Law Quadrangle Notes

The University of Michigan Law School

Volume 18, Number 1, Fall 1973

Allen and Burt on Experimental Neurosurgery

Conard on Legal Nitty Gritty

CONTENTS **law quad notes**

Publications Chairman: Professor Yale Kamisar, The University of Michigan Law School; **Managing Editor:** Harley Schwadron, The University of Michigan Information Services; **Contributors:** Larry Lau, Paul Vielmetti, Law Students; **Designed and Edited** in the University Publications Office.

Photo Credits: Larry Lau—1, 4, 10, 16; U-M Information Services—2, 6; Tom Wanzeck—special photographic effects on cover, 8, 11, 13, 14, 15.

Vol. 18, No. 1 **Fall 1973**
Law Quadrangle Notes, issued quarterly by The University of Michigan Law School. Second-class postage paid at Ann Arbor, Michigan. Office of publication, 409 East Jefferson, Ann Arbor, Michigan 48104.

Send Form 3579 to: Law Quadrangle Notes, Law School, The University of Michigan, Ann Arbor, Michigan 48104

u·m notes

Marvin Niehuss Retires After 50 Years at U-M

Editor's Note: *Prof. Marvin L. Niehuss' association with the U-M as a student, law professor, and University administrator has spanned a half-century. The following is an account of his contributions as a U-M "career man."*

When Marvin L. Niehuss entered The University of Michigan as a freshman in 1920, he paid a scant $105 per year in out-of-state tuition. At that time, enrollment at the Ann Arbor campus was only 8,000, and the University's annual appropriation from the state was automatically calculated as a fixed percentage of the state's real estate taxes.

Today all that has changed. Now the University submits a detailed annual budget request to the state and awaits legislative approval. Graduate and undergraduate enrollment, which swelled immediately after World War II and again during the 1960's, is now approaching 35,000 for the Ann Arbor campus. And tuition fees have increased steadily over the years.

Niehuss recalls his early days at the University with fondness. And he has equally pleasant memories of the University over the past five decades, when it weathered the challenges of financial uncertainty and unprecedented growth.

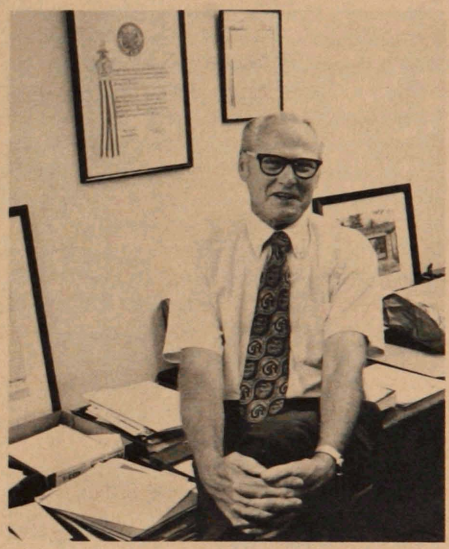
Niehuss spent his entire career at the U-M, from his student days through his service as a law professor and the U-M's executive vice-president. On his retirement in June, the U-M Regents, in granting him the title of professor emeritus of law, noted that "few men in the history of the University have come to know it so well, or have done more to help shape its destiny."

Indeed, during his 23 years as a U-M administrator, Niehuss was the man responsible for the University's achieving sufficient levels of financial support in the face of such trying circumstances as World War II, the post-war enrollment bulges, and the recession of the late 1950's.

One theme that Niehuss has continued to stress over the years is the importance of maintaining the high quality of education at the U-M. "I've often said this in the past, and I think it is just as true today: It took the people of Michigan over 100 years to build a public institution that is virtually unrivalled in the nation, and it is an asset we don't have the right to waste," the U-M educator insists.

And although it has become fashionable today to debunk our social institutions, Niehuss believes that many Michigan residents still take pride in the U-M as "an institution where their kids can get an education equal to or better than anywhere else in the world."

The educator also offers a traditional point of view in asserting that "a strong faculty and good libraries are the essential ingredients of an outstanding university." "The U-M has done well in these areas over the years," he adds. "Looking to the future, I would say we are in as good a position as any other university in maintaining our standards of excellence."



Marvin L. Niehuss

A native of Louisville, Ky., Niehuss worked his way through undergraduate school and received a bachelor's degree in economics from the U-M in 1925, with membership in Phi Beta Kappa. He then taught in the U-M economics department and the School of Business Administration while pursuing his law degree, which he received in 1930.

Niehuss has been associated with the University ever since, except for two years when he practiced law in Chicago. He joined the law faculty in 1933, and nine years later, during World War II, was asked to coordinate the Emergency Training Program and other government contracts for the University.

Niehuss' success in this task helped ease the U-M through a difficult World War II period. In the early part of the war the U-M came under fire for supposedly not doing enough for the war effort, and President Alexander Ruthven was criticized for advising students to continue their education instead of enlisting in the military.

Upon joining the administration, Niehuss discovered that about a third of the University's budget was already involved in work for the government. After informing President Ruthven of this, Niehuss accompanied the U-M president to Lansing to tell the story to the legislature. The legislators were impressed, and criticism of the University eased. And in this way, Niehuss began his career in legislative relations.

In 1944 Niehuss was asked by President Ruthven to take the new position of vice-president for University relations, which would include responsibility for legislative relations. He retained the post until 1951 when, under President Harlan Hatcher, Niehuss became vice-president and dean of faculties, a post that involved legislative relations in addition to responsibility for academic affairs of the University.

Finally, in 1962, Niehuss became executive vice-president and retained responsibility for legislative relations, while Roger Heyns (now president of the American Council on Education) assumed the post of vice-president for academic affairs.

Throughout his administrative career, Niehuss has been known for his ability to win the respect of both faculty and legislators. As one commentator pointed out earlier:

"Since cynicism rather than reverence usually marks the attitudes of faculty and lawmakers toward college administrators, it is high praise when a literary college professor says: 'Niehuss is probably the clearest thinker and the straightest talker on that side of the street.' "

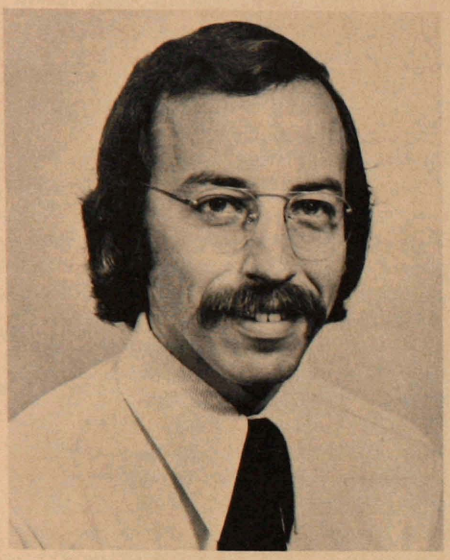
That remark was made following the economic recession of the late 1950's when the University faced serious financial problems. But Niehuss is proud of the fact that, despite financial uncertainties, few faculty members left the U-M. And after the recession had eased, he notes, substantial salary increases were put into effect.

Niehuss retired from his administrative duties in 1968 and resumed teaching at the Law School, where he has specialized in real estate law.

Now, at age 70, he has retired from the law faculty, thus ending an active association with the University that spanned a half-century.

Although his future plans are indefinite, Niehuss says he hopes to remain in Ann Arbor and pursue long-overdue personal projects. With characteristic dedication to the U-M, he notes that one of his immediate projects will be the preparation of papers and documents relating to the University's past for donation to the Michigan Historical Collections.

Charles Borgsdorf Heads Writing, Advocacy Program



Charles Borgsdorf

Much of the work of practicing lawyers involves the writing of "opinion letters," "briefs," "motions," and other documents explaining points of law, and the delivery of oral arguments in court cases.

Such activity constitutes the "nuts and bolts" of the legal profession and should not be overlooked in a law school curriculum, according to Charles W. Borgsdorf, who was recently appointed assistant dean in charge of the legal writing and advocacy program at the Law School.

A U-M law graduate and former associate of a Wall Street law firm, Borgsdorf favors the long-standing Law School tradition of student practice in writing and argumentation in a moot court setting.

"Legal research, the preparation of legal documents, and the presentation of oral arguments are fundamental to a lawyer's practice," he says. "And by offering practical experience in these areas, the Law School teaches students how to write and think like lawyers."

Each year all first-year law students at the U-M are divided into 23 "case clubs" in which they prepare and argue cases before third-year law students who serve as judges.

The compulsory program may lead to participation in the Law School's annual Henry M. Campbell Moot Court Competition for upperclass students. Following two elimination rounds, the competition culminates with four finalists arguing a hypothetical case before a bench that often includes a U.S. Supreme Court Justice and other distinguished jurists.

Borgsdorf's appointment to the Law School post marks the first time a faculty member will devote full time to the supervision of the writing and advocacy program. In the past, those duties were handled by several Law School graduates or by a faculty member who devoted a portion of his teaching time to the program.

U-M Law Dean Theodore J. St. Antoine views the new arrangement as an innovative addition to the School's total program. And if it is successful, he says, it could serve as a model for other law schools.

Under Borgsdorf's supervision, 23 Law School seniors will serve as judges and teachers in the writing and advocacy program. Borgsdorf will be responsible for maintaining some uniformity in the program and will also conduct a seminar on writing and advocacy instruction for the senior judges each term.

He says the program for first-year students will stress library research, the drafting of legal documents, oral advocacy, and a general introduction to the legal process.

As an associate with the New York City law firm of Shearman and Sterling, Borgsdorf specialized in corporation, securities, and antitrust law. He was also active as a volunteer neighborhood legal aid attorney and as a volunteer investigator for New York City Board of Correction.

Prior to his Law School appointment, he taught business law for two years at McMaster University in Hamilton, Ont.

Studies Give Support To Jury Size Reduction

Two University of Michigan studies support the view that reduction of jury size from 12 persons to 6 will not affect the outcome of court cases.

The studies found that:

—Based on actual cases at the Wayne County, Mich., Circuit Court, where civil juries were reduced from 12 members to 6 in 1970, there were "no statistically significant differences" between verdicts reached in the two jury settings.

—In mock trials conducted at the U-M, there were "no significant differences" in the verdicts and fact-finding capacities of 6- and 12-member panels. The study also found that reduction of jury size did not serve to hasten jury deliberations.

—In the mock trials the 6-member jurors were found to "participate rather than remain silent significantly more often" than the 12-member jurors.

Findings of the studies were announced in The University of Michigan *Journal of Law Reform*, a student-edited legal journal of the U-M Law School. The survey of cases at the Wayne County court was supported by a grant from the American Bar Foundation.

Former *Journal* editor William Newman has noted that the studies were the first attempts to examine 6- and 12- member jury deliberations by using principles of statistical and sociological research.

The studies were undertaken to determine the effects of a 1970 U.S. Supreme Court ruling which permitted the use of fewer than 12 jurors in a criminal case. Since then, at least 57 federal district courts—as well as many state and county courts—have adopted local rules reducing the size of civil juries from 12 members to 6.

In one study, Joan B. Kessler, a U-M doctoral student in speech communication, found a "statistically significant difference" in juror participation, with six-member juries being much more likely to have 100 per cent participation in the deliberation process.

She found that in six out of eight experimental trials, all members of the smaller juries participated in the deliberation process. By contrast, there was full participation in only 1 of 8 trials with 12-member juries.

"From a small-group communication viewpoint," Mrs. Kessler wrote, "the six-member jury may be superior to the larger group, as the small size may encourage greater over-all juror participation."

Mrs. Kessler's study included experiments with a total of 144 undergraduate U-M speech students, who served on 6- and 12-member panels in deciding a videotaped mock trial. Based on an actual automobile negligence case, the trial experiments featured a resident in orthopedics from U-M Hospital who testified as an expert witness, two law students who acted as attorneys, and an experienced trial lawyer who served as judge.

Mrs. Kessler's study also found "there were no significant differences between the verdicts, time of deliberation, and numbers of issues discussed in the two different-sized panels." In addition, she discovered that "the 6-member jurors are not significantly more satisfied with the deliberative process than the 12-member jurors."

The U-M researcher noted that a major reason for reducing jury size was to decrease the time of jury trials. But in fact, Mrs. Kessler found that in the mock trials, the mean deliberation time was somewhat higher for the six-member juries.

In studying juror satisfaction, the researcher found that 53.1 per cent of the participants in the 12-member juries said they were "very satisfied" with the proceedings, compared to

33.3 per cent of the 6-member jurors.

One explanation, she reasoned, is that "more controversy" occurred in the six-member settings, where more members participated in the proceedings and "the diverse ideas of the minority" were more likely to be voiced.

"The added controversy in the six-member juries seems to have led to more difficulty in reaching consensus, and consequently to less satisfaction with the group product," she wrote. "Perhaps, in a real trial situation the six-member juries would take more time to resolve the conflict and ultimately reach a decision. Presumably, the jurors would then be more satisfied in a smaller group."

In terms of verdicts, the study found that with six-member juries, six cases were decided in favor of the defendant and two ended in hung juries. The results for the 12-member juries were seven cases in favor of the defendant and one hung jury.

The other study, conducted by Lawrence R. Mills, a U-M law student, found "no statistically significant differences" in the proportion of verdicts rendered in favor of plaintiffs and defendants, and in the amounts of money judgements that were awarded.

Mills' study was based on a statistical analysis of automobile negligence and other civil cases (not including divorce cases) conducted at the Wayne County Circuit Court from March 1 to August 31, 1969, and from March to August 31, 1971—before and after Michigan eliminated the 12-member jury requirement for civil cases.

Mills' data revealed some "observed" differences, such as higher damage awards in automobile negligence cases heard by six-member juries. However, the researcher attributed these to "pure chance" or to such other factors as a 10 per cent rate of inflation which had an obvious effect on damage claims in the two periods covered by the study.

Among the findings:

—For both the 6- and 12-member juries, the median trial duration was three days in automobile negligence cases and four days in other general civil cases.

—For the six-member juries, the percentage of verdicts in favor of plaintiffs was 49.2 per cent in automobile negligence cases and 61.5 per cent in other civil cases. For the 12-member juries verdicts in favor of plaintiffs were reached in about 52 per cent of cases in both categories.

—Damage awards ranged from $152 to $225,000 in cases heard by 12-member juries and from $500 to $315,000 for those of 6-member juries, but most of the awards fell into a range under $10,000. The median amounts awarded in automobile negligence cases were $4,400 for 12-member jury cases and $6,662 in 6-member jury cases. The median amounts for the other general civil cases were $14,750 in 12-member jury cases and $12,965 in 6-member jury cases.

Mills emphasized that "the comparison of data from the 12-member jury cases with data from the 6-member jury cases reveals some differences between them, but these disparities may not result from the change in jury size.

"An important rival explanation is that there is no real difference between the two different-sized juries, and that the observed differences between the two samples arose purely by chance."

Mills noted that "even if the two samples in the study were taken solely from 12-member jury cases, the limited size of the samples would cause some differences between them simply as a chance occurrence."

Paul Kauper Honored For Legal Contributions

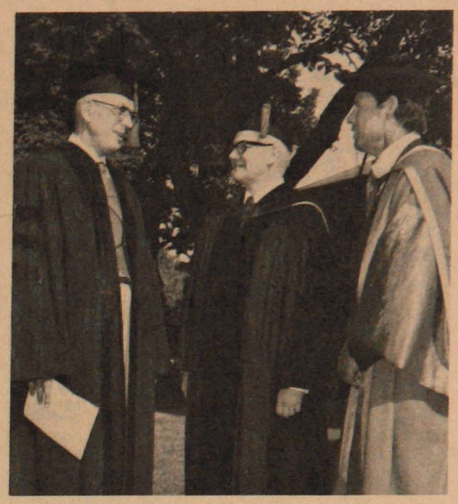
Professor Paul G. Kauper of U-M Law School, an internationally recognized authority on constitutional law, was awarded an honorary doctor of laws degree by Wittenberg University in Springfield, Ohio.

Prof. Kauper was honored at Wittenberg's spring commencement exercises for his contributions as a teacher and scholar and his "special attention to religious liberty and problems of church and state."

The citation also noted Prof. Kauper's involvement in affairs of the Lutheran Church, including his service as a trustee of the U-M's Lutheran Student Foundation and his participation on the Board of College Education of the American Lutheran Church.

Prof. Kauper has been on the U-M law faculty for 37 years and currently holds the Henry M. Butzel professorship. He is the author of many books, including *Cases and Materials in Constitutional Law*, *Frontiers of Constitutional Liberty* , *Civil Liberties and the Constitution*, and *Religion and the Constitution*.

The recipient of many honors, Prof. Kauper in 1971 was named Henry Russel Lecturer, the highest honor the University can bestow on a senior faculty member, and in 1959 was selected for the U-M's Distinguished Faculty Achievement Award for his scholarship, teaching, and public service. He has also received honorary degrees from other universities including the Heidelberg University in Germany.



From the left are Prof. Kauper, G. Kenneth Andeen, Wittenberg president, and Erno J. Dahl, Wittenberg vice-president for academic affairs.

Prof. Kauper attended Earlham College and received his law degree from the U-M in 1932. Before joining the U-M faculty in 1936, he worked as a research assistant at the U-M and spent two years with a New York City law firm.

In addition to his service to the Lutheran Church, Prof. Kauper has been active in many Ann Arbor civic and governmental groups. He is a member of the American Bar Association, the Michigan Bar, the American Judicature Society, and served as president of the National Order of the Coif.

Wright Urges Licenses For Tax Preparers

The rising number of "both grossly erroneous and fraudulent" individual income tax returns prepared by commercial tax preparers demands that this fast-growing industry be regulated through a government licensing system, a University of Michigan law professor suggests.

Writing in the Law School's *Journal of Law Reform*, Prof. L. Hart Wright says that instances of fraud and incompetence by a "completely unregulated commercial preparation industry" have now reached "alarming proportions."

In a 1972 Internal Revenue Service (IRS) study covering a seven-state region, for example, only 30 out of 560 samples of commercially-prepared returns were found to be correct, amounting to an average tax loss of $234.99 per return, according to Professor Wright.

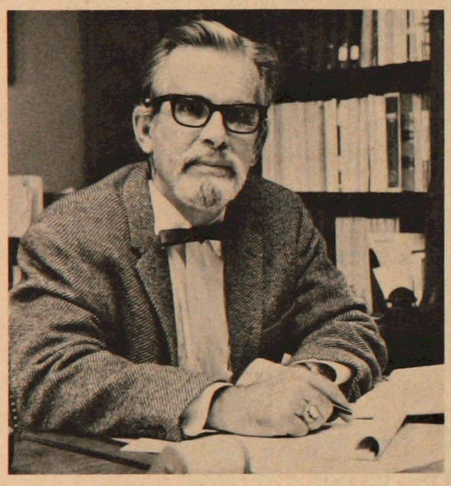
Underlying the need for a licensing system, says Wright, is the fact that, despite recent IRS efforts to expand

its taxpayers' assistance program, the individual taxpayer is still left with the burden of evaluating the "competence and integrity" of commercial tax preparation firms.

"Given the taxpayer's legitimate competing concerns of cost and a minimum required competence, and also of his own inadequate understanding of the law," says Wright, "it is the height of folly to expect him to be able to determine whether a given preparer has the requisite competence to do his return."

Prof. Wright, a specialist in federal tax law, also maintains that a recent IRS proposal, which would establish statutory penalties for tax deficiencies "knowingly" caused by tax preparers, would prove ineffective because it would place the burden of enforcing activities of some 200,000 commercial tax preparers on the already overworked federal court system.

Instead, he says, "Congress would serve the nation's tax system better by



L. Hart Wright

affirmatively mandating, as a complement to the service's proposals and existing arrangements, a return-preparer licensing system."

Such an arrangement, according to Wright, should include character investigations, instructional materials, examinations, and other measures designed to qualify "only those who prove themselves to be competent and trustworthy." In effect, he says, a licensing system would serve to "prevent wrongs before they are committed."

Wright also contends that proposals for the IRS itself to assume the tax preparation functions now handled by private firms would be unrealistic, in light of the "awesome costs" of such a venture and the fact that millions of taxpayers have grown accustomed to seeking assistance at more conveniently located private firms.

Another point urged by the U-M professor is more equitable and impartial treatment of the "small" taxpayer whose return has been audited.

In most cases, he observes, "examiners fail to inform taxpayers of their relative chance of a favorable decision—or possibly a settlement by mutual concession—if they were to appeal to the higher echelons of the IRS bureaucracy."

And all too often, according to Wright, regional offices which have full "settlement" power are inaccessible to the small taxpayer who is unable to afford a protracted contest with federal authorities. As an alternative, Professor Wright suggests that, in small cases, settlement power be delegated to the more accessible district offices.

Legal Study Questions School Placements

The use of intelligence tests as the sole criterion for determining if school children are "mentally retarded," a practice facing mounting criticism from educators and social scientists, is also questionable from a legal point of view, according to a University of Michigan study.

The study, appearing in the *Michigan Law Review*, says the tests have led to the placement of disproportionate numbers of black and other minority students in programs for the mentally retarded.

And because IQ scores are "untrustworthy indicators of mental retardation in minority children," the study declares, their use may violate the "due process" and "equal protection" guarantees of the fifth and fourteenth amendments of the Constitution.

The *Law Review* article is written by David Lang, a black U-M law graduate who is now associated with a St. Louis, Mo., law firm. Lang's research, completed while he was a U-M student, is part of a larger study undertaken by the U-M's Institute for the Study of Mental Retardation and Related Disabilities.

Lang stresses that, among other shortcomings, intelligence tests "do not provide sufficiently meaningful information about the learning capability of minority students" because the mean scores and other normative data are based solely on tests conducted with white children.

Citing the most widely used tests, he notes that "the Stanford-Binet test was originally standardized in 1937 by giving the test to 3,184 subjects, every one of whom was a white, native-born American; the revision in 1960 again included only whites.

"The Wechsler Intelligence Scale for Children is similarly suspect in that it was standardized by testing 2,200 subjects, all of whom were white."

The tests are also inadequate, according to the study, because they overlook environmental, psychological, and socio-economic factors that could have a significant bearing on test results.

"For example, in contrast to middle-class children, lower-class children will tend to be less verbal, more fearful of strangers, less motivated toward academic achievement, bilingual, less knowledgeable about the world outside their neighborhood, and more likely to attend inadequate schools.

"These factors may contribute to a reaction known as 'test anxiety.' The disadvantaged child, apprehensive about his ability to score well. . .may react to the testing situation in a self-defeating manner: he may become highly nervous, or he may withdraw. Either reaction could lower his test score.....Additionally, a black child may lack rapport with a white examiner, a factor that could substantially affect his performance."

In illustrating effects of the tests, Lang notes that 80 per cent of the students in the nation's mentally retarded classes are children from "low status" backgrounds, including Afro-Americans, American Indians, Mexicans, and Puerto Rican Americans.

And a recent study in Missouri, according to Lang, "disclosed that learning disability (LD) programs, which are remedial in nature, are predominantly filled with white, middle- and upper-class children, while educable mentally retarded (EMR) programs, which are compensatory in nature, have disproportionate numbers of black children."

Turning to legal aspects of the problem, Lang cites a lack of litigation on the questions of scientific testing, but adds that several previous cases support the claim that such tests discriminate against minority children.

He notes, for example, that in a 1967 landmark ruling striking down the "tracking system" in Washington, D.C., schools, the use of aptitude and achievement tests were found to be discriminatory against black and lower-class students and in violation of the equal protection guarantee.

A strong argument could also be made against use of the IQ tests on grounds that they are inappropriate means of classifying children, Lang suggests.

"Under the traditional equal protection standard," he writes, "a state generally retains discretion to classify people so long as the classification bears a rational relationship to a legitimate state purpose. . . .It could be argued that the use of IQ tests

bears no rational relationship to the placement of minority children because of the defects in the tests."

Citing reforms under consideration or already adopted in Michigan and California, Lang offers these recommendations:

—Whatever tests are given should be administered in a child's primary language by an examiner of the child's own race.

—Attempts should be made to eliminate bias in the tests, and a child's "cultural and adaptive behavior" should be taken into account in evaluating test results. Before placement of a minority child, there should be an examination of the child's developmental history and cultural and scholastic background.

—The child and his parents should be granted a hearing both before the test is administered and before the child is placed in a program for the mentally retarded. Parents should be required to consent to such a placement in writing.

—The capabilities of a child placed in a program for the retarded should be reviewed annually.

U-M Students Aid County Jail Program

Editor's Note: *The following is an account of an Inmate Rehabilitation Program at the Washtenaw County Jail in Ann Arbor. In response to inmate interest in Michigan law and defendants' rights, students from the U-M Law School—notably Kenneth Mayfield and Louis Roberts—have taught classes at the facility on basic criminal procedure. Also participating in the legal education program are members of the county Public Defender's Office.*

When Bill, 25, finishes his sentence at the Washtenaw County Jail here next spring, he'll have something to show for it.

He has access to classes in English, math, money management, and criminal law; counseling in drug abuse and alcoholism; use of over 500 library books; and regular medical care. Ultimately he may finish high school in jail and be granted temporary release into the community to attend college or begin a career.

University of Michigan staff and students are playing a major role in this innovative Inmate Rehabilitation Program, the most comprehensive effort of its kind in Michigan. They volunteer as tutors, teachers, family liaisons, and in many other capacities intended to meet the prisoners' individual needs and to give them a stake in society.

'More than 80 per cent of the inmates in American prisons are repeaters, according to a recent poll by the U.S. Department of Justice," says Molly Reno, program coordinator.

"In Michigan, jail inmates have the same average intelligence level as the rest of the population, but their illiteracy rate is three times higher. Their unemployment level is three times higher as well. Unskilled and poorly educated, severed from their families and community, it is not surprising that so many former prisoners drift back into crime," she says.

A 1972 graduate of the U-M, Ms. Reno researched the kinds of rehabilitation programs elsewhere in the state and interviewed inmates at the Washtenaw County Jail to determine what kind of program they felt would be most useful to them. Overwhelmingly, the inmates expressed the desire for a better education.

The County then applied for and received a $47,580 grant from the U.S. Law Enforcement Assistance Agency authorizing a three-level rehabilitation plan:

"First, Sheriff Frederick J. Postill and his staff took measures to eliminate arbitrary rules, standardize disciplinary procedures, and generally evolve an atmosphere conducive to rehabilitation instead of punishment," Ms. Reno explains.

"In the area of personal adjustment, the program has enlisted community groups to counsel inmates who have drug or alcohol-related problems. Two inmate workers, both former convicts, are also available to counsel inmates," she says.

"Our third and biggest emphasis is on education and vocational training, the needs most stressed by the inmates themselves. Thirty inmates, carefully screened, attend classes in trailers on the jail premises. Those who are greater security risks are eligible for cell study, with volunteer teachers preparing and evaluating their assignments. Arrangements have also been made for qualified inmates to take classes at the U-M, Eastern Michigan University, and Washtenaw Community College, returning to their cell in the evening."

The U-M has been involved in many aspects of the non-profit rehabilitation program, including the following:

—The U-M Library Science Students Association has collected and organized over 500 books for an inmate-run library. They built wheeled bookcases for circulating the books through the cells, and are buying new books with a $50 per month stipend from the County Library. In nine weeks, tests show that one group of inmates has improved their reading comprehension from 9th to 12th grade level.

—Sixteen licensed doctors from the U-M Intern-Residents Association alternate coming to the jail two hours a day, five days a week. "A great many of the persons brought into jail need medical attention," Ms. Reno explains. "Prior to this, inmates who could convince the attendants they were sick had to be driven to private physicians under guard. The new system saves time, money, and eliminates the security risk."

—In response to a high interest in Michigan law and courtroom practices, two volunteers from the U-M Law School are teaching a class to the inmates in basic legal criminal procedure.

—The U-M Artists and Craftsmen Association has begun holding craft lessons at the jail.

—Students from the U-M School of Social Work are working with the inmates' families to alleviate budgetary, health, and housing problems. "For example, we are cooperating with the Ann Arbor Housing Commission to secure better homes for the families," Ms. Reno says. "The program staff acts as the family's advocate with school counselors, landlords, and others with whom they come in contact. Trusted inmates are also permitted 48-hour passes with their wives and children."

Members of the program staff have spoken before or met with some 80 community groups to solicit not only their moral and financial support but their services for the inmates and their families. Thus, Octagon House, a local drug counseling agency, meets weekly with inmates who have chronic drug-abuse problems. Staff of the Washtenaw Council on Alcoholism meet with prisoners with drinking problems, and members of Alcoholics Anonymous accompany prisoners with trustee status to their bi-weekly meetings.

Local stores have donated chess, checkers, and other adult games to the jail. Copies of local newspapers and magazines are available, and each cell block now has a television set.

"We have learned that more than 95 per cent of the inmates have never voted," Ms. Reno remarks. "They don't feel part of the community at all. We have added a course in county politics to help reduce this sense of alienation and involve them in the political process.

"Our success depends initially on having enough eligible inmates sentenced to the jail instead of being removed to the state prison," Ms. Reno explains. "Thus, the program works closely with judges, lawyers,

parole officers, and other law enforcement officers to encourage local sentencing. It maintains a close liaison with the community, courts, potential employers, and the inmates' families in an effort to reach beyond the inmates' immediate problems."

A case in point is Bill. A bright, personable youth, he was expelled from school at seven, bounced from an unstable home to a New York reformatory, and then to a state training home. At 18, he was caught in a burglary attempt and was ultimately sentenced three times during the next seven years to state prison. He also became addicted to narcotics.

"Bill has a very high IQ and an excellent rapport with groups," Ms. Reno relates. "People take an instant liking to him. After his last conviction, the judge, agreeing that prison wasn't reforming Bill, sentenced him to the jail rehabilitation program."

The young man received drug counseling, was admitted to the classroom program and given work assignments within the jail. He earned a weekend pass to visit his wife and children, and eventually will be granted a daytime release to work outside in the community.

"Bill is aiming for a career in drug counseling. Like many ex-cons in their mid-20's, he has had no high school degree and has never held a job," says Ms. Reno. "When he finishes this program, he will have both."

"Bill will go back into the community and we'll never see him here again." —*Pat Materka*

Prof. Hawkins Joins BYU Law Faculty

Carl S. Hawkins, a University of Michigan law professor since 1957, has joined the faculty of Brigham Young University in Provo, Utah, where he will assist in establishing a new law school.

Hawkins will be one of the original faculty members at the new school, which opened its doors to the first freshman class in September.

Active in affairs of the Mormon Church for many years, Prof. Hawkins is a 1948 graduate of Brigham Young, a Mormon-supported institution. His desire to serve the church was a major factor in his decision to take the new position.

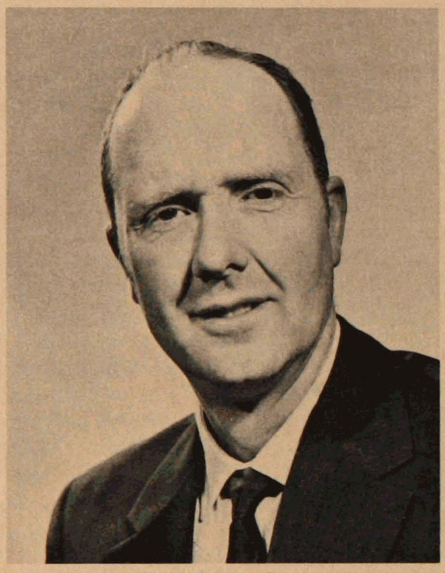
Dean Theodore J. St. Antoine said Prof. Hawkins had been extremely popular with Michigan law students and exhibited a "genuine love of teaching."

"Carl was also a fine scholar and played an active role in affairs of the Law School and the state bar," St. Antoine said. "Over the years he made significant contributions to the shaping of many bills before the Michigan legislature."

Hawkins recently held the post of executive secretary of the Michigan Law Revision Commission, which is responsible for upgrading state laws. He had also served as chairman of the Civil Procedure Committee of the Michigan bar and was reporter of the Michigan Supreme Court Committee on Standard Jury Instructions.

He is the co-author of a six-volume work explaining rules of procedure for Michigan courts, and is considered a leading authority on the subject. He is also co-author of a torts casebook published in 1968.

Hawkins has held many positions in the Mormon Church. He was made bishop of the Ann Arbor ward of the Church of Jesus Christ of Latter-Day Saints in 1958, and was later appointed second counselor (assistant) to George Romney, then president of the Detroit Stake of the Church, which includes Mormon congregations in Southeastern Michigan and parts of Ohio and Canada.



Carl S. Hawkins

Hawkins became president of the Detroit Stake in 1967. When that unit was reorganized in 1969, he became president of the newly created Dearborn Stake.

Hawkins received his law degree, with honors, from Northwestern University in 1951, and later was made a partner of a Washington, D.C., law firm, where his work included representation of Indian tribes in claims against the federal government.

In 1957 he won a judgment of $3 million for the Uintah and White River bands of Ute Indians in the U.S. Court of Claims, and in 1960 he successfully defended a $10 million judgment previously awarded the Crow Indian tribe by the Indian Claims Commission.

Law Grads Accept Federal, State Clerkships

Clerkships to state and federal courts have been accepted by 35 University of Michigan law graduates from the class of 1973.

Nine of the graduates have secured clerkships with judges sitting in federal circuit courts. Fifteen will clerk for other federal judges and 11 will clerk for state court judges.

The graduates and the judges under whom they will serve are as follows:

Ronald Allen
The Hon. W. Wallace Kent
United States Court of Appeals, Sixth Circuit
Kalamazoo, Michigan

Lackland Bloom
The Hon. John R. Brown
Chief Judge, United States Court of Appeals, Fifth Circuit
Houston, Texas

Nolan A. Bowie
The Hon. Theodore Newman
Superior Court
Washington, D.C.

John Burkoff
The Hon. G. Mennen Williams
Michigan Supreme Court
Detroit, Michigan

Bruce Campbell
The Hon. Noel Fox
United States District Court
Western District of Michigan
Grand Rapids, Michigan

Bruce Diamond
The Hon. Frank Coffin
Chief Judge
United States Court of Appeals, First Circuit
Portland, Maine

Preston Dobbins
The Hon. Damon Keith
United States District Court
Eastern District of Michigan
Detroit, Michigan

Steven Douse
The Hon. John Feickens
United States District Court
Eastern District of Michigan
Detroit, Michigan

Robert Dyer
The Hon. Lafel E. Oman
New Mexico Supreme Court
Santa Fe, New Mexico

Michael Frank
The Hon. Donald Holbrook
Michigan Court of Appeals
Lansing, Michigan

Philip Frost
The Hon. Philip Pratt
United States District Court
Eastern District of Michigan
Detroit, Michigan

Brian Garfield III
Minnesota Supreme Court
St. Paul, Minnesota

Ronald Gould
The Hon. Wade H. McCree, Jr.
United States Court of Appeals, Sixth Circuit
Detroit, Michigan

Steven Greenwald
The Hon. Charles Levin
Michigan Supreme Court
Lansing, Michigan

Donald Hultin
The Hon. Donald Kelley
Colorado Supreme Court
Denver, Colorado

Robert Jaspen
Staff Law Clerk
United States Court of Appeals, Fourth Circuit
Richmond, Virginia

James Jenkins
Illinois Court of Appeals
Springfield, Illinois

Charles Lowenhaupt
The Hon. Norman O. Tietjens
United States Tax Court
Washington, D.C.

Patrick MacFarland
The Hon. Edward A. Tamm
United States Court of Appeals, District of Columbia Circuit
Washington, D.C.

William Meyer
The Hon. John W. Oliver
United States District Court
Western District of Missouri
Kansas City, Missouri

Raymond Mullins
The Hon. Damon Keith
United States District Court
Eastern District of Michigan
Detroit, Michigan

Matthew Myers
The Hon. Raymond Pettine
Chief Judge
United States District Court
Providence, Rhode Island

John Nannes
The Hon. Roger Robb
United States Court of Appeals, District of Columbia Circuit
Washington, D.C.

Gerald O'Grady
Superior Court of Massachusetts
Boston, Massachusetts

David Pederson
The Hon. Warren K. Urbom
Chief Judge
United States District Court
Lincoln, Nebraska

Steven Rhodes
The Hon. John Feickens
United States District Court
Eastern District of Michigan
Detroit, Michigan

Rosalind Rochkind
The Hon. Ralph Freeman
United States District Court
Eastern District of Michigan
Detroit, Michigan

George Ruttinger
The Hon. Malcolm R. Wilkey
United States Court of Appeals, District of Columbia Circuit
Washington, D.C.

Frederick Schafrick
The Hon. J. Edward Lumbard
United States Court of Appeals, Second Circuit
New York, New York

Stephen Schuesler
The Hon. Robert Danhof
Michigan Court of Appeals
Lansing, Michigan

John Schwartz
Arizona Supreme Court
Phoenix, Arizona

Richard Silvestri
The Hon. Noel P. Fox
United States District Court
Western District of Michigan
Grand Rapids, Michigan

Roger Theis
United States District Court
New Mexico

David Zalk
The Hon. Philip Neville
United States District Court
Minneapolis, Minnesota

At the Present Time EXPERIMENTAL NEUROSURGERY Cannot be Performed on Involuntarily Confined Mental Patients

by
Robert A. Burt
Francis A. Allen

Professors of Law
The University of Michigan

The following is a part of the brief submitted by Burt and Allen, arguing that state-compelled psychosurgery would be cruel and unusual punishment under the Eighth Amendment and that state compulsion would inevitably taint any apparent consent for psychosurgery of involuntarily detained mental patients. The Court agreed with the result sought by this brief, though its opinion rested on First Amendment grounds related to the "thought control" implications of psychosurgery.

Editor's Note: *In July, 1973, a three-judge Circuit Court for Wayne County, Mich., ruled that experimental psychosurgery could not be performed on any person involuntarily detained in state mental institutions, even if consent were given to the experiment* (Kaimowitz v. Department of Mental Health (1973). *This was the first court case to consider the propriety of psychosurgery. It received considerable national attention and is a striking precedent regarding both psychosurgery and, more generally, medical experimentation with captive populations.*

The litigation was filed after one subject had been selected by experimenters at the Lafayette Clinic in Detroit, a unit of the State Department of Mental Health affiliated with the Wayne State University Medical School. Because it was a taxpayer's suit challenging the expenditure of state funds, and had not been filed at the direction of the experimental subject, the Court determined that the subject needed his own counsel and appointed Profs. Robert A. Burt and Francis A. Allen of the University of Michigan Law School as principal counsel and co-counsel respectively. Prof. Andrew S. Watson of the Law School and the U-M Department of Psychiatry examined the subject and testified at the trial.

The experimental subject, known in the litigation only as "John Doe," had been confined for 18 years in the state maximum security mental institution after being indicted for murder and judged to be a "criminal sexual psychopath" under then-applicable Michigan law. The experimenters considered that Doe was "habitually aggressive" and that he could not be cured by any conventional therapies. The psychosurgery would involve destruction of small portions in the amygdala region of the brain if the experimenters found what they considered "demonstrable physical abnormality" following electrode implantation deep in the subject's brain.

In preliminary proceedings, Doe's counsel successfully argued the unconstitutionality of the statute under which Doe was confined. Though Doe was thus free, and though the Clinic then decided to end the experiment altogether, the Court ruled that the questions raised were sufficiently important to support an action for declaratory judgment. A 10-day trial was then conducted, with evidence ranging widely over the neurological justifications of psychosurgery and the prospects for obtaining adequately informed consent for medical treatment or experimentation in state mental institutions.

Because the state is constitutionally prohibited from compelling experimental neurosurgery for aggressivity, and because the taint of compulsion cannot be dispelled for involuntarily confined mental patients, no such experimental surgery can at the present time be performed on involuntarily confined mental patients.

A. State compulsion for the contemplated experimental neurosurgery violates the constitutional prohibition on cruel and unusual punishment and the fundamental right to privacy.

There is. . .one striking exception to [the] general rule [that any medical procedure without consent is a battery]. Persons who are involuntarily committed to state mental institutions, on a permanent commitment order, need not give consent to medical treatment. The precise purpose for such commitment status is to displace the ordinary rule that doctors are forbidden to treat without consent.

The questions for resolution by this Court have been framed with the apparent assumption that consent is a necessary prerequisite, by a patient or his guardian, to experimental neurosurgery for aggressivity. In order to formulate the standards against which that consent must be measured, however, it is necessary to understand the basis for ruling that consent is required. E. Gordon Yudashkin, Director, Michigan Department of Mental Health, for example, suggested that the Department of Mental Health might well have authority to compel a committed person to accept this experimental surgery, just as the Department has authority to compel acceptance of drug therapy or psychotherapy. He did state that the Department, under his direction, would not exercise any such authority to compel experimental neurosurgery.

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The state, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. . . .The primary principle is that punishment must not be so severe as to be degrading to the dignity of human beings.

In elaborating this standard, Justice Brennan suggests that the test

will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and there is no reason to believe that it serves any penal pur-

Robert A. Burt (left) and Francis A. Allen

pose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause. . . .

By these standards, compelled experimental brain surgery is clearly impermissible. Its risks, and its possible deprivation of personality attributes, are "degrading to the dignity of human beings." It would be "unusually severe." The passions surrounding this trial are themselves ample evidence of the ethical discomfiture in "contemporary society" regarding psychosurgery generally; the virtually automatic assumption by all parties that compelled neurosurgery would be unthinkable testifies to its "substantial reject[ion] by contemporary society" as a compelled treatment. . . .

The remaining two standards posited by Justice Brennan require a more extended discussion. The question whether the contemplated surgery "serves any penal purpose more effectively than some less severe punishment" has two aspects. First, the testimony [at trial]. . .has established that any beneficial result, to control or diminish aggressivity, is wholly unpredictable, and that aggressivity can only be reliably controlled in the present state of neurological knowledge by destruction of such extensive amounts of brain tissue that other personality functions are excessively impaired. It would thus appear impossible adequately to demonstrate that the contemplated surgery is more effective than "some less severe" intervention, such as conventional psychotherapy (with all its uncertain effectiveness). Second, the question posed for resolution by declaratory judgment in this case posits that all conventional therapies must be exhausted before invocation of the surgical procedure. Exhaustion of conventional therapies to demonstrate that the surgery is "more effective. . .than some less severe" disposition is accordingly constitutionally required if the surgery is compelled. . . .

Justice Brennan's remaining standard is whether "there is a strong probability that [the punishment] is inflicted arbitrarily." This standard appeared to be the basic ground for Justice Stewart's conclusion that the death penalty was invalid because it is imposed on "a capriciously selected random handful." Justices White and Douglas rely on the same essential ground. . . . (Justice Marshall's lengthy opinion appears generally to track Justice Brennan's analysis.)

The arbitrariness of the contemplated surgical procedures is amply established by the testimony. . .regarding the total absense of correlation between one purported diagnostic key—"demonstrable physical abnormality of the brain"—and aggressive conduct. Indeed, one admitted purpose for the experiment according to Dr. Ernst Rodin, the principal experimenter, Professor of Neurology at the Lafayette Clinic, is to determine whether current belief is correct in asserting that there is no such correlation. Since there is thus no established basis for distinguishing between aggressive persons who do and who do not have "demonstrable physical abnormality of the brain," selection of candidates for destruction of brain tissue on that basis is patently arbitrary. (On this score, it should be noted that if future animal research, for example, establishes a more sufficient base for a correlation between brain "abnormality" and aggression, this argument would no longer apply.)

Beyond this fundamental arbitrariness in selection, the testimony at trial clearly establishes that the "Criteria for Inclusion in the Aggression Project" is a grab bag of essentially miscellaneous criteria. Dr. Yudashkin stated that the ten criteria were not a "specific diagnostic entity," but were essentially a "miscellaneous sociological description." Dr. Andrew Watson, Professor of Psychiatry and Law, The University of Michigan, testified that the criteria were not "narrow, carefully defined, and carefully limited criteria likely to screen out very many people" and that he was "hard pressed to imagine what you end up with" in applying these criteria. Similarly, Dr. Ayub Ommaya at the National Institute of Neurological Diseases and Stroke, testified that the study criteria did not define a "homogeneous population." Accordingly, there is (in Justice Brennan's words) "strong probability that (the surgery would be) inflicted arbitrarily," on (in Justice Stewart's words) a "capriciously selected random handful" for whom (in Justice White's words) "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."

It is thus clear that—if the surgery were compelled by the state—it would violate the constitutional ban on cruel and unusual punishment. Moreover, in view of the drastic assault on human personality and bodily integrity involved in the surgery, it is equally clear that such compelled surgery would contravene the constitutional "right of privacy" recently invoked by the Supreme Court to invalidate state laws that compelled women to bear unwanted children.

As a matter of state law, there is no precedent in Michigan cases and little precedent elsewhere that we have found addressing whether there are any exceptions to the general rule that committed persons may be compelled to accept any treatment imposed by the state commitment institution. Our research has found attorney generals' opinions in Vermont and Wisconsin that address this question, and each concludes that as a matter of law no consent is required. The most directly applicable is a 1948 Wisconsin attorney general's opinion considering whether "drastic therapy, such as prefrontal lobotomy" must be consensual by the person or his guardian, [which] concludes as follows:

> . . .[H]aving in mind the drastic nature of prefrontal lobotomy or psychosurgery, its permanent effects as well as the fairly high mortality rates accompanying or following the procedure (approximately 2 to 3 per cent), and the rather limited percentage of cases resulting in improvement ("good" or "favorable" results in 20 per cent of "cases of dementia praecox" and 55 per cent of "involutional melancholia cases"; "fair results" in 37 per cent of the former and 33 per cent of the latter.), we would most strongly urge obtaining the consent of near relatives or guardians wherever possible. . . .
>
> We wish to make it clear that this conclusion is in the nature of advice as to policy, and that as to the law relating generally to the care and treatment of insane persons in state institutions we subscribe to the view expressed. . .by the attorney general of Vermont that in the absence of express statutory provision the care and treatment of inmates in state mental institutions must be discretionary in the duly appointed officers of the institution.

No explicit provision in Michigan statutes governing mental health commitments requires a different result. . . .

We submit, nevertheless, that the state may not compel anyone to accept the contemplated experimental neurosurgery for aggressivity. Such compulsion would, we contend, violate the ban of the Eighth Amendment on cruel and unusual punishment. Moreover, because consent for such operation is constitutionally required, judicial intervention to assure the total absence of state compulsion is most emphatically required. But, as the record in this case amply demonstrates, institutional confinement is itself so inherently coercive that the taint of state compulsion cannot be adequately dispelled to satisfy the necessary burden of showing consent for the contemplated experimental neurosurgery for aggressivity at its present state of scientific development.

Because it is central to our argument that state compulsion to the contemplated experimental surgery would be cruel and unusual punishment, it is necessary at this point to consider at some length the modern standards that have evolved under the Eighth Amendment to understand their applicability to this contemplated surgery.

As a preliminary matter, it is clear that provision of seriously inadequate, inappropriate, or harmful medical care for involuntarily incarcerated persons is itself cruel and unusual punishment violative of the Eighth Amendment. Second, the Eighth Amendment prohibition applies to state compulsions whether or not those compulsions are imposed in prisons or in other "therapeutically labelled" institutions. Accordingly, the fact that John Doe or other persons are confined for aggressive conduct in a "hospital" rather than a "prison" does not affect the applicability of the constitutional ban against cruel and unusual punishment. Similarly, whether such persons are confined against their will for danger to others or to themselves is immaterial in applying the constitutional ban.

In *Trop v. United States*, (1958), the Supreme Court gave modern statement to the principle of the Eighth Amendment. In holding "cruel and unusual" a federal

"[The risks of] compelled experimental brain surgery . . . and its possible deprivation of personality attributes are 'degrading to the dignity of human beings.' "

law which stripped wartime deserters of citizenship, the Court ruled that statelessness

> subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. . . .It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

Mr. Justice Brennan amplified this reasoning in his concurring opinion:

> [I]t can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable. Indeed, in truth, he may live out his life with but minor inconvenience. . . .Nevertheless it cannot be denied that the impact of expatriation. . .may be severe. Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

Subjection to experimental brain surgery—uncertain and grave in its risks of harm, assaultive on basic emotional and cognitive functions, disruptive and potentially destructive of human personality and personal identity—the "threat" of all this equally "makes the punishment obnoxious." It is, above all, "an especially demoralizing sanction."

The standards governing the Eighth Amendment ban have recently been given extensive elaboration in the Supreme Court's decision on capital punishment. *Furman v. Georgia*, (1972). Although the five members of the Court majority differed in their reasons for invalidating the death penalty. . .the opinions indicate that all five would regard experimental neurosurgery for aggressivity in the same way, and that all five would consider such compelled surgery to be constitutionally impermissible.

Justice Brennan's opinion most directly returns to the reasoning of the *Trop* case, to distill this principle:

> In view of the constitutional principle at stake, that forbids the state from compelling persons into experimental neurosurgery, it is essential that the state discharge a high burden of proof that any such surgery performed by its officers is free from any taint of compulsion. Accordingly, the standards to assure absence of compulsion must be more stringent and exacting for state officers than, under ordinary malpractice law, the requirement that private physicians obtain consent for medical procedures. The Constitution regulates state action; it does not directly constrain private conduct. Accordingly, the elaborate analogies that defendants' counsel . . . has drawn during this trial between the compulsions operating on dying patients, for example, who consent to risky experiments and the compulsions operating on persons confined by the state are wholly inapposite. A private physician may choose to overlook the compulsions operating on his dying patient. The state, under malpractice laws, probably will not ordinarily intervene to countermand the physician's judgment, and, in any event, it is not constitutionally obliged to intervene. But the state itself is not entitled to overlook the compulsions it directly imposes on potential "patients" involuntarily detained in state institutions, since the Constitution requires the state to refrain from compelling its citizens into accepting the experimental surgical procedures at issue here.

B. The taint of state compulsion cannot be adequately dispelled from any involuntary mental patient's decision to accept experimental neurosurgery for aggressivity.

John Doe testified in this Court, concerning the reasons that he agreed to the contemplated surgery while involuntarily confined in state custody, and the reasons he withdrew his consent after—and only after—this Court had ruled unconstitutional the Criminal Sexual Psychopath statute under which Doe was confined. Dr. Andrew Watson, a psychiatrist who had seen Doe both before and after this Court's opinion, confirmed in his testimony the dramatic change in psychological capacity that accompanied this change in legal status. [When asked] whether the Court's action regarding the CSP statute "was a quite significant part of this psychological mechanism" that led John Doe to withdraw his consent, Dr. Watson stated, "Absolutely. He sees himself now as an entirely different person. And he comes into the process in an entirely different way." John Doe's testimony establishes that the pressures on an institutionalized person are both pervasive and impossible to allay while that person remains involuntarily confined.

These pressures do not, of course, affect all persons in the same way. Some persons, for example, fight institutional pressures to the last ditch. Others, like John Doe, bow to institutional pressures in order to prove themselves "cooperative" and therefore worthy for freedom, or even more trivially, for minor privileges (such as a reading lamp for one's bedroom or ground passes to have picnic lunches with visiting parents). But since the state is constitutionally obliged to assure that no one is compelled by the state to accept experimental neurosurgery for aggressivity, it is insufficient to argue that since *some* can resist state pressures, it is permissible to overlook the existence of others—such as John Doe—who cannot so resist.

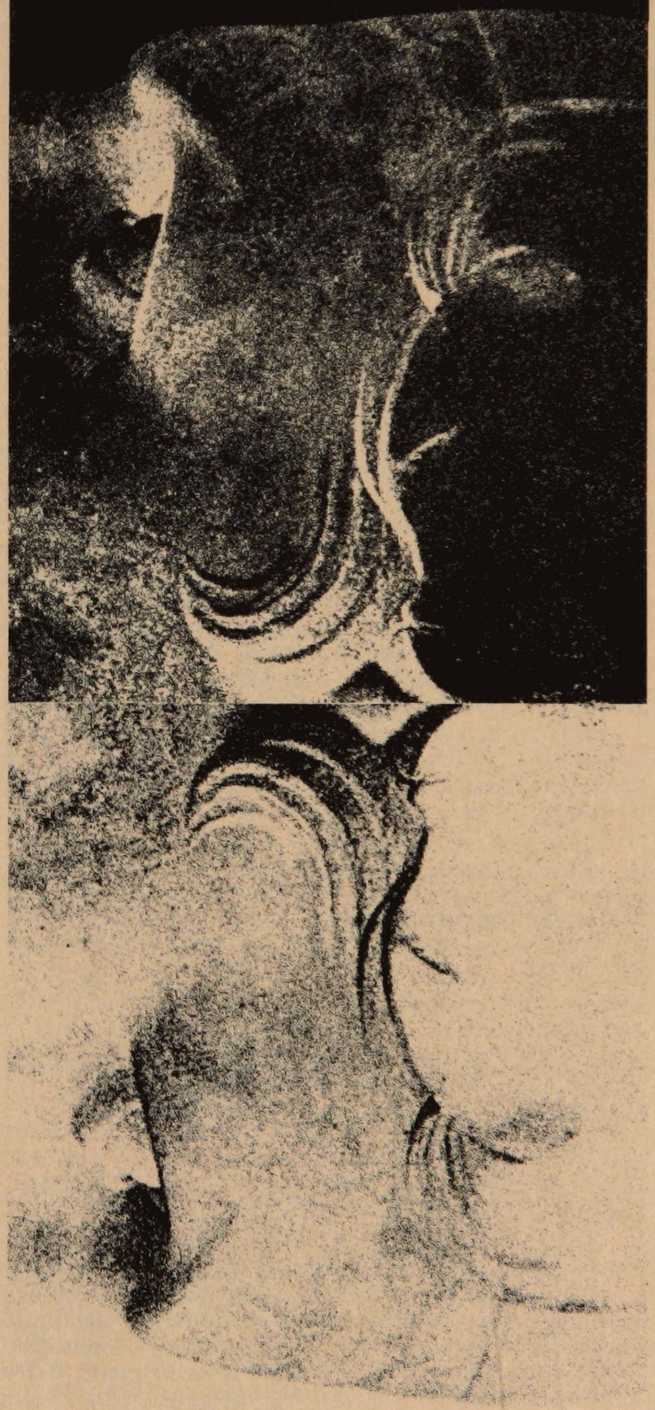
There are two possible responses to the reality that some persons, at least, involuntarily confined by the state will not have psychological capacity to exercise free choice regarding the contemplated surgery. One response, apparently pursued by defendants in this case, is to design mechanisms that screen out those in the institutionalized population who do and those who do not have the necessary capacity. But that response, we submit, is patently inadequate. John Doe, for one, was subjected to as extensive a screening procedure—to test the reality of his consent—as is ever likely to be carried out. That screening procedure failed; it did not identify the inappropriate motives that led Doe to consent to the operation. Dr. Yudashkin, who first presented the contemplated surgery to Doe and who interviewed him several times on this question, "doubt[ed] that [persons] would submit themselves to unnecessary surgery in order to gain their release."

When asked if Doe had told him that an important motive of his was to volunteer just to increase his chance to get out, whether or not the surgery would be done, Dr. Yudashkin replied: "I would have advised him against it."

The fact, is, however, that this was a central motivation for John Doe in consenting to the surgery. The fact emerged with considerable clarity in the course of his testimony in this trial. . . .

For purposes of understanding John Doe's motivation, it is not dispositive whether Dr. Yudashkin indicated any desire that Doe agree to the surgery. Indeed, Dr. Yudashkin has testified that he meant to exercise no influence one way or the other with Doe, and when directly asked the question, Doe stated, "I wouldn't say he was really advising me. I would say that he was really asking me. You know—there was no pressure." But this statement by Doe illustrates why the institutional setting is so powerful in undermining truly voluntary consent. The pressure need not come from the individual's conscious intent. In perfect good faith, Dr. Yudashkin could believe that he was leaving John Doe free to accept or reject the surgery. In perfect good faith, John Doe could believe that he was in fact free on this matter. But the circumstance, the total environment, in which both men

"[The] coercive environment gave John Doe a powerful motive to hide from himself, and from all others, the real, inappropriate motives that led to his consent [to the surgery]."



acted kept from John Doe both his freedom and his capacity to see how coerced and inappropriate his motives were in agreeing to the surgery. Even more importantly, that coercive environment gave John Doe a powerful motive to hide from himself, and from all others, the real, inappropriate motives that led to his consent.

Dr. Watson's testimony clearly establishes this, as follows:

> In my first contact with him [John Doe], he was still believing that his destiny was linked with getting that surgery. And he got angry with me when I threatened that by challenging that. As I said earlier, [I said to him], if everything is going so fine, why do you want to get this surgery? And you see, that is a threat psychologically. And he wanted to get it because that is how he was going to get the end he wished to achieve.
>
> I would construe that behavior, by the way, as a manifestation of the defense we call denial, which is a way of obscuring from one's self dangerous things one does not know how to cope with. He does not know how to cope with these feelings back then, and if he did, he would have to change his mind, which he did not wish to do with the dominant part of his decision making.

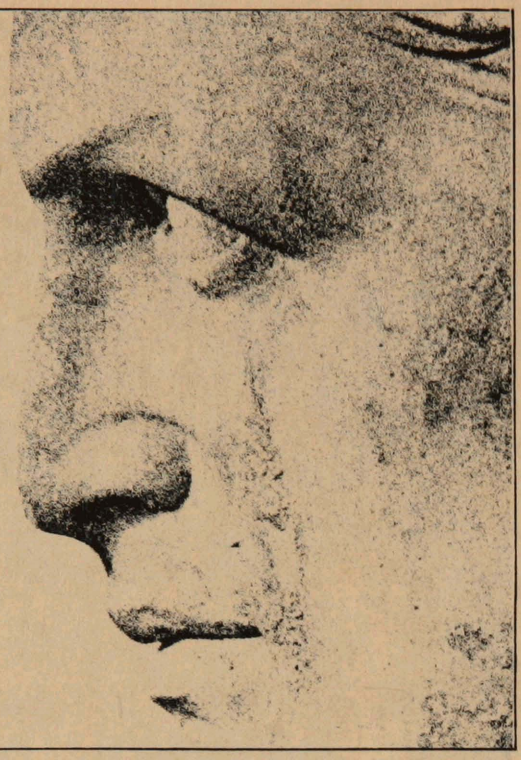
The institutional pressures that led John Doe to hide from himself and others the true character of his consent to the surgery had an even more treacherous impact in this case, according to Dr. Watson's testimony. Those pressures also likely led John Doe to present a false or exaggerated picture of the intensity of his "emotional surges." Because John Doe had not engaged in any violently aggressive acts for eighteen years—during the entire period of his confinement at Ionia—these self-reported "surges" were the central basis for the doctors' judgment that he was a proper candidate for the contemplated surgery. Dr. Watson testified as follows:

> He also told me, . . . during the point where he was still justifying surgery to me and to himself and to everyone else—he told me . . . whenever he feels some emotion, he feels it more intensively than other people. . . . [H]e was endeavoring then to prove to me on that first interview that he was a violent person who has these episodic rages.
>
> By the way, I thought it was a catechism which they had him recite over and over.
>
> Q. What would have motivated him—I am sure it was against his interest to portray himself as you describe, as a violent, aggressive, uncontrollable individual—what would have motivated him to try to do that?
>
> A. It sounds like that, but [if] his motivation is to get himself this surgery so as to get him out of Ionia, then it is not against his interest. . . .
>
> Q. So, are you saying that in the way he presented himself, he falsely,—although unconsciously—falsely tried to distort the diagnostic impression that the diagnoser would get in order to qualify for this surgery?
>
> A. By the point of time I saw him, he wanted that surgery because he thought that was going to serve his end and that was what he was talking about. He had described that very thoroughly.
>
> Q. Is it possible that this conduct on his part that you are describing could fool some diagnosticians?
>
> A. Oh, yes. People fool people all the time in the sense, you know, that they are misled, especially if they have done something like kill somebody. That mere idea instantly potentiates everybody's misperception, and, indeed, I think I could trace through the record of Ionia for year after year after year precisely that type of non-perception of John. . . .

John Doe's testimony, and Dr. Watson's explanation of Doe's state of mind in his testimony, thus establishes two propositions:

first, that John Doe's consent to the experimental surgery was for "social gain . . . not medical gain." As Dr. Watson testified, "he was tying his major motivation to the wish to please—to cooperate—and, therefore he

"The arbitrariness of the contemplated surgical procedures is amply established by the testimony . . . regarding the total absence of correlation between one purported diagnostic key—'demonstrable physical abnormality of the brain'—and aggressive conduct."



would get treatment. Now, that is not the same linkage at all as going for a medical—a dangerous medical procedure in order to change something in order to be able to behave differently"; and

second, that the environmental pressures of the institution which pushed John Doe to this inappropriate consent also led him to conceal, from himself and from others, the real basis for his consent and, perhaps even more importantly, the real reason for his descriptions of the "emotional surges" that made him appear appropriate for the operation. This second proposition establishes the virtual impossibility of designing effective screening mechanisms to differentiate among involuntarily confined persons who should and should not participate in experimental neurosurgery for aggressivity.

This second proposition is further proven by considering the elaborateness of the procedural screening mechanisms that John Doe passed through, to the point that the implantation of depthelectrodes would have occurred if this litigation had not been filed. In this screening mechanism, the director of the State Department of Mental Health interviewed Doe several times. Doe was interviewed by three members of a Consent Committee, composed of a clergyman, a layman, and a lawyer. The latter, Ralph Slovenko, professor of Law and Psychiatry at Wayne State University, testified regarding John Doe's motives as follows:

We all have various motives, and . . . the major one in this case is that this person was concerned about his self-control over his aggression.

In other words, he had put aside whether or not this was a consideration for discharge. It was a matter—he looked upon it entirely as therapeutic, as a means of dealing with his aggressive outbursts.

The propriety of the medical diagnosis in John Doe's case was reviewed by a three-man professional committee chaired by Dr. Elliot Luby of the Lafayette Clinic, and they concluded that John Doe was a suitable candidate. Dr. Rodin, the principal investigator, testified as follows:

Q. In your judgment, did he consent as you have described it in order to assure that he would be released from institutional confinement?

A. No, he wanted to be relieved of his uncontrollable urges.

Dr. [Jacques] Gottleib, the director of the Lafayette Clinic, talked with John Doe, and testified to his motivation as follows:

A. Well, I think he expressed that pretty clearly, that he has surges from time to time that he would like to be relieved of that are disturbing to him. And this offered an opportunity for him to be relieved of these surges and urges so that he could regain his position in society.

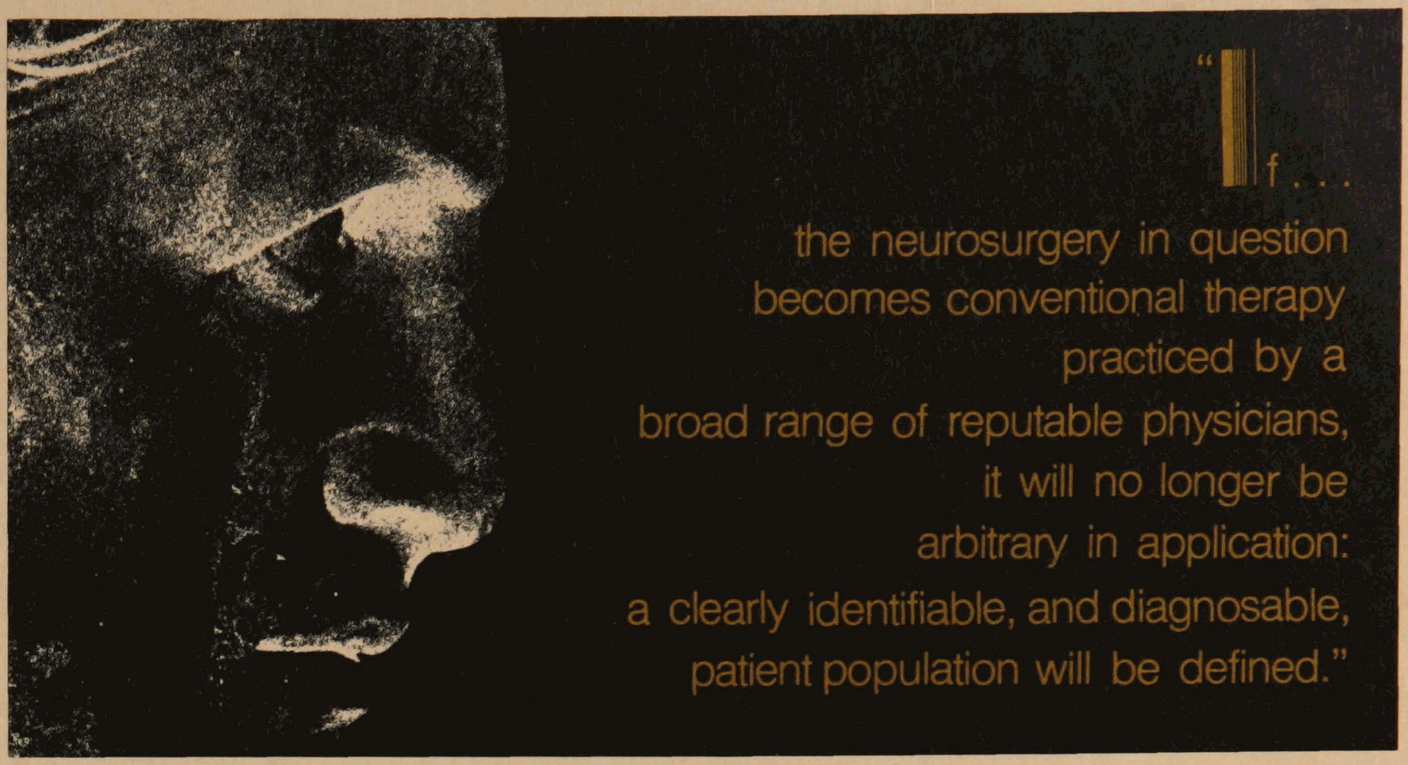
In this trial, however, we have had a quite unique and fortuitous opportunity to conduct a "controlled experiment" (better controlled, we would note, than the experimental surgery contemplated in this case). We have had extensive testimony of John Doe's attitudes toward surgery while he was involuntarily confined in the state mental hospital system. Then, because on March 23, 1973, this Court ruled that John Doe was illegally detained, John Doe testified in this Court on April 4 as a free man (though still residing in a state mental hospital while community placement was being arranged). In that testimony, the following exchange took place:

Q. . . . Now, in January, before this suit was filed, we understand from the doctors that they were prepared—they were ready—they had done everything up to the point of actually implanting these electrodes deep in your brain. Is that your understanding?

A. Yes.

Q. Could you tell us what your current attitude toward that procedure is? Whether today you are willing to have that happen to you?

A. Well, as I understand it right today, I am not willing to go through with this. . . . I have went through a number of changes and I would like to be able to pursue a convalescent status and be able to go out on this type of thing because I am finding that since I have been out from under the pressure of Ionia and I see that I have gotten a future and I have settled down quite a bit and the feelings that I was constantly going through have decreased a considerable amount. And I think that when I am out from under the institutional life and policies that I think that I will become even more stable. And I have become even less with problems of nervousness and so forth.



John Doe's experience, and his testimony, proves that the state cannot discharge its constitutionally required obligation to demonstrate that no taint of compulsion would accompany the decision of an involuntarily detained person to agree to experimental neurosurgery for aggressive conduct. Because that taint of compulsion cannot be removed, because it is inescapable in the coercive setting of a state confinement institution, it is "cruel and unusual punishment" and an invasion of the constitutionally protected "right to privacy" for the state to sponsor such surgery on its captive population.

This holding need not mean that no conventional medical treatment can be provided to a captive population. For those committed to mental institutions, conventional treatment at least related to cure of mental illness can be offered without regard to consent. Conventional treatment for other purposes to those committed to mental institutions, and conventional treatment of all sorts for those confined in prisons, are—by their very conventionality—much less likely to be viewed by commitment patients or prisoners as keys to their freedom or even to increased privileges.

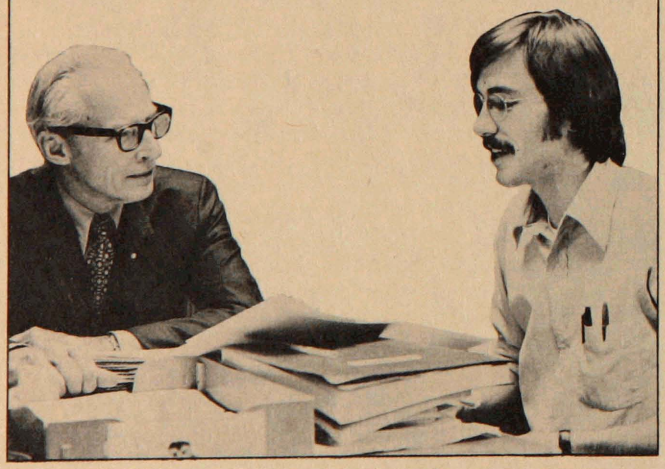
More difficult questions are presented for medical experimentation on these captive populations. Consent to experimentation, for example, for malaria or cancer cures might be viewed by inmates as leading toward earlier parole or better institutional treatment. But the most troubling, the least assuredly consensual of all possible experiments, is an experimental procedure directly related to the reason that originally brought the potential subjects to be committed. That is, medical experiments related to "cures for aggressivity" are likely to be viewed by institution inmates and staff alike as particularly pressing concerns. John Doe might or might not prove his worth for release, his "cooperativeness" by agreeing to an experiment that might cure malaria. Whether he would consent to an experiment that might cure his "aggressivity" is, however, much more patently relevant to his view, and staff views, of Doe's worth for release, his "cooperativeness." Accordingly, this Court's ruling that the contemplated surgical procedure cannot be performed on involuntarily confined persons in state mental institutions would not necessarily imply that no medical experiments of any sort can be performed on state mental hospital or prison populations.

Further, this ruling would not necessarily mean that neurosurgery for aggressivity could never be performed in the future on state mental hospital or prison populations. The specially stringent standards, to assure no taint of compulsion, are imposed by constitutional norms. But if this neurosurgery becomes widely accepted conventional therapy for aggressive conduct, the constitutional norm would not apply with full force to it. If, that is, the neurosurgery in question becomes conventional therapy practiced by a broad range of reputable physicians, it will no longer be arbitrary in application: a clearly identifiable, and diagnosable, patient population will be defined. It will no longer have unknown risks and uncertain benefits: risks and benefits will be clearly and persuasively identified in the course of its wider use in the medical profession. And community dismay and unease at this procedure will be substantially allayed; the acceptance of this neurosurgical technique as conventional treatment by the medical community generally will amply testify on this score. Accordingly, the basis for ruling that compelled neurosurgery for aggressivity is constitutionally impermissible may, in the future, be so attenuated that it will be permissible to perform this surgery in institutional settings notwithstanding the inescapably coercive pressures of those settings.

Proscribing experimental neurosurgery for aggressivity on involuntary mental patients would not, moreover, stifle future scientific development of this technique. [T]here is a powerful case that the time is not yet proper for any human experimentation for this technique. Much additional animal work can and must be done. But, at most, as defense witness Dr. [Earl] Walker [Professor of Neurology, Johns Hopkins University] testified, "the art has progressed to the point where a very careful study might be carried out on a few cases. . . ." Those few cases need not, and should not, be drawn from involuntarily confined persons in state mental institutions. The experimental procedure itself is, at best, at the far end of legally permissible medical experiments on human beings. It would be wrong to authorize such an experiment to be performed on a population whose participation is, in any event, itself, at best, at the far end of the legally permissible spectrum for truly voluntary consent.

LETTER FROM THE LAW CLINIC

by Professor Alfred F. Conard



Alfred F. Conard and Thomas Casey, student

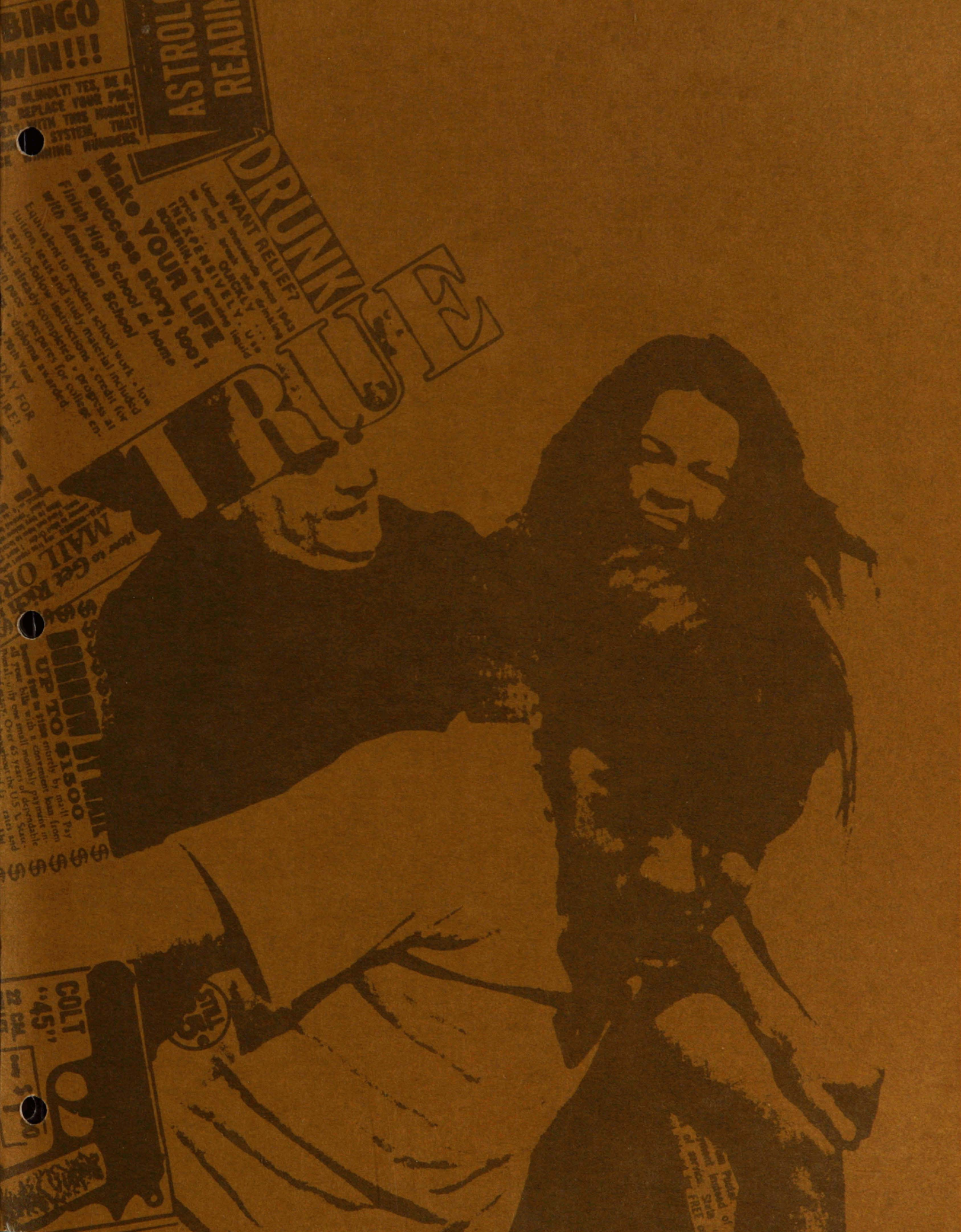
"Are you really going to work in the law clinic?" For several months, I heard this question delivered with diverse intonations from the lips of colleagues and friends.

It exploded with shocked incredulity from Yves, who believes that clinical work is just another avenue of escape—like pass/fail grading—from the rigor of learning the law. (Yves and other personages mentioned here are purely imaginary, and any identification with actual characters, living or dead, would be false and malicious.) It was intoned with a sigh of despond by Moe, who believes that clinics lower the student's sights from "what the law ought to be" to "how to make money out of the law that now is." It was sung in a taunting tone by Geoffrey, who thought that my "volunteering" two years earlier was a gallant gesture made without any expectation of being called on to perform. It was enclosed in hilarious chuckles by Sandy, who thinks my supervision of students' courtroom procedures—35 years since my most recent appearance as counsel—is about as useful as Rip Van Winkle showing up to coach Lee Trevino. It was murmured hopefully by Elijah, who longs for a law school dedicated to community service. But the happiest recipient of the news was the dean, whose views of clinical education—whatever they may be—are subordinated to his eagerness to staff the operation.

The Professorial Payoff

Participation in the clinical program offered me many personal rewards. One was participatory observation of the administration of civil and criminal justice in Washtenaw County in 1973. Since I supervised seven student teams, I was in court much more than any single practitioner could be; in the course of four months, I saw in action every one of the 11 circuit, probate, and district judges of Washtenaw County, and learned something of their professional characteristics and ways of doing business. I experienced a spectrum of controversy which could be met nowhere else in private or public practice. The clinic's business embraces misdemeanors (mostly shoplifting, drunken disorders, and drunken driving), juvenile delinquencies, child custody disputes, divorces (often accompanied with injunctions against assaults on wives and children), support orders, commitments of mental incompetents, landlords' suits for eviction, tenants' suits to recover seized furniture, disputes over usurious or predated loans, consumers' warranty controversies, driver's license revocations, school expulsions, and food stamp allocations. I saw and talked with scores of accused persons, and learned from their mouths what they experience, or think that they experience, at the hands of complainants, police, and prosecutors. I refreshed and updated my observation of the usual behavior and reactions of judges, bailiffs, clerks, jurors, prosecutors, private attorneys, clients, and witnesses. None of these experiences, I confess, will raise my stature as a professor of corporation law. What they enhance is my competence to evaluate the adequacy of justice in American society, and the possible ways of ameliorating its quality. The clinic provides a worm's eye view of justice which is very different from that of a law firm associate, an appellate judge's clerk, a model act draftsman, a presidential commission researcher, or a government counsel staffer—the usual "real world" exposures of law professors.

A second area of personal reward was the chance to teach students in the way a coach teaches players. Tell him in general terms what to do; then watch him do it; whisper suggestions to him as he operates; immediately afterward, review what he did and what he could have done better. Most students respond with fantastic enthusiasm to this kind of a regime. They invest immense


BINGO
WIN!!!
ASTROL
READIN
DRUNK
TRUE
COLT
".45"

and even excessive amounts of time, and turn their minds to problems with unfeigned intensity. It is as different from classroom teaching as coaching football is from lecturing on intercollegiate athletics. It gives a teacher a chance to know young people not merely as students, but as co-workers and companions.

The Students' Payoff

The cynical queries of my colleagues reinforced my own curiosity about whether the clinical program is also good for students, and, if so, in what way. My first stab at getting the answer was to question the 120 students who have participated in the clinical law program in prior years. Their answers were amazing. A clear majority thought that the clinic was "more valuable than any other seven hours of law school work." Most of the rest rated it "among the best third of my law school courses."

What they got out of it would be, I expected, a harder question. But it proved to be an easy one for the students. A distinct majority identified the primary value as "providing a realistic perception of the flesh and blood situations which are involved in law."

(This was perceived as the foremost benefit by 34 out of the first 52 replies, and was one of the first 5 benefits for 50 out of 52. Next in line was "instruction in techniques of litigation and preparation for litigation," perceived as the foremost benefit by 13 out of 52, and as 1 of the first benefits by 34 others. "Escape from classroom indoctrination," was the next in line as a number 1 choice, but was surpassed in total mentions by "developing an awareness of ethical problems of the practitioner.")

This answer spotlights the most fundamental and pervasive problem of higher education—if not of all education. In law schools, most students learn to articulate and manipulate concepts with faint perceptions—or false perceptions—of the human events referred to. As the junior law student's formal education moves into its 18th successive year, it moves progressively further from the realities of his own experience to the dry technicalities of novation, double jeopardy, intervening cause, ultra vires, and renovi. The symmetry and simplicity which imparted charm to the abstractions of mathematics and philosophy have been replaced by the crabbed illogic of precedents.

Clinical experience puts color in the empty outlines of the legal comic book. Arrest, bail, divorce, eviction, probation, complaint, summons, and deposition suddenly take on reality and meaning. Questions which were dull and meaningless become important and exciting. Answers which seemed black and white become gray, red, and green. Dull legal rules become memorable elements of unforgettable events.

Another product of clinical experience is training in those lawyer skills which receive so little cultivation in the law school version of Socratic discourse. One of these is interviewing, where the student's prior indoctrination (whether based on the classroom or the boob tube) leads him to a cross-examiner's style that is the opposite of a search for facts. Another is counseling, which includes helping the bewildered client to understand and accommodate to the bruising events which he encounters, as well as guiding him to dodge the slings and arrows. A third is negotiation—the art of settling for something when you can't get everything. A fourth is digging out facts—from policemen and police records, from housing inspection reports, from records of prior litigation in related cases, from friends and landlords and neighbors. A fifth is drawing motions, pleadings, stipulations, and judgment orders. A sixth is to conduct oneself in court with the correct mixture of deference and assertion toward the court, courtesy and defiance toward opposing counsel, candor and intensity toward the jury, politeness with persistence toward witnesses.

A third output of the clinic experience is a first-hand experience and acquaintance with the sore spots and disease centers of American society. The student meets and defends the outcasts who play a perpetual tag game with police, the transient tenants who are recurrently evicted, the delinquent minors who prefer pinball parlors to home and school, the alcoholics who drive and fight and beat their wives, the embittered mothers who seek divorce (or paternity acknowledgement) and child support, the weary judges who preside over this endless parade of misery. The student comes away with a first-hand knowledge of many of the active agents in the modern morass of poverty and crime.

What's the Hurry?

"Experience, practice, exposure: these come quickly enough, and continue as long as you practice. Why sacrifice for these the once-in-a-lifetime opportunity to learn from professors?" This is the question asked by my fellow-teachers, and perhaps by those students—about 75 per cent—who never take the clinical program.

Experience and doctrine, I would answer, are enhanced by interaction. One wouldn't teach science for three years without conducting a laboratory experiment. Medical students dissect cadavers, dental students fill cavities, social work students interview and counsel, engineering students build models and test materials—while they are being indoctrinated. Anti-clinicians will respond that the freshman moot court program and the senior practice court supply many of the benefits of experience in a simpler and more economical way. This is true, but living experience can add something that simulation never supplies. At best, simulated litigation offers verisimilitude rather than verity in matters of pleading, proving, and arguing. It offers nothing at all in the areas of interviewing, investigating, counseling, and negotiating.

The idea that experience can wait until students are working for a living is fallacious for other reasons. Most law offices do not furnish a neophyte with beginners' instructions; they don't send him to court with a supervisor, then postmortem his performance, then send him again if he did badly. They generally pick those who seem forensically gifted and make them into apprentices to the courtroom masters; the others are immured in tax, securities, and probate departments. In smaller firms, neophytes are often sent forth on short notice to hearings for which they have no preparation, no supervision, and no postmortem. Lawyers who hang up their own shingle are condemned to stagger their own way through whatever business comes their way—and suffer the disasters of their untutored mistakes.

It is true that some offices guide their neophytes wisely and well, and that many self-taught lawyers quickly master their arts. But the function of education is to shortcut the long, hard road of experience, and there is as much reason to shorten it in the arts of practice as in the realm of theory.

A more bothersome question about clinical study is whether the techniques learned in handling the affairs of the poor are useful in handling the affairs of ordinary citizens; and, even more doubtfully, whether they are useful in handling the affairs of the rich and powerful corporations who furnish the most important sector of legal employment. The techniques are indeed different. In the petty affairs of clinical work, most of the rules of law applied are drawn from the office manual or from the student's memory; in private practice, where more is involved, more research is called for and is done. Negotiation in clinical practice involves a few dollars or weeks in jail; in private practice it may involve millions

"Clinical experience puts color in the empty outlines of the legal comic book."

of dollars and long-term franchises. The scale is different, but the essence is the same. The student who has drawn a petty complaint or negotiated a minor settlement with an older lawyer looking over his shoulder is far more ready to litigate and negotiate a big case.

But the supreme justification for clinical law is not its contribution to competent practice. It is the opportunity to meet the whole spectrum of justice as seen by the poor and maladjusted—the police, the misdemeanor courts, the motor vehicle department, the juvenile court, the divorce court, the courts of small claims and evictions, the truancy boards. There is no private law office and no public law office that offers so diverse a contact with the troubles of one's fellow humans.

To Preserve the Blessings of Liberty

Granting that the clinic is good for students, the question arises whether it is good for clients. What do we do for them? I start with the criminal cases, where plusses and minuses are most easily recorded.

Our biggest criminal business is in bargaining pleas. Prosecutors habitually charge the accused with the maximum offense which could be inferred from the evidence. This is what the defendant will plead guilty to if he chooses not to struggle, and what he will probably be convicted of if he attempts to defend himself. But if a lawyer appears for the defendant, and there is any measurable chance of winning, the prosecutor will usually accept a plea for a lesser offense. Nearly every clinic student has obtained a reduction of "driving under the influence of intoxicating liquor" (with automatic license suspension) to "driving while impaired by intoxicating liquor" (which charges 4 points toward license suspension). A few students have obtained reduction of "reckless driving" charges to "careless," or "assault with a weapon" to simple "assault," or of "breaking and entering with intent to commit larceny" to "entering without permission."

If we can't get a reduction, we help our clients plead guilty. This is more complicated than it seems. Twenty years ago, if an accused said he was guilty, he was forthwith adjudged guilty. Today, instructed by Supreme Court reversals, judges do not accept guilty pleas unless the defendant is willing to testify under oath, "I was drunk" or "I did take the merchandise without intending to pay for it," or "I did menace the complaining witness with a knife," and to waive expressly their rights to remain silent, to subpoena witness, and to be tried by a jury. If defendants want to get their conviction over with the least delay, it is helpful for them to be told what they must do, and it is reassuring for them to have a lawyer along at pleading and at sentencing.

If defendants insist that they are not guilty, we generally go to trial, whatever we may suspect about the true facts. We try to weed out the really hopeless cases by declining them when the client first comes in, but we don't always succeed. The client's initial story usually drapes him in robes of innocence; when the stains appear, we have already accepted him as a client and he is entitled to our help in telling his story to the court. Besides, stories that seemed implausible at intake often are corroborated by investigation. And we are sometimes appointed, or requested, by the court to take cases which we would not have chosen for ourselves.

Trying cases of this kind is discouraging, because we haven't picked them as winners, and often lose them. We have the case because no attorney in private practice would want it. Even so, we have had some remarkable successes. Against one prosecutor we won three contests in a row, and he dismissed charges in the next two.

One unforeseen victory involved a couple whose car collided with a lamp post; they climbed out to inspect the

damage. Police arrived, smelled beer, and asked who was driving. The couple refused to say, angry words followed, and the frustrated police charged the couple with drunk and disorderly conduct; they were acquitted. Another success involved a mother who had purchased a zipper, and put it in her shopping cart; after it fell out twice, she transferred it in her purse; when she came to the cash register, her four-year-old was screaming to go to the toilet, and she hastily paid for the contents of her cart, forgetting the zipper; the store detective, who had been following her shopping tour, arrested her for shoplifting; the judge acquitted her. A third case involved a 16-year-old black who was charged with snatching money from a cash register; he denied it, but we had only his word to match against that of a very persuasive clerk. Unfortunately for the clerk, we discovered that at the trial of a different defendant he had said our client gave back the money.

Victories are useful not only to the clients who are acquitted, but to a much larger number for whom we obtain dismissals or reduction of charges. The fact that we can and do win leads prosecutors to review their cases with greater care, and concede in advance when their charges are inadequately supported. The prosecutors' responses convince me that our defenses are well prepared in relation to the gravity of the cases involved. We put more time and preparation into each case than do any of the other lawyers—including prosecutors—who practice in the misdemeanor courts.

Our lowest batting average is scored in the drunk cases, because alcoholics are the world's worst self-deceivers. Shoplifters, speeders, and gun-toters will admit their errors, but alcoholics never had more than a coupl'o'beers, and never recall lapses from their normal prudent and gentlemanly (or lady-like) behavior. Even when they purport to plead guilty, the court is forced to reject their pleas because they deny drunkenness, or remember nothing. So we go to trial, and our willingness to go to trial gives us leverage in bargaining for pleas.

Holy Deadlock

In contrast to the colorful criminal cases, the dullest and most unloved are the divorce cases. There is a six-months backlog of such cases on our waiting list; there always will be, because if it dropped to five months, a hundred more clients would add themselves to it. There is one way of beating the queue: that is to be an abused wife who is in imminent danger of maiming or death unless her drunken husband is restrained from beating her. This relates to the fact that police in our area will not enter into a family fight unless a court restraining order has issued, and courts do not restrain the interaction of spouses unless one of them has sued for divorce.

These cases are exciting when the tearful and terrified wife first bursts into the office, and when students answer a midnight call to come out with their restraining order and induce police to expel the defendant. They wear thin when the wife persists in admitting the husband on successive weekends with identical results; and when the wife refuses to help us find the husband whom the court has at last ordered to jail for contempt.

After a divorce petition is filed, there is a two- to six-month waiting period, at the end of which a final decree is entered, severing this ill-starred union, except that sometimes the wife vacillates, calls the matter off and calls it on again, and eventually decides to stay married. In how many of the final decree cases, and of the "reconciliation" cases, did we enhance human happiness? We will never know.

Some friends ask whether we are really needed in divorce cases since the Michigan law has been simplified by "no-fault." It is true that a resourceful college graduate with an uncomplicated case could probably stumble successfully to a valid divorce decree. But if one of the parties had left the state, or if there were any differences about child-custody, child support, and property division, even the smart college graduate would trip over his own lines. Clinic clients are rarely college graduates and rarely resourceful. Most of them are poorly educated, easily baffled individuals to whom the blessings of no-fault divorce will remain inaccessible if they are not helped by Legal Aid or by Clinical Law.

> "[T]he function of education is to shortcut the long hard road of experience, and there is as much reason to shorten it in the arts of practice as in the realm of theory."

The Hapless Debtor

In a surprising number of cases, we extricate clients from unreasonable demands of landlords and creditors. A couple of girls came in because their landlord threatened to evict them for three months unpaid rent; they had receipts for each of these months. We first thought the case was so simple that we weren't needed, and told the girls to go to trial and show their receipts to the judge. When they tried this, the landlord claimed that there was a rent deficiency in earlier months. We had to come into the case and straighten out a dispute which had resulted mainly from the landlord's slovenly recordkeeping and his neglect to investigate carefully before suing.

In another case, a woman who bought a house subject to an existing land contract was being charged with delinquencies which accrued before she bought—of which the real estate agents had said nothing. Her own cries of distress produced only threats to foreclose. After we entered the case, the realtor paid off the delinquencies; whether he obtained the money from the vendor or took it out of his own commission we never knew. Our mere appearance had apparently changed his attitude toward the buyer's problems.

Some of our consumer cases have been really significant victories. Used car dealers occasionally sell cars which they should know are not in running order, and then fall back on a small-print "warranty" which obliges the seller to nothing except paying half the repair charges—charges which will be set by the seller himself. Students won a big victory over a local car dealer when they persuaded the judge that, notwithstanding the terms of the warranty, a car sold by a merchant must be

merchantable. The opinion has been printed in a national reporter of commercial code decisions.

More Perfect Justice?

Like most lawyers, I have described these cases as though our clients were little Snow Whites, pursued by malicious witches. This is not the whole story. Most of our clients have fallen short of the care and prudence of a "reasonable man or woman." In some cases they have been downright delinquent. Most of our divorce plaintiffs have married unwisely, many have contributed to the breakdown of marriage by their own irascibility, prodigality, infidelity, or alcoholism. Our accused misdemeanants have been in the wrong places with the wrong people, doing the wrong things. Do they deserve defense?

On the usual plane of legal discourse, we have no doubts. In civil cases, we do not present rights which do not exist. In criminal cases we do not try to prove innocence when the client has told us of his guilt. We do not suborn or encourage perjury.

But we aim higher than merely avoiding wrong-doing. Since the clinic is supported by public and charitable funds, it should make a positive contribution to justice and welfare. In most cases, it clearly does. Even if tenants are dirty and delinquent, society benefits when their delinquencies are correctly calculated, and a reasonable time allowed for them to find a new shelter. Even if car buyers are greedy and foolish, society benefits when dealers put cars in operable condition before they sell them. Even if wives are insufferable, imprudent, and unfaithful, society gains when they are liberated from servitude to alcoholic wife-beaters.

But some cases present more puzzling problems. For example, there is the case of the brothers whose father is in prison for heroin peddling, and their mother on probation for the same offense. The boys are perpetual truants, are frequently engaged in scuffles on the streets, and have no visible means of obtaining the money which they spend on cigarettes, clothes, and pinball machines. The prosecutor filed a petition to adjudge one of the kids delinquent because he stole bills from a restaurant. Should we advise the defendant to concede—since he certainly *is* a delinquent—or to defend because the par-

Most [clinic clients] are poorly educated, easily baffled individuals to whom the blessings of no-fault divorce will remain inaccessible if they are not helped by legal aid or by clinical law."

ticular accusation—stealing bills—is false? Our answer is unequivocal. We defend against a false charge. Even though this kid might be better institutionalized (we disagree among ourselves on this) we think justice is promoted by insisting that the grounds of official action be valid. That is the only way to keep the system honest.

Occasionally we defend an accused whom we strongly suspect is guilty as charged, but who refuses to admit it to us or to the court. This may come about when we are court-appointed to defend (chiefly in juvenile cases) or when we accept the case on a plausible story that later becomes implausible. When we have taken a case and investigated it, it is too late to send the client looking for alternative counsel. He is entitled to have his story heard and we have to give him that chance, even though the performance wastes the time of judges and jurors in a lost cause, while lawyers and witnesses in worthier cases cool their heels. It is a painful business, because losing cases decreases our bargaining power in other cases. Clinicians disagree on what to do in such situations.

Private practitioners have various ways of avoiding trials of these hopeless cases, which would be ruinous to their reputations. Usually, they need only to set a high fee, which the defendant cannot pay. To the few who could pay, the lawyer needs only to point out that a trial would be a useless waste of money.

Unpaid defenders must find some other way to persuade defendants to plead guilty. They may do it by suggesting that the judge will take a more favorable view of the defendant's aptitude for rehabilitation if he pleads guilty. But this ought not to be true, and certainly is not always. Alternatively, unpaid defenders may induce a plea by arguing that "it is a waste of your time—you'd be better off working at your job." This is often untrue, because the defendant has no job, and the courtroom is warmer and more comfortable than his lonely room. It is really the lawyer's and the court's time, rather than the defendant's, that the lawyer is thinking about. I believe the honest thing to say is, "I am not going to take up my time and the court's with that story. If you go to trial with it, you go alone." To take this position is not to deny a poor man the rights of the rich, but only to deny him a charade which no paying client would buy.

Our hardest ethical problems, as I view them, arise in civil cases where—strange as it may seem—we have superior bargaining power. An example is a case where our clients had bought for $600 a side of beef which was under weight and under grade. They had paid $100 and were sued for the $500 balance. The sellers had already been convicted of under-weighting in a preceding criminal prosecution for the same transaction. They offered to accept $200 in full payment.

The student lawyer was a shrewd bargainer. He knew it would cost the seller more than $200 to go to trial, plus the unfavorable publicity involved in reviewing the under-weighting. But a trial would cost our client nothing, and give the student a valuable trial experience. The student refused to pay a penny. The opposing attorney berated us for extortion; the judge counseled us to be reasonable. We held fast, and the seller dropped his suit.

Opposing counsel felt that we had taken unfair advantage of the fact that our clients' expenses are paid by the state and by a foundation while the opponents' are paid by themselves; they asserted that a private practitioner would have settled much more easily. To us it seems that we merely equalized the power of the contestants. The seller was a chain store corporation, well able to pay the litigation costs if the outcome would teach a salutary lesson to delinquent buyers. Instead, they learned a salutary lesson themselves.

The danger of injustice is greater when the party on the other side has very limited recourses, like a small-scale landlord against whom we represent an indigent tenant. The landlord cannot really afford a trial, while we can. In my opinion, we should bargain for no more than we would be likely to get on a trial, even though our bargaining position might enable us to get more. We should not take undue advantage of the public and charitable resources on which we operate. Some legal aid lawyers take a different view; they think that we should get the most we can for our clients by legal means. Despite this theoretical difference, I saw no cases in the clinic where I thought that we had overreached.

Bar Relations

One of the most sensitive aspects of the clinical law program is the attitude of lawyers and judges toward practice by students who have not "passed the bar," and whose clients pay no fees.

A natural concern of lawyers would be that the clinic takes cases on which the private practitioners might have earned a fee. We hear this complaint now and then, but never from the lawyers who are worried about losing the business. One of our critics was counsel for an automobile dealer, against whom we had filed suits for breaches of warranty on used cars. Another was the father of a young landlord whom we had sued for assaulting a tenant and seizing his furniture. Obviously neither of these lawyers was concerned about our taking business from some other lawyer; they were concerned because we were bringing suits that wouldn't be brought at all if the clinic didn't do it. One young lawyer, from whom we may be taking business if we take it from anyone, expresses quite a different attitude. He thanks us for the opportunity to earn fees in small cases which—if there were no clinic—would be uncontested.

Another vulnerability of the clinical program is suggested by a recent nationally circulated questionnaire asking to what extent law students degrade and delay court proceedings by their ineptitude and ignorance of court procedures. In the clinic program, I saw no evidence of this phenomenon. Whatever the students' weaknesses may have been, they did not delay or embarrass proceedings. They used substantially less time than older practitioners in objecting to evidence, challenging jurors, and requesting recesses to consult clients or explore settlement. In general, they were better prepared on the law and procedure than other attorneys in the same courts. This was primarily because the students spent much more time on preparation for these small cases than any private attorney could afford to. Sometimes it was simply a matter of the law student being more intelligent and better educated.

A third concern expressed by some judges and lawyers is that law students are too ready to try cases that should be settled or conceded.

One troublesome type of case has arisen where costless services are used on both sides of a dispute; this unusual possibility presented itself in a divorce case where Model Cities Legal Services represented one spouse and the Clinical Law Program the other. Both spouses were prepared to go to trial on their respective rights to household furniture and pets, and respective duties to pay debts incurred during the marriage, although the total resources of both were not enough to remove them from the "indigent" category. Fortunately, both lawyers were able to agree on a reasonable settlement, and impose it on their more litigious clients.

In claims against business enterprises, matters are less easily settled. When we bring suit on behalf of a used car buyer against a dealer on a warranty of fitness, business lawyers are likely to say we are "unprofessional" because we put far more dollars' worth of time than the total claim of our client. But so does the defendant. Each side is measuring its investment not against the par-

ticular case, but against the hundreds of potential claims like it. What startles the dealer's lawyer is the presence of a more-or-less equal antagonist on the other side.

Formation of Attitudes

Every major experience in one's life makes an important impact on one's attitudes and interests. But people can rarely tell about these changes; what they now believe seems to them what they always believed. So I must infer rather indirectly what changes took place in the attitudes of clinic students during the course of their experience.

The most conspicuous change is in their attitude toward courtroom practice. A student learns quickly that he, too, can get favorable judgments, findings, verdicts, and even ex parte preliminary restraining orders by filling out the right papers and saying the right things at the right time and place. And soon after he learns this, he learns that it is mostly a very dull routine, consisting in large part of idle hours waiting in courtrooms and antechambers. The mystery—and with it the mystique—of courtroom law is gone. The thirst to try a case—just for the experience—is replaced by a rather cool appraisal of the relative advantages and disadvantages of courtroom practice.

A second important change is in students' attitudes toward poor people, of whom they have seldom seen so many so close up. The direction of change depends on where they started. One student told me he was surprised to find that so many of the poor are white; the clinic's clients are about equally divided between whites and blacks. Some start out with the belief that the poor are a bunch of deadbeats who need a bit of goading; they learn that some are the victims of temporary misfortune and that even the incurably poor are more bewildered than malingering, and already numb from goading. Others began with the faith that the poor need only an equal chance in order to become average citizens; they gravitate toward thinking that a considerable segment need something extra. Both wings come closer to recognizing that there is no quick way of making all paupers into burgers; there is a substantial fraction of the population whose members need a regime of education, of employment, of restraint, and of support designed for persons of less than average aptitude, incentive, and self-reliance. As one student phrased it, their legal problems are only the tip of an iceberg which involves problems in employment, housing, marriage, in drinking, and in every phase of their lives. They will never be in harmony with a society structured around the rights and duties of an "average" American.

Another fruit of the clinic experience is an appreciation of the "revolving door" of criminal justice. We discover that some of the clients whom we counsel are far more familiar than we with the judges, the bailiffs, the clerks, and the probation officers; they have been through the mill, and seem likely to come again. Is there any way of breaking the cycle? The best thing we do is to keep people from getting into the cycle, by obtaining dismissals and acquittals of false or exaggerated charges. When the charges are true, but relate to first offenses, we talk with defendants as frankly as we can about how they can avoid repetition. Sometimes we are able to arrange through social workers for better housing or welfare allowances which may alleviate the clients' most emergent needs.

Regarding "causes" of our clients' problems: I think every clinician would agree with the recent conclusion of the Schafer Commission that alcohol is the most abused drug. In at least half of the divorces which we process, the husband's drunkenness is the precipitating agent. Half of our misdemeanors are drunk driving, drunk disorderly conduct, assaults while drunk, or driving without a license which was suspended for drunk driving. At least half of our negligence cases have a heavy odor of alcohol.

An interesting attempt to break the circle of these cases in Ann Arbor is a special federally financed program on alcohol abuse. Misdemeanants convicted of alcohol-related offenses are given a series of lectures and are administered Anabuse. We have seen some clients whose addiction seems to have been diminished. There are others who manage somehow to drink too much in spite of the sickening effects of the Anabuse dosages. It is interesting to overhear students in the role of trying to communicate to clients—on the clients' level of discourse—the advantages of "laying off the booze." Since we have no instruction in the arts of either Billy Graham or Karl Meninger, we are not sure how much good we do.

In the dreary parade of drunken offenders, we sometimes find a lighter aspect of alcoholism in its leveling effect. Aside from alcohol cases, the people we see in the misdemeanor courts are mostly the poor, either in work clothes or in hippie paraphernalia. Their lawyers, if any, are usually young and impecunious. But the alcohol offenses bring in a scattering of tastefully well-dressed gentlemen and ladies accompanied by leading members of the local bar. Their cases are often called earlier than ours, but they get essentially the same sentences.

On students' attitudes toward major societal reforms, the clinical experience seems to have a tempering effect. There is less discussion of whether the death penalty should be restored or abolished than of whether police reports should be made available to defense lawyers. Like physicians, clinical lawyers become more engrossed in what they can do for the individual client than in how to excoriate the evils of contemporary society. Several students commented on their loss of faith in "simplistic" societal reforms. In this respect, the U-M clinic may differ from some others, which focus on test cases and class suits, and which give more exercise in planning and research than in client contacts and courtroom conduct. I doubt that this narrowing of focus will be permanent. But I believe that clinic alumni will carry away a heightened sensitivity to the complicated mechanics of reform, and a recognition of the tendency of great principles to run awry in their practical application.

"Like physicians, clinical lawyers become more engrossed in what they can do for the individual client than in how to excoriate the evils of contemporary society. Several students commented on their loss of faith in 'simplistic' societal reforms."

Second-Class Postage
Paid at
Ann Arbor, Michigan