professor of history at Bard College, where he was regarded as "an extraordinarily dedicated, enthusiastic, and imaginative teacher."

Assistant Dean McCauley To Enter Law Practice

Assistant Dean Matthew P. McCauley will step down from the post of admissions officer at the University of Michigan Law School to go into private law practice with the firm of DeVine and DeVine of Ann Arbor.

A member of the U-M law staff since 1968, McCauley cited "satisfaction with my accomplishments, weariness, and a deferred desire to enter general law practice" as reasons for his departure.

He is expected to step down from the post in mid-summer, after the Law School's 1972 freshman class has been selected for admission. A successor has not yet been named.

Noting that McCauley became the Law School's first full-time admissions officer when he accepted the post four years ago, U-M law Dean Theodore J. St. Antoine said McCauley has done an "extraordinarily fine job" in dealing with one of the most hectic periods in the School's history. McCauley showed a "rare blend of good humor, dedication, and the ability not to lose one's cool under pressure," the dean said.

During the past several years, Dean St. Antoine noted, the Law School has been flooded with an unprecedented number of applicants for admission, largely as the result of the increasingly popularity of the law as a career choice among college graduates.

In addition, McCauley was responsible for implementing new policies regarding the admission of a greater number of minority group applicants, and has been active in student recruitment, the dean said. In the four years McCauley has served as admissions officer, minority enrollment increased from about 1 per cent to 10 per cent of the total Law School enrollment.

During McCauley's tenure, special efforts were also made to recruit more women law students, with the result that female enrollment at the Law School has doubled.

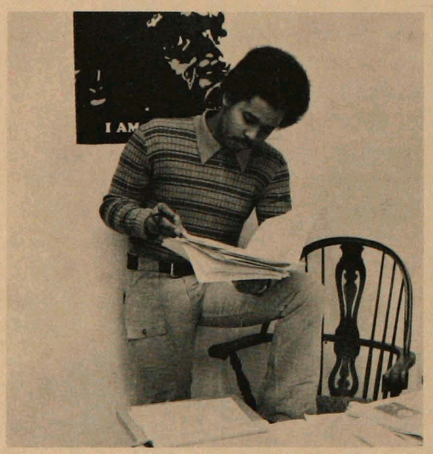
The admissions officer was involved in other Law School affairs, including student financial aid and the restoration of historical paintings and prints in Law School buildings.

A graduate of Harvard College, McCauley received his law degree from the U-M in 1967. He joined the Law School staff after working for a year overseeing development of a new city in Zambia, Africa.

McCauley and Dean St. Antoine are currently screening applicants for the admissions officer's post. They say they are eager for a woman to fill the position, and preferably one who is a U-M law graduate.

Black Enrollment, Jobs Are BALSA Concerns

A national lobby representing the interests of black students at some 140 law schools across the country is what U-M student Robert T. Pickett envisions as the future of the National Black Law Students Association (BALSA).



Robert T. Pickett

Pickett, a third year student at the Law School, was elected BALSA chairman at the association's national convention in Washington, D.C. He also serves as president of the National Bar Association's Law Student Division and is a consulting editor for a new publication, the *Black Law Journal.*

A campaign aide for former Vice President Hubert Humphrey during the 1968 presidential race, Pickett received his B.A. degree from Kent State University, where he was president of the student senate government association and vice president of the student body.

Now five years old, BALSA includes about 90 per cent of the approximately 4,000 blacks enrolled at the nation's law schools. A local U-M chapter represents the 105 blacks enrolled at the Law School this year.

Pickett describes the organization's primary concerns as three-fold: acting as a clearinghouse for black law student interests and broadcasting these concerns to the legal community; fostering black law student involvement in all areas of the community; and acting as a catalyst for legal reform.

Local BALSA chapters have tried to make the law school experience more meaningful for black students who might be suspicious of a system of laws that has sometimes worked to oppress members of their race, according to Pickett.

Nationally, BALSA has encouraged increased black enrollment in law schools and urged black graduates to return to their hometowns—in both the North and South—and provide legal services there. BALSA is also attempting to increase job opportunities for black law graduates in all areas.

"Not enough blacks are going into the corporate legal fields," Pickett says. "We are now attempting to reinvigorate an earlier effort at creating an independent national black placement service to remedy that."

Wherever black students go after graduation, Pickett says he is convinced they share one desire common to almost all U-M law graduates: they want to become first-rate attorneys.

Pickett himself will move to New York City this summer to begin work with a large firm there. Eventually he plans to establish his own firm and play a role in politics.

Justice Swainson Maintains Law School Office

Upon an invitation by University of Michigan law Dean Theodore J. St. Antoine, Michigan Supreme Court Justice John B. Swainson has uncovered an ideal retreat for legal

writing and research, midway between his home in Manchester, Mich., and his formal office in Lansing.

Justice John B. Swainson

A double amputee as a result of leg injuries sustained during World War II, the former Michigan governor occupies a part-time office on the 10th floor of the U-M's Legal Research Building.

"I spend more than half my time here in Ann Arbor rather than in Lansing where I handle administrative work and the scheduled oral arguments," he says. "The U-M law library is the finest in this part of the country."

His law clerk, 1971 U-M law graduate Gene Farber, helps maintain the Ann Arbor office and accompanies the Justice on his trips to Lansing.

Among his other concerns, Justice Swainson maintains a keen interest in legal education. He expresses the view, for example, that graduates of all Michigan's law schools should be able to enter practice without the necessity of a bar examination.

Noting that other members of the Court, as well as many state legislators, are beginning to see the issue as he does, the Justice contends that the quality of legal education in Michigan and the ability of students to complete three years of schooling under excellent faculty supervision should be enough to qualify students for practice.

He is also eager to see more students accepted at law schools in the state, in light of the increasing popularity of law as a career choice among college graduates.

In the future, he says, there may be "a dearth of good attorneys, with the courts opening up whole new areas of law, as they have done recently in the environmental area."

Prof. Kamisar Testifies At Female Sports Hearing

A University of Michigan authority on constitutional law has joined the battle for State legislation that would allow girls to compete in interscholastic noncontact sports with boys.

In testimony before the Michigan House Education Committee, Prof. Yale Kamisar argued that the current Michigan High School Athletic Association rule prohibiting females from competing in such interscholastic sports as tennis, golf, track, and swimming constitutes a denial of equal protection under the state and federal constitutions.

The U-M law professor suggested that "the principle of non-discrimination requires that high school girls be considered on the basis of their individual capacities and not on the basis of any stereotypes about girls generally."

Responding to the argument that female participation in varsity sports would force an "unpleasant association" upon male athletes, Kamisar pointed out that the males have a "reciprocal freedom" not to compete if the participation of females displeases them. But this freedom, he said, must be subordinate to the right of females to compete.

Kamisar likened the problem of sexual equality to the racial sphere, where a black's right to serve on a jury or live in a particular neighborhood takes precedence over a white man's freedom to associate with whomever he chooses.

Under the constitution, Kamisar said, "sex, like race, is a suspect classification because it relegates a whole class to an inferior status without regard to individual capacities."

A number of female tennis players and their coaches also testified at the hearings, saying that if females were allowed to compete they could earn spots on their high school teams.

Kamisar also contends that, under his interpretation of the principle of non-discrimination, participation of females in noncontact sports would also apply to intercollegiate competition. If a woman is proficient enough to make a college track or tennis team, for example, she shouldn't be prohibited from competing, the law professor says.

Battles Moves To U-M Opportunity Program

Ronald M. Battles, assistant to the dean for financial aids at the Law School, has become a senior administrative associate for the University of Michigan's Opportunity Program.

Battles, who assumed the new post on Jan. 1, will help coordinate supportive services for disadvantaged and minority students at the U-M.

A member of the Law School staff since March, 1970, Battles was responsible for evaluating the School's financial aid program in terms of student needs.

A graduate of Pennsylvania State University, he received an M.B.A. degree from the U-M School of Business Administration and had served in the military in Vietnam.

Arthur R. Miller Joins Harvard Law Faculty

Arthur R. Miller, a member of the University of Michigan Law Faculty since 1964, will leave the U-M to join the law faculty at Harvard University.

Miller, who graduated from Harvard Law School in 1958, will become a full-time professor at his alma mater in the fall. He is currently a visiting professor there, on leave from the U-M.

U-M Law Dean Theodore J. St. Antoine called Prof. Miller's departure a "real loss to us, both professionally and personally," but pointed out that, "as all his friends know, Harvard has always occupied a very special place in Arthur's life." Although recent years have seen a considerable number of professors leave the U-M Law School to become deans at other institutions, this is the first time in many years that a member of the law faculty has left to accept a professorship at another law school.

Miller is co-author of multi-volume treatises on federal practice and on New York civil procedure. His research on legal problems created by computers and data banks became widely known last year with the publication on his book, *The Assault on Privacy—Computers, Data Banks and Dossiers.*

Law Profs Appear In TV Center Films

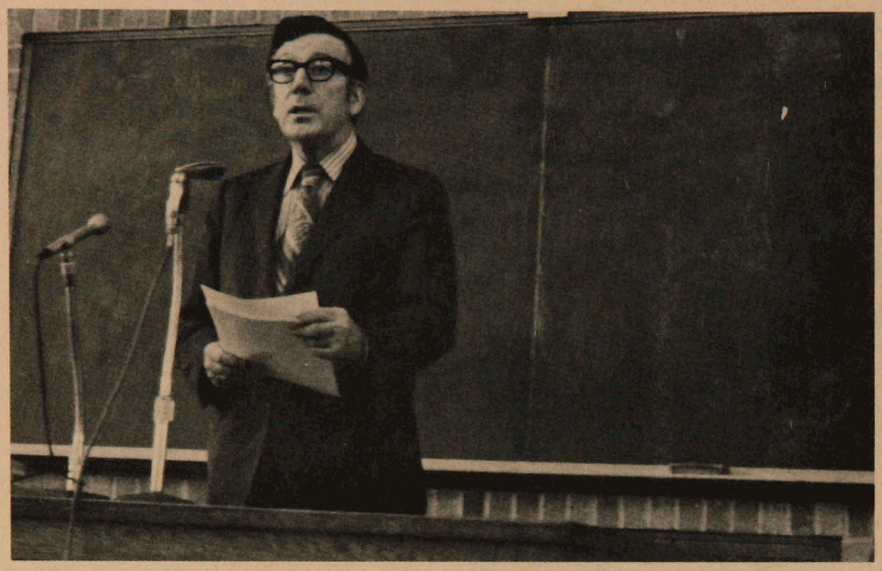
The increase of tainted products on the market and violations of the Pure Food and Drug Act are among the

"white collar crimes" examined by two University of Michigan law professors in a recent film series produced by the U-M Television Center.

The TV production features Profs. Vincent Blasi and G. Joseph Vining. Appearing with them is James Welch, a Washington attorney and former assistant to consumer advocate Ralph Nader.

Prof. Vining also appeared in another recent TV Center production, "Crisis in Our Courts," which focuses on ways to reform our current bail system, provide speedier trials, and solve other judicial ills.

Also appearing in the production were Profs. John D. Stevens and William E. Porter of the U-M Journalism Department and Howard James, formerly a reporter with the ***Christian Science Monitor.***

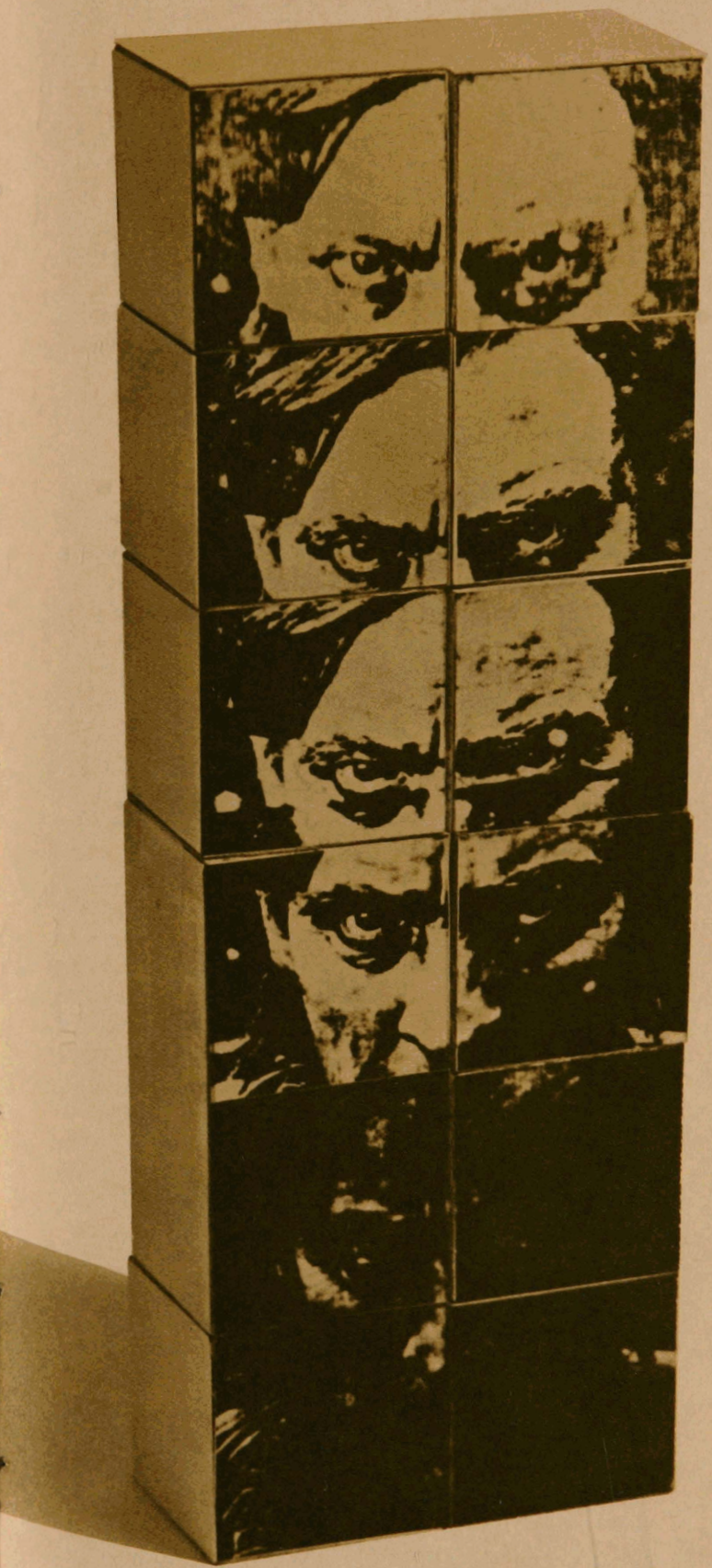


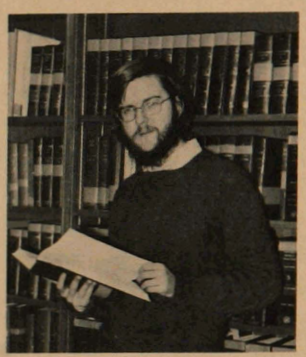
United Auto Workers President Leonard Woodcock evaluated President Nixon's economic performance in a presentation at the University of Michigan Law School recently.

Five corporate tax experts from around the world discussed the "value added" tax and other taxation alternatives in a series of presentations recently at the University of Michigan Law School. From left are: J. Van Hoorn, Jr., executive director of the International Bureau of Fiscal Documentation, Amsterdam; Helmut Debatin, head of international tax affairs for Germany; Theodor M. Vogelaar, director general of international marketing and harmonization of legislation for the European Common Market; Baron van Houtte, Belgium's minister of state and formerly minister of finance and prime minister of Belgium; Pierre Kerlan, head of international tax affairs for France; and Prof. L. Hart Wright of the U-M Law School. Invited here by Prof. Wright, the five visitors gave presentations before law students and met with Edwin C. Cohen, the U.S. assistant secretary of the treasury for tax policy.

SOME COMMENTS ON

THE ADMINISTRATION OF THE INSANITY DEFENSE





by Professor
David L. Chambers, III

[*Editor's Note:* Extracts from an ***amicus curiae*** brief filed by Professor David Chambers in ***United States v. Brawner,*** in which the U.S. Court of Appeals for the District of Columbia Circuit invited a thorough reconsideration of the insanity defense. At various places in his brief, Professor Chambers draws upon a 1969 study of the operations of John Howard Pavilion at St. Elizabeths Hospital he did for the National Institute of Mental Health.]

Several versions of the insanity defense are under consideration in this case. The purpose of this brief is to suggest that much more is needed than a reformulation of the test before the defense can operate in this jurisdiction in a manner that will provide a fair hearing to defendants raising the defense and that will serve satisfactorily the functions this court has envisioned for the insanity defense. Apart from the difficulties inherent in a concept of criminal responsibility, what prevents the defense from operating more satisfactorily in this jurisdiction is not so much a problem of language as a problem of institutions—of the examining process at St. Elizabeths Hospital and of the pressures on and needs of judges, prosecutors, defendants, defense counsel, and juries. Specifically, the diagnostic process at St. Elizabeths Hospital needs to be greatly improved, the conflict of interests of its staff in performing their diagnoses needs to be eliminated, jurors need to be provided more adequate information at the beginning of an insanity hearing about the standard they will be expected to apply, and attorneys in criminal cases need to be provided information on the insanity defense and what is expected in a hearing on the defense.

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Some of these matters are ill-suited for resolution through a reversal of the judgement in the present case; some may indeed be beyond the power of the court to resolve through any single decision. If, however, the Court fails to take such steps or help to see that they are taken, I fear that it will make little difference which version of the insanity defense it chooses to adopt.

A secondary purpose of the brief is to bring to the Court's attention the special problems of the defense in the large number of cases in which it is raised before a trial judge without a jury. Partaking greatly of the character of the plea-bargaining system, such cases pose grave questions about the operation of the defense in this jurisdiction.

Problems Posed in Contested Insanity Defense Trials Such As That in the Case at Bar

Today virtually all defendants who raise the insanity defense in the District of Columbia have been examined before trial at John Howard Pavilion at St. Elizabeths Hospital, pursuant to a court order under D.C. Code section 24-301(a). Unless the Court adopts a standard under which psychiatric testimony is substantially irrelevant or takes steps to alter the practice, it is likely that courts will continue to send to John Howard for observation almost all men who seek a psychiatric examination.

The examinations at John Howard are of much more critical significance in the lives of those examined than may appear. Though technically merely advisers to the Court, the hospital doctors effectively make the final decision in the vast majority of insanity defense cases. If the hospital certifies a defendant as not mentally ill, he will in the great majority of cases abandon his effort to establish an insanity defense, even though there may well be other psychiatrists, equally competent, who would believe him seriously ill. Even if the defendant does seek and obtain an outside psychiatrist and does succeed in obtaining a favorable view from him, he is almost certain to be convicted, among other reasons, because the doctors at John Howard appear to judges and juries to be so well-informed. On the other hand, if the hospital certifies the defendant as ill, the U.S. Attorney's Office will normally be willing to acquiesce in a court verdict of not guilty by reason of insanity and the man will be returned to the hospital.

In short, in this jurisdiction, it is rare indeed that a man is found not guilty by reason of insanity unless St. Elizabeths certifies him as ill. If found not guilty by reason of insanity and returned to the hospital, he may well spend far less time in custody than if he had been sent to Lorton. Conversely, because commitment is open-ended, he may spend far longer than the maximum he could have received for his crime. In either event, the hospital staff has been entrusted with enormous power and responsibility. It is my belief that the hospital is structurally incapable of handling its power responsibly and that the Court should take steps to alter the present arrangements.

Current Practice at St. Elizabeths

Under current practice at St. Elizabeths, a defendant who is found not guilty by reason of insanity is returned to the very building—John Howard Pavilion—to which he was committed for pre-trial examination. I believe that this system results in a denial of liberty without due process of law to anyone found guilty after a trial in which a St. Elizabeths doctor has testified adversely to his defense. The twin perniciousness of this system is well-illustrated in this very case.

First, if a hospital doctor testifies that the defendant is not mentally ill, the factfinder—judge or jury—may quite justly fear that the hospital will promptly release him if he is found not guilty by reason of insanity. It may thus return a verdict of guilty even though it believes the testimony of other doctors at the hospital or outside doctors that the defendant is seriously ill and deserves acquittal. In the trial in this case, two psychiatists who held supervisory positions at St. Elizabeth's Hospital testified adversely to the defendant. They may well have appeared to the jury to be likely to order the defendant's release if he were found not guilty by reason of insanity—either out of pique at the jury's rejection of their testimony or out of an honest, professional belief that the defendant, if dangerous, was not dangerous by reason of illness. The hospital is in fact unlikely to have released Mr. Brawner immediately, but it is the appearance to the jury, not the true practice, that is critical.

Second, the doctors who examine a defendant at St. Elizabeths may be influenced, consciously or unconsciously, in making their diagnosis by the prospect that the defendant will be returned to them if found not guilty by reason of insanity. Given the elusiveness of the notion of mental illness, a doctor may unconsciously resolve a close case not on medical grounds but on the ground that the defendant would pose difficult control problems for the hospital, or because the doctor feels that he has little available to him to treat the defendant or even for the reason that the treatment wards of the hospital are overcrowded. In this case, since the two psychiatrists for the prosecution were in charge of insuring the security and tranquility of

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John Howard Pavilion, their conclusion that no relation existed between defendant's illness and his crime may have been subtly affected by defendant's hot-temperedness—his so-called "explosive personality."

The hospital staff itself has from time to time been troubled by this conflict. Dr. Winfred Overholser, a distinguished former Superintendent of the hospital, once wrote to a District Court that had requested the hospital to examine a person alleged to be a sexual psychopath, stating that his staff "was extremely busy taking care of the patients who are already here." Dr. Overholser then went on:

> Another point of propriety is one that I should like to raise, namely, whether it is proper that physicians on the staff of St. Elizabeths Hospital should be called upon to determine whether a person not now in the hospital as a patient should be examined by them to determine whether he should be sent to the hospital. In civil cases I am sure that a question of this sort would be raised and I wonder whether it is entirely proper, whether legal or not, to make such an arrangement in a criminal case.

The decisions of the Supreme Court, this Court, and other federal courts make clear that those in public positions who make decisions affecting individual or corporate interests must be truly impartial. Under the due process clause, judges may not receive part of the fines they levy, nor may commissioners of federal commissions sit on cases in which they have so committed themselves publicly to a position that they are unlikely to be able to listen objectively or to give the appearance of objectivity. Under the Supreme Court's decisions, due process requires not merely the prevention of "actual bias" but beyond this, the prevention of "even the probability" of bias.

Similarly due process requires that government doctors whose word carries such enormous weight be in a position to render judgments unaffected by factors irrelevant to the question they are asked . . . . Although the judicial system normally relies on cross-examination, rather than disqualification, as its method for attacking the credibility of biased witnesses, the doctors here, as witnesses, are in a unique position and disqualification seems the only appropriate remedy. First, they are provided by the Government and the Government is held to high standards of fairness in its handling of criminal cases. And second, as shown above, their findings, especially when negative, are so rarely rejected by judges or juries that they can be properly held, because of this de facto power, to the standards of impartiality to which we hold the judges themselves.

Accordingly, the Court in this case might hold that the defendant has been denied his liberty without due process of law through his conviction based in part on the adverse testimony of St. Elizabeths' psychiatrists. In the last two years, St. Elizabeths has taken steps to alleviate the conflict posed in cases such [as this,] but these [measures] do not appear to go far enough. For males like Mr. Brawner, there is now a diagnostic staff within John Howard that does not participate in treatment. On the other hand, for women, the same staff persons perform both diagnosis and treatment, and, as before, for men, examination and treatment are in the same building, even if with different staffs. Moreover, the Acting Associate Director of Forensic Programs participates in pre-trial staff conferences for all classes of patients and signs diagnostic reports while simultaneously directing post-trial treatment and certifying persons for release. Thus, there remains an important overlap in staff involved in both diagnosis and treatment. Even if a total separation occurred within the hospital, however, institutional pressures—awareness of overcrowding and so forth—might continue to influence the diagnostic process. Beyond this, the appearance of unfairness would continue to exist so long as the hospital was involved both before and after a verdict. Thus, the Court should hold that the Government may not rely on witnesses from St. Elizabeths so long as the hospital continues to be involved in post-trial care.

Until such time as new facilities are available for pre-trial diagnosis or for post-trial treatment, the Court might direct the examinations be performed either by Legal Psychiatric Services (under D.C. Code section 24-106) or by private psychiatrists. The latter course seems particularly desirable to foster.

The district courts clearly possess the power to permit such outside examinations and to provide compensation for them. The real obstacle in setting up such a system is finding a sufficient supply of doctors willing to perform examinations. Few [psychiatrists] enjoy criminal cases. For some, the low compensation is the sticking point and more adequate funding may be necessary. For others, it is a rejection of the notion of criminal "responsibility"; for still others, it is an understandable distaste for the vicious attacks to which they may be subjected on the stand by counsel. The Court should, I believe, seek ways to overcome these barriers and to aid in the establishment of a system to encourage private psychiatrists' participation.

In *Rouse v. Cameron,* which involved the right to treatment, [this] Court suggested that the district courts "consider inviting the psychiatric and legal communities to establish procedures by which expert assistance can be best provided." . . . [T] he Court further suggested that "such procedures might include provision of permanent or

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rotating panels of experts." I do not believe that such a system was ever created. Perhaps the Judicial Conference working with the District of Columbia chapter of the American Psychiatric Association could now secure its establishment for pre-trial examinations.

Steps Need to be Taken to Insure Adequate Diagnoses at St. Elizabeths

If the Court rejects the argument that St. Elizabeths be barred from involvement in pre-trial examinations, it should nevertheless remain concerned about the quality of examinations available at the hospital. The Court in this case may adopt a standard for the insanity defense that places heavy reliance on a formal finding of mental illness. If it does, the need for reliable psychiatric testimony is obvious. Even if it adopts a standard that relies to a much greater extent on a lay judgment of the justness of punishing the defendant, the testimony of psychiatrists and psychologists will remain important in helping to order the events and patterns of the defendant's life. At the time of Mr. Brawner's examination, John Howard Pavilion, wholly apart from the conflict discussed above, fell far short in its ability to provide adequate examination. Even today, the hospital faces grave problems.

The diagnostic process at John Howard has been described many times by St. Elizabeths doctors explaining at trial the basis for their testimony. Dr. David J. Owens, a former director of John Howard, provided one such description reprinted in part in [this Court's] decision in *Washington v. United States:*

> When a patient is under constant observation, the examinations that were conducted in St. Elizabeths by the psychiatrists, laboratory studies, psychological examinations, social service, interviews with relatives, all of this was part of the basis of my opinion that I rendered and the examination which I conducted at the medical staff conference on November 16, 1965. . . . By [constant observation] I mean 24 hours a day, and reports are submitted to the physicians as to their behavior, actions, or activity while on the ward.

Conceivably an apt description of the process in November, 1965, Dr. Owens' statements are pure fantasy as a description of the process in operation at the time of Mr. Brawner's examination in 1968. In 1969, men referred by the district courts for examination generally spent at least 60 days in the hospital for observation. Sixty days provides, of course, a more than adequate period to conduct a rigorous examination, but the doctors at John Howard suffered under such oppressive case loads and such onerous court schedules that they rarely saw a patient for diagnostic purposes more than twice and then usually for less than an hour on each occasion. At any given time, the doctor was likely to have been responsible for 25 to 30 patients held for pre-trial examination and 60 patients held for treatment and likely to have spent between half a day and a full day each week in court. One of the psychiatrists on the staff when I was there sadly characterized his own psychiatric work-ups as "tokens." Another spoke of how much more thorough an examination he would provide for a private, paying patient.

To make matters worse, the level of information provided to the doctors by the United States Attorney's Office about the offender and alleged offense was undependable; often the hospital had little more than the defendant's own version. For a variety of reasons, observations by the ward nursing staff and psychologists were only infrequently considered by the doctors in making diagnoses.

In short, the examination process was far less thorough than the doctors themselves considered satisfactory. From the materials available to me, it appears that Mr. Brawner received a reasonably typical examination—and thus an examination that in some ways appeared less than adequate. . . . Mr. Brawner reported to the staff some exceedingly strange events in his recent past which might have been verified and illuminated through discussions with family members and others who knew him. Apparently hospital staff never interviewed these persons, even though his claims, if confirmed, might have affected the judgments of the staff—and perhaps more importantly, the judgment of the jury. This failure to interview is hardly surprising, since John Howard, like most hospitals, relies on its social work staff to gather such information and that staff in 1969 was hardly a staff at all, consisting of one full-time and one part-time social worker to serve an annual examination load of nearly 400 defendants as well as all persons committed for treatment (around 370 on any given day). By comparison, Clifton T. Perkins Hospital in Jessup, Maryland, which performed 360 court-referral examinations in 1970, has 11 full-time social workers and Bridgewater State Hospital in Bridgewater, Massachusetts, with 560 court-referrals in 1970, has 7 full-time social workers.

. . . Perhaps a reversal is the most appropriate remedy in this case. . . . For the administration of justice in the District, an even more critical question is the adequacy of examinations for the future. The hospital has now established examination teams composed of a psychiatrist, a psychologist, and a social worker. Each of the two teams dealing with male felons examines about 15 men each month. I have no first-hand impression of this new scheme.

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The acting associate director believes that it produces thorough examinations—and the new arrangement does stand out in marked contrast to the system in operation three years ago when the defendant in this case was examined. Problems do remain, however. Staff turnover is high and, even though positions exist, the hospital finds it most difficult to attract doctors into forensic work. In short, it is not certain that the present team system can survive indefinitely. Court appearances continue to make deep cuts into psychiatrists' time. One of the psychiatrists regularly engaged in performing examinations now spends an average of two days a week in court. More social workers for the staff would be highly desirable. Even with improvements in staffing, John Howard still has fewer social workers than it needs. Four social workers now aid in pretrial diagnoses. The hospital is now performing examinations at an annual rate of 850 (counting males and females charged with felonies and misdemeanors) and still has a high number of treatment patients. The function social workers serve—interviewing family and acquaintances of the defendant—has especial importance in this jurisdiction where the Court has encouraged the development of thorough data on the defendant's past.

[Editor's Note: The brief then offered a variety of specific suggestions, including greater reliance by the courts on private psychiatrists and psychologists, use of the Judicial Conference's prestige to secure funds for more adequate staffing, and pressure on the U.S. Attorney's Office to provide more adequate information about the crime a defendant who is to be examined is alleged to have committed. In the next part of the brief it was urged that whatever instruction the Court adopts, it should require trial judges to outline to the jury at the ***beginning*** of the insanity hearing the standard the jury is to apply. Otherwise, the jury is likely to be confused throughout the hearing on the insanity defense what is expected of them.]

More Information Needed

During the period that I worked at St. Elizabeths Hospital, one fact that was particularly painful to me was how little most trial counsel appeared to understand about the insanity defense and its operation. Many defense lawyers appeared to regard a verdict of not guilty by reason of insanity as a great victory without regard to the length of time their clients would spend in the hospital and without regard to the effect of long-term hospitalization on their clients. Few provided any information to the hospital during their client's stay despite the fact that the information that had led them to move for their client's examination might have proved helpful to their client if conveyed to the doctors. (In five years of examining female defendants, one doctor could remember only two occasions when defense counsel volunteered information to the hospital.) Many failed to interview hospital doctors whom they planned to call at trial until the morning of the trial. This fact was doubly tragic because the hospital staff, within the confines of their schedules, seemed to me uniformly willing to give freely of their time to explain to counsel what they were prepared to say and help counsel understand their client's problem. Some counsel appeared, at least to the doctors, to be unaware of any more than the key phrase from ***Durham,*** and were unaware of ***McDonald*** or ***Washington.***

This Court has been reluctant to reverse verdicts of guilty on the ground that counsel did not adequately raise or exploit the defense of insanity. It would nevertheless be wise to consider the steps that might be taken to make counsel more aware of the state of the insanity defense in the District, the procedures to follow, the availability of funds to hire private psychiatrists, and so forth. According to hospital doctors, many of the staff of the United States Attorney seemed equally ill-informed and equally in need of better information.

At least two specific suggestions can be made:

(1). The Court might suggest to the Judicial Conference the preparation of relevant materials to be given to all counsel appointed in criminal trials. The materials might profitably cover not merely the insanity defense but also competence to stand trial, the commitment of defendants after being found not guilty by reason of insanity, and the remedies available to those committed after being found not guilty by reason of insanity. All are areas of considerable confusion. . . .

(2). In ***Thornton v. Corcoran,*** [this] Court raised the possibility that the presence of counsel at staff conferences at the hospital at which decisions were made about his client's mental condition might be necessary to protect the defendant's interests. The issues raised by ***Thornton*** are knotty indeed, but it is at least clear that lawyers could profit greatly from greater involvement in the diagnostic process. Their presence at a staff conference (or even a tape of the conference) would not merely arm them better for examining or cross-examining the doctors but, equally importantly, provide them a broader understanding of their client and his problems. Such an understanding could then be translated into a more sophisticated handling of a trial.

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In the Forensic Psychiatry Center in Ypsilanti, Michigan, which serves courts throughout Michigan, the staff from time to time invites the defendant's counsel to attend staff conferences on the issue of competency to stand trial and finds the lawyer's presence mutually beneficial. At Clifton T. Perkins Hospital in Jessup, Maryland, which performs pre-trial mental examinations for courts throughout Maryland, the staff used to record its conferences for its own purposes and found that the tape recordings did not impair the spontaneity of the examinations. Funding problems, not dissatisfaction, led to an end of the taping. Perhaps St. Elizabeths could be encouraged to try a variety of approaches.

The Court Should Begin to Consider the Operation of the Insanity Defense in the Large Number of Cases Tried Before Judges Without Juries

Mr. Brawner was convicted in a jury trial and thus the insanity defense's application in trials without juries is not formally before the court in this case. Nonetheless, since well over 90 per cent of verdicts of not guilty by reason of insanity in this jurisdiction in recent years—246 of the 260 such verdicts between 1965 and 1970—have been rendered in trials before judges without juries, the Court may be interested in learning more about the way the defense operates in these cases that so rarely are brought before this or any other court for review. . . . [R]epeated discussions with hospital doctors made clear that, at least as of 1969, a very substantial majority of all cases in which the defense was raised were tried without a jury.

It is thus ironic that in the jurisdiction that has placed the greatest emphasis on the role of the jury, insanity defenses are heard not by juries but by judges. It is doubly ironic that, through these cases tried without juries, the jurisdiction that has sought most ardently to discourage testimony by psychiatrists in technical terms and to encourage a through inquiry in lay language into the whole course of the defendant's life, has in fact become a jurisdiction where most insanity defense trials take only a few minutes and the psychiatrist's word is brief and final.

Most trials before judges without juries are hardly trials at all but much more comparable to the taking of guilty pleas. As reported to me by many doctors, most trials in which they participated consisted of a statement of facts stipulated by the parties, followed by brief testimony by a single John Howard psychiatrist who was asked for his judgement that the defendant was mentally ill and, even after *Washington,* that the crime was a product of the illness. The trial then quickly concluded with the judge entering a verdict of not guilty by reason of insanity. The process has been facilitated by the practice of the trial courts of using a standard order, even after *Washington,* that simply asks the hospital for its conclusion on whether the defendant was ill and his crime a product of his disease and by the practice of the hospital in sending to the Court (and to counsel on both sides) its reply that simply states its conclusions, usually without elaboration, regarding illness and "product."

If the hospital's answer is that the defendant is ill and his crime a product of his illness, the government will ordinarily be willing to permit the entry of a verdict of not guilty by reason of insanity, at least so long as there is a tacit or explicit understanding that the defendant will not contest his indefinite commitment to the hospital at the hearing that was required under the *Bolton* case. Thus, a standard that this Court has shaped more and more to tap the community's sense of justice, the healthy side of its retributive instincts, has become a quick dispositional tool in which community judgment plays no role.

Whatever the Court thinks of this practice of bargained insanity pleas, it is unlikely that any of the changes in the defense proposed to the Court in this case will, acting alone, substantially alter the present pattern. If the Court adopts the ALI standard, which, at least on its face, appears to ask a largely medical question, trial judges are likely to feel even more justified in accepting the hastily related conclusion of the hospital psychiatrists. Even if the Court adopts a standard that places less emphasis on psychiatric diagnoses, the present practice offers so many benefits to its participants that the practice is hardly likely to change. For both the judge and the prosecutor, the bargained defense serves to conclude a case with a minimal cost in time and with a reasonable assurance of long-term incarceration. For the defendant, it provides an alternative to prison, to which he could have been sent, if he had preferred, by pleading guilty. For defense counsel, especially appointed counsel, it is attractive in reducing trial time and in providing the appearance of victory.

Accordingly, despite the importance of this case to the debate over criminal responsibility, the Court's decision is likely to have little significance for the day-to-day operation of the defense as it operates for most defendants. I am not certain that the probable lack of impact will be unfortunate. There is in fact much that can be said in behalf of the present practice. Apart from its efficiency and its attractiveness to prosecutors and defendants, it can be justified as aiding the sensible administration of justice in the District, since in a rough way it assures that some

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seriously ill persons are sent to a hospital. Almost the only defendants found not guilty by reason of insanity under this truncated system are those whom the hospital staff agrees are ill. If such cases were submitted to juries with full hearings, some such cases, perhaps most, would end in convictions. The convicted defendant would be sent, at least initially, to prison rather than to the hospital—a tragic fate for some men, for whom John Howard would be a much more satisfactory place of incarceration than Lorton Prison. At John Howard, even though the treatment is sadly inadequate, it remains true that medication is more easily and certainly available, that the atmosphere is quieter and more supportive, and that the men are treated with greater respect.

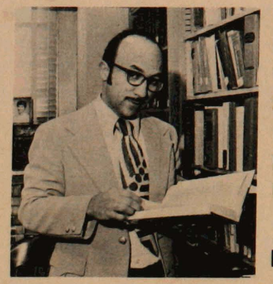
On the other hand, the current practice is open to some major criticisms. First, of course, is that it entails the trial judge's disregard of this Court's repeatedly expressed expectation of a "community" judgment based on a thorough knowledge of the defendant. Second, and more important, although it insures that some men who need psychiatric help are placed in a psychiatric facility, it operates in a haphazard manner and a far more efficient system could be developed. A substantial number of those whom St. Elizabeths certifies as ill and who are thus found not guilty by reason of insanity in nonjury trials, have problems with which John Howard is in fact ill-equipped to deal. For example, in the view of most of the medical staff when I was at the hospital, those diagnosed as suffering from antisocial personality (the current term for the sociopath or psychopath) or passive-aggressive personality, both within the American Psychiatric Association's Diagnostic and Statistical Manual, are generally unresponsive to any treatment techniques available at John Howard and would fare at least as well if not better in prison. These men, often quite manipulative of other patients, are also considered by most hospital doctors to hinder the treatment of a large number of severely psychotic patients who will almost certainly remain the core of those found not guilty by reason of insanity.

Conversely, many criminal defendants who could profit from psychiatric treatment are never sent to the hospital for pre-trial examination. Among those who are sent for examination, some who are ill are almost certainly overlooked. As mentioned above, the hospital staff has too little time to spend on cases and must often make decisions without adequate information. Though the District Code permits the transfer of men from Lorton to John Howard if they are mentally ill, the system has worked most haphazardly (at least in the past) and the men sent seemed for a complex of reasons to receive even less adequate treatment than other patients.

In short, the current system of bargained insanity defenses has many values as a dispositional tool but probably makes far less sense than a well-staffed psychiatric staff and facility within the District prison system. So little likelihood exists for such a facility in the near future that I would hesitate to recommend curtailing the current practice simply in hopes that Congress might create such a facility. The wisest first step for the Court to begin to consider may be comparable to the steps it is taking with guilty pleas—bringing the system into the open. If open, judges might try to make sure that the defendant understands that he risks long-term commitment to an institution and the lifelong stigma of the label "mentally ill." . . . The judge might also openly confront the defendant's and prosecutor's use of the defense as a dispositional tool and begin to explore with the psychiatrists whether the hospital is the best place among alternatives open to the Court for the defendant's rehabilitation, even if he does suffer from what the American Psychiatric Association would label as an illness. If the judge felt the hospital inappropriate, he could reject the defense, but permit the defendant to go to trial on the merits or on the defense before a jury or before another judge.

The fact that the bargained insanity defense accounts for such a high portion of verdicts of not guilty by reason of insanity has a broader implication. The Court will probably adopt a different test of insanity in this case. The Court—or someone—should monitor the use of the new version over the next few years. If, after a few years, the Court finds that the present pattern remains unaltered—that juries return only three or four verdicts of not guilty by reason of insanity every year, and that the defense is raised in contested trials in only a very small number of cases each year—perhaps the Court should undertake an even more basic reconsideration of the defense. The ***Durham*** experiment, however valuable it has been for sharpening the debate on criminal responsibility, has also proved expensive, especially in terms of its impact on the quality of care provided at St. Elizabeths. ***Durham*** may also have served to deflect attention from the necessity for creating—as California has created—extensive psychiatric facilities within the prison system. It may then be time for the Court to embark on the ultimate experiment—abandoning the defense altogether and building a humane and effective system of criminal corrections.

'HEADWINDS' MINORITY PLACEMENT IN THE LEGAL PROFESSION



BASED ON REMARKS BY PROFESSOR EDWARDS AT A LAW SCHOOL ALUMNI LUNCHEON SPEECH, NEW YORK CITY, JANUARY 28, 1972

Professor Harry T. Edwards

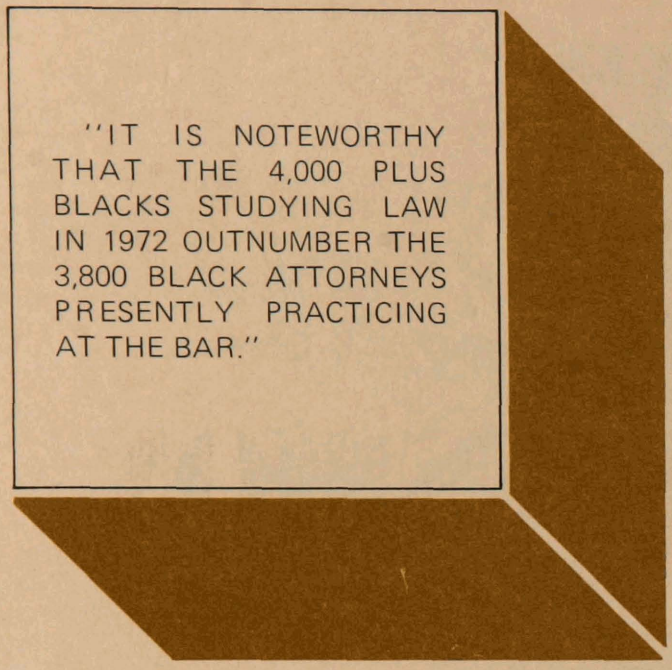
It is an undisputed fact that less than 2 per cent of the nation's estimated 300,000 lawyers are black. To paraphrase the words of one commentator:

> There is no need here to define exactly what constitutes 'shortage,' or to dwell upon the question whether the number of black lawyers should be exactly proportionate to black population. The number of black lawyers is so small that there is a shortage by definition, and obviously we are years from facing the more refined question of whether, by definition, such a shortage has ceased to exist.

However, in the decade since 1960, particularly during the last five years, the legal profession has become sensitized to the social problems stemming from the dire shortage of black legal practitioners. It is noteworthy that the 4,000 plus blacks studying law in 1972 outnumber the estimated 3,800 black attorneys presently practicing at the bar. Even more importantly, a substantial number of the 4,000 students are studying at the so-called "distinguished" institutions of legal education. Thus, the premier demand of the sixties upon our profession, i.e. greater numbers of black lawyers, is in the process of being met and should no longer be the point for critical debate.

The concern for the profession in the 1970's has now taken a shift in emphasis, moving beyond mere concern over quantity, and on toward the ***quality*** of black participation in the profession. A comparison of the professional roles assumed by those few blacks currently practicing law in the United States with the professional roles occupied by the dominant white majority will serve to isolate and define what I envision as the area of qualitative concern.

Recent studies of black practice indicate that an overwhelming preponderance of black professional activity is directed toward such areas as criminal defense, divorce, family law, personal injury, and landlord-tenant law. This concentration is to the exclusion of such areas as taxation, antitrust, securities, admiralty, banking, corporate, labor, and administrative law. After studying this phenenomenon, one law professor has noted that ". . . because of tradition, social discrimination, and lack of training, black lawyers have been excluded from the areas of law where specialization would be most profitable." Profitable, I maintain, not only in an individual pecuniary sense, but also in the sense that there is a denial to society of the benefits of having the black perspective forcefully represented in those spheres of



activity at the heart of the decision-making process, where the stakes are high and the impact ubiquitous.

The problem of underrepresentation of blacks in the legal profession is often characterized as the need to alleviate the shortage of attorneys who can advise, counsel, and defend blacks or the poor in general when they become subjects of and are adversely affected by our system of laws. However, such a definition of the problem is unnecessarily and unrealistically narrow. The system of laws in the United States reflects nothing more than the power of certain men to transform their views into regularized and codified mores. The impact of the perceived lack of black lawyers must then extend beyond mere numbers and, in great measure, must touch upon those influential lobbies in America which have historically had a significant qualitative impact on the process of societal decision. Thus, for example, the need for black lawyers in the offices of major law firms, corporations, brokerage houses, and banks is plainly apparent.

In examining the practices of major law firms, I have found little reason to differentiate between major Eastern and major Midwestern firms in regard to their actual performance or attitudinal orientation on the subject of black placement. Therefore, there may be substantial relevance to your interests in conclusions that may be drawn from a study of major Midwestern law firms which I undertook in the summer of 1971. The Midwest was selected for study since it ranks second only to the South as an area of black population concentration.

The first part of the study sought to discover the connection between major Midwestern law firms and major law schools. The study was limited to associate (i.e. non-partner) attorneys presently employed by the surveyed firms. This limitation was imposed so that the results would reflect current recruitment and hiring patterns. This part of the study revealed an affirmative relationship between major law firms and the distinguished law schools. Major law firms, for purposes of the survey, embraced all 30-man and over law firms on the theory that the large law firms employed a large percentage of lawyers working in the major metropolitan areas surveyed and also on the theory that these firms wield great influence and prestige, both in the legal community and the community at large. Part one of the study revealed:

1. 71 law firms which employed 30 or more attorneys were located in 9 sample cities.
2. 1,427 associate attorneys were in the 71 firms.
3. Of the 1,427 associates, 60 per cent had received their legal training at 10 law schools; the remaining 40 per cent at 58 schools.
4. Of those 10 law schools that provided 60 per cent of the associates, 5 schools contributed nearly 50 per cent of the total of all associates.
5. Further, two schools, Harvard and Michigan, were alone the source of the 30 per cent of the total of all associates.
6. Most of the schools among the 10 identified are characterized in professional circles as "national" or "distinguished" institutions of legal learning.

Part one went on to develop that those law schools identified as the prime source of new legal talent for the firms, are also those law schools at the forefront of the effort to recruit and train future black lawyers.

Thus, it was concluded that the existing and well-developed interrelationships between the so-called "distinguished" law school and the targeted type of law firm constitute a conduit for enhancing both the ***quantitative*** and ***qualitative*** opportunities for future black lawyers.

Part two of the study sought to determine the actual hiring patterns for blacks among these major Midwestern law firms. The results revealed the following:

1. Only 1 among 1,249 partners, and 12 out of nearly 1,000 associates in the responding firms, were black. Thus, only ½ of 1 per cent of all of the attorneys in these firms were black.
2. In the matter of summer positions, there were more cities in which a black clerk worked during the summer of 1971, than there were cities in which a black attorney was currently either a partner or associate.
3. In all cities in which black summer clerks were employed, the percentage of black clerks to total clerks was significantly higher than the percentage of black associates to total associates.

Although the survey indicated a slight trend toward increased hiring of blacks, it is too easy to merely say that more blacks are now attending major law schools, and, therefore more are being employed by leading firms which recruit primarily from those schools. The presence of more black students at such institutions may, of course, be a major factor in increased black hiring, both because many of the large firms tend to rely on a school's reputation to determine the abilities of the individual applicant, and because more blacks will tend to be in contact with the large firms than before. Along with these factors, however, must be coupled a growing sense of "acceptability" of black attorneys within the large firms and within comparable levels of client or governmental contact. This hint of an affirmative trend is borne out by the comments received

with many of the survey returns, as well as by the many comments that I received subsequent to publication.

Beyond this consideration of the firms and schools lies the third factor in the balanced equation—the black law student and soon to be black attorney. Not only has the number of blacks attracted to a legal career grown dramatically, but the nature of their interest has expanded as well. With the prospect for elimination of discriminatory barriers to full opportunity within major law firms in the offing, black law students are diligently preparing for a specialized and sophisticated practice in such areas of concentration as taxation, trust and estates, antitrust, securities, labor, corporate, admiralty, public utility, and administrative law as well as the formerly circumscribed traditional areas.

The duty thus devolves upon the firms, the law schools, and the bar associations to ensure the matching of professional placement opportunities with student aspirations. Placement of blacks into the mentioned areas of practice, areas of impact and quality, has not heretofore been a grave problem. This was in part because of the lack of interest on the part of firms beyond a token minimum of blacks, and in part because of traditional barriers to opportunity that served to discourage significant numbers of blacks from academic preparation to enter these selective areas. Further, there was the insurance factor of guaranteed absorption of the scarce few black law graduates by legal service agencies and governmental bureaus. However, the black graduates entering the profession in 1972 and after anticipate facing a new situation, and they are preparing to take advantage of it.

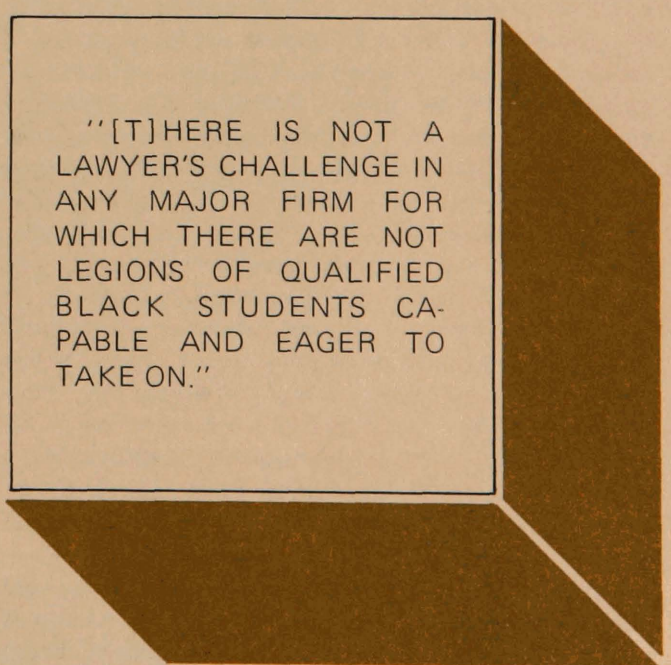
Extensive commentary on the seriousness of the coming demand for quality professional placement opportunities is not necessary; the explosion in black enrollments speaks for itself—or soon will. Although there were occasionally one or two black law students per class at Michigan as early as the 1930's (*e.g.,* Hon. George W. Crockett, Jr., J.D. '34, who is now Judge of Detroit Recorder's Court; and Cecil F. Poole, J.D. '38, who became U.S. Attorney for the Northern District of California under the Johnson Administration), there were still only one or two blacks per class as late as the mid-1960's, when I attended Michigan Law School. This year, some 110 blacks are enrolled at the Michigan Law School.

The question I bring you, then, is how shall I, as an academician, and you, as members of the practicing bar, bring our respective institutions into the posture of focusing upon the conduit relationship? How may we spur and prod the forging of a synergistic effort which can bring about the filling of firm needs with highly qualified black attorneys?

Although the responses to, discoveries by, and conclusions drawn from my study of six months ago give rise to a trickling well-spring for hope, my experiences with the present black seniors and second-year students at Michigan have given me cause to pause and question the substance behind those expressions of major, white, Midwestern law firms indicating that they were actually seeking, or would welcome and consider, qualified black applicants. Borrowing words from the Supreme Court in *Griggs v. Duke Power,* "built-in headwinds" appear to be operating upon blacks seeking opportunity.

When the drive to prepare more blacks for careers in law moved from a focus upon admissions at the law school level to a focus upon placement at the placement level, too many of the major law firm-type supporters of the threshold drive turned into "yes-but-not-in-my-neighborhood-type" detractors. Their past concern with expanded opportunities for blacks at the bar has shifted away from the spirit underlying the initial effort and toward a search for ways to achieve minimum adherence. As qualified blacks from distinguished law schools began to show up in interview rooms, some ingenious minds began to devise subtle ways to continue the exclusion of all but the "superstar" blacks, who have always been acceptable to fill token slots in these firms.

I for one am deeply concerned over the use of inflated educational requirements in hiring, particularly those exclusively emphasizing grades. In too many instances, it appears that excessive reliance on the accumulated grade point index has become a pseudo-scientific form of continued prejudice. The artificial nature of the use of inflated educational requirements, especially law school grade point averages, is best reflected by the intrinsic frailty of the grading system itself. The notion that high grades will accurately predict success in practice is at best unsupported conjecture. The gulf between the accepted conjecture and the present reality is best seen with reference to the law school practice of grading all students "on the curve." Under this policy, no individual student's grade point average, by itself alone, is capable of measuring the absolute potential worth of that student upon graduation; indeed, the final grade point average, by itself, is incapable of reflecting student motivation, interest, maturity, or development and growth over three years. Rather, such averages express nothing more than the student's final position on a predetermined and arbitrary "curve" of rankings from high to low. Consider: if every member of the freshman class in 1972 enters law school with the allegedly "perfect" predictive credentials of 800 LSAT and 4.0 grade point average, still each student in the class would subsequently be evaluated on the curve; furthermore, between 30-40 per cent of the students in this "perfect" class would ultimately finish



law school with averages in the C to C- plus range, irrespective of their success in mastering the courses in the academic curriculum. Thus, a grading system which fails to yield absolute or near-absolute measure of individual performances within a hypothetical group of "paper-equals" possessing "perfect predictive credentials" can only expand in its odious impact when applied to a non-hypothetical group of students with multifarious credentials, interests, and levels of motivation.

Black graduates are often rejected out-of-hand at the initial interview for failing to possess an average established as the minimum qualifying standard, when it is the standard itself that should be rejected as a poor predictor of performance. Validation, and the establishment of a correlation between the standard and the variable characteristics that it is supposed to measure and predict, has largely been overlooked.

It is interesting to note that recent surveys conducted by the University of Michigan Law School indicate that there is no significant correlation between law school grades and professional achievement after graduation. Consequently, if a placement standard is applied automatically, simplistically, and arbitrarily for administrative convenience or other reasons it may result in the de facto exclusion of a large number of black graduates from positions of significance within the profession.

I cannot overstate my belief, founded upon my experiences as a student, as a practitioner for a major law firm, and as a professor, that there is not a lawyer's challenge in any major firm for which there are not legions of qualified black students capable and eager to take on. These are highly qualified and competent black students; they are products of our leading law schools; they have been exposed to the best of legal minds; and they bring with them sharp minds plus a proven determination and ability to treat obstacles and frustrations as a matter of course. Translating the educational discrimination of the past into the job discrimination of the present is impermissable exclusion. We must start by taking a clear look at the hiring criteria, and at the relationship between the criteria and actual job requirements as well as actual job performance.

I would also remind you that the major law firms, corporations, and other "establishment" institutions within the profession, have been notoriously lax in enforcing ***alleged*** placement standards among white students over the years. As we all well know, many hirings in many of the best firms in the nation have been prompted by considerations of nepotism, client preferences, personality, place of graduation, client-getting potential, governmental connections, and other such criteria having nothing whatsoever to do with the applicant's grades, test scores, or demonstrated professional competence. In other words, the placement process within the legal profession has always been something less than a perfected science. Indeed, even though law school admissions criteria have frequently been attacked as invalid and unreliable, nevertheless, the law schools have at least relied upon observable criteria; the same has not been true of the hiring process in the legal profession.

Therefore, it would be inappropriate now for the legal community to exclude blacks from positions of prominence within the profession on the basis of standards that have never been validated and, indeed, have never been uniformly administered within the ranks of the majority population.

To be quite candid with you, there have been literally thousands of C+ and B average white students who, upon graduation from the University of Michigan Law School, have been given the opportunity to and have succeeded in every phase of practice within the profession. What I am urging is that these same opportunities should be open to black students, for they too will have completed a vigorous legal training, without favor, at law schools of established repute.

Several years ago, the raging debate in the law schools concerning the extension of admissions standards for minority applicants was put to rest and the institutional resistiveness to assessing minority applicants on other than traditional criteria was ameliorated. Possibly to the surprise of many, the distinguished law schools have survived the "trauma" of minority admissions with few casualities. The skeptics have discovered that the black student population, just like the white student population, includes among its ranks some very bright, some very aggressive, some very sensitive, some very wise and, in addition, some very poor students. Most black students are not at the top of the class, but then, of course, most white students are not at the top of the class either.

Some alumni of Michigan and other leading law schools have often been too quick to assert that some minority students admitted to the study of law are less "qualified" and "capable" and therefore will be less likely to attain measures of professional accomplishment upon graduation. It is significant, however, that many of these same alumni, who have attained positions of status and influence within the major law firms, were themselves admitted to law school with "paper credentials" no better than those demonstrated by the minority students currently entering law school. For example, the mean LSAT and mean grade point average for the class entering Michigan Law School in the Fall of 1957 (with no minority admits) were almost exactly the same as the mean LSAT and mean grade point average of the minority students entering Michigan Law School in the Fall of 1971. I have been advised that the LSAT and grade point scores of minority applicants this year are higher than last year; given this trend, it may not be long before most of our minority admits will be better "qualified," by reference to their "paper credentials," than many of our alumni who entered school before 1970.

Of course, my purpose is not to judge who is "better qualified," particularly with reference to "paper credentials" which have never been shown to measure professional achievement after graduation. Rather, the point is that the law schools have seen fit to attempt to expunge the taint of past racism in the profession and, therefore, the hiring firms within the profession surely can do no less. Black students are competing on equal ground with their white counterparts in law school, and they are competing well. Thus, they must be given the opportunity to practice in all areas of specialization within the legal profession. As the new generation of black lawyers join the bar, it is our heavy burden to ensure that these graduates are not impeded by artificial and "built-in headwinds."

SOME THOUGHTS ON TRAINING FOR THE LAW

by Professor Paul D. Carrington

Editor's Note: A substantial part of the 1971 meeting of the Association of American Law Schools was devoted to an examination of *Training for the Public Professions of the Law: 1971,* a report to the Association by its Curriculum Study Project Committee, chaired by Professor Carrington. Followed are edited excerpts from the report.

Summary: The Model. For the limited purpose of illuminating its conculsions and stimulating a re-examination of accreditation standards, the Committee here presents a Model Curriculum. The model is not tendered as an "ideal curriculum," or as uniform legislation in draft form, designed for instant enactment without change by all schools or any school. Rather, it is a set of concrete examples of how this report's concepts might find expression in a program if an institution were interested in implementing them.

The model can be summarized as follows: The Standard Curriculum is its core. This is a program leading to the J.D. degree and can be completed by many students with two academic years of rigorous study. It is open to students who have achieved success in three years of higher education or its equivalent. It attempts to achieve economies by abandoning the doctrinal organization which presently dominates the traditional curriculum. In doing so, it focuses more direct attention on social and professional problems and on other disciplines devoted to the study of society. It seeks to allocate teaching resources more deliberately, providing for a substantial segment of "Intensive Instruction" to assure deeper penetration of professional training. This segment might be used to give place to appropriate programs of clinical education.

The Standard Curriculum is some respects anticipates further training in the Advanced Curriculum. The latter is designed to serve the needs of professionals seeking an opportunity to develop more specialized skills and insights in the university setting, including those who aspire to careers in teaching or research. It also serves students desiring to meet resident-study requirements with maximum efficiency. The Advanced Curriculum is designed to foster non-continuous law training, by helping students introduce into their law study episodes of practice work, public service, or study in law-related disciplines.

The Open Curriculum is literally open to all students in the university or in other cooperating institutions who aspire to learn about law. It not only seeks to dispel myths laymen harbor about the legal process, but also to make a direct assault on the unitary tradition of the legal profession by offering professional degrees for allied professions. The latter feature is presented with some diffidence.

The model seeks to assure continual cost-benefit analysis of all programs by charging the full operating cost, as well as one can determine it, to each program and unit of instruction. In order to prevent such added charges from inhibiting students from opting for as full an educational development as desired, payment is deferred and can be charged against professional income. Funds available for subvention are then applied to support programs identified as worthy of being offered even though they cannot pay their own way. In this way, the model avoids using public or private support as a general subsidy to upper middle class professionals.

In short, the model seeks to orchestrate four themes which do not always harmonize. It seeks to make legal education more functional, more individualized, more diversified, and more accessible. None of these are new goals or values. The alternatives for responses to issues such as those addressed here have not materially increased since the time Plato wrote. But the responses that fit one time and place may be less suited to another. It depends on the times. These times call upon legal educators to re-examine the basics of their calling.

General Rationale. A faculty explaining its attraction to the model described might begin from the premise that a university law school should serve as a conduit between the world of affairs and inquiry. Through this conduit pass

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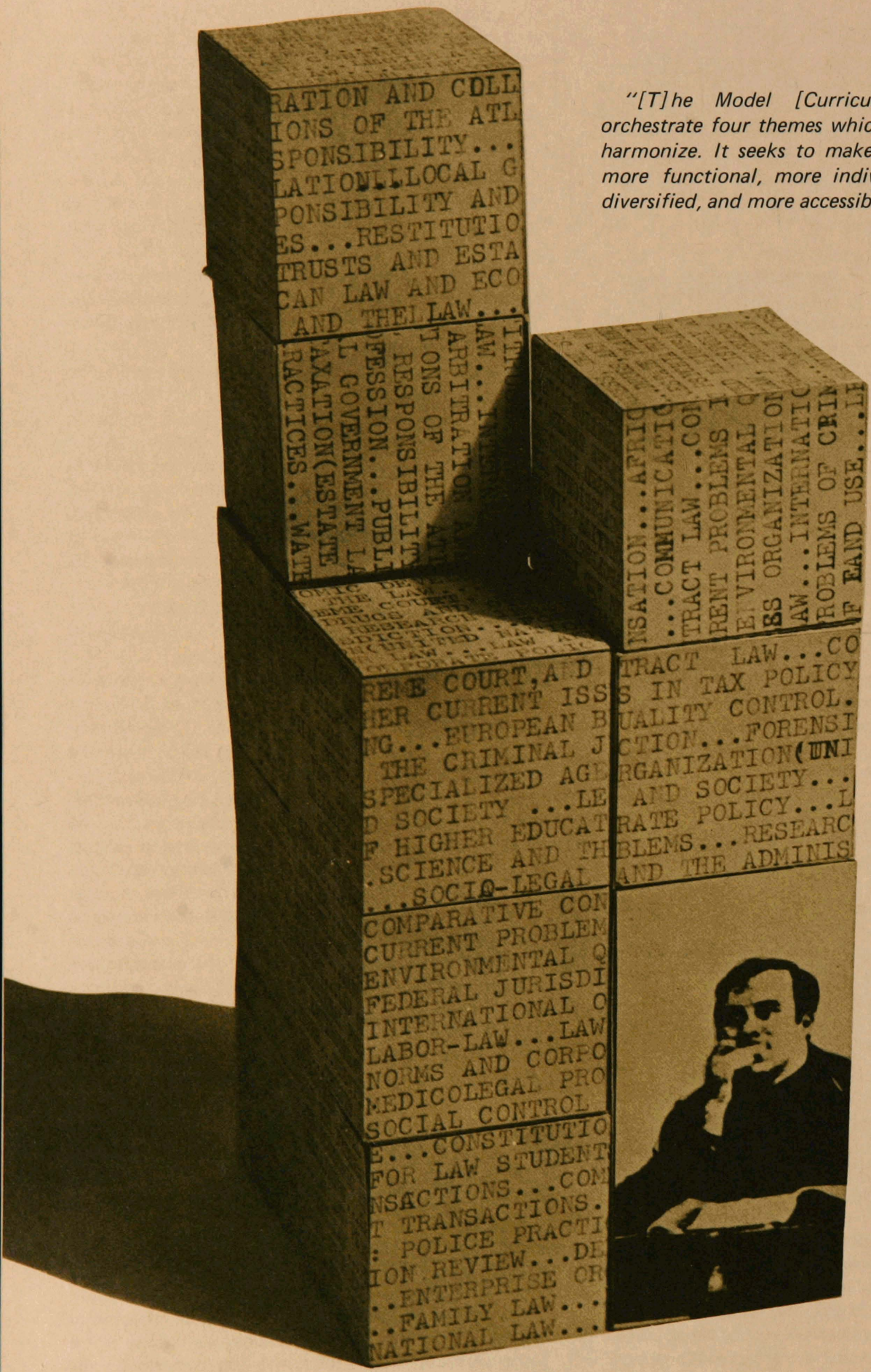

both ideas and people. It is a means by which the university can share its values and traditions, such as humanism and rationality, with the institutions of public decision-making. In return, the university can receive a better purchase on reality and a better sense of the limits of its insights. The law school can serve its public both by means of a penetrating academic inquiry into law and legal institutions and by helping professionals to develop the skill to apply the insights obtained in the delivery of legal services. The model subscribes to the hope of Karl Llewellyn that, "if there be one school in a university of which it should be said that there men learn to give practical reality, practical effectiveness, to vision and to ideals, that school is the school of law."

At the same time, the model recognizes that there is conflict in dual obligations, such as those of the law school to the worlds of inquiry and affairs. Thus, it recognizes that some kinds of training that might benefit the consumers of legal services are not well-suited to the university environment. In particular, this is true of training to perform highly standardized tasks useful in the mass-production of legal services. Effective performance of such work generally requires that the spirit of intellectual inquiry be anaesthetized. There are better means of providing such training, if it is needed, than by appending it to the university.

In the same vein, the Model Curriculum also recognizes that the university law school has a special obligation derived from its unsought position astride the gates of entry to professional careers. If, in its desire to attain academic excellence, it imposes academic requirements which are not functionally justified, it inflates the cost of legal services and inhibits social mobility. Indeed, such non-functional academic requirements can be said to violate the spirit of the national policy now expressed in Title VII of the Civil Rights Act of 1964. This undesired restrictive effect occurs even if the financial cost of the non-functional requirements are borne by public funds not otherwise available, because limitations on such funds tend to discourage enlargement of the numbers participating in the public benefit. Thus, the costly, elite medical education of recent decades has had an unwelcome effect on the cost of medical services. Meanwhile, it has made little measureable contribution to the health of the burdened public. It is an excellent example of what legal education should not permit itself to become. Moreover, the need for economy and self-restraint is especially important in law, for the reason that restrictions on access tend to cause public institutions to become less sensitive to the values and concerns of those segments of the public which are less well represented among the academic elite. Accordingly, the model seeks to pursue academic and professional excellence, but not heedlessly of social, economic, and political costs.

Despite these points of tension, the law school's two relationships are importantly dependent on one another. It is possible to conduct education for lawyers which has almost no point of contact with practical affairs; such education is exemplified in many civil law systems. But such arid educational enterprise may well have even less value to the mission of inquiry than it has to the improved conduct of affairs. It is equally possible to conduct education for lawyers which has almost no point of contact with any intellectual inquiry; in some respects, such education is now exemplified in the English apprenticeships. But this kind of educational enterprise may be quite destructive of the capacity of the legal system to respond to the broader needs of the society it serves and of the profession to maintain a suitable understanding and appreciation of its role. Thus, for too long, legal education in this country aspired to a pose of spendid isolation which was thought to exalt the law as a superior discipline. That isolationism has now gone the way of America First, "as legal realism" has triumphed over "doctrinal purity." What remains of law as an independent discipline is in a state of intellectual crisis; the doctrinal axioms which sustained the image of sovereignty have lost their vitality, like so many sunken battleships, leaving many of the assumptions of legal professionals all but defenseless. The model seeks to pursue a broader, more stable intellectual framework to sustain the craft of law.

Intensive Instruction: The Clinical Method. The program of Intensive Instruction contemplates a significant change in teaching method. The purpose of the heavy allocation of resources is to permit much closer supervision of student work than is now customary even in seminar instruction. Lectures and group discussions would be largely displaced in this segment of the curriculum by critical evaluation of written work, or other professional exercises. It is assumed that such supervision is essential to the planned development of high professional standards of craftsmanship in the exercise of a variety of professional skills. The goal would be to provide an experience for all students comparable to that customarily provided only to those who write for publication in the law review, or who become employed by the most prestigious law firms.

One must doubt whether the model can achieve this goal, because of limitations which may be inherent in law teachers. Most would surely be quite capable of performing the intended function for some period of time; most have performed it in school. But few have exhibited a taste for this kind of work and experience tends to indicate that many individuals are unable to sustain enthusiasm for it over an extended number of years. It is at least possible that a tolerance for it is inversely related to the skills and traits of the virtuoso scholar, teacher, or lawyer. Perhaps this obstacle can be overcome if the assignments of students can relate to matters of immediate interest and concern to the faculty. This would frustrate the desire of some students, but would assure a better prospect for adequate feedback. The problem can also be helped by making good use of advanced students and adjunct faculty in this teaching role. If the number of individuals which the permanent faculty must supervise can be kept small by making this kind of teaching only a small part of their teaching load, it might achieve its goal. Otherwise, the benefits to be derived from the inadequate faculty feedback to the students would be too small to merit the cost.

Intensive Instruction can facilitate the use of teaching clinics. Without such a high level of supervision, the clinical experience can be counter-productive as a means of inculcating professional standards of craftsmanship. With such supervision, there can be no doubt that clinical expe-

rience can be effectively used in teaching. It is motivational for some students. It may help many to grasp more effectively the relation between thought and action, between intellectual discipline and practical affairs. It may be particularly helpful as a basis for shared introspection and other instruction designed to provide deeper understanding of the professional role and responsibility.

On the other hand, clinical education (narrowly defined as simultaneous service to clients as a part of academic training) is not assigned a major role in the model for the reason that it cannot withstand a cost-benefit analysis as a dominant method of instruction. The problem or simulated clinical method is far more efficient as a means of transmitting most of the skills which are suitable objects of study. There is no legal clinic which compares to a hospital in the variety of experiences it can provide; such variety can be provided by simulation. Clinical work necessarily features much legal mechanics; simulation avoids the deadening routine of the standardized task. Liberated from the needs of clients, simulated clinical experiences can more easily fit academic schedules and calendars. A clinical method which introduces real clients into the teaching activity distracts both teacher and student from one another and from the learning process to the pressing need of clients.

Perhaps some students may become more sensitive to difficult social problems by reason of work in such clinics. But it would be hard to find a correlation between such experience and concern for social justice; if the present bar is insensitive, it is not because its members are not exposed to reality. Moreover, mere exposure to social problems can be acquired by far less expensive means than teaching clinics. There is also the risk that the teaching clinic designed for these purposes can be used by students as an escape from the intellectual rigors of sound professional training if such clinics are assigned a dominant place in the curriculum.

Yet another difficulty with a larger commitment to the use of teaching clinics is the staffing problem created. The clients of the clinic need attention even when the students are unavailable. The remaining burden must fall on the faculty supervisors. As a result, the problem of recruiting and retaining faculty staff for Intensive Instruction is compounded. The teacher willing and able to give both effective personal supervision to students and effective service to clients is difficult enough to find; it is perhaps too much to expect such persons also devoted to intellectual inquiry.

The disadvantaged clients who are served by the teaching clinics might be seen to benefit substantially by a greater abundance of services. But this benefit is subject to a substantial discount because the working professionals are distracted from client service by the competing claims of the students

Economy of Time. An important goal of the model is to reduce the time frame for general and professional education so that roughly five years of higher education will suffice for most students to attain professional status. Thus, the standard of admission for the Standard Curriculum allows entry after three years of undergraduate study; and the requirements for the professional degree are such that some students will be able to complete it in two academic years while most will complete it in less than three.

In the pursuit of this goal, the Model Curriculum seeks to reverse a long term trend. With few exceptions, instruction in law was not a two-year program until after the Civil War. Harvard offered the first three-year program in 1876 and that became a standard of the American Bar Association as recently as 1921. At that time, two years of undergraduate education was the usual admission standard. Now, an undergraduate degree is widely required, so that the minimum measure of time served is usually seven years. Many educators have long questioned the wisdom of escalating requirements. Many of the decisions, such as that made by the American Bar Association in 1921, expressed economic and social policies which would not stand public inspection today. The general trend is now under attack in such reputable quarters as the Carnegie Commission on Higher Education and the American Academy. The case for reversing it with respect to legal education rests on several considerations.

The case for this change could rest simply on the values already expressed in this rationale, which favors the development of student freedom and responsibility. It is quite reasonable to assign the burden of justification on those who impose constraints. Indeed, such an allocation of the burden might be viewed as an obvious application of the morality of a free society.

That moral judgment can be reinforced by reference to the apparent adverse consequences of time-serving requirements. Most of these consequences derive more or less directly from the fact that longer training programs are less attractive to prospective entrants than shorter ones, other factors being equal. Thus, as the model shortens the investment of time and foregone income required of its students, it becomes more attractive. While it is fair to say that few law schools now need a stimulus to their admissions programs, there are advantages to enlarging the range of their appeal.

The first advantage is an impact on the long-term availability of legal services. Even in a services market which is rigged by a licensing authority, there is some relation between the attractiveness of entry and the supply of service. Unless prevented from doing so, old schools enlarge and new ones open. The resulting steady increase in the supply of services maintains pressure on the price of service, and service is extended into new areas. The deterrence on price rises would be particularly effective in enlarging service to middle and lower income groups. (The model assumes this to be an objective; it could be questioned if it is assumed that lawyers are a contentious lot who engender conflict.)

The increased appeal of law study would also operate to improve the quality of services delivered to the public. Most directly, it would enlarge and improve the pool of applicants from which the entering classes are to be filled. This factor may operate with special effect on students drawn from disadvantaged economic backgrounds, because such students are more often afflicted with a short time perspective. This is to say that the offspring of the poor tend to have a more urgent appetite for reward and are less likely to await the long-term payoff provided by extended professional training. The effect would be magnified by the fact that scholarship resources would be effectively enlarged by

half. This special effect can be seen to offer additional benefits in assuring to disadvantaged groups and individuals a better chance of obtaining advocates from among their own and in assuring that power is more frequently exercised by persons sympathetic to moral values other than those of the dominant middle class.

Less directly, the reduction in the time frame might be expected to improve the quality of services by facilitating improvements to the quality of training. More students would be financially able to pay for quality instruction if they could gain access to professional income sooner. This is reflected in the model's proposal to retrieve the full cost of most instruction in the Standard Curriculum from the prospective professionals. Also some of the time gained may be applied to more effective academic pursuits such as joint degree programs and special instruction.

A final objective served by the model's reduction in time-serving is to provide leadership among the professions: all the professions need to be led away from what has become an "academic credentials race" that is increasingly costly to the public. The principle of Title VII has yet to be observed in operation among the professions and much professional employment is now over-rated with respect to academic qualifications. Somehow, the impulse to collect

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academic funeral beads for whole professional groups must be contained; a trend which sends prospective plumbers into the intricacies of hydraulic engineering in order to qualify to perform a change of washers has to be corrected. Who is to lead the way back to a more rational allocation of resources, if not the lawyers?

While some of the foregoing considerations are speculative, their impact gives substantial reinforcement to the earlier assertion that requirements of time-serving are subject to a continuing duty to justify themselves. Thus, law faculty who have long wondered what to do with the third year must require of themselves an answer to the more basic question, why must there be a third year for all?

It is included that there are no sufficient reasons for requiring a third year of time serving, if students are exposed to a rigorous and intensive two-year program which can be extended for some students, and if the standard training is supported by better specialized training for experienced professionals.

Conclusion. The Model Curriculum described would serve many goals. Its principal goal is to demonstrate that many values are inextricably involved in curricular decisions. There is no neutral curriculum; however unintentionally, any program of instruction in law serves either well or ill:

(1) the quality of legal services;
(2) the availability of legal services;
(3) the degree of access of all groups in the society to a voice in the exercise of power;
(4) social mobility;
(5) the individual freedom of students;
(6) the humane qualities of the educational environment;
(7) lawyers' understanding of the problems of other professionals and of society as it is affected by lawyers' work;
(8) the public's and other professionals' understanding of the legal process and professions;
(9) the public fisc;
(10) the congeniality of the law school to intellectual inquiry;
(11) the rigor of the rationality which has marked the American legal professions at their best.

The model is not the only, nor necessarily the best, means of serving and reconciling all these goals. It is a device for inducing those who make curricular decisions to think about them all.

Radical as some features of the Model may seem, it is conservative in two important respects. The first is that the model abides what it regards as the appropriate jurisdictional limits of curriculum planning. It does not presume to express any grand design of the society in which we should live, but meets the social issues only when they intersect with the educational mission of facilitating the attainment of individual goals by students and teachers. In this respect, the model assumes that a law school is not equipped with a suitable process for identifying the ultimate goals of society. It also assumes that no institution committed to inquiry should attempt firm conclusions because to do so would impair its receptivity to other ideas. It expresses the faith that the university law school can best serve by continuing the tradition of the university as a harbor for reason, tolerance, and speculation. It expresses skepticism that a law school can be effectively used as a means of altering the goals of the larger society. In this respect, it assumes that those changes which might be accomplished through the use of the law school curriculum could be accomplished at least as effectively by other means. It should be conceded that this is a debatable conservatism. Thomas Jefferson, for example, planned his university law school as a school for Whigs, as an incubator for generations of like-minded Jeffersonians. In resisting this kind of manipulation, the model can fairly claim to be more Jeffersonian than Jefferson.

The model's second conservatism is that it expresses faith in the institutions of legal education and in the tradition of rigorous rationality which have been their pride. Indeed, it seeks to turn that tradition on itself. In an effort to "think like a lawyer" about the problems of legal education, the Model Curriculum warmly embraces tradition; it celebrates more than it changes.

the amnesty problem

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by Professor Joseph L. Sax

Amnesty raises anew the agonizing problem of a society's responsibility to assure that the law is enforced. Often stated as the question whether we can afford not to enforce all the law all the time, the proper—and much more difficult—question is when to refrain from enforcing the law. For it is a platitude among lawyers that if every law were rigorously enforced there would be at least as many people inside the jails as outside them. To take only the most obvious of examples, full enforcement of the common prohibition on the use of profane language in public would almost daily clear the streets of people and sweep them into our prisons.

But the problem is much more far reaching than such trivial examples suggest. The purpose of law enforcement is to hold a society together against disintegrating influences; yet total law enforcement would often have just the opposite result. Are we to jail every family member who has committed an unlawful assault in the context of a domestic quarrel, or put in jail every mother who has briefly left her child unattended in an automobile while she stepped into a store? To do so would utterly rend the fabric of family life, undermining rather than sustaining the very purpose for which law exists.

Nor is the obvious need to moderate law enforcement with compassion merely a demand of practical justice in the day to day workings of a society. For there are other loyalties that must be served in any but the grimmest totalitarian governments, defined by their unyielding demand for a total obedience to the state as the ultimate duty of man. The mandates of God's law drive many of the most exalted persons that have passed across the tapestry of history, and one can know only contempt or pity for governments that cannot bring themselves to accommodate to those of its citizens who act out of concern for the state of their immortal souls. One of the most poignant books of recent years, ***In Solitary Witness,*** is a biography of an Austrian peasant named Franz Jägerstetter who was executed in 1944 for refusing to serve in Hitler's army. On the day before he was to face the firing squad he wrote this letter to his children from his jail cell:

My dear little ones. Your photos brought me great happiness. Of course it would be much better for me if I could see you again in person. But you should not let yourselves be disappointed just because your father never comes to tell you stories any more. Today there are many children whose fathers cannot come now or who will never come again . . .

Many actually believe quite simply that things have to be the way they are. If this should happen to mean that they are obliged to commit injustice, then they believe that others are responsible. The oath would not be a lie for someone who believes that he can go along and is willing to do so. But if I know in advance that I cannot accept and obey everything I would promise under that oath, then I would be guilty of a lie. For this reason I am convinced that it is still best that I speak the truth, even though it costs me my life. For you will not find it written in any of the commandments of God or the Church that a man is obliged under pain of sin to take an oath committing him to obey whatever might be commanded of him by his secular rulers. Therefore you should not be heavy of heart if others see my decision as a sin. In the same way do not be troubled if someone argues from the standpoint of the family, for it is not permitted to lie even for the sake of the family. I would not exchange my lonely cell for the most magnificent royal palace. It will pass away, but God's word remains for all eternity . . . Now, my dear children, when Mother reads this letter to you, your father will already be dead. He would have loved to come to you again, but the Heavenly Father willed it otherwise. Be good and obedient children and pray for me so that we may soon be reunited in heaven.

Dear wife, forgive me everything by which I have grieved or offended you. For my part, I have forgiven everything. Ask all those whom I have ever injured or offended to forgive me too.

On the night before the condemned man's execution, a priest, Father Jöchmann, entered his cell. He found Jägerstetter completely calm and prepared. On the table before him lay a document; he would only to have signed it and his life would be saved. He pushed it aside and walked to the scaffold. On that day, Father Jöchmann said "I can only congratulate you on this countryman of yours who lived as a saint and has now died as a hero. I say with certainty that this simple man is the only saint that I have ever met in my lifetime."

Our own history too, taken from the most tragic period in our national experience, the War Between the States, provides telling examples on both sides. In 1850 the Congress made it a crime to rescue or assist in the escape of a fugitive slave, and Senator Salmon P. Chase of Ohio chaired a meeting in Highland County that resolved: "Disobedience to the enactment of the Fugitive Slave Law is obedience to God." The Common Council of Chicago adopted a resolution denouncing the act and forbidding city policemen to render any assistance in its enforcement. Similar laws were

enacted throughout Ohio, Indiana, Michigan and Illinois. The pastor of the Congregational Church in Hartford, Connecticut preached a sermon in 1850 typical of what was being said in pulpits throughout the North:

> Who is proud of dwelling in a land where men are bought and sold like swine in the pens, and where a Christian who ventures to aid the fugitive from bondage is fined a thousand dollars and imprisoned for six months? We owe no allegiance to such a law and whoever else may regard it, we shall treat it as a nullity.

In Boston, when a runaway slave was seized and brought before the court, a crowd "collected and rescued the prisoner . . . and hurried him through the square. They went off toward Cambridge, the crowd driving along with them and cheering as they went." In Syracuse, a number of prominent citizens participated in the rescue of a fugitive slave. "Eighteen citizens were indicted, but such was the sentiment of the community that prosecutions were unavailing." This was the typical response in Northern cities.

On the other side of the ledger were the untold thousands who, in good conscience, fought on the side of the Confederacy. In law every one was guilty of treason. On Christmas day, 1868, President Johnson proclaimed "unconditionally and without reservation, to all and to every person who . . . participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States." The reason, the President said, was "to secure permanent peace, order and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people." Of this declaration, Carl Schurz said, "There is not another single example of such magnaminity in the history of the world, and it may be truly said that in acting as it did, this Republic was a century ahead of its time."

While the amnesty of 1868 is perhaps the most famous in our history, it is by no means unique. From the beginning of the nation, amnesties have been granted—by Presidents Washington, John Adams, Jefferson, Madison, Jackson, Lincoln, Andrew Johnson, Harrison, Cleveland, Theodore Roosevelt, Wilson, Coolidge, Franklin Roosevelt, and Truman. And the subjects have covered the spectrum from property tax revolts to piracy and polygamy, and from military desertion to the Whiskey Insurrection.

One of the most interesting aspects of the amnesty tradition is the light it casts on the question of what effect forgiveness would have as a precedent for military recruitment in the future? For several reasons, I think it is plain that it would have no precedential meaning for the future. Our history makes clear that the amnesty question has been dealt with during and after each American war in a quite distinctive way, responsive to the particular situation of the time. Even if one were a close student of history—as few persons likely to be affected by an amnesty are—he would be hard put to govern his conduct on the basis of any specific expectations as to what the government would do in the next war. The only expectation one might reasonably have, at least based on past experience, is that some form of amnesty would be likely in relation to the Vietnam war, as it has been with other wars. In short, amnesties are always quite special events, without significant precedential value, widely separated in time and circumstances. Moreover, it is well known among legal experts that the ability of the law to govern future conduct varies widely according to the kind of conduct sought to be affected. It is easiest to affect carefully planned business conduct by tax statutes, and most difficult to affect conduct guided by passion or conscience. Plainly an amnesty speaks essentially to the latter categories.

Another matter that has troubled many persons is whether a grant of amnesty to war resisters or deserters would appear as condemnation of those who responded to their government's call to service, who fought and some of whom died, often under circumstances of great courage, and at great personal sacrifice. Certainly no such condemnation or abandonment could be read into any amnesty. Quite to the contrary, an amnesty is preeminently an act of reconciliation welcoming back into the society all those who have followed their own consciences, whichever way their sense of duty carried them. To grant an amnesty is not only to relieve the legal liability of certain persons, but to say to all those who have opposed the war that it is time to bind up the wounds of ill feelings with those who have supported the war; to reconcile families as well as communities that have been split by the war; and to put aside all thought of retribution on all sides as to those ordinary citizens who responded to an inner call of duty, whichever way that call may have led them.

In this respect, it would in my opinion be a necessary concomitant of any amnesty that all thought of war crimes prosecutions be set at rest for ordinary citizens or soldiers who only followed the dictates of their conscience or the orders of superiors, whether on the battlefield of Vietnam or elsewhere. Unmitigated vengeance can only be destructive. We should, in this context too, take a lesson from the War Between the States. For surely it cannot be said that the pardons and amnesties granted to those who fought for the Confederate States were taken, or should have been taken, as a condemnation of those who bravely fought and died for the Union.

It may help to put our own views on this domestic matter into perspective to note that some Americans who have supported continuation of the war in Vietnam have done so out of a concern that if the forces against whom we have fought came to power, there would be a bloodbath. That is, they fear the Vietnamese would ***not*** amnesty their own fellow countrymen who fought on the losing side. I take this concern as suggesting that amnesty would be appropriate, and indeed, the only decent thing, for the Vietnamese among themselves. I share that view, and I think we should take no less generous a view toward our own citizens.

Before turning to a specific consideration of the terms and arrangements which the Congress might wish to consider in regard to amnesty, I would like to say a few words out of my own experience with some individuals who would be affected by an amnesty. It would be a terrible mistake to believe that an amnesty, even if it were granted tomorrow, would somehow relieve war resisters and deserters from all of the pain and trepidation which those who served fully in the armed forces have undergone. Several years ago, I visited a number of deserters in Paris and Stockholm, and, as has been the case with many college teachers, I have had many, many hours of conversation

with young people who were trying to work out their own response to a call for military duty that had come or was on its way during the Vietnam war. The experience for these people was exceedingly trying. The effort to resolve the conflict between that sense of duty to country and community with which they had been imbued, and the duty to one's conscience, is an experience not to be envied or lightly passed over.

They saw people and institutions that they respected greatly sharply split over the legality, propriety, and morality of the war. They saw and read of conduct that tore the nation apart. They saw members of the Congress turn one way and another over the nation's responsibility. They were told that to participate in the war was to be implicated in a national crime; and that to resist the draft was a grave felony. They saw friends die in battle, and friends languish in federal prisons.

They did not find the easy accommodation between honor and duty that was available to their fathers who fought in World War II, or even to persons of my generation who served in the Armed Forces a dozen or fifteen years ago.

There is no "typical" deserter either in background, beliefs, or attitude. The young men I met in Stockholm came from all over the United States—a surprisingly large number of them from small towns in the South and Middle West. Their backgrounds were as varied as their origins—the sons of truck drivers and pharmacists, of railroad clerks and lawyers, even of professional soldiers. There were college graduates in the group and men who had not gone beyond the eighth grade. Some had been drafted, but many had enlisted in the armed services. A considerable number had voluntarily joined the Marines, and several were Special Forces and Airborne volunteers.

I was surprised to learn how many of the deserters had not been opposed to American policy when they entered the military—but had reflected conventional acceptance of the war. In retrospect I realize that this should not have been surprising, for answers to the question, "Why did you desert," frequently emphasized the sharp contrast between what the man had heard and believed before he entered the Army and what he saw with his own eyes after he was exposed to the reality of the war.

There is no easy answer to the question why these boys deserted, as there is no easy answer to any of the problems of human motivation. But I do know now that fear for one's personal safety cannot explain the actions of many of the deserters. One boy had been in the Army for 2½ years and had only 60 days left to serve; he was in Germany and with no prospect of going to the war zone. He told me he felt compelled, before his discharge came, to face up to the responsibility of being a part of the military enterprise carrying on the Vietnam war.

Another deserter from Des Moines, Iowa, told me: "I was glad to be drafted. I was told all the bad things about the Viet Cong and I believed them. In Germany I was assigned to guard a deserter and we began talking. I thought he had been brainwashed by the Communists. But later I got talking to Vietnam veterans and began to hear, 'the killing doesn't matter because they're just a bunch of slant-eyes.' I began to ask myself 'Who's really being brainwashed?' When you ask that, that's it."

The only common denominator I found was in what happened to these men after they deserted. It was then that they began to think about what they had done, to try to figure out the meaning of what had happened to America, and to them. They sought to understand what had caused them to desert. They began to read, many for the first time in their lives.

Their desertion was overwhelmingly the product of personal experience, sometimes in the battle area, sometimes in the preparatory training. They came prepared to believe in the justice of their conduct; and they found disillusion. They took a risk that none would envy, finding their way to a strange country, without jobs, without even a common language, and without any certainty that they would not be returned for prosecution. They lived poorly, uncertainly, and often unhappily. They have been tested in ways that few of us have ever been tested; they have been tested in ways that no one can envy. And they have borne, if not the greatest adversity, adversity enough.

I know there are many who believe that deserters and resisters are largely individuals who acted simply to save their lives from the perils of war. And no doubt some are, just as some of our students who truly opposed the war undertook quite safe military obligations because they could not face going to jail. My own observation is that few deserters viewed themselves as taking the easy way out, and their way was not an easy one. But I do not pretend to be able to plumb the emotions of all who served or of all who refused to serve; nor to evaluate critically the motives of one who refused to risk his life for a cause he thought deeply unjust. I do think there is a time for that compassion which transcends analysis, and I strongly feel that now is such a time both for those who have served and those who decline to serve.

Let me now turn, finally, to some thoughts upon the specifics of amnesty that the Congress may wish to consider.

To deal with amnesty at this time presents a number of problems unlike those presented earlier in our history that make the issue of implementation considerably more complicated. Most amnesties in the past dealt with situations that were, at the time, already completed. It was, therefore, possible simply to absolve a known class of persons of conduct already completed. Alternatively, amnesties have often been conditional, and partook of a bargain; deserters, for example, have been forgiven past conduct if they would return to military duty; or rebels pardoned if they would swear an oath of allegiance for the future.

Neither such technique is responsive to the present problem. To grant deserters amnesty conditioned on fulfilling military service, or even on some other non-military service, would not, in my opinion, heal the divisiveness created by the war. To fail in creating a true reconciliation is to fail in the principal purpose of an amnesty.

Moreover, there is a terribly complex practical problem. It would be anomalous to amnesty war resisters and deserters of the past few years while military conscription continues of new people who might also have conscientious objections to service, and while the war continues.

In addition, there are a number of persons who ought to

be considered in any general sort of amnesty though their conduct did not involve personal military service. Some such persons have been charged with interfering with the Selective Service laws, and some may have been charged merely with crimes such as trespassing or the obstruction of traffic. From a technical point of view, dealing with this wide ranging panoply of offenses presents the most difficult problems of all.

What these comments suggest is that the amnesty problem is not easily extricated from the broader problems of what has been called the "selective conscientious objection" issue in exemption from military service, and the problem of the volunteer army.

If Congress were to accept the volunteer army idea, for example, it would be quite consistent to apply that idea retroactively to all people who could have opted out of military service previously, had there been an all volunteer army at the time they became eligible for military service. In this way, deserters and draft resisters now under the cloud of prosecution or already convicted could be relieved of liability *nunc pro tunc* and be put in the same position as one who first becomes eligible for military service now or in the future. Perhaps the Congress would wish to carve out an exception for that no doubt very small group who may have deserted under fire, but in general the problem could be solved simply by requiring those who did not wish to serve and would not have been required to serve in a volunteer army to so certify.

A slightly more elaborate procedure could solve the problem under a selective objection arrangement. Both for the past and the future, persons eligible for military service could expunge their liability by filing a document asserting their conscientious reservations about service at the time and under the circumstances in which they were called, or are being called, to serve in the armed forces.

A third, but more limited approach, would be to allow a reopening of the present conscientious objector status to all those who have resisted or avoided service, failed to register, or deserted. If the present law were then generously applied, perhaps by a special board of examiners created by the Congress, at least a substantial number of problems could be dealt with. To be sure, in such circumstances, it would be most important to assure that current implementation of the CO rules by draft boards was not more onerous than the application being given retroactively.

For those persons who have violated the law in ways that do not involve simply their own failure or refusal to serve in the armed forces, a rather different problem is presented. In some instances, such persons engaged in active, rather than passive resistance, and no doubt some distinctions might have to be made related to the nature of their activity. For such persons, whether already convicted and in jail, having completed a jail term, or subject to prosecution, it would be possible to create a board of review. Where such persons were prepared to make application to the board, and to demonstrate that their conduct or alleged conduct was the product of conscientious objection to the war and was not of itself significantly harmful to human wellbeing, they would be entitled to a board recommendation for pardon or amnesty. I am not certain about the propriety of this particular approach in relation to the technical requirements of the ongoing criminal law process, but I am confident that a workable and lawful means of meeting this problem could be arranged.

I would like to be able to recommend some simple and absolute process to deal with all these multifarious problems, but I am afraid the issues are too complex to admit of any solution that simply states an amnesty for all conduct related to the Vietnam war, particularly at this time and with the present state of the selective service laws. I do not, by this, mean to suggest that the Congress should delay action on the amnesty problem, for I believe that the issue is an urgent one.

I therefore suggest the following: That the Congress at the earliest possible date create a commission or task force to study the amnesty problem, including detailed information about the numbers of people likely to be involved in any of a variety of amnesty proposals, the range of legal violations that would have to be dealt with in any comprehensive amnesty, and the changes in the law that would be required to carry out recommendations for a comprehensive amnesty.

Such a commission should also recommend detailed procedures for undertaking the implementation of an amnesty, and recommend the specific statutes or resolutions needed to convene a working amnesty board or boards. I think it ***will*** be necessary to create a working administrative board, in some respects along the lines President Truman used under his Executive Order 9814 of December 23, 1946, rather than anticipating that the problem can be dealt with in a single statutory statement.

As you know there has been some controversy over the question whether amnesty is within the authority of the President or the Congress, or both. The better view seems to be that both the Congress and the President have amnesty authority. ***Brown v. Walker***, 161 U.S. 591, 601 (1895). It would hardly seem appropriate for the amnesty issue, designed to draw the nation together, to provoke a conflict between two of the branches of government. My own view is that a desirable approach would be for the Congress to set up an amnesty board, with authority to examine cases or classes of cases, and to make, as its final act, a series of recommendations to the President by having the initiative action in the Congress, with final dispositive action following recommendations to the President, both the legislative and executive branches would be drawn into participation in healing the wounds of war. At the time that the President acts on amnesty recommendations of the kind described above, it would be appropriate for him to exercise his pardoning power as to those members of the military who have engaged in unlawful conduct in the battle zone that he deems equally to be needful of that healing legal grace which is entrusted to him by the Constitution.