The Lawyer and the Quality of Service to the Poor and Disadvantaged Client: Legal Services to the Institutionalized

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Client dissatisfaction with legal services is commonly recognized as a serious problem. Based on extensive experience with disadvantaged clients confined to correctional and mental institutions, Professor Dickey contends that much of this dissatisfaction is justified. In this Article, he describes and illustrates the qualities that lawyers need to function effectively as members of a "helping profession," and offers suggestions for the development of those qualities.

The quality of legal services is considered unsatisfactory by many poor and disadvantaged clients, particularly those who are confined in correctional and mental health institutions. Careful objective observation and inquiry demonstrate that the reasons for dissatisfaction extend beyond the fact of confinement. In many of the situations of legitimate client dissatisfaction, the lawyer has performed in accordance with current professional standards—standards which do not in fact give adequate emphasis to meeting the needs of the client. This variance between professional standards of competency and adequate service to clients’ needs results from a number of factors.

First, the economics of the legal profession frequently make it difficult for the lawyer to serve the client adequately, especially in the criminal law field where compensation typically is limited to providing a traditional criminal defense. The client’s needs often go beyond representation in the criminal case and include the need for what might be viewed as social work or civil legal aid assistance. The economic resources to provide for service beyond the immediate needs of the criminal case are rarely available.

A second reason is that "service to the client" has not been a principal criterion for evaluating the quality of the lawyer’s work.

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1. For a helpful recent examination of the problems relating to providing quality legal services to the poor, see Bellow, Turning Solutions Into Problems: The Legal Aid Experience, 34 NLADA BRIEFCASE 106 (1977).
Achieving law reform, often thought to be in the “public interest,” receives higher status in professional and academic circles than serving the “client’s interest.” Although the “public interest” in law reform and the “client’s interest” may coincide, they may also conflict. And when they are in conflict, serving the “public interest” is a disservice to the client. Yet many legal service agencies funded to serve the poor and disadvantaged give great stress to law reform and give low priority to serving the needs of the individual client.

A third reason is that lawyers have great difficulty in helping poor and disadvantaged clients identify their problems and best interests. When the client is poor and comes from a cultural, economic, or social background which is different than the lawyer’s, the gap in the lawyer’s understanding of the client may result in advice that has unanticipated and devastating effects. In such situations, lawyers too often tell indigent clients what services they need rather than involve them in identifying their problems and interests. Lawyers assume that they know best how to defend a criminal case and how to identify the law reform aspects of a poor client’s situation. Lawyers for the poor often are better at “telling the client” than they are in “listening to the client,” and are convinced that the client needs to learn from the lawyer rather than from the client. The result is an understandable frustration on the part of the client that develops into anger and alienation when the lawyer’s failure to be sufficiently concerned appears to result in serious disadvantage to the client.

My experience as director of the Wisconsin Law School Legal Assistance Program—which has conducted careful “diagnostic” interviews of literally thousands of indigent correctional inmates and mental health patients and then provided “full service” legal aid to them—has led me to several conclusions about the qualities needed to provide high quality services to confined clients. The significance of these conclusions are relevant to the needs of all poor and disadvantaged people. It may also tell us a great deal about the legal services needs of those who are more economically affluent.

First, to effectively serve clients, lawyers need an understanding of the impact on the client of advice and decisionmaking by lawyers. With reference to the accused, it is important for lawyers to know the human consequences of criminal conviction and mental commitment because, every day, they give advice and make decisions which have a profound impact upon the lives of individuals. Without an understanding of the alternatives under consideration, it is impossible to adequately help clients make informed decisions that may seriously affect them.
Second, lawyers need to understand the professional role of the lawyer. Members of the bar often are uncertain of their responsibility in certain situations and how the interests of clients can best be served. For example, with regard to juveniles and the mentally ill, lawyers often are confused as to whether their responsibility is to keep the person out of the institution or to obtain some form of treatment which will hopefully help to resolve the delinquency or mental illness. With regard to the criminally accused, lawyers often feel that their responsibility to the client ends with the resolution of the charge when, in fact, the client has many other problems—some related to the charge, many to eventual reassimilation into the community—which require legal assistance.

Third, understanding how the criminal justice and mental health systems operate enhances lawyer representation of clients. Too often, lawyers make decisions and give advice without an adequate understanding of the implications of the advice for the client at later stages of the system. For example, detainers and parole discretion have profound effects on the correctional treatment of the confined. Few lawyers, in my experience, adequately explore the effects of detainers and a person's realistic chances for parole with their clients, even though detainers and parole are significant factors to be considered before an informed decision can be made as to whether to plead guilty, a common disposition of criminal cases.

Fourth, lawyers need to bring their substantive knowledge and skills to bear effectively on the integrated problems they confront. While insight into clients' problems, knowledge of relevant law, and analytical and writing skills are certainly a prerequisite for the resolution of problems, lawyers must also exercise sound judgment. The problems are complex and require the integration of skills if they are to be solved.

This Article suggests the need to reformulate current responses to the legal services needs of the poor, particularly the institutionalized poor, so that services can reflect the needs of the clients rather than the economics and traditional specialization of the legal profession. The status of serving the "client's interest" should be recognized as being as important as serving "law reform" interests, and lawyers should learn to be more concerned about adequately diagnosing the client's needs than persuading the client to accept traditional legal services. The Article also suggests that it may be necessary to restructure legal aid offices to serve clients more adequately. Courses in law school and continuing education programs for lawyers also should be created to foster these additional qualities. One such course, de-
developed at the University of Wisconsin Law School, is discussed in detail in the Appendix to this Article.

I. DATA

The "data" in this Article are drawn from the experiences of the Wisconsin Law School Legal Assistance Program (WLAP). Staff attorneys and students have provided legal services to confined mental patients and correctional inmates at all state institutions for over ten years. Work has been completed on roughly eleven hundred such cases each year for the past four years. For several years prior to that, similar work was done for a limited number of clients.

The initial contact with the client comes during their first month of institutionalization as part of the four-week "Adjustment and Evaluation Process." A diagnostic interview with each newly admitted patient and inmate is designed to elicit all the difficulties the client has with which a lawyer might be of help. The types of problems of the clients have received a detailed description elsewhere.

The student or attorney completes a seven-page interview form on each potential client, and writes a memorandum detailing the facts discovered, the issues that have arisen or are anticipated, and what should be explored or done to help the client if assistance is requested. Detailed records are kept of the work done and the results achieved.

The interviews and case work have several purposes. We wish to understand the legal needs (typically wide ranging) of these clients, and to help them solve or cope with their problems. In addition, we wish to understand how these clients can best be served by the legal profession. Finally, we attempt to equip law students to be effective in client service by having them assist inmates and patients in the

2. The Wisconsin Law School Legal Assistance Program consists of three projects. The Legal Assistance To Inmates Project provides services to state correctional inmates and to residents of the Federal Correctional Institution at Oxford, Wisconsin. The Mental Health Project provides services to patients in the three state mental institutions. The Post-Conviction Defense Project specializes in post-conviction matters and provides services to all inmates and patients at state institutions.


resolution of their problems. This Article is devoted to analyzing my conclusions about how quality legal services can be provided.

The examples in this Article are meant to be illustrative of common problems encountered by Wisconsin faculty and law students in the Legal Assistance Program, and the qualities lawyers need to solve these problems. They are often very complex and difficult to understand fully, but only in their full complexity do the underlying problems for the legal profession emerge. It is for this reason that the cases are discussed in detail.

As will be apparent, many of the illustrations could be used to support more than one conclusion. For example, Illustration 1, below, supports the conclusions that lawyers need to understand the human consequences of their advice, need to better understand their professional responsibilities, and should understand how the criminal justice and mental health systems operate in action. It would be an oversimplification to argue that the illustration supports only one of these conclusions, to the exclusion of others. Indeed, it is usually a combination of a lack of these qualities that has unfortunate results for clients. However, in the interests of clarity, I have isolated illustrations according to the conclusion they most appropriately support.

II. QUALITIES IN THE PROFESSION NECESSARY FOR EFFECTIVE CLIENT SERVICE

A. Sensitivity to the Human Consequences of Advice and Decisionmaking

Every day, judges, prosecutors, and defense lawyers make decisions that affect the lives of defendants and their families. It is vitally important for lawyers to know the human implications of their advice and decisions, for the consequences of not knowing can be devastating for the client. Such consequences include the following:

5. A number of articles allude to the broad range of problems stemming from arrest, conviction, commitment, and confinement, often in the course of describing various programs that provide legal services to this population. A few treat the civil and familial problems caused or exacerbated by confinement, which can be addressed legally, as well as criminally related prisoner and patient grievances. See M. FINKELSTEIN, PERSPECTIVES ON PRISON LEGAL SERVICES: NEEDS, IMPACT, AND THE POTENTIAL LAW SCHOOL INVOLVEMENT (1971); Dickey & Remington, Legal Assistance for Institutionalized Persons—An Overlooked Need, 1976 S. ILL. L.J. 175; Kimball, Introduction: Inmate Problems and Correctional Administration, 1969 Wis. L. REV. 571; Pyc, Law School Training in Criminal Law, 3 AM. CRIM. L.Q. 172 (1965); REMINGTON, Wisconsin Correctional Internship Program in PROCEEDINGS OF THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY 56 (1965); Weintraub, Delivery of Services to Families of Prisoners, 40 FED. PROB. 28 (1976). See also L. SILVER-STEIN, DEFENSE OF THE POOR (1965); Comment, Resolving Civil Problems of
(1) Inmates and patients become frustrated and bitter. They believe that they are being treated unfairly because the advice they take has results that were not explained to them and that they do not anticipate.

(2) Inmates and patients do not receive the help in the institution that they think they need and will receive. Sometimes therapy is unavailable; or jobs, vocational training, and education are unavailable or are denied because of the inmates' security classification.

(3) The families of patients and inmates sometimes suffer greatly from the fact of confinement.

(4) The above results, in turn, adversely affect the inmates' and patients' responsiveness to the treatment and programs that are available. Thus, the correctional process is frustrated.

Often, if these results were foreseen, different decisions might have been made and different advice given.

Three illustrations indicate how these consequences are sometimes brought about. Illustration 1 deals with a situation in which some form of confinement of the client seems inevitable. The question is whether it is more desirable that a person be committed under Wisconsin's Sex Crimes Law\(^6\) or sentenced under the criminal code. The

\(^6\) See generally, Wis. Stat. §§ 975.01-975.19 (1975). Unlike the sexual psychopathy laws in many states, Wisconsin's Sex Crimes Law comes into play only after conviction of specified sex offenses. In sum, it calls for mandatory commitment of all persons convicted of those offenses for the purposes of a "social, physical and mental examination" to determine the need for "specialized treatment" for sexual deviancy. This sixty-day maximum examination commitment can also be ordered for persons convicted of any other offense except homicide and attempted homicide if the court finds that "the defendant was probably directly motivated by a desire for sexual excitement in the commission of the crime." Id. §§ 975.01-975.02 (1975). If the Wisconsin Department of Health and Social Services, the department to which the convicted person is committed, recommends specialized treatment for his "mental or physical aberrations," a hearing is held on the question of such need, and if the jury, if one is demanded by defendant, or the court concurs with the recommendation of the department, the person is committed for an indeterminate period. Id. §§ 975.06-975.12.

Many studies have been conducted of the Wisconsin Sex Crimes Law. The history and legislative purpose of the law are discussed in Huebner v. State, 33 Wis.2d 505, 521-26, 147...
ILLUSTRATION 1. A patient in a maximum security mental hospital had received a 30-year commitment for rape under the sex crimes law. He desired to "get back to court," to have this commitment changed to a sentence and expressed a sense of frustration and injustice, because his lawyer told him that it was in his best interest to be in Central State Hospital, where he would receive treatment and eventually be released when he was "cured."

The law student to whom the patient revealed his complaint investigated the matter carefully. The plea of guilty transcript revealed that the defense lawyer advised the client to waive his right to a hearing\(^7\) on the issue of whether he should be committed and to accept the recommendation that he be committed. In fact, the defense lawyer, the judge and the prosecutor all agreed that commitment was in the client's best interest. The client thus pleaded guilty

\(^7\) Huebner v. State, 33 Wis.2d 305, 147 N.W.2d 646 (1967).
on the assumption that he ultimately would be committed and waived his right to a hearing as to whether commitment was appropriate.

The client was upset because he believed, upon experience and reflection, that commitment was not in his best interests. At the time of the plea and commitment, the maximum sentence for rape under the criminal code was thirty years. Maximum sentences are rarely given, and a person so sentenced is not subject to any extension or increase in the term of his confinement. In contrast, commitment under the Sex Crimes Law is automatically for the maximum term, and confinement may be extended indefinitely if the department to which commitment is made determines that discharge would be dangerous to the public. Had the man been sentenced as a correctional inmate, he in all likelihood would not have received the maximum term, and he would not have been exposed to extensions of confinement beyond the stated term. He was angry that this had not been explained to him before his plea and waiver.

The patient also learned that the criteria for release, while taking into account his responsiveness to treatment, were in large measure identical to those used by the correctional parole board. Included among these criteria are the need for punishment (by serving a minimum number of years), the seriousness of the offense, and the dangerousness of the offender. The client felt that this was inconsistent with the rhetoric of the Sex Crimes Act, which led the man to believe that he needed “specialized treatment,” would receive it and, when he was cured, would be released.

The lawyer’s perception of the treatment program and conditions at the institution and the criteria for release were erroneous. The “hospital” in reality is as restrictive as but less comfortable than a

10. The likelihood that a sex crime offender will be confined longer than he would have been as a correctional inmate depends, of course, on the individual case. See Comment, Criteria for Commitment Under the Wisconsin Sex Crimes Act, 1967 Wis. L. REV. 980; Comment, The Special Review Board, 1973 Wis. L. REV. 172. Halleck points out the possibility of longer confinement in Halleck, A Critique of Current Psychiatric Roles in the Legal Process, 1966 Wis. L. REV. 379, 392 [hereinafter cited as Halleck]. See also V. KNOPKE-WETZEL, DEFENSE OF CRIMINAL CASES IN WISCONSIN 16-3 to 16-4 (1974) [hereinafter cited as KNOPKE-WETZEL] which points out some factors that defense counsel should consider when advising a client subject to the Sex Crimes Law. For example, a father convicted of incest is often released after one year if the home situation has changed sufficiently to assure protection of the victim. Consultation with a psychiatrist who is familiar with the specialized treatment program currently available at Central State Hospital may be helpful in judging whether the specific client could make progress under such a regime. If he would not be able to respond to available modes of therapy, he might well spend more time in treatment than he would under a sentence.
maximum security prison. It has limited treatment resources and job opportunities and an inadequate staff of social workers.

The client was angry, for the maximum security correctional institution might have been preferable to the hospital. The patient would have been able to work in a prison, avoid the idleness of the hospital, and earn some money for his personal needs. No job was available for the patient in the mental health institution. The rhetoric about the institution being a "hospital" had led the inmate to make a choice that in fact limited the available vocational and school programs and industries.

The only treatment provided the patient was two group therapy sessions per week and the "milieu therapy" of simply being in the institution. The required periodic re-examinations to determine release were not being made.\footnote{Wis. Stat. \textsection 975.09 (1975). The status of the periodic examination remains uncertain. State \textit{ex rel.} Terry v. Schubert, 74 Wis.2d 487, 247 N.W.2d 109 (1976), \textit{vacated sub nom} Percy v. Terry, \textit{---} U.S. \textit{---}, 98 S.Ct. 40 (1977).}

The patient's negative feelings were reflected in his attitude toward the institution staff, the parole board, and the other patients. The law student who assisted him felt that these might have been interpreted as resistance to therapy and poor adjustment to the institution. This, in turn, would likely delay his release from the institution and might profoundly affect his attitude and actions when he ultimately was released.

Clearly, defense counsel's advice as to the implications of the plea and waiver, what the client could expect at the institution, and the criteria for release on parole was inaccurate. The incorrect perceptions were apparently shared by the prosecutor and judge in this case. As a result both the inmate and the mental health process were frustrated.

Many correctional inmates and mental health patients, like the patient in Illustration 1, might receive substantially different sentences if judges, prosecutors, and defense attorneys knew the true implications of particular sentences for people. For example, judges frequently explain their reasons for imposing relatively long sentences by stating that the convicted person will receive an early parole release. In fact, the criteria for parole release are often not adequately defined, and it is difficult to predict when a particular inmate will be paroled. More significant, perhaps, are the collateral implications of lengthy sentences for inmates. If judges were aware of these implications, many of which defeat the purposes of the judges in imposing
particular sentences, sentencing practices might be modified, as Illustration 2 suggests.

Illustration 2. The inmate wanted his two 10-year consecutive sentences for burglary and arson of a church reduced. He was not able to clearly articulate why his sentence should be reduced, but the man did raise enough questions in the mind of the student who interviewed him to lead her to investigate the case.

Among the unanticipated consequences of the sentences were: (1) the client was confined for a longer period than the judge anticipated, simply because of the length of the sentences; (2) the client was denied access to the vocational programs in which he had interest because of the effect of his sentences on his security classification; (3) the client was denied access to the Mutual Agreement Program because of the length of his sentences; and (4) the client was bitter because he felt that the purposes of sending him to prison were not being fulfilled.

The sentencing transcript revealed that the prosecutor argued and the judge agreed that “unless consecutive ten year sentences are imposed, he will be paroled in a year.” In fact, the parole of an inmate after serving one year of a 10-year sentence is practically non-existent. An inmate who makes average progress can expect parole release in about three and one-half years if the crime was not one involving assault. And, assuming that the inmate earned all the “good time” for which he is eligible, his mandatory release date, i.e., the date on which he must be paroled, is roughly five and one-half years from sentencing. This particular inmate received two 12-month deferrals from the parole board, the maximum deferral it gave at the time, and the board cited the length of sentence as a reason for refusing to grant parole. The judge indicated at a hearing on a motion to modify the sentence that he did not think the man would be confined for as long as he was.

The classification committee which determines an inmate’s security rating and thus his institutional assignment, assigned the client to a maximum security institution. The committee felt compelled to follow the informal administrative guideline that inmates with sentences of eight years or more be assigned to maximum security in spite of its belief that other factors, such as the man’s age, his vocational interest, and its judgment that he is not dangerous, would dictate assign-

14. Wis. Stat. § 57.06 (1975). Women are immediately eligible for parole. Id. § 57.07.
ment to an institution which permitted greater freedom and responsibility.15

Because of the length of sentence imposed, the inmate was denied an opportunity to pursue his vocational interest in drafting. Since drafting courses were available in a minimum security institution but not in the maximum security institution, he was assigned to work in the kitchen.

The long sentence also prohibited the inmate, by administrative regulation, from participating in the Mutual Agreement Program even though his social worker thought it appropriate. This is a program in which the parole board and the inmate contract for parole release in return for satisfactory completion of vocational and instructional programs and avoidance of serious disciplinary difficulties. It provides useful incentives for inmates.

Understandably, the inmate was very demoralized by the effect that his sentence had on him. Correctional officials also were frustrated by their inability to provide this inmate with the program best suited for him.

Besides directly affecting the confined person, confinement in mental health and correctional institutions also has serious human consequences for the inmate's family. The effect on the person's family, in turn, often influences his conduct in the institution, his involvement in correctional programs, and his ultimate reassimilation into

15. The classification procedure at the Wisconsin State Reformatory is described in Comment, Administration Fairness in Corrections, 1969 Wis. L. Rev. 587. See Goldfarb & Singer, supra note 5, at 91-95 for discussion of the functions of reception centers and inmate classification procedures. See also The American Prison Association, Handbook on Classification in Correctional Institutions (rev. ed. 1965); American Correctional Association, Manual of Correctional Standards 352-56, 358-61, 364-65 (1966) which states:

The primary objective of classification as a systematic process is the development and administration of an integrated and realistic program of treatment for the individual, with procedures for changing the program when indicated . . . . [It is] the process through which the resources of the correctional institution can be applied effectively to the individual case.


There is evidence that prisoners' attitudes toward judges and lawyers improve after they are exposed to legal assistance programs, at least partly because they feel their problems are being coped with, which reduces their sense of isolation. See M. Finkelstein, Perspectives on Prison Legal Services (1971); Goldfarb & Singer, supra note 5.

the community. These consequences ought to bear on the sentencing decision. The following example illustrates the serious implications of confinement on family and family relationships, and the need for lawyers to identify the collateral consequences of their advice.

Illustration 3. A newly arrived inmate at the Wisconsin State Prison indicated that he was 45 years old, had been convicted of armed robbery and kidnapping, and had received a 10-year sentence. These were the inmate's first offenses and were apparently committed in economic desperation. He had been laid off from two jobs during the year prior to the offenses and had attempted several business ventures which failed. The inmate's wife was seriously ill, and the family had no health insurance. Three of his four children were too young to work full time and required dental work totaling $3800. The man was extremely anxious about the fact that his wife was ill and without money and his children "had no father." Furthermore the man was terrified of the maximum security institution.

Investigation substantiated both the validity of the reported facts and the seriousness of the inmate's anxiety. The institutional social worker and psychiatrist feared that, in desperation, the inmate might try to kill himself. At the very least, they believed, his frustration and fears posed special problems to the institution, and the man's feelings of powerlessness to help his family might be acted out in violent ways.

The above example illustrates the profound effect confinement may have on the family of the confined person. What will happen to the wife and children and how this will affect his behavior both in the institution and when he is released are questions the answers to which we only can guess. The sentencing transcript and presentence report revealed that none of the facts about the man's economic circumstances or family situation had been taken into consideration at sentencing. Whether they would have influenced the sentence is problematic, but they are relevant to the decision. Because the judge, prosecutor, and defense attorney were unaware of the man's family problems, they were unable to alleviate any of his concerns or provide his family with help by communicating the problems to the county social workers.

Without knowledge of the human consequences of confinement, many of which are illustrated above, the lawyer cannot intelligently advise a client nor recommend a sentence.

B. An Understanding of the Professional Role of the Lawyer

It is not always easy to know the scope and nature of a lawyer's responsibility to a client or the measure of its success. Often attorneys and clients see the responsibility as a narrow one. For example, the criminal lawyer is considered successful if he secures an acquittal or a short period of confinement for his client, or if broad law reform is achieved by a particular case.

But people charged with crimes, people who are subject to commitment proceedings, correctional inmates and confined patients usually have complicated problems. Their resolution often requires someone to go beyond the immediate concern of the case, the adjudication of guilt or innocence, or the determination of sentence.

Unfortunately, these complex problems are not always addressed by lawyers. While there are other reasons for this, at least two are related to professional responsibility. First, the lawyer may be aware of a client's problems but not view them as within the scope of his responsibility. The second reason is that the lawyer may never identify the client's problem fully, because he does not "listen" to the client, but "tells" the client what is best for him. The lawyer often believes that it is for him to decide what is in the client's best interest and then persuade the client to take his advice.

The following illustrations make several points:

(1) Client problems often are complex and require more of lawyers than simply attention to adjudication of the case.

(2) It is critical, if clients are to be served effectively, that they be fully informed of the options available to them and involved in the identification of their best interests. Lawyers should counsel clients, not decide what clients ought to do and then persuade them to do it by withholding information or exaggerating consequences.

(3) Problems which may not seem significant to lawyers may be important to clients. Lawyers should be sensitive to this fact.

(4) The questions of professional responsibility raised by the illustrations are troubling and difficult to answer. Clients would be greatly helped if lawyers' professional responsibility were defined with reference to clients' needs.

(5) The nature of client problems is such that some restructuring of lawyer offices may be necessary to most efficiently solve them.

Five problems which raise specific questions of the lawyer's responsibility to clients follow. Whatever the reason for the fact that the lawyers defined their responsibility narrowly, or in a way that is arguably inconsistent with the client's best interests, it is apparent in each case that there were unfortunate consequences for the clients.

Illustration 4. An inmate in a segregation cell (a form of solitary confinement) asked to be represented at a hearing before the institution's disciplinary committee. The man said that he had received a disciplinary ticket for attempting to kill himself and that he could forfeit some earned good time if the disciplinary committee so decided.

The inmate revealed that the reason for his attempted suicide was that he was depressed because his wife was being bothered by a man in the rural community in which she lived. The inmate was frustrated at his inability to help his wife and was fearful for her safety. He was also deeply concerned about his wife's financial situation. She was poor, out of work, and in debt. The inmate had been convicted of "Conduct Regardless of Life" for having fired a gun at the very person who was now harassing his wife, after a confrontation over a visit by the other man to the inmate's home while he was away.

The lawyer who represented the client on the criminal charge for which he was confined had not explored the economic, social, or psychological ramifications of the client's plight. The client had received a relatively short sentence for the crime and was satisfied with his lawyer's work on the case. Apparently, the attorney did not feel that it was his responsibility to inquire about the wife's ability to cope by herself while her husband was confined or to take steps to prevent further harassment by the victim.

The second lawyer was able to help this client. He persuaded the local sheriff to increase the patrols around the wife's house, counseled her to contact him if there were further difficulties, and informed the man who visited the woman that he was not welcome. The lawyer also persuaded the family's creditor to wait until the husband's release before requiring further payment, and put the wife in contact with the appropriate welfare agency. These measures reassured the
woman and her husband and considerably alleviated their problems, already exacerbated by the man's confinement.

Troubling professional responsibility problems are often raised in the representation of people of doubtful mental competency to stand trial.

Illustration 5. The client was committed to the state mental hospital because he was incompetent to stand trial. He had been charged with disorderly conduct, had been sent to the state hospital for sixty days of observation, and had then been committed. He wanted another attorney, because he claimed that he talked to his present attorney for only five minutes on two occasions and that his attorney had urged him to accept the commitment. He also wanted to leave the institution.

Some attorneys regard a commitment for incompetency to stand trial as a disposition superior to a criminal conviction. The client in Illustration 5 stated that his lawyer said he would “do less time” if he accepted the commitment. The lawyer did not explain his reasons for this conclusion, but added that he would also get the treatment he needed for his mental problems in the institution. But whether this is a superior disposition depends upon the particular case. In Illustration 5, several factors suggest that an alternative, such as a plea of guilty, may have been preferable.

Had the client been convicted of the substantive offense for which he was charged, a misdemeanor, the maximum period of confinement would have been 90 days. However, the client was now going to be

18. Wis. Stat. §§ 971.13, 971.14 (1971). Wis. Stat. § 971.13 provides that no person shall be tried for an offense so long as he is “unable to understand the proceedings against him or to assist in his own defense.” This section also provides, as some state statutes do not, that the defendant may not be convicted, sentenced, or committed for an offense so long as he fails to meet those standards, which are in accord with Eizenstat’s proposed model incompetency statute. See Eizenstat, Mental Competency to Stand Trial, 4 Harv. C.R.-C.L. L. Rev. 379 (1969).

The requisites of competency are discussed in Dusky v. United States, 362 U.S. 402 (1960). Attempts have been made to give more specific content to the generalized definition of incompetency given in Dusky and in most state statutes. See L. McGarry, Competency to Stand Trial, Assessment Instrument and Handbook (1972); Robey, Criteria for Competence to Stand Trial: A Checklist for Psychiatrists, 122 Am. J. Psych. 616 (1965). Other important sources discussing attempts to improve identification of those who are truly incompetent are gathered in Brakel, Presumption, Bias and Incompetency in the Criminal Process, 1974 Wis. L. Rev. 1105, 1108 n.14, a very thought-provoking article which sets forth many of the practical and philosophical difficulties with the concept of incompetency, and suggests that findings of incompetency should be kept to an absolute minimum and that procedural rather than substantive reforms may be a more fruitful way to protect potentially incompetent defendants.

Wis. Stat. § 971.14(5) (1975) no longer requires that a defendant be discharged after the maximum period for which he could have been imprisoned if his conviction has elapsed. It does, however, require competency re-examinations at six-month intervals.
confined for at least 150 days—60 days in observation status and the balance as provided by statute and hospital policy.

The man was very concerned about the fact that the misdemeanor charges against him were still outstanding. He was particularly upset when he discovered he could still be convicted on these charges and confined for an additional 90 days pursuant to that conviction, even if he was committed for the maximum possible period as an incompetent.\textsuperscript{19} He would receive no credit for his present confinement against any sentence he might receive.\textsuperscript{20}

Furthermore, the man was probably more likely to be involuntarily civilly committed for an indeterminate period after the incompetency commitment.\textsuperscript{21} As a practical matter, civil commitment proceedings more likely would be commenced against someone in the hospital than against an inmate in the county jail, where he would have been confined after a conviction for the misdemeanor.

This man was receiving little, if any, treatment in the state hospital. This hospital is a maximum security institution with limited treatment facilities and is not geared to treating people whose confinement is likely to be as short as this client’s. This man did virtually nothing while he was in the institution. Had he been sentenced in his home county, he likely would have had work release privileges and been able to retain his job. He feared that he would lose his job after having missed so much work. Finally, the institution in which he was confined was miles from his home, making it very difficult for his family to visit.

The Wisconsin Law School Legal Assistance Program has had extensive experience with clients committed as incompetent to stand trial. Its experience is that, particularly where the charge is a misdemeanor, a client is much more likely to be released at the end of the commitment and the charges are more likely to be dismissed if the client has a job, a place to live, and access to some supportive services (including outpatient treatment) in the community. The student contacted the man’s attorney, indicated this and offered to help.

\textsuperscript{19} In 1975, the legislature amended Wis. Stat. § 971.1465, deleting the section which provided that commitment for the maximum term precluded conviction and confinement for the same crime.

\textsuperscript{20} Milewski v. State, 74 Wis.2d 681, 248 N.W.2d 70 (1976).

\textsuperscript{21} See Burt & Morris, \textit{A Proposal for the Abolition of the Incompetency Plea}, 40 U. CHI. L. REV. 66, 75 (1972), who propound the idea that even if a defendant is mentally impaired, he is better off tried. McGarry & Bendt, \textit{Criminal vs. Civil Commitment of Psychotic Offenders: A Seven-Year Follow-Up}, 125 AM. J. PSYCH. 1387 (1969) found that the average length of confinement for an incompetent committee was 61 months, whereas it was only 14 months for civil committees. At the end of a 7-year observation period, all civil committees had been returned to the community, while the same was true for only 1 of 6 incompetency committees.
The lawyer replied that, while the client would undoubtedly appreciate such help, it was not within the scope of the lawyer’s responsibility to the client.

Illustration 5 raises serious questions about the professional responsibility of lawyers to their clients. Whether it is in the client’s best interests to get treatment or to be confined for as short a period as possible is difficult to know. However, the process by which the decision is made is usually a telling one. If no effort is made to involve the client in the decisionmaking process and to inform him of the consequences of the alternatives, it is apparent that the lawyer views his responsibility as deciding what is in the client’s best interest. To be concerned about the period of confinement without concern about the quality of the help given during confinement and upon release suggests that the lawyer does not see his responsibility to be to help the client cope with problems and ultimately be reassimilated into the community. It is doubtful if such a view of the lawyer’s responsibility is adequate to serve clients effectively. If the lawyer does not share the client’s concern, it is unlikely that alternatives to prison and mental institutions will be sought.

The following example raises different issues of professional responsibility:

Illustration 6. The inmate asked for legal assistance because he wished his sentence reduced. He said that he had learned, from a discussion with his social worker at the institution in which he was confined, that there were inaccuracies in his presentence report. He said that the report stated that his family life was very unstable, that other members of his family were felons, and that he was unemployed at the time of the offense. These facts were untrue, he claimed. He also said that the presentence report “implied” that he was carrying a knife attached to his key ring. This gave the sentencing judge the false impression that he was a dangerous person. Had the sentencing court been aware of the true facts, he believed, he would have received a less severe sentence.

The inmate said that he had never seen the report, nor had he discussed it with his lawyer before sentencing. In fact, he was not sure his lawyer had even read the entire report. He said the lawyer examined it in his presence “just before sentencing” and had, as far as he could tell, only looked at the last page for the recommendation of the probation officer who prepared the report. He said the judge stated he had read the report before he imposed sentence.

To investigate the client’s claim, a copy of the presentence report and the inmate’s social services file\textsuperscript{22} were checked. They revealed that

\textsuperscript{22} A complete correctional file can be found in F. Remington, B. Newman, E. Kimball, M. Belli & H. Goldstein, Criminal Justice Administration (1969).
the inmate's concern about the accuracy of the report was wellfounded. The report contained many, although not all, of the inaccuracies complained of by the inmate. It concluded that the inmate's family life was unstable. However, the inmate's parents had never been separated, the father continued to be steadily employed, and the family owned its own home in a lower middle class section of the city. Although the report characterized the family as unstable and an unsuitable place for the inmate to return upon release, it made no mention of other family members being felons. The report incorrectly reported that the man was unemployed at the time of the offense.

The presentence report did state that the client was carrying a knife when he was arrested. A check of the property still held at the county jail revealed that it was a very small pocketknife, attached to a key chain, with a one-and-one-half inch blade. The agent who prepared the report did conclude from the knife and the fact that the inmate had been involved in several fights in high school, that he was dangerous and that confinement was recommended.

The transcript of the sentencing phase of the client's case revealed several critical facts. The defense lawyer did not address the background of the defendant in his remarks at sentencing. He made a pro forma argument for probation for his client without any reference to specific facts, without challenging the facts or the conclusions in the report, and without offering any additional information.

The sentencing judge stated that he had read the report and even commented that he knew the defendant's family and that it was a "good one." This seemed to rebut the report's conclusion that the man's family life was unstable. However, the judge said that he felt the man was dangerous and should be confined. It was evident from his remarks that the judge relied on the report in determining the appropriate sentence.

The report's inaccurate information and conclusions continued to have a profound effect on the inmate after sentencing. Virtually every report or recommendation by institutional staff and parole board members made reference to the man's carrying a knife while on the streets and his unstable family life. These reports, usually quite terse, never contained any facts supporting the conclusions and never indicated that the facts relied on had not been verified. Dangerousness was given as a reason for not transferring the man to a medium security institution. It was the basis for his social worker's recommendation that he not be paroled, and for the parole board's decision not to grant parole.
The board also indicated that before the man could be paroled, an adequate parole plan which called for him to live outside his family home should have been prepared. The judge’s remarks at sentencing which corrected the report’s conclusion about the man’s family were not reflected in the file. The only page from the sentencing transcript in the file was the one that contained the actual pronouncement of the man’s sentence.

The lawyer who worked on the case of the inmate described in Illustration 6 came to the following conclusions:

(1) The presentence report is a critical factor in determining whether a convicted person is to be confined, the treatment of the individual if he is confined, and the determination of parole release.

(2) The reliability of the presentence report is essential, yet the reports often may contain objective inaccuracies, as well as dubious inferences drawn from too little information.23

(3) Inmates are often confused about the information in the report and properly concerned about it, yet they rarely see it or discuss it with their lawyer or anyone else.24 Much of their information comes from second-hand sources which are inaccurate.

(4) The subject of the report must have access to it if its accuracy is to be checked and misinformation corrected.

(5) Finally, the client’s lawyer at sentencing is in the appropriate position to ensure that the report is corrected and, indeed, is often the only person in such a position. It is critical that the lawyer do this to fulfill his responsibility to assist the client in solving the problems that may create future difficulties.

Unfortunately, lawyers commonly do not reveal the presentence report to their clients, nor do they discuss it with them.25 As Illustration 6 indicates, this practice can have profound effects on the client. Complaints about the accuracy and effects of the reports are common among inmates, and these complaints often have some foun-

23. The preliminary findings of a study conducted by the author reveal that a substantial number of the inmates questioned in the Wisconsin correctional system indicated a belief that there were factual inaccuracies in their presentence reports which adversely affected their sentences.

24. The study alluded to in note 23 supra also indicates that a substantial number of clients never see or discuss the report with their attorney.

25. See notes 23 & 24 supra.
dation in fact. Of course, it is impossible to say whether the inaccuracies affected the sentence imposed or the correctional treatment of the inmate. However, at least in Wisconsin, the report is the single most important document which affects a person's institutional and program assignments, as well as parole decisions.

Why lawyers are not more attentive to the presentence report is difficult to explain. Many may not recognize its significance beyond sentencing. Another explanation may be that lawyers view sentencing as a social work decision and not an important part of their function. Some may believe that they are unable to affect the sentencing decision. Whatever the explanation, it is clear that the lawyer can assist his client by ensuring that the report is accurate.

Perhaps the most common complaints of inmates about the quality of their representation are directed to the guilty plea process. Inmate comments and attitudes raise serious questions about the lawyer's responsibility at this critical stage, as the following illustration points out.

**Illustration 7.** The inmate said that he wanted to "appeal" his conviction. He had pleaded guilty to burglary and expressed a great deal of hostility and bitterness toward his attorney who, he said, had "railroaded him."

The man had originally been charged with five counts of burglary. His lawyer had told him that conviction on all five counts was a certainty if the cases went to trial and that the judge would impose the maximum penalty of 50 years—10 years on each count. If the defendant would plead guilty to one count, however, the prosecutor would "read-in" the other four counts and would recommend a sentence of eight years. Confronted with these alternatives, the defendant reluctantly agreed to plead guilty and received the eight-year sentence. At the proceeding, a police officer whom the defendant said he had never seen established the factual basis for the crime from police reports.

When the man reached the institution he "heard that no one ever received more than eight years for burglary, no matter how many were committed" from that particular judge. He also stated that had he gone to trial "he never would have been convicted" because the police officer's testimony was hearsay and would not have been admissible evidence and that he might just as well "have taken his chances." For these reasons he wanted to withdraw his guilty plea.

Investigation led to conclusions conflicting in some respects with the client's claims. The allegation that the inmate's plea was involuntarily induced by false statements made by his attorney was difficult to verify. However, there was evidence that the lawyer had exaggerated the possibility that the man would receive a more severe sen-
It was likely that a false impression was thereby created and that this was one of several factors which convinced the man to plead guilty. There was ample admissible evidence of the inmate's guilt on several counts of burglary, and conviction seemed certain if the case went to trial. The practice of the judge who accepted the man's guilty plea and sentenced him was in fact to impose a sentence of eight years on similar defendants, whether they pleaded guilty or went to trial. It was true that the policeman who testified to establish the factual basis for the plea did so for administrative convenience and had no personal knowledge of the crime. In addition, the record of the "read-ins" was inadequate and did not fully ensure that the man would not later be charged with those crimes. The record did not adequately identify the crimes the inmate acknowledged he committed.

Most importantly, the lawyer who represented the defendant before conviction did not adequately communicate to the client the basis for his advice that the client plead guilty. Nor did defense counsel adequately explain the nature of the proceedings. The client did not fully understand the reasons for his lawyer's advice, nor was he able to make an informed judgment about his best interests. The client, later confused and frustrated, was bitter because he felt that

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26. See Alschuler, The Defense Attorney's Role In Plea Bargaining, 84 Yale L.J. 1184, 1194 (1975). This article contains an illuminating discussion of the legal issues related to inflated predictions of sentences by defense attorneys to induce clients to plead guilty.

27. See Blumberg, The Practice of Law as a Confidence Game: Organizational Co-optation of a Profession, 1 Law & Soc. Rev. 15 (1967). The defense attorney may respond to the plea bargaining situation by:

- abandoning [his] ideological and professional commitments to the accused client, in the service of ... [the] higher claims of the court organization. All court personnel, included the accused's own lawyer, tend to be coopted to become agent-mediators who help the accused redefine his situation and restructure his perceptions concomitant with a plea of guilty.

Id. at 19-20. See also Gard, supra note 17, and Mazor, supra note 17, for discussions of the inappropriateness of "persuading" the client to plead guilty by failing to present the defendant with full and accurate evaluations of his factual and legal situation. Commentators have often been critical of the practice of plea bargaining. For the most part, they have called for abolition or drastic reform. Among the most thoughtful articles are a number which raise the ethical and moral difficulties that are part of the practice, and cite the important cases and previous commentaries that are essential to a full understanding of the problems. See D. Newman, Conviction (1966); Alschuler, The Supreme Court, the Defense Attorney, and the Guilty Plea, 47 U. Colo. L. Rev. 1 (1975); Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L. J. 1179 (1975); Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50 (1968); Alschuler, The Trial Judge's Role in Plea Bargaining, Pt. 1, 76 Colum. L. Rev. 1059 (1976); Note, The Unconstitutionality of Plea Bargaining, 83 Harv. L. Rev. 1387 (1970); Note, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. Pa. L. Rev. 865 (1964); Note, Plea Bargaining: The Case for Reform, 6 U. Rich. L. Rev. 325 (1972); Note, Restructuring the Plea Bargain, 82 Yale L.J. 286 (1972).
with adequate representation he would not have been convicted. This, of course, was not true.

It is important for lawyers to avoid creating the belief that the criminal justice system treats people unfairly. A confined person who feels that he was convicted wrongly is understandably bitter, and is often unresponsive to any correctional treatment and unwilling to participate in constructive programs. This in turn affects when he is released on parole and how effectively he is reassimilated into society.

What is more troubling about Illustration 7 is the apparent view of the lawyer that he should decide what is best for the client and then persuade the client to follow his advice. The ultimate consequences of such a view of professional responsibility are serious, for people will quite rightly believe they have been treated unfairly. This is true even when the ultimate conviction and sentence are inevitable.

The problem that arose in Illustration 7 should have been foreseen by the attorney. What is not so obvious is that problems, seemingly insignificant before conviction, often take on great importance afterward. Such problems, like credit for preconviction jail time, easily can be avoided but often can be cured only at unnecessary expense to the criminal justice system, as Illustration 8 indicates.

Illustration 8. The inmate said that the records clerk at the correctional institution in which he was incarcerated was making an error in the computation of his mandatory release and parole eligibility dates. (His mandatory release date is the maximum time he may serve after his good time is deducted; his parole eligibility date is the date he becomes eligible for parole.)

According to the inmate, the judge said that in imposing sentence he was giving the defendant credit for the five weeks he spent in the county jail before sentencing. However, the inmate said, the institution was not giving him such credit. If it did, he concluded, his parole eligibility and mandatory release dates would be five weeks earlier. He asked that his sentence be corrected to reflect this credit.

In jurisdictions where credit for preconviction custody or “jail time” is not automatically credited and where the sentencing court has the discretion to credit such time toward the defendant’s sentence, there is little uniformity in the practice of judges. In Illustration 8, the judge had stated on the record that he was crediting the jail time by imposing a less than maximum sentence. This practice is no longer proper in Wisconsin, but it once was a source of confusion among inmates.28 The judgment of conviction and sentence said

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28. Credit for pre-conviction jail time served because of indigency in now mandatorily credited in Wisconsin. Johnson v. Fraat, 548 F.2d 699 (7th Cir. 1977); Klimas v. State, 75 Wis.2d 244, 249 N.W.2d 285 (1977). The issue was governed by Byrd v. State, 65 Wis.2d 415, 222 N.W.2d 696 (1974), at the time this case arose.
nothing about such credit, nor did the defense lawyer mention credit at sentencing. The district attorney had argued that the defendant should not receive credit. The institution records office had computed the man’s parole eligibility date and mandatory release date as though the man had received no such credit. This was consistent with the judgment form.

The inmate felt that the judge had not been honest with him, for he had promised credit and not delivered, at least not to the man’s satisfaction. The prosecutor acted unfairly, the man thought, because he had served time and, as he said, “time is time.” His defense lawyer, the man felt, should have argued strenuously for the credit. In fact, the lawyer did not regard the five weeks as important given the sentence imposed. The man’s sense of injustice was exacerbated by the fact that many inmates at the institution to which he was sentenced had received shorter sentences than he for similar crimes and yet received credit for their preconviction confinement.

In some of the Illustrations in this section, the lawyer failed to adequately represent his client from the client’s point of view. This does not necessarily mean that the conduct did not comply with accepted standards of competency within the profession. To state that clients are unhappy and that their complicated problems are not resolved is not to conclude that the lawyer has a responsibility to help solve them. However, client needs ought to be an important factor in defining the profession’s standards of competent representation. And, certainly, clients ought to be involved in deciding what is in their interests, not told what is best for them.

My own view is that lawyers for the poor and disadvantaged are members of a helping profession and that the client’s needs are of primary consideration in defining responsibility. When the criminal client’s needs bear directly on the ultimate goal of successful reintegration into the community or affect the quality of life while confined or the helpfulness of the correctional process, the lawyer should be responsive. A lawyer who fails to do so is analogous to a doctor who treats only one of several maladies from which a patient is suffering: one sickness may be cured, but the patient does not get better.

One may ask why the lawyer should have responsibility for what, perhaps, has traditionally been considered to be social work concerns. The lawyer is in a position to help identify and solve many of the problems collateral to the criminal charge which a client may have. As is apparent from the Illustrations in this Article that the lawyer is often in a position to deal with many of these problems, related as so many are to the fact or consequences of conviction and confinement.
Of course, working on all of a client’s problems may not always be the most efficient use of the lawyer’s time. He can delegate responsibility to paralegals; legal aid agencies might properly have social workers on their staffs to be of assistance; and the appropriate government agencies can be enlisted to help clients. As the illustrations suggest, the cost of inattentiveness is high.

C. Understand the Way the Systems Operate in Action

Three of the most prominent characteristics of the criminal justice and mental health systems are their complexity, their fragmentation, and the importance of the exercise of discretion in their administration. These characteristics make prediction of what will happen to clients at later stages in the system difficult but not always impossible. One who is familiar with the system can usually predict future options and the factors which will bear on the exercise of these options.

Lawyers who represent, prosecute, and judge people against whom criminal or commitment proceedings have been started, need to understand how the “systems” operate. 29 This is different from understanding fully the impact of consequences which I have already discussed. It is not only important to know the results of advice, it is also important to understand the process by which they are or are not achieved.

The two examples which follow examine in some detail how the system operated for two people. They illustrate that intimate knowledge of the system is necessary to fully advise clients of the possible consequences of particular decisions in order to effectively represent them.

Illustration 9. A woman at a Wisconsin correctional institution had received a one-year sentence for forgery. In response to a question as to whether there were any detainers filed or outstanding charges pending against her in any jurisdiction, she replied that she believed that a federal warrant had been issued for her arrest for

29. Jerome Frank was one of the first proponents of giving law students direct field experience in order to deepen their insight into the structure, operations, and goals of the legal system. His focus, however, was on courts rather than other segments of the criminal justice or mental health systems. See J. FRANK, COURTS ON TRIAL 233 (Atheneum ed. 1963). Others who have described the need for direct experience with a social or legal institution in order to fully understand its functioning include Gorman, Clinical Legal Education: A Prospectus, 44 S. CAL. L. Rev. 537 (1971); Feden, The Role of Practical Training in Legal Education: The American and Australian Experience, 24 J. LEGAL Educ. 503 (1972); Wright, The Need for Education in the Law of Criminal Correction, 2 VAL. U. L. Rev. 84 (1967).
forgery in Alaska. Although this warrant had not been filed as a detainer at the institution, it subsequently was filed. Her trial attorney had assured her that Alaska would never pursue such a charge if she were confined in Wisconsin, and he did nothing about it. The client was worried about the charge.

The failure to resolve the detainer at an early stage in the Wisconsin proceedings had two serious consequences. First, it limited the alternatives and leverage of the client to resolve it. Second, it affected the correctional treatment available to the client, the length of her stay in the institution, and her ability to be successfully reassimilated into society. Her trial attorney, who advised her to plead guilty in Wisconsin, might have worked out a plan to dispose of both the federal and the state charges at the same time. Perhaps the federal prosecutor would have demanded that she receive a sentence in excess of one year in Wisconsin in exchange for dismissal of the Alaska charge. This at least would have allowed her to serve all her time in one correctional system, which would have enhanced both her chance to participate in programs and the likelihood of parole. It also would have reduced the uncertainty, frustration, and sense of injustice the client felt.

Other options were lost by the failure to dispose of the problem before trial in Wisconsin. Wisconsin law provides that a person may be permitted to serve a Wisconsin sentence in another state's institution if the sentencing court so directs. Had the United States Attorney insisted that the client face charges in Alaska, the defendant could have attempted to dispose of the federal charge first and then asked the Wisconsin sentencing judge to permit her to serve her Wisconsin sentence in a federal institution. Or, under federal law, she might have been permitted to serve her federal sentence in Wisconsin. Of course, her leverage with the United States Attorney was reduced by her conviction and confinement in Wisconsin.

The uncertainty as to whether the client ultimately would serve a sentence in Alaska had an adverse psychological effect. She found


33. The effects of a detainer on the prisoner's psychological state and on the ability of institutional staff to plan for rehabilitation are described in Dickey & Remington, supra note 5, at
it difficult to adjust to the institution, and felt no incentive to participate in any institutional programs in Wisconsin.

Even if this inmate had desired to participate in programs, the detainer made her ineligible for many. Her short sentence made her a good candidate for a work-release program which would have enabled her to earn money, leave the institution daily, and enhance her chances for an early parole. But she was ineligible because of the detainer, according to the rules of the Division of Corrections. 34

Under these rules, the inmate was also ineligible for a minimum security classification which would have permitted her to have more comfortable living arrangements and more freedom within the institution. Furthermore, her social worker informed her that she probably would serve until mandatory release, because it was impossible to work out a satisfactory parole plan in Wisconsin due to the possibility that she might have to go to an institution in Alaska upon her release. Thus, the effect of the detainer was to frustrate not only the client but the correctional process as well and to reduce the chances for the successful reassimilation of the offender in the community upon parole release.

In Illustration 9, discretion was exercised by the United States Attorney. He permitted the client to plead guilty to the federal charge, and she received a one-year concurrent sentence. Discretion is perhaps the single most prominent characteristic of the criminal justice system. 35 It is exercised at virtually every stage—by the police officer who decides whether to arrest, the prosecutor who decides whether to charge, the judge who determines the appropriate sentence, and the parole board who decides when an inmate is to be released. It is important that lawyers understand the significance of discretion, how its exercise affects the system and the people in it, how it may be limited, and what the role of the lawyer may be in ensuring that discretion is properly exercised. The following Illustration indicates that it is important for lawyers to understand the significance of discretion.


34. See Rules for Work and Study Release, Promulgated 1977 by the Wisconsin Division of Corrections.

35. For a general discussion of the operations and problems of discretion in the criminal justice system, see AMERICAN FRIENDS SERVICE COMMITTEE, Discretion, in STRUGGLE FOR JUSTICE 124-44; M. COHEN, LAW AND SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY (1967); K. DAVIS, DISCRETIONARY JUSTICE (1971); K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); K. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1976); Wexler, Discretion: The Unacknowledged Side of Law, 25 U. TORONTO L.J. 120 (1975).
Illustration 10. An inmate said that he was not being treated fairly by the parole board. He had served 18 months of a 6 year sentence for robbery. The inmate stated that he had a good disciplinary record, that he had gotten his General Equivalency Degree while at the institution, and was working in the auto body shop "with no problems."

The parole board had just issued the man his second 12-month deferral, the maximum deferral given by the board. The inmate was notified of the decision by a form with a checkmark next to the statements that "Release at this time would depreciate the seriousness of the offense" and "Release is not appropriate because of prior poor adjustment while under supervision." The inmate thought that his "record" warranted immediate parole.

A major concern of defendants and confined people in jurisdictions with indeterminate sentencing systems is when they will be released. To fully advise clients who are considering a plea of guilty in anticipation of a particular sentence, it is important to understand the parole process. Unfortunately, this process is not understood well by inmates or lawyers. This often leads to unnecessary confusion and bitterness among inmates because their unrealistic expectations are not fulfilled.

The exercise of discretion at the parole hearing is of great importance to the inmate. This decision dictates the immediate future of the person considered for parole and determines whether he will remain in the institution indefinitely or be given a short deferment, indicating that he will be paroled in the near future. Many factors are considered in making the parole decision: the severity of the of-

36. The New York Special Commission on Attica, Attica (1972), concluded that a major factor contributing to prisoner discontent at the time of the 1971 riot was uncertainty regarding parole dates. A letter to the governor from 10 Fox Lake, Wisconsin Correctional Institution inmates shortly after a prison disturbance in June, 1977, indicated that one of the reasons for the riot was dissatisfaction about the small number of prisoners being paroled, and suspicion on the part of inmates that the Parole Board was denying release in order to keep the prisons filled to capacity and thereby "fatten the budget for the Division of Corrections." One of the most articulate descriptions of the anxiety brought about by parole appearances can be found in M. Braly, False Starts: A Memoir of San Quentin and Other Prisons 251 (1976). See also Coleman, The Crime of Treatment, 2 Psych. Opinion 5 (1974).

37. Parole decisions are often based on scanty information obtained at the time of commitment. During confinement, information regarding changes in the individual is also inadequate. See President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967). For information regarding the types of criteria parole boards should or do use, see K. Davis, Discretion and the U.S. Parole Board, in Discretionary Justice 126-33 (1969); Robison, Robison, Kingsnorth & Inman, By the Standard of His Rehabilitation (1970); Kingsnorth, Decision-Making in a Parole Board Bureaucracy, 6 J. of Research in Crime & Delinquency 210 (1969). See also Advisory Council on Parole, National Council on Crime and Delinquency, Guides for Parole Selection (1963); Boller, Preparing Prisoners for Their Return to the Community, 30 Fed. Prob. 43 (1966); Gottfredson, Comparing and Combining Subjective and Objective Parole Pre-
fense, the length of sentence, the person's disciplinary and work or school record in the institution, his past criminal record, the situation he will return to in the community if paroled, rumors about the man in the institution, the parole board's judgment of the person's dangerousness, the likelihood that he will commit another crime if released at the time, and the reaction in the community from which the person came if he is paroled.

Clear standards and guidelines for the parole decision are necessary. In trying to determine what an inmate had "to do" to be paroled, we found that there were no written standards for the critical decision on parole other than the conclusions on the deferral form. It was impossible to know what criteria the board considered relevant to its decision. Judicial review of the deferral decision is usually not feasible. The standard for review makes it unlikely that the board's decision will be overturned. Moreover, judicial review is time consuming and costly, and would not ensure fairness before the parole board. The board should issue clear, written parole standards to inmates, and inmates should have access to the information the board considered, an opportunity to present evidence, and a full written explanation of the decision.


38. See Chappell, The Lawyer's Role in the Administration of Probation and Parole, 48 A.B.A.J. 742 (1962); Jacobs, Parole: An Interest in Due Process, 6 CAP. U.L. REV. 205 (1976); Merrit, Due Process in Parole Granting: A Current Assessment, 10 J. MAR. J. OF PRAC. & PROC. 93 (1976); Note, Applicability of Due Process and State Freedom of Information Acts to Parole Release Hearings, 27 SYRACUSE L. REV. 1011 (1976). For a view of parole proceedings that concentrate on factors aside from fairness to the inmates, see Dell'apa, Adams, Jorgensen and Sigurdson, Advocacy, Brokerage, Community: The ABC's of Probation and Parole, 40 FED. PROB. 37 (1976) and Karsh, Release Hearings: To Protect the Public!, 40 FED. PROB. 55 (1976). Dictum in State v. Goulette, 65 Wis.2d 207, 222 N.W.2d 622 (1974) declined to comment on the adequacy of parole hearings and the standards applied because the court had been informed that the Wisconsin Department of Health and Social Services was "in the process of formulating, in written form, the procedures and standards to be used by the Parole Board . . . ." Those written standards turned out to be the conclusory guidelines printed on the "Parole Board Decision" which is checked and handed to each inmate as notice of the decision. Reasons for not granting parole include: (1) parole would depreciate the seriousness of the criminal behavior; (2) there is a reasonable probability that the inmate will not comply with the requirements of parole; (3) continued confinement is necessary to protect the public from further criminal activity; and (4) the inmate needs treatment that cannot be provided adequately or safely outside prison.

However, fairness depends on many factors, over many of which the board has no control. The board cannot make available programs which, if the inmate participated in an appropriate way, would improve his chances for parole. For example, it is an empty promise to say that a person will be paroled if he completes high school, when the person cannot be admitted to the correctional institution's high school due to overcrowding. The parole board has no control over such a problem. This is an example of the fragmented nature of decisionmaking in the system.

Knowledge of the parole process, then, is important to advise clients effectively. Without a feeling for the criteria for parole release and how an inmate can satisfy them, the client is unable to fully understand the consequences of a particular sentence. It also frustrates the correctional process if inmates feel that they are being treated unfairly.

D. The Ability to Exercise Good Judgment to Further Client Interests

An assumption implicit in this Article is that lawyers need knowledge of substantive and procedural law in order to be effective. But substantive knowledge may be to no avail unless it can be marshalled in an effective way. Conventional wisdom is that the missing element here is skill: the ability to interview and communicate, to write, to question witnesses or to convince people of the validity of one's position.40

What may not be so apparent is that lawyers also need that elusive quality, good judgment, in order to be effective. The ability to identify an integrated legal problem, analyze the alternatives and their implications, and make an intelligent judgment about its resolution is

40. Many writers who support clinical legal education do so largely because they see it as an effective way to teach the far-ranging skills a lawyer needs in practice, from client interviewing and counseling to litigation design, as well as the more traditional skills of legal research and writing. See, e.g., Bazelon, The Defective Assistance of Counsel, 42 U. CINN. L. REV. 1 (1973); Bellow & Johnson, Reflections on the University of Southern California Clinical Semester, 44 S. CAL. L. REV. 664 (1971); Brown, Teaching the Law Visible Decision Processes of the Lawyer, 25 J. LEGAL EDUC. 386 (1973); Cleary, Law Students in Criminal Law Practice, 16 DEPAUL L. REV. 1 (1966); Dauer, Expanding Clinical Teaching Methods into the Commercial Law Curriculum, 25 J. LEGAL EDUC. 76 (1973); Dutile, Criminal Law and Procedure—Bringing It Home, 26 J. LEGAL EDUC. 106 (1973); Grismer & Shaffer, Experience-Based Teaching Methods in Legal Counseling, 19 CLEV. ST. L. REV. 448 (1970); Kessler, Clerkship as a Means of Skills-Training, 11 J. LEGAL EDUC. 482 (1959); Meltsner, Clinical Education at Columbia: The Columbia Legal Assistance Resource, 24 J. LEGAL EDUC. 237 (1972); Shaffer, What Most Lawyers Do for a Living Law Students Are Seldom Taught, 1 LEARNING & L. 40 (1974); Symposium, The Merging of Professor and Practitioner, 1 LEARNING & L. 8 (1974).
of critical importance to the client. It also is important to be able to judge when law reform is inconsistent with a client's best interests.

Illustration 11. The inmate indicated that he had pleaded guilty to burglary and attempted theft and had received sentences of two years for each offense, to be served consecutively. The inmate stated that he had broken into a store that sold stereo equipment and was apprehended while picking the lock which led to the room where equipment was stored. He said that he entered the building with the intention of stealing equipment. The inmate also indicated that he had admitted committing several other burglaries and that these crimes were "read-in," pursuant to the plea agreement, when he pleaded guilty to the two crimes of which he was convicted.

The student who assisted the client alertly raised the question of whether the inmate's conviction on two offenses arising from the same set of facts was a violation of the Double Jeopardy Clause, i.e., whether attempted theft was a lesser included offense of burglary.\textsuperscript{41} Research on the question indicated that the issue was undecided under that particular statutory scheme. The case thus offered an opportunity for law reform.

The question of whether to attempt to withdraw the guilty plea and to raise the double jeopardy issue on appeal was a difficult one. The inmate was reluctant to appeal, even after the student explained that one of his sentences might be vacated if the appeal were successful. What, asked the inmate, about "read-ins?" If his conviction for attempted theft were vacated, would he be tried on the "read-in" charges? Most importantly, could his overall sentence be increased if he were so convicted?\textsuperscript{42} He had, after all, admitted to the other offenses in open court. Could those admissions be used against him at a later trial? For a variety of reasons, the client decided to withdraw his guilty plea to attempted theft. Before reaching this decision, the student and client had to resolve these questions.

In this case, the client had entered his plea of guilty pursuant to a plea agreement. The student and client were thus forced to confront the question of whether the client should renege on the plea agreement. The client was reluctant to do so. To be sure, the judge could have simply sentenced the client to four years of confinement for the

\textsuperscript{41} See Wis. Stat. §§ 939.32(2), 943.20(1)(a), and 943.10(1) for definitions of attempt, theft, and burglary respectively. See also State v. Hall, 53 Wis.2d 719, 193 N.W.2d 653 (1972) (intent to steal will not be inferred from breaking and entering alone).

single offense of burglary and dismissed the other charges. The client initially felt that his "deal" had been "four years for everything."

In this case, the student felt that an opportunity to litigate a case involving significant legal reform was a factor in favor of appeal. This raised the issue of the responsibility of the attorney in a situation where the client's interest did not coincide with the value of law reform.

What is the "right thing" to do in such a case? Should the client live up to the plea agreement which, in a sense, was freely and knowingly made? Did the multiple convictions violate the Double Jeopardy Clause thereby making the plea of guilty an involuntary one? Is law reform more important than what is best for this client? Is it in the best interest of this client that he live up to his agreements?

Who should decide these questions? In my experience, to say that the client should decide is an oversimplification, for the client invariably asks the lawyer what he should do. Lawyers confront integrated problems of this type every day. The lawyer must analyze the problem and the implications of alternative solutions, make a judgment, communicate with the client, and resolve it effectively.

Lawyers need skills to be effective, but they also need the ability to exercise sound judgment to help clients with complicated problems. The exercise of such judgment requires the integration of the qualities described in this Article, knowledge of substantive and procedural law, the ability to analyze problems in all their complexity, and the skill to bring about the desired result once that is known.

III. SOME SUGGESTIONS FOR DEVELOPING THE Qualities Needed to Serve Clients

If my conclusions are correct about the qualities needed to serve the clients of the legal profession effectively, a logical question is how lawyers' service to clients can be enhanced. Several different responses may be called for.

First, we need to know more about the nature and scope of the difficulties which clients confront.43 We ought not restrict the identification of problems to the needs that clients identify, for clients often do not know what difficulties are susceptible to legal assistance. If lawyers identify additional needs, follow-up is imperative to determine their effects on the clients, to analyze whether the clients were really aided or whether other solutions would have been more helpful, and to determine what effects the advice will have. The univer-

43. Some such work has already been done. See Dickey & Remington, supra note 4.
sity, the law school, and the legal profession have a responsibility to answer such questions so that society is better served by the profession.

The Wisconsin Law School Legal Assistance Program has two relevant studies under way at the present time. The first is a study of the presentence reports in which several questions are being addressed: (1) Do lawyers discuss presentence reports with clients? (2) Do reports often contain errors? (3) To what extent do errors affect sentences? (4) How do inmates feel, after a period of confinement, about the way their lawyers represented them at sentencing?

The second study inquires into the role of defense lawyers in the decision to commit people as incompetent to stand trial. The attempt is to determine to what extent clients and their lawyers agree on the appropriateness of commitment and to understand the clients' perception of the fairness of the process.

Further thought ought to be given to the structuring of lawyers' offices, particularly public defender and legal aid offices. If the problems of clients are as complex and interrelated as this Article suggests, creating separate offices to handle "criminal" problems and "civil" problems may be an inadequate type of organization. Such division of responsibility may inhibit the identification and effective resolution of clients' problems. Another possible need is for paraprofessionals to function in the public sector as they do in the private sector.

In addition, continuing education of the bar ought to be responsive to the real needs of the profession. A lawyer's education surely does not end when he finishes law school. The development of a lawyer's ability is an ongoing process. Continuing education should provide help in making refinements. The Department of Law of the University of Wisconsin—Extension has had several programs for lawyers which stress full service to clients. Members of its staff are in the process of developing written materials on the responsibility of the lawyer to the client at sentencing.

Finally, undergraduate legal education should develop the necessary insight, knowledge, understanding, and abilities of students that will improve the profession's service to clients. Legal education ought to be responsive to the profession's and clients' needs. Presently, little stress in law school is given to developing the student's ability to ascertain a client's needs and interest; more is given to the acquisi-

44. See Brown, The Education of Potential Clients, 25 S. Cal. L. Rev. 183 (1951); Marks, A Lawyer's Duty to Take all Comers and Many who Do Not Come, 30 U. Miami L. Rev. 915 (1976); Shaffer, Christina Theories of Professional Responsibility, 48 S. Cal. L. Rev. 721
tion of knowledge of the kind needed to serve the client and some is
given to the ability to use knowledge effectively to help clients. But
whether these abilities are developed is fortuitous, depending to a
great extent on the circumstances of the new lawyer’s work. Yet the
need for these abilities is as great as is the need for the lawyer to
acquire knowledge.

One way for the law school to do this is to offer courses that pro-
vide students with the opportunity to understand the consequences of
commitment and conviction; to think about the responsibility of the
lawyer to the client and the implications of advice; to understand the
way that systems—criminal justice, mental health, and bureaucracies
in general—work in action; and to develop other skills that lawyers
use, particularly the ability to confront integrated legal problems of
the type lawyers face. The development of good judgment can only
come when the lawyer has the exposure to clients, their problems,
and the system.

The Wisconsin Law School Legal Assistance to Correctional In-
mates and Mental Patients Program (WLAP) is an example of a pro-
gram designed to improve the lawyer’s ability to deliver high quality

(1975). For the various roles a lawyer can play aside from litigator, see H. Freeman & H. Weihofen, Clinical Legal Training 169-83 (1972); Q. Johnstone & D. Hopson, Lawyers and Their Work 106 (1967); Brown, The Law Office: A Preventive Law Laboratory, 104 U. Pa. L. Rev. 940 (1956); Schwartz, The Missing Rule of Professional Conduct, 52 L.A.B. Bull. 10 (1976); T. Parsons noted in Essays in Sociological Theory 362 (1954) that “the social role and function of the lawyer can be therapeutic, helping his client psychologically in giving him necessary emotional support at critical times.”

45. Southwestern University School of Law has an experimental program called “Southwestern’s Conceptual Approach to Legal Education” which attempts to equip lawyers to effectively represent clients by developing the qualities outlined here. Dean Boyack of Southwestern de-
scribed the problem to which the program responds in this way:

The bench and the bar are saying that the students never see the total client prob-
lem because the client problem is never part of one course. . . . In real life a client
does not appear with a label saying, “I am a tort problem.” It takes one to three
years after law school for a student to cut his teeth on clients. He learns the law
through rough experience.

Watkins, At a School in California Students Learn the Law Without the Casebook, 14 The Chronicle of Higher Education 21 (Aug. 1, 1977.)

Works dealing with the subject of education for professional competence in general, many of
which cite the advantages of clinical education for the purpose, include: J. Stone, Legal Edu-
cation and Professional Responsibility, Report and Analysis of the Boulder Con-
fERENCE ON THE EDUCATION OF LAWYERS FOR THEIR PUBLIC RESPONSIBILITIES 1956 (1959);
Brown & Brown, What Counsels the Counselor? The Code of Professional Responsibility’s Eth-
ical Considerations—A Preventive Law Analysis, 10 Val. U. L. Rev. 453 (1976); Greenbaum &
Parsole, Roles and Relations in Legal Practice, 28 J. Legal Educ. 228 (1976) (reporting on a
non-clinical method for teaching these subjects); Smith, Is Education for Professional Respon-
sibility Possible? 40 U. Colo. L. Rev. 509 (1988); Strebeigh, Watergate and the Law School, or
Can Legal Ethics Be Taught?, 1975 Yale Alumni Magazine 20 (January, 1975); Watson, Some
legal services to clients. The program seeks to teach students to identify and understand a client's problems and best interests; to teach the student substantive and procedural law, as well as how the law works in action; and to enable the student to apply his ability to serve the client. An Appendix to this Article fully describes this program and the educational philosophy which underlies it.

IV. Conclusion

Effective assistance to clients requires that lawyers have particular qualities and skills. Lawyers must be able to ascertain which client problems can be relieved by legal assistance. This requires a knowledge and interest in people, as well as an ability to help clients define their problems. Lawyers must also have knowledge of substantive and procedural law. Finally, the lawyer must be able to bring the knowledge to bear in the resolution of client problems.

More specifically, and with particular reference to serving clients such as correctional inmates and confined mental patients, lawyers need to understand the impact the criminal justice and mental health systems have on the accused, the convicted and the involuntarily committed. Without an understanding of the alternatives available to clients and their consequences, it is impossible to render adequate assistance. Lawyers also need to define their responsibility to their clients. This responsibility in the past has not extended to the needs and concerns of the whole client. As a consequence, lawyers have terminated their representation of people who continue to require assistance to resolve their legal problems. Effective legal assistance cannot be rendered without an understanding of how the system operates, for decisions which may at one point seem helpful may later turn out to be not in a client's best interest. Finally, lawyers need skill and good judgment to help clients, and this requires experience with people and their complex problems.

These conclusions suggest several possible courses of action. The profession and its clients would be greatly aided by further research into clients' needs and how lawyers could better serve them. The

46. For educational programs which see this type of direct institutional experience as a primary purpose see Casad, The Kansas Trial Judge Clerkship Program, 18 J. LEGAL EDUC. 75 (1965); Everett, The Duke Law School Legal Internship Project, 18 J. LEGAL EDUC. 185 (1965); Kimball, Correctional Internships—A Wisconsin Experience in Education for Professional Responsibility, 18 J. LEGAL EDUC. 86 (1965); Oliphant, Law Students in the Lower Courts, Hennepin County, Minnesota, 7 CLEPR Newsletter 1 (March, 1973); Wilson, Legal Assistance Project at Leavenworth, 24 NALDE BRIEFCASE 254 (1966).

A number of clinical programs operating in prisons and jails are described in 3 CLEPR Newsletter (November, 1970) & 4 CLEPR Newsletter (May, 1972).
organization of lawyers' offices might be altered to insure that the whole client is served. And, of course, continuing legal education and undergraduate education should include opportunities to develop the knowledge and abilities I have identified as useful to clients.

I have also identified one program—the Wisconsin Law School Legal Assistance to Correctional Inmates and Mental Health Patients Program—that is responsive to the client and professional needs which I have identified. Such programs have special strengths and require particular structure and resources to be effective.

**APPENDIX**

**Legal Education Designed to Develop the Ability to Serve Clients Effectively:**

The Wisconsin Law School Legal Assistance Program (WLAP)

WLAP has two primary and complementary purposes: first, the education of law students and second providing legal services to correctional inmates and confined mental health patients. The primary educational goals of the program are to develop the qualities discussed in detail at pages 411 to 437. Additional educational objectives include the development of knowledge of substantive and procedural law and of analytical and writing abilities.

Staffed each semester by thirty-five to fifty students, six attorneys, and two law professor-at-torneys, WLAP provides legal services to correctional inmates and mental health patients in all state adult correctional and mental health institutions and the Federal Correctional Institution at Oxford, Wisconsin. Under the supervision of attorneys, the students interview every inmate and patient upon his admission to the institution at a "diagnostic interview." Inmates and patients who are already confined are interviewed at their request and whenever necessary during the course of representation. At these interviews, great stress is given to the identification of all the potential client's problems which a person trained in law could help resolve. All of the cases used in the illustrations in this Article were encountered by lawyers and students working in WLAP.

Students are required to write a memorandum which sets out the facts of each of their cases, identifies client problems and potential legal issues and presents proposed solutions. After this memorandum is reviewed by a supervising attorney and the course of action agreed upon, the student works toward the resolution of client problems. This often involves further factual investigation, writing simple letters, legal research and writing, consultation with other attorneys, negotiation with other parties, and so on. Students typically work on 25 and 30 cases each per semester.

The legal needs of confined people fall into three broad categories. The first category relates to the fact and duration of confinement. Confined people need assistance to appeal their convictions, to bring federal habeas corpus or to otherwise collaterally attack the conviction or commitment; to modify their sentences and the conditions of their commitment; to help them decide whether to appeal; and to answer their questions about sentence computation, parole policies and other procedural matters. Second, confined people and their families need the assistance of legally trained people to deal with social and economic problems such as debts and support obligations, tax problems, social security and health benefits, and licensing problems. Attention needs to be directed to social and economic problems which bear on the ultimate reassimilation of the person into the community, including resolution of detainers. A last category of legal needs relates to the conditions of confinement. An inmate or patient may require help, for example, in seeking judicial review of confinement conditions in federal court via 42 U.S.C. § 1983 or the use of the administrative grievance procedure. WLAP assists confined people with all of these problems, either by direct representation or by referral to the approp-
Clinical Legal Education: A Prospectus, Clinical Program, Training, analysis which views "clinical" courses as helter-skelter, relatively untutored experience
orientation classes at the beginning of each semester and a seminar with four to eight other visits an institution for eight full days per semester to interview clients and attends 12 hours of with each student individually for two hours each week and must review and approve all actions created to represent confined people in so-called "1983" actions.

A. Teaching Law Students what Lawyers Should Know:
The Importance of Experience

How can we teach law students what good lawyers should know so that professionally responsible, high quality services are provided to the client? This question has no simple answer. Too often discussion of "clinical" education focuses on teaching methods. The critical point that is overlooked by such focus is that teaching methods should be adjusted to suit the particular

47. Another problem with much of the debate on the subject is the type of "either-or" analysis which views "clinical" courses as helter-skelter, relatively untutored experience untrammelled by any substantive learning. Allen expresses fear in The Prospects of University Law Training, 63 A.B.A.J. 346 (1977) that "American legal education is confronted by the rise of a new anti-intellectualism," id., although he submits that "increased emphasis on practical skills becomes a threat to university training only when it ignores the broad range of values and social interests that legal education is called on to cultivate." Id. at 349. Redlich, Perceptions of a Clinical Program, 44 S. Cal. L. Rev. 574 (1971), reports on a clinical program plagued by disorganization, lack of adequate supervision, and also harmed by the failure to provide students with theoretical underpinnings for their work. For other important criticisms of the concepts underlying clinical legal education see Grossman, Clinical Legal Education: Why Has it Failed, in Kitch, Clinical Education and the Law School of the Future 54 (1970); Gorman, Clinical Legal Education: A Prospectus, 44 S. Cal. L. Rev. 537 (1971) (expressing fear that unless clinical programs opening all avenues of experience for students are developed it is doubtful that such programs will become a significant feature of legal education). On the other hand, supporters of clinical legal education point out that carefully designed and executed experiential law programs do not have the flaws that critics dwell on. See, e.g., B. Boyer & R. Cranton, ABF Research Contributions—Research on Legal Education (1974); Council on Legal Education for Professional Responsibility, Clinical Education for the Law Student 35 (1973); Bellow & Johnson, Reflections on the University of Southern California Clinical Semester, 44 S. Cal. L. Rev. 664 (1971); Binder, Education Versus Service, in CLEPR Conference Proceedings, Buck Hill Falls, 1973; Grossman, supra; LaFrance, Clinical Education: "To Turn Ideals into Effective Vision," 44 S. Cal. L. Rev. 624 (1971); Moulton, Clinical Education: As Much Theory as Practice, Harv. L. Sch. Bull. 16 (October, 1972).

Other commentators point out that clinical education is not meant to replace other modes of legal education, but rather to enrich them. See, e.g., Pincus, Legal Education In A Service Setting, in Council on Legal Education for Professional Responsibility, Clinical Education for the Law Student 27 (1973); Seymour, The Advocate's View, 50 St. John's L. Rev. 434 (1976); Symposium, The Merging of Professor and Practitioner, 1 Learning & L. 8, 71 (1974). In answer to those critics who feel that the benefits adduced for clinical legal education can more properly be gained once the student becomes a practitioner, some legal educators assert that professional standards of competency are best established "before the forces of the everyday world have a chance to depress standards of performance." Educational Values of Clinical Experience for Law Students, 2 CLEPR Newsletter 29 (September, 1969). See also Brickman, CLEPR and Clinical Education: A Review and Analysis, in Council on Legal Education for Professional Responsibility, Clinical Education for the Law Student (1973); Conrad, Letter from the Law Clinic, 6 CLEPR Newsletter 1 (November, 1963).
goals sought to be achieved. There is a spectrum of teaching methods that are appropriate in law school, including the Socratic method, lecture, seminar, casebook method, hornbook method, and the course which includes a field component.

In the criminal justice field, field components may include observation of the parole board, police ride-alongs, attendance at a civil commitment hearing or the rendering of legal assistance to institutionalized persons, depending upon the goals of the course. The existence, nature and structure of the field component should depend upon the subject matter of the course and its specific educational goals. It would be silly, for example, to suggest that a student studying conflicts of law should go and observe the boundaries between states. The importance of observing the police in action, understanding the function of the police and the kinds of problems they encounter is obvious.

An assumption underlying WLAP is that experience can be a significant ingredient in the achievement of some important law school educational goals. Students can understand the nature of the problems of confined people by talking with them and by attempting to resolve their problems rather than by simply reading about them. Observing, experiencing, and discussing real problems are very effective learning experiences. "Mere learning," the ability to repeat what one has read or heard, does not prepare students to handle real problems. A person who "really learns," on the other hand, can apply his knowledge and has a base on which to extend his insight. He has, in a sense, learned how to learn or to teach himself. One way of acquiring knowledge which can be applied and built upon is through a properly structured experience of providing legal services to confined people.

Many students who start in the program fail to identify issues, not because they do not know they are there, but because their ignorance of how to resolve them creates an unwillingness to try. They fear the unknown; they fear failure. This stunts their curiosity and growth. Given the confidence that success and experience in dealing with people often brings, many become increasingly willing to try to teach themselves and to develop their ability to solve problems independently.

Another value of courses which expose students to clients and their problems—to the law in action—is that they are a helpful way to increase sensitivity to the needs of clients and a person's role in meeting these needs. And, two not inconsistent goals of legal education are to make the student sensitive as well as cerebral.

The effectiveness and importance of WLAP in achieving its goals are difficult to measure. My conclusion that WLAP is an effective way to develop important lawyers' qualities is based on observation and feedback from students and former students now in practice. If what WLAP seeks to teach is "learned better," it is not possible to "prove" that the substantive knowledge and sense of professional responsibility is retained by the lawyer in practice. Prolonged exposure to the problems of poor people can wear a person's sensitivity away and develop a tendency to ignore a person's less immediate problems. In addition, there are strong pressures to act in ways different from the way WLAP tries to train lawyers. For example, an appointed attorney's fee in a criminal case may be paid by the county and need to be approved by the judge who appointed him. If the judge does not believe that the lawyer should concern himself with problems collateral to the criminal charge like detainers or family problems, related as they


49. See Redmount, A Conceptual View of the Legal Education Process, 24 J. Legal Educ. 129 (1972) who notes that "[e]motional arousal . . . is a determinative influence in further learning. Learning involvement may be intensified if law regarding commercial transactions is put in the context of immediate issues involving real people." Id. at 136. See also Dutile, supra, note 41; Grismer and Shaffer, Experience-Based Teaching Methods in Legal Counseling, 19 CLEV. ST. L. REV. 448 (1970); Kimball, supra, note 47.

may be to the reassimilation of the defendant into the community, the lawyer may not be paid for such service. While a course in law school cannot eliminate this problem, it can at least identify it and prepare the student for the likelihood of dealing with such a conflict. Once this problem is identified as significant, it is more likely to be addressed by state and local governments and the legal profession.

One objection to WLAP is its expense. Some might argue that it is an expensive method for educating law students and that it can be supported only if the benefits gained justify the cost incurred. Perhaps, it is suggested, we should be satisfied with cheaper methods and use scarce resources in other ways.

In the case of WLAP, there are good reasons for incurring the expense aside from its educational benefits. We put great demands on the criminal justice system in Wisconsin and in most other states. We ask our police, lawyers, courts and corrections system to do much, without the resources it takes to do the job properly. Because the criminal justice system is so fragmented, there is little opportunity for systematic training of newly appointed lawyers. These offices do not have the luxury of a large law firm which might train its young lawyers in a careful, systematic way. Many district attorneys and defenders are placed into positions of great responsibility directly out of law school. This places a great responsibility on the law school to adequately train these lawyers, for law school may be the only opportunity for them to carefully consider their role and responsibility with adequate guidance. Since it is so important to guide and encourage the development of this sense of responsibility, the law school and university can easily justify incurring moderate expense to achieve these important goals.

But as became apparent to John Dewey, mere experience does not insure a high quality education. Indeed, unguided, raw experience can have devastating results. The student may be overwhelmed by the new experience, with serious professional and psychological consequences. Or, if the experience is without guidance, the student learns the wrong things or learns only part of what should be learned. Exposure of a law student to an experience where teachers are irresponsible may develop irresponsibility.

What qualities must a program with a substantial field component have to enhance its educational goals? This issue will be discussed in the specific context of the WLAP.

**B. Characteristics of a Legal Assistance Program Necessary to Achieve Educational Goals**

The teacher plays a critical role in achieving the educational goals just described. Exposure to confined people and their problems, and the rendering of assistance in their resolution is a crucial component of the educational experience. But if the experience is to be meaningful, sensitive supervision is necessary. Among other things, this means:

1. **Recognition of individual educational needs.** There is a great variety of abilities and educational needs among law students. For instance, the writing ability of students varies greatly. Some students enter their second year of law school unable to write a simple, tactful letter to a creditor inquiring about the status of an inmate's debt. Other students are capable of writing effective, sophisticated briefs. To assign the student with the writing problem a difficult brief is devastating, and to assign only simple writing assignments to the sophisticated writer provides no challenge. The poor writer needs a graduated program that helps him develop, while the good writer needs a challenge at a different level. The problems of confined persons are as

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51. See, e.g., the quite different points of view expressed in J. Dewey, Democracy and Education (1916), and J. Dewey, Experience and Education (1938).
52. Redmount, supra note 50, at 165-66, reflects that:

- Learning is achieved through first the motivation and then the capacity of the student. Motivation is the vehicle that provides drive, inquisitiveness and persistence.
- Capacity provides . . . the means, rate and quality of understanding . . . .

In effect, a sequence develops in which the student moves from experience to generalization and, most probably, from fact to law. Generally, one goes from the simple to the complex, from the concrete to the abstract, and from the observation
varied as the educational needs of law students. It is not hard to find inmates with debts who need letters written on their behalf, or confined people who require appellate briefs. Responsibilities can be assigned to fit the present abilities of the students.

Students differ in their emotional development as well as their academic development. The maturity and self-confidence of students vary greatly. Some are able to take ten cases and systematically work their way through them, assigning priorities intelligently and recognizing that not all ten cases can be resolved at once. Other students are paralyzed by ten cases, and as a result are unable to do anything. This can be devastating, for what little confidence that student had probably disappeared in the face of the apparent failure to deal effectively with the cases. The recognition of the individual needs of students and the structuring of their experience to take those needs into account are important ingredients in a good educational experience.

2. Preparation: the need to bring substantive knowledge to the experience. The dilemma of all programs in which a student learns, in part, by doing is that one cannot "do" unless one has some notion about what the problem is and what the options are. It is of little educational value to send a student in "cold" to help someone. More often than not, the results are devastating for the client and the student. A substantial basis of knowledge is necessary before the process of learning by doing can begin. The student must have some notion of how to interview a client, what problems and questions he might anticipate, and what questions he should ask to elicit the information required if assistance is to be rendered.

The results of the experience are, hopefully, that the young lawyer understands his responsibilities and develops the skill to elicit problems and resolve them. Both the preparation for the experience and experience itself involve learning how to teach oneself. But not all the problems one might encounter as a lawyer will be dealt with in law school or in the field experience. It is important, then, that the young lawyer be prepared to constructively teach himself when he leaves law school.

An important ingredient in the development of the ability to teach oneself is self-confidence. For many, the experience in WLAP or a similarly designed course is their first relatively unstructured experience in which great demands are placed upon them; in which the stakes are as real as the human needs. While it is counter-productive to be uncritical, it is usually helpful to reinforce students positively. As they develop confidence in their ability to face new situations, they are more willing and able to teach themselves.

3. The importance of the available teacher. An exciting characteristic of the Wisconsin Legal Assistance Program is the enthusiasm of the students for learning. The resolution of problems and the education of students thus takes on great immediacy. Students need and want assistance and guidance when they encounter problems. Their desire to learn cannot wait until the scheduled meeting time. The teacher must then endeavor both to be available to help the student when the student is ready to learn and to make available to the student the materials (the most obvious being an adequate library and work space) that the student can use to teach himself. This is in contrast to the traditional course, when the students come to class at the assigned hours. Since some students are ready to learn at odd hours, the teacher has to be ready to teach then, or at least make available to the students adequate materials and learning situations to enhance the ability of students to learn when they are ready and motivated. This is demanding of teachers, but their availability is an important quality of an effective legal assistance program.

4. The need to demonstrate the right way and the freedom to make mistakes. People learn from their mistakes. It is often difficult for a teacher to see a mistake coming, in an interview to analysis and synthesis. Sequence implies direction and it avoids stagnation and ineffectual repetition. The sequence is geared to the need and disposition to learn and must consider the rate at which different learning takes place.

J. Bruner also notes in Toward a Theory of Instruction 35 (1966) that "[a] curriculum should involve the mastery of skills that in turn lead to the mastery of still more powerful ones, the establishment of self-rewarding sequences . . . ."

conducted by a student, for example, and not correct it before it occurs. While this may sometimes be appropriate, it is often more valuable to the student to permit the mistake to occur and discuss and correct it afterward.

Students must be given the freedom to make mistakes while the teacher insures that the mistakes do not prejudice the client and do not go uncorrected. Often, an effective way of correcting a mistake, particularly an interviewing or writing mistake, is to simply demonstrate an effective way of interviewing or writing. The correcting interviewer thus edits the interview, just as the editor corrects the letter or brief.

A great danger is to demonstrate the wrong way to do things and point out the mistakes in a discussion afterward. The inexperienced student can suffer a real setback by being shown the wrong way to do something, for this is what he remembers. The lesson is that when one is demonstrating, one should do it right.

5. The importance of student contact with each other. Students can learn a great deal from each other. Even so simple a thing as a common place where each student has his own work space and where students can talk to each other about mutual legal problems can be an extremely important educational tool. Fortunately WLAP has its own building with an office for each attorney, a desk for each student and a library. This creates a situation in which students can learn from one another, consult with attorneys as is necessary and have the necessary materials available.

6. The importance of a formal meeting of students and teacher. It is also important that students and teacher meet in a formal setting to insure that the students have the opportunity to share mutual problems and insight to insure that problems are kept in the proper perspective. There is a tendency in a program of the kind I have described for students to so focus their attention on individual problems that they fail to fully understand the significance of the problem in a more general context. For example, a student who has learned about the exercise of discretion in a parole hearing, as in Illustration 10, may fail to grasp the point that discretion characterizes many parts of the system. A class discussion may be needed to emphasize this point. Once the student makes the connection between what the parole board does and what the police officer does when he decides to arrest or not arrest, he may have real insight into the exercise of discretion. Structured discussions, based on the experience of students, is necessary to reach a desirable level of understanding and generalization. It is a useful vehicle for helping students assess the true significance of their experience.

54. See Shaffer, Collaboration in Studying Law, 25 J. LEGAL EDUC. 239 (1973) wherein Thomas Shaffer describes an experiment at Notre Dame in which "cooperative student strategies" were suggested to incoming law students. The program offered "good evidence that students who work together in studying and understanding . . . difficult material do better when they assist and accept assistance from each other." Id.