Book Reviews

THE RIGHT TO TREATMENT: A SYMPOSIUM. Edited by Donald S. Burris. Springer Publishing Co., Inc., New York, N.Y., 1969. Pp. x, 229.

The "right to treatment" of those subjected to today's systems of social control is one of a growing number of areas in which courts and legislatures are beginning to demonstrate a willingness to review matters that have traditionally been regarded as purely discretionary with those in charge of psychiatric and correctional programs. Included within these areas are transfers between correctional and mental health facilities,[1] regulations in the correctional system regarding access to legal materials,[2] discipline,[3] religious practices,[4] and medical treatment.[5] Willingness to interfere with the administration of the mental health system has been less, but some attention has been given to the administration of certain treatments,[6] the decision to treat a patient during full-time hospitalization rather than on an outpatient basis,[7] and even transfer of patients between wards within a facility.[8]

More consideration has been given to the right to treatment than to most of the other issues, and the experience with this issue will probably affect judicial and legislative activity in the other areas. Although the authors of this symposium, originally published in the *Georgetown Law Journal*,[9] have phrased their discussion in terms of the right to treatment,

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[1] United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir.), *cert. denied*, 90 S. Ct. 81 (1969) (transfer from prison to psychiatric facility).

[2] Johnson v. Avery, 393 U.S. 483 (1969) (prison regulation prohibiting inmates from assisting others in preparation of writs is invalid); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966).

[3] Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); *cf.* State v. Bruton, 246 Ark. 288, 437 S.W.2d 795 (1969) (statute authorizing State Penitentiary Board to prescribe "mode and extent" of punishment for violation of prison rules unconstitutional delegation of legislative power because of lack of guidelines).

[4] Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (Black Muslims entitled to receive newspaper and correspond with Elijah Muhammad, but not to listen to weekly radio program).

[5] Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966) (allegation that prison authorities deprived inmate of medical care stated a cause of action).

[6] CAL. WEL. & INST'NS CODE §§ 5325 (f), (g) (West Supp. 1970) (statutory right to refuse shock treatments and lobotomy). *But see* CAL. WEL. & INST'NS CODE § 5326 (West Supp. 1970) (rights of patient, including right to refuse treatment, "may be denied for good cause only by the professional person in charge of the facility or his designee").

[7] Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966), *on remand*, 267 F. Supp. 155 (D.D.C. 1967).

[8] Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969) (review of decision to deny patient's request for transfer from maximum security ward to less restrictive ward).

[9] *Symposium—The Right to Treatment*, 57 GEO. L.J. 673 (1969).

the discussions are of significance to the general subject of legal supervision over the administration of systems of social control.

The matter of major concern in the area of right to treatment is essentially one of administration: how is the right to be defined? For those courts which have assumed responsibility for enforcing a right to treatment the issue is presented most directly, as they must formulate a criterion for application to specific cases. Those courts reluctant to undertake the same task are deterred primarily by what they see as the impossible task of defining the right in a manner which would make it meaningful without imposing an insurmountable burden on lower courts and mental health personnel.[10] The limited range of views presented in this symposium emphasizes the administrative nature of the basic issue.

The only significant argument made against legal recognition of the right is that of Dr. Thomas S. Szasz, the psychiatric profession's profuse self-critic.[11] But Szasz's argument is against nonvoluntary treatment itself rather than against recognition of a right to treatment within a system that detains individuals because of mental illness. Recognition of the right to treatment, Szasz fears, will make nonvoluntary hospitalization more attractive and thus detract from what he believes is a more appropriate policy objective: the creation of sufficient mental health resources so that treatment is available to all who desire it, and the recognition of the right to refuse treatment so that psychiatric hospitalization is not used (as he asserts it is now) as an agency for social control under therapeutic sheep's clothing. Given his assumptions, Szasz's arguments are impressive. But given the state of the real world, they lose most of their force. Society will continue to exert coercion upon some of those who are "mentally ill," so the matter must be discussed within such a context. Szasz says nothing tending to establish the impropriety of recognition of a right to treatment in a context in which continued detention of the mentally ill persists.

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[10] Judge Bazelon summarized the objections to judicial enforcement of the right to treatment as follows:

> (1) courts are not as competent as hospitals to make treatment decisions; (2) the evaluation of standards of adequacy and suitability may be next to impossible in the present state of psychiatry, where 'treatment' means different things to different psychiatrists; (3) no matter how much compulsory treatment is afforded, compulsory hospitalization is itself generally based on ill-conceived standards and goals and ought to be reformed radically or discontinued altogether; (4) the real problem is one of inadequate resources, which the courts are helpless to remedy . . . . Bazelon, *Introduction* to THE RIGHT TO TREATMENT: A SYMPOSIUM 1 (D. Burris ed. 1969) [hereinafter referred to as THE RIGHT TO TREATMENT].

Except for (3)—which is Dr. Szasz's objection—all of the objections could be met by defining the right in a way which would enable courts to avoid the objectionable inquiry.

[11] Szasz, *The Right to Health*, in THE RIGHT TO TREATMENT, *supra* note 10, at 59. The substance of the argument is taken from T. SZASZ, LAW, LIBERTY, & PSYCHIATRY (1963).

Thus, the essential dispute narrows to whether there can be a workable definition of the right. Can it be defined in a manner that will, in the long run, accomplish more good than harm, *i.e.*, in a manner that will accomplish the underlying purpose without trapping courts into making factual inquiries or judgments they are not competent or equipped to make? The primary value of this symposium lies in its development of this issue.

Initially it must be recognized that defining the right involves a number of interrelated but separate policy choices. First, the long-range objective must be defined. Is it to be the general upgrading of the quality of care in public psychiatric facilities, or is it to be the relief of particular individuals whose treatment is such that it does not justify their deprivation of liberty? Second, it is necessary to determine whether the optimum enforcement procedure is to be outside evaluation of particular situations or a reasonably reliable administrative procedure within the systems themselves, subject to only minimal supervision in their day-to-day tasks. Finally, assuming that a certain degree of supervision will be imposed upon administrative decisions, the responsibility for that supervision must be allocated among the judicial, executive, and legislative agencies of government. Should the objective of judicial cognizance of the right be to stimulate executive or legislative activity, or should the judiciary remain the primary supervising governmental agency?

Putting aside these underlying sub-issues for the moment, the right to treatment might be defined in the following ways:

A Right to be Cured

The right might be defined to recognize a right to relief if the program is not successful. For example, it might be held that one involuntarily detained would be entitled to release if reasonable and continuous progress was not being made towards his return to health. None of the participants in the symposium advocated such a definition of the right.

A Right to the Most Appropriate Course of Treatment

This would substitute for the requirement that the course of treatment be successful the requirement that it be the most appropriate available. Thus, the right would be denied if there were other treatment programs or techniques that would be more appropriate, *i.e.*, that would be more likely to result in recovery or would achieve it more quickly. None of the participants in the symposium advocated this approach.

A Right to a Course of Treatment That Is Theoretically Adequate

This is the middle ground advocated by Charles R. Halpern,[12]

[12] Halpern, *A Practicing Lawyer Views the Right to Treatment*, in THE RIGHT

counsel for Charles Rouse in the celebrated case from the Circuit Court of Appeals for the District of Columbia recognizing the right to treatment, *Rouse v. Cameron*.[13] Under Halpern's approach, a patient would be entitled to relief if he established the failure of the facility to provide a "active program of treatment" which is "a reasonable plan considering all the circumstances." Emphasis would be on the existence of a plan which analyzes the "causes of the patient's mental illness" and articulates a scheme of therapeutic intervention. This program, if necessary, must include "appropriate efforts to draw an uncooperative patient into treatment." The court would not choose among various approaches to therapy nor among various techniques within any given approach; it would be sufficient, Halpern suggests, that the program provided "an adequate and appropriate treatment for the particular patient under any generally accepted professional standard."

A Right to Have the Detaining Institution Meet Certain Minimum Standards

Dr. Morton Birnbaum, whose early writings are often credited with stimulating interest in the right to treatment,[14] advocates use of an objective standard by those courts willing to recognize the right.[15] Pointing to the extensive hearing on remand in *Rouse*, Birnbaum argues that a standard which focuses on whether any particular patient is being treated adequately will inevitably require that facility staffs spend long periods preparing for and attending hearings, thus interfering with professional time devoted to treatment. Moreover, the impact of further treatment may be decreased if a patient has been present during an adversary hearing which has included "speculative contentions regarding the adequacy of his therapy." Rather than relieving the plight of individual patients, Birnbaum suggests that the goal of a right to treatment should be the improvement of general levels of care in public psychiatric facilities with minimum disruption of the treatment of individual patients. This could be best accomplished, he argues, by a criterion which would require the facilities to meet several objective standards: quantitative staff standards (he suggests those set by the American Psychiatric Association as a starting point), and a minimum number of consultations and physical examinations within a given period of time (and a requirement that careful records be kept to permit courts to assure that the standards are being met). A statistical showing that the institution met these objective standards would end the litigation; there would be no inquiry into the care or treatment afforded the specific petitioning patient.

TO TREATMENT, *supra* note 10, at 107.

[13] 373 F.2d 451 (D.C. Cir. 1966).

[14] *See* Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

[15] Birnbaum, *A Rationale for the Right*, in THE RIGHT TO TREATMENT, *supra* note 10, at 77, 78.

A Right to Regular Executive or Legislative Evaluation of Adequacy of Facilities

This final alternative would have as its purpose simply to assure that governmental agencies, arguably better able than courts to consider and respond to alleged inadequacy of treatment, have in fact directed attention to the matter. Thus, if a court were convinced that the legislature or an executive agency of sufficient authority had determined that the policies and facilities of the institution were appropriate, the inquiry would end. In the absence of adequate legislative or executive supervision, of course, more extensive judicial evaluation would be necessary. But the objective of judicial enforcement of the right would be to focus attention on the problem and encourage legislative and executive response rather than judicial assumption of primary or even secondary responsibility for determining the adequacy of the facility as a whole or its treatment of a specific patient. None of the participants in the symposium advocated this approach, although there is some precedent for it in the correctional area.[16]

As a practical matter, the choice is between the third and fourth formulations. To put these in perspective, however, it is necessary to consider the polar extremes. Despite assertions to the contrary, it is abundantly clear that it is the legislative and community intent that the mentally ill be subject to detention for the protection of the public as well as for the purpose of relieving their subjective discomfort by means of treatment.[17] Moreover, empirical examination of the mental health system makes clear that persons are often hospitalized because of community (or family) embarrassment, inconvenience, or simple irritation.[18] Thus, the community often demands that the mentally ill be handled without regard to treatability. To expect that by judicial fiat the community demands can be changed or rendered ineffectual would be to vastly overrate the capacity of law. If it were possible to make the mental health system unavailable for nontherapeutic purposes, the community would almost certainly find an alternative—and not necessarily better or more humane—way of dealing with those whose bizarre behavior it finds in-

[16] *Cf.* Director of Patuxent Institution v. Daniels, 243 Md. 16, 221 A.2d 397, 412, *cert. denied*, 385 U.S. 940 (1966) (court has no power to act in regard to complaint of inmate held pursuant to Maryland "Defective Delinquency" Act unless the ineffectiveness of the treatment is "clearly demonstrated" *and* "the other branches of the government fail to act"; finding that "legislative and executive branches . . . are keeping abreast of and familiar with the operation of Patuxent Institution . . . .").

[17] Statutory criteria for nonvoluntary hospitalization generally provide alternative bases for deprivation of liberty: "dangerousness" and "need for treatment" or its equivalent.

[18] *See* Dix, *Acute Psychiatric Hospitalization of the Mentally Ill in the Metropolis: An Empirical Study*, 1968 WASH. U.L.Q. 485, 502-53; Smith, Pumphery & Hall, *The "Last Straw": The Decisive Incident Resulting in the Request for Hospitalization in 100 Schizophrenic Patients*, 120 AM. J. PSYCHIATRY 228 (1963).

tolerable. Criminal prosecution, for example, is a potential alternative method of dealing with many (perhaps most) of those admitted to psychiatric facilities on a nonvoluntary civil basis.[19] If the end result of judicial enforcement of the right to treatment were to channel a significant portion of the mentally ill into the criminal system, the value of the right as thus implemented would be subject to obvious question. The first formulation would require as a condition of retention that the attention afforded the patient be such that it can at least be reasonably expected to result in the patient's return to the community. For this reason, given the current status of community demands upon the mental health system, it is impracticable.

The second alternative presents the specter feared by the medical profession: judicial scrutiny of the objective validity of specific courses of treatment. Objections are usually based on purported judicial inability to accurately evaluate the alternatives. This is the "ambiguity of medical practice" that both Birnbaum[20] and Judge Bazelon[21] seek to preserve from judicial evaluation. That such ambiguities exist is beyond dispute, and they are probably underestimated. Learning behavioral theorists, for example, have challenged the entire medical model of mental illness and the therapeutic processes based upon it.[22] Even the somatic therapies—primarily drugs plus electroconvulsive therapy—have been developed on a hit-or-miss basis and the means by which they cause remission of symptoms is not understood.[23] Dr. Dale C. Cameron's contribution to the symposium,[24] an examination of various techniques that are labeled treatment, demonstrates the complexities of reevaluating a medical choice among the alternatives. But his contribution ignores a more fundamental issue: the reliability of the medical choice. An extreme example observed during the staffing of a patient in a metropolitan public psychiatric facility demonstrates what can be the nature of the medical decision:

> The patient, an elderly Negro, was reported by his wife to entertain delusions and hallucinations regarding her faithfulness.

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19 Professor David Levine, in a study not published in this country, examined the events preceding the admission of 100 randomly selected patients admitted to a state hospital. When the results were presented to a prosecuting attorney, it was determined that 71 of the 100 patients had committed an act that, if accompanied by the requisite state of mind, would give rise to criminal liability. Levine, Criminal Behavior and Mental Institutionalization (undated, unpublished paper; copy on file with this reviewer). If this is an accurate finding, it is clear that the criminal system is a potentially available alternative means of dealing with well over half of those presently admitted to psychiatric facilities on a "civil" basis.

20 Birnbaum, *A Rationale for the Right*, in THE RIGHT TO TREATMENT, *supra* note 10, at 99.

21 Bazelon, *Introduction* to THE RIGHT TO TREATMENT, *supra* note 10, at 2.

22 *See generally* CASE STUDIES IN BEHAVIOR MODIFICATION 1-28 (L. Ullmann & L. Krasner eds. 1965).

23 E. ROSEN & I. GREGORY, ABNORMAL PSYCHOLOGY 194 (1965).

24 Cameron, *Nonmedical Judgment of Medical Matters*, in THE RIGHT TO TREATMENT, *supra* note 10, at 41.

> He admitted entertaining such doubts, but maintained they were well based in fact. On several occasions he had struck her. After the staff interviewed both the patient and his wife together, there was a long silence. Finally, the supervising psychiatrist said, 'I don't know . . . . Let's try scrambling his brains and see what that does.' [The procedure referred to was electroconvulsive shock therapy.] The staff psychologist concurred and shock treatments were administered.[25]

Whatever other arguments can be made against judicial reevaluation of treatment choices, it is simply not true that judicial noninterference can be justified on the basis of a thoroughly reliable and "scientific" basis for the medical decision. What is done for a specific patient may also be significantly affected by such fortuitous factors as the historical orientation of the medical school with which the facility in which he is hospitalized is most closely associated. While competitive experimentation with different therapeutic approaches may, in the long fun, further medical progress, it is theoretically troublesome to force an individual to accept some specific therapies rather than others for such purely fortuitous reasons. In view of the inconclusiveness of conflicting claims it is offensive to not only compel one to accept treatment but at the same time to deprive him of the right to choose among alternatives, none of which is capable of proof as best. Yet to require that each patient be afforded a choice would result in administrative nightmares. However theoretically appropriate the second alternative might be, it simply could not be effectuated within the existing framework.

The fifth alternative is likely to be found little more attractive. It does have the benefit of simplicity and of assuring patients of a forum in what is arguably a more appropriate agency. Moreover, it meets the argument that the "real problem" is inadequate financing by relegating complainants to those with control over the purse strings. But it also requires abandonment of the traditional role of the courts as the ultimate recourse of those abused by government. If it were established as a matter of fact that a broadly-based public authority effected continuous supervision of the mental health system and made good faith efforts to require the system to perform above an objective minimal level and as far above that as circumstances permitted, judicial abstention might be acceptable. Such an authority could be a legislative group or, and more likely, an executive agency. What would be of prime importance is that it be independent of the mental health system. But this is too ambitious a hope to seriously consider. The fifth alternative would amount to virtual abandonment of the right to treatment pursuant to a fiction, and most courts would so recognize it.

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[25] The described situation occurred in the presence of this reviewer while engaged in research for *Acute Psychiatric Hospitalization of the Mentally Ill in the Metropolis: An Empirical Study, supra* note 18, and is preserved in this reviewer's personal files.

Thus, the question boils down to whether inquiry is to be limited to the general level of care in a given ward, facility, or some other administrative unit, or whether attention is to be focused on whether specific patients are being dealt with in a manner consistent with any of several acceptable standards. The former has the advantage of encouraging better care without time-consuming and arguably antitherapeutic specific factual inquiries. But its broad focus—and emphasis on overall resource allocation—suggests that it might be better suited as a policy objective of a legislative or administrative nature. The latter inquiry is more consistent with the judiciary's traditional function of resolving particular disputes and permitting broad principles to develop from the consolidation of experience gained in accumulated cases. Birnbaum's arguments against this sort of inquiry are not convincing. His prediction of antitherapeutic effects assumes that treatment corresponds to the psychotherapy model which requires that the patient not only have complete confidence in the therapist but that the therapist not even be subject to question. Whether depth psychotherapy can be an important part of public psychiatric care is questionable; the somatic therapies are more likely to be relied upon.[26] Insofar as this is the case, the so-called therapeutic relationship is of minimal importance. Moreover, if a patient is resistive enough to want to litigate the adequacy of his treatment, it is likely that the difficulties of establishing a therapeutic relationship with him would be insurmountable, especially in the time available in public facilities. As to the time consumption, it is likely that as hospital practices began to accommodate themselves to the need to defend their programs and as judges became better acquainted with the subject matter, the time involved in litigation would drop.

The definition of the right as one of a theoretically adequate course of treatment for each patient is also consistent with the role of the judiciary as the ultimate recourse of those who believe themselves abused by governmental power. Moreover, it constitutes a reasonable compromise among the competing interests: it requires that reasonable efforts be made to return patients to full freedom in the community, but does not unrealistically purport to require society to abandon its demand for custodial care when this goal is not within reach. To attempt to do more by judicial fiat would be futile. While implementation of such a criterion would undoubtedly require some painful adjustment on the part of both courts and mental health personnel, the burden on both would almost certainly decrease as both agencies became more adept at "making a record" during the administrative procedures and as courts gained increasing confidence in improved administrative procedures.

Once the initial resistance to judicial interference has been over-

[26] Dix, *supra* note 18, at 499-500.

come, the role of the court might well settle into that of a review of the record for "substantial evidence" to support the administrative determination. Judge Bazelon has suggested this in his introduction to the symposium[27] and developed his proposal elsewhere.[28] But for this to be a realistic solution, it is necessary that the ultimate authority of the courts be acknowledged and that a reliable internal administrative procedure be developed within the mental health system.

If this approach is reasonably successful in regard to the right to treatment, analogous approaches might be used in the numerous other areas in which there is a growing demand for recourse from "administrative discretion." The substantive right would be defined in a manner which would require that the administrative decision be "reasonable" as that is defined in the context by any generally accepted professional standard. If there were potentially conflicting professional standards, the court enforcing the right would not choose among them. Moreover, the expectation would be that as the new relationship between the courts and the administrative agencies settled, development of an adequate administrative decisionmaking process would enable the judicial function to become only a review of the record made in the administrative process to assure that substantial evidence supported the decision. Until the development of judicial confidence in the administrative apparatus, however, it would continue to be necessary in many cases to take evidence in court bearing on the reasonableness of the administrative decision. In each area, however, this approach should not be adopted without full evaluation of the alternative ways of defining the right asserted. The principal value of *The Right to Treatment* is its presentation of several—but not all—alternative approaches to defining the right to treatment for such evaluation.

GEORGE E. DIX*

THE LAW SCHOOL OF TOMORROW. By David Haber and Julius Cohen, Editors. Rutgers University Press, New Brunswick, New Jersey, 1968. Pp. 240.

A recent study concerning law school curriculum prefaces its report by stating, "the Committee has come to believe that legal education is in a crisis and that fundamental changes must be made soon."[1] Although many concerned with the present state of legal education are less

27 Bazelon, *Introduction* to THE RIGHT TO TREATMENT, *supra* note 10, at 3.
28 Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969).
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1 THE COMM. ON CURRICULUM (REP. OF THE CHAIRMAN), ASS'N OF AM. LAW SCHOOLS, ANNUAL REP., pt. 1, § II, at 7 (1968).

pessimistic, all seem to agree that some revision is required. The future of legal education was, therefore, an appropriate topic for discussion during the dedication of the new home of the Rutgers Law School. A two-day symposium was devoted to the theme, "The Projection of an Ideal: The Law School of Tomorrow." The three individual seminar topics were "Law as a Phase of the Humanities and as a Subject of the Behavioral Sciences," "Directions for Research, Empirical and Nonempirical," and "The Training of the Practitioner." Each seminar included presentations by a lecturer and two commentators, followed by remarks from a distinguished group of scholars.[2] The proceedings of the symposium were compiled and published in *The Law School of Tomorrow*.[3]

THE TRAINING OF THE PRACTITIONER

The seminar on practitioner training had as its main speaker Justice Abe Fortas of the United States Supreme Court. Addressing himself to the question of what knowledge, skills, and qualities the law school should impart to a student to prepare him for his role as practitioner, Justice Fortas asserted that the lawyer's ability to perform his functions is based upon the "techniques of a craft."[4] Accordingly, he emphasizes technique rather than knowledge. "[F]or the law school, teaching 'the law' is not the objective . . . because teaching 'the law' does not produce a lawyer. The essence of craftsmanship in the law is not knowledge, but skill. The quality of the lawyer's mind depends . . . upon its competence as an instrument."[5] Judge Henry J. Friendly, in his comments, characterized the objective as the development of the legal mind: a mind that is analytical, classifying, discriminating, and capable of exercising sound judgment.[6] Implicit in this emphasis on mental skill is the conclusion that while legal principles and practical skills should be taught in law

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Seminar I	Seminar II	Seminar III
Lecturer:	*Lecturer*:	*Lecturer*:
Robert M. Hutchins	Harold D. Lasswell	Abe Fortas
Comments:	*Comments*:	*Comments*:
Paul Goodman	Mark S. Massel	Henry J. Friendly
Sidney Hook	James A. Robinson	Myres S. McDougal
Discussion:	*Discussion*:	*Discussion*:
Carl J. Friedrich	Layman E. Allen	Milton Handler
Alan Gewirth	Frederick K. Beutel	Vern Countryman
Jerome Hall	Abraham Edel	Norris Darrell
Graham B. J. Hughes	E. Adamson Hoebel	August G. Eckhardt
John Ladd	Ernest M. Jones	James A. Fowler, Jr.
John O. McCormick	Harry Kalven, Jr.	Clarence Morris
Joseph Neyer	Paul Kurtz	Jack B. Weinstein
F.S.C. Northrop	John T. Noonan, Jr.	E. Donald Shapiro
Frederick A. Olafson	Glendon Schubert	DeWitt Stetten, Jr.
Henry R. Winkler		Theodore Voorhees

[3] THE LAW SCHOOL OF TOMORROW (D. Haber & J. Cohen eds. 1968) [hereinafter cited as THE LAW SCHOOL OF TOMORROW].

[4] *Id.* at 183.

[5] *Id.* at 184.

[6] *Id.* at 195-96.

school, they are of secondary concern. Of primary importance is the development of an understanding of the legal process, an understanding which takes into account the changes which are occurring in the practice of law.[7] Because of the increased involvement in the legal process of labor and business organizations and because of increasing governmental regulation of private institutions, the lawyer's role in these areas has largely become one of lawmaking through a complex of planning, negotiation, regulation, and legislation, with the traditional role as adversary only an incidental factor.[8] A modern approach to legal education must take into account the different types of skills needed in modern practice.

How can the law school best provide such training in craftsmanship? Traditionally, law schools have relied on the "case method" of instruction as a training vehicle. Justice Fortas recognizes the value of this approach as an excellent method of teaching fundamentals of the law and for training students to analyze the relationship between law and facts.[9] It is the best approach for the development of the "legal mind" in the sense urged by Judge Friendly. But training to assist the future lawyer must go further. The student must become acquainted with the multifarious roles of the modern lawyer as counselor, advocate, and decision-maker. Exposure to the role of the lawyer in the "legislative" process of "rule-creating" through planning, negotiating, and drafting is essential.[10] Unfortunately, the case method does not adequately present materials concerned with areas where dispute resolution and rule formulation by litigation are incidental. For this reason, it has been urged that other approaches be emphasized in the second and third years of law study.[11]

The approach favored by Justice Fortas is the problem method. "[T]raining in craftsmanship in the law is best communicated by the analytical consideration of living or simulated living problems."[12] He believes the problem method is superior to the case method because the former allows consideration of all relevant materials—cases, statutes, documents, and nonlegal materials—in a manner more closely resembling that encountered in law practice. Also, discussion can be expanded to include serious examination of policy questions; nonlitigation skills such as negotiation, planning, and drafting can be brought into play.[13]

Justice Fortas also believes that law review work is excellent training.

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[7] *See* Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL ED. 189 (1948); Griswold, *The Future of Legal Education*, 5 J. LEGAL ED. 438 (1953).

[8] Singer, *Harvard's New Course in the Legal Process—A Pattern for a More Comprehensive Legal Education*, 12 J. LEGAL ED. 251, 252-53 (1959).

[9] THE LAW SCHOOL OF TOMORROW, *supra* note 3, at 185.

[10] Fuller, *supra* note 7, at 192-93.

[11] *E.g.*, Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL ED. 1 (1964).

[12] THE LAW SCHOOL OF TOMORROW, *supra* note 3, at 185.

[13] Gellhorn, *supra* note 11, at 11-12.

The requirement that a student do an exhaustive and careful job, subject to meticulous scrutiny, "carries with it the message of thoroughness and excellence which . . . is an essential part of the practitioner's training."[14] Justice Fortas, however, does not consider the utilization of this type of training in other programs. Conceding the value of the law review experience, then a similar experience should be available to the other 90 percent of the law school student body. This might be accomplished in part by the adoption of a more intensive first year research and writing program, and by increasing both the number of seminars requiring substantial papers and the opportunity for students to engage in independent research. For such programs to achieve their purpose, the student writing must take place in the context of an exacting editorial process at least approaching that of law review intensity. The demand on the professor's time would be great, but if many such courses were offered, maximum enrollment in each one could be kept within reasonable limits. Also, qualified second and third year students could be enlisted to assist the professors in the first year writing program.

The last major area discussed by Justice Fortas is the role of clinical programs in the law school curriculum. Generally, he advocates expansion of both clinical programs administered in the law school and internships involving full-time employment.[15] Such clinical experience should be expanded beyond legal services to the poor to include programs in government agencies, courts, and law offices. But the programs must be well-planned to be beneficial. "[T]he dividing line is whether the particular activity permits and demands thoroughness—excellence."[16] Value will vary directly with the intensity and depth of the student's participation in particular problems. Steps must also be taken to insure that such programs do not degenerate into "how-to-do-it" courses or merely provide some employers with clerks to work on projects with little educational value accruing to the student.

Justice Fortas does not detail the steps necessary to insure excellence and thoroughness or to avoid the purely practical approach devoid of substantial educational content. The solution is complex, requiring a detailed analysis of the specific programs and their organization.[17] However, there are certain general prerequisites to a successful program. For example, in regard to Justice Fortas' first concern, excellence and thoroughness in the teaching of practical skills, particular skills which should be pursued are (1) interviewing and counseling of clients; (2) gathering and analyzing facts; (3) legal research of issues; (4) decisionmaking concern-

14 THE LAW SCHOOL OF TOMORROW, *supra* note 3, at 187.
15 *Id.* at 188-89.
16 *Id.* at 188.
17 For an analysis of clinical programs in general and of specific existing programs, see CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE (E. Kitch ed. 1970) [hereinafter cited as CLINICAL EDUCATION].

ing strategy; (5) negotiation; (6) applying concepts of professional responsibility to specific cases; (7) preparing for and participating in trial and appeal; and (8) participating in the planning function, including the drafting of legal documents.[18] Guarantees must be provided to insure that the students participate in a manner which will result in a thorough grounding in the above mentioned skills. It has been suggested that there are two basic methods which can be pursued.[19] First is intensive, close supervision by the professor or an attorney associated with the program. As an alternative or in addition to the first method, the professor should provide instruction, including detailed operational manuals, concerning the particular skills the students will be required to exercise.

Many educators would undoubtedly be satisfied with a clinical program which provides thorough schooling in practical skills. Others, however, would require more. One author has suggested that a second major goal of clinical education should be to further the students' understanding of the judicial and legal process.[20] More specifically, students would study:

> 1. The functioning of the legislature, governmental agencies and the courts; policy-making, rulemaking, and rule-applying as formally anticipated and actually carried out.
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> 2. The impact of governmental agencies, the courts, and the law on various classes of persons, especially those who live in environments of poverty and/or manifest various forms of alienation.
>
> 3. Professional responsibility—the systems by which legal services are provided, their prospects and limitations, and the areas of omission.
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> 4. Prospects for reform of institutions and the law found to be needed in 1.-3. above, including the scope of and controls on discretion and innovations for more efficient and/or equitable resolutions of disputes; there often should be special focus on the most effective strategies and sources of initiatives for reform . . . .[21]

Thus, in addition to skills development, students would be required to step back and critically examine the process in which they have been participating. Such an approach would presumably avoid the second pitfall envisioned by Justice Fortas—that of clinical programs degenerating into "how-to-do-it" courses.

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[18] Ferren, *Goals, Models and Prospects for Clinical-Legal Education*, in CLINICAL EDUCATION, *supra* note 17, at 94-95.

[19] Kitch, *Foreword* to CLINICAL EDUCATION, *supra* note 17, at 13.

[20] Ferren, *Goals, Models and Prospects for Clinical-Legal Education*, in CLINICAL EDUCATION, *supra* note 17, at 95.

[21] *Id.* at 96.

LAW AS A PHASE OF THE HUMANITIES AND AS A SUBJECT OF THE BEHAVIORAL SCIENCES

In his introduction to this seminar, Professor Julius Cohen poses the questions to be considered:[22] Should the law school of tomorrow "be linked more closely to what is called the broad humanistic university tradition . . . . If so, how should it be done?" Should the modern law school "be more concerned and involved with law . . . as a subject for constant investigation by the behavioral sciences? If so, how should it proceed?"

The principal paper, entitled "The University Law School," was presented by Robert M. Hutchins, President of the Center for the Study of Democratic Institutions and past Dean of the Yale Law School. Dr. Hutchins' basic thesis is that both universities and law schools are in a how-to-do-it mold and that steps should be taken to return both to the mainstream of the humanist tradition. Presently, the methods employed to prepare students for their future roles are determined by pressure groups which want people trained to perform specific services. The assumed requirements of the profession determine the curriculum and the methods of instruction. This approach produces teachers as well as students, who are technical specialists in only one discipline and results in an isolation of the disciplines.

Dr. Hutchins proposes that both the university and the law school restructure their approach to more closely reflect the humanist tradition. This would mean more emphasis on theory, the assumption being that the best practical education is a theoretical one. As for legal education, a jurisprudence concerned with legal principles and the clarification and refinement of those principles should receive the major emphasis. Interdisciplinary studies would be the essence of the approach for both university and law school. Dr. Hutchins asserts all disciplines should participate in the "drawing of the circle of knowledge" for no one subject can be fully understood except in relation to other subjects. The change would result in the concurrent and interdependent study of "the great problems of modern man" by the various disciplines.[23]

Few assertions made by Dr. Hutchins go unchallenged by the other speakers. It is insisted that neither the national law schools nor the universities fall into the how-to-do-it category. Law schools presently approach law jurisprudentially; the university is freer, more scholarly and

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22 THE LAW SCHOOL OF TOMORROW, *supra* note 3, at 3.

23 *Id.* at 19. For example, "Can science be constitutionalized? Can technology be controlled? . . . Can and should the old geographical federalism be replaced by some kind of professional or occupational federalism? Must a modern government plan, and, if so, how can planning be made compatible with democracy? . . . How can the citizen cope with bureaucracy? . . . What law should govern the communications revolution that is under way . . . ? . . . Who will own and operate the satellites through which the fate of our culture may be decided?" *Id.* at 20-21.

creative than at any time in its history.[24] Several speakers disagreed with the proposal that legal education should emphasize jurisprudence at the theoretical level. For them, a mixture of theory and practice that will develop the skills and qualities of mind of the legal professional is preferable.[25]

At this point, one might ask whether the questions posed by Professor Cohen have been answered. Professor Frederick A. Olafson concludes that they have not even been faced squarely: "[W]hat is essentially a practical question of educational policy has become the occasion for a dispute among ideologies. . . . In a sense . . . our discussions have been irrelevant to the actual problems that face this institution at this point in its history."[26]

In the opinion of the reviewer, the beginning of the movement calling for the broadening of legal education to include nonlegal materials can be traced to studies on legal education undertaken in the years 1926-28 by the Columbia University Law School faculty.[27] Subsequent discussion by legal educators reflects considerable disagreement, not only concerning the form in which integration should be effected, but as to the need for integration in *any* form. Most educators, however, appear to agree that at least a minimum amount of integration is desirable. Recent developments require that a competent lawyer acquire some knowledge in the behavioral and social sciences. For example, to adequately deal with problems in the family law area, the lawyer must often evaluate and make intelligent use of the behavioral sciences.[28] Behind most legal doctrines, whether judicial or legislative in origin, lie certain economic, political, and social factors. In many areas of the social and behavioral sciences, advances have raised the work product to a level of practical utility to the legal scholar and student. To more fully understand legal doctrines, this learning should be considered.

Some of the disagreement over the concept of integrated teaching materials seems to result from a failure to recognize the number of levels at which law and other disciplines are complementary. At the purely factual level, even the so-called practical lawyer would admit that the student's training is enhanced by a knowledge of facts made available by social or behavioral science studies. At another level, studies may describe certain patterns or conformities in human and social behavior and suggest to the lawyer the impact of rules of law on society. At still another level, law study may be enriched by the nonlegal scholars' judgment of what men ought to do and what law must do in view of such

[24] THE LAW SCHOOL OF TOMORROW, *supra* note 3, at 40, 47 (S. Hook).
[25] *Id.* at 27-29 (P. Goodman), 40-44 (S. Hook), 75 (F. Olafson).
[26] *Id.* at 74.
[27] Currie, *The Materials of Law Study*, 3 J. LEGAL ED. 331, 332 (1951).
[28] Foote, *The Law and Behavioral Science Project at the University of Pennsylvania: Family and Criminal Law*, 11 J. LEGAL ED. 80 (1958).

judgments. At these more abstract levels substantial disagreement can be expected, but even the practical-minded law teacher should be willing to go at least part way. He should recognize that even if the law student were being trained solely for his craft, he would not be properly trained unless made to consider at least that minimum which judges are required to consider in the formulation of legal principles.

The law student should study nonlegal materials in the context in which he will face them in practice. This requires the integration of legal and nonlegal materials as they relate to specific legal problems. The goal is not the training of an economist or psychologist but the training of future lawyers in a process of dispute resolution that necessitates consideration of material from other disciplines, including the intelligent and effective utilization of contributions by social and behavioral scientists.[29] In some instances achievement of the goal will require the teaching assistance of experts in fields outside the law. The law school of the future should consider the possibility of prescribed training in nonlegal fields for law graduates who elect to teach in law school.[30] The general challenge will be the preparation of teaching materials which collect and meaningfully integrate pertinent nonlegal data with the more traditional legal materials.

DIRECTIONS FOR RESEARCH, EMPIRICAL AND NONEMPIRICAL

This seminar was devoted to a consideration of the type of research in which the law school of the future should participate. The lecturer was Professor Harold D. Lasswell of the Yale Law School, who spoke on the topic, "Toward Continuing Appraisal of the Impact of Law on Society." His principal thesis is that both legal and nonlegal research should be improved and expanded to achieve "a continuing comprehensive appraisal of the impact of law on society, as well as . . . the reciprocal effect of social process on legal process."[31] The underlying aim of the appraisal would be to provide a reliable basis for future policy decisions.[32]

Dr. Lasswell outlines two highly generalized models, one of the social process and the other of the decisional process. He also utilizes eight value-institution categories which provide a common frame of reference for conducting comparative research of all social situations. Using one of the value-institution categories, namely power and the institutions of government and law, it is possible to identify the legal process from a func-

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[29] Fuller, *supra* note 7, at 199-202.

[30] Miller, *The Impact of Public Law on Legal Education*, 12 J. LEGAL ED. 483, 495-96 (1960).

[31] THE LAW SCHOOL OF TOMORROW, *supra* note 3, at 87.

[32] Dr. Lasswell has stated that the ultimate aim of legal education should be to provide a "conscious, efficient, and systematic *training for policy-making*." Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 206 (1943).

tional standpoint as the stable pattern of interaction among the various steps in the decision process.

Dr. Lasswell feels that the social and behavioral sciences are sufficiently well-developed to provide a framework for analysis of the interaction between the legal and social processes and that there will be an adequate number of qualified lawyers and social scientists to provide the necessary manpower for research. He proposes the creation of a balanced research network composed of diverse agencies and including the utilization of universities and professional organizations. In addition, a supplementary network of law, science, and policy centers should be created to act as gathering places for competent persons on short-term appointments and as clearing houses for, and the coordination of, research projects.

It is the opinion of the reviewer that there are many obstacles to be overcome before law schools can contribute meaningfully to the type of research envisioned by Dr. Lasswell. Substantial participation in nondoctrinal research would necessitate a shift in legal education toward increased consideration of social and behavioral science materials, including their methods of empirical research. Gaining the cooperation of the social sciences and liberal arts departments of the universities is another hurdle. Most departments show little interest in many of the areas of inquiry and their faculties lack an adequate understanding of the legal process.[33] Nor have law professors shown much inclination for such research. Occupied with the teaching function and the production of casebooks, most law professors do not identify with the scholarly community and lack a tradition sustaining nondoctrinal research and the outlook that characterizes the application of the scientific method to problem solving.[34] As a result there is a need to educate law professors in social science methods of research.[35] An additional problem is that the high cost of large-scale studies makes it improbable that many such studies can be financed by the law schools themselves.

Assuming the above obstacles can be overcome, there is the question whether law school faculty and students should become involved in the type of research outlined by Dr. Lasswell. An increased orientation toward research raises the danger of a resulting neglect of teaching and a devaluation of instructional tasks by members of the faculty. Neglect of doctrinal research presently carried on by most faculty and students is another danger. One writer concludes nondoctrinal research "would set tasks for law that would be too hard, too dull and expensive, and the

33 THE LAW SCHOOL OF TOMORROW, *supra* note 3, at 139-40 (M. Massel).

34 Jones, *Some Current Trends in Legal Research*, 15 J. LEGAL ED. 121, 135-37 (1962).

35 There are an increasing number of programs for this purpose. *See, e.g.*, ASS'N OF AM. LAW SCHOOLS, ANNUAL REP., pt. 1, § II, at 153 (1968) (report on the Social Science Methods in Legal Education Institute).

marginal increment too meager, to justify the input of time and money which fidelity to this method would entail."[36] Nonetheless, the increased use of nonlegal materials in the law school curriculum would require some knowledge of social and behavioral science research methodologies so that the materials can be intelligently evaluated. The above arguments, moreover, do not preclude the application of research techniques from other disciplines on a more modest scale than that proposed by Dr. Lasswell.

CONCLUSION

This collection of lectures, comments, and discussion presents a unique compendium of the views of numerous scholars, both legal and nonlegal, on the subject of legal education and its future. It strikingly reflects differing viewpoints on most major issues of proposed reform. However, some current questions facing legal education are notably absent. For example, should some areas of the law be turned over to paraprofessionals and, if so, what should the role of the law school be in their training? Also several of the discussions remain at the general or theoretical level, ignoring the tough questions and problems which arise in practical application. For those directly involved in the formulation of educational goals for law schools, the book will add little to prior knowledge. For others, the book will provide informative reading for those interested in educational policy for the law school of tomorrow.

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[36] Cavers, *Science Research and the Law: Beutel's "Experimental Jurisprudence,"* 10 J. LEGAL ED. 162, 164 (1957).

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