Husky, rasping voice; expectant look as he calls upon a student who has raised his hand, growling out in friendly fashion a lengthened midwestern affirmative “Yassss”; words like “penetrating” (with the extra “n” clearly enunciated) and “essence” spoken with special relish to encourage thoughtful students to distinguish “the reality of things” from fluff: How missed he is! What an empty place in the hearts of students, colleagues, friends, and acquaintances his death has made.

David Louisell came from Duluth, and law school at Minnesota. For him, even more than for most, roots meant something. Recalling the coal-stoked furnace of his family home in a cold place swept by gales off the lake, he scoffed at my own complaints about the dry winds of the Rockies and plains; nobody, he seemed to say, can reject his roots. When he found his wife-to-be Dorothy, the two were in Washington, but she too was from Duluth, a childhood friend, and like him, she had the speech and fortitude of a hearty Minnesotan.

He went to a fine Wall Street firm, but did not stay. He told me with a chuckle of the baffled disapproval registered by a respected senior partner, who told him that he was throwing his future away. He was not. In time, he founded his own firm in Washington, D.C. He got his first taste of teaching at Catholic University in Washington, and during his time there he served at sea in the wartime Navy. A call to teach from Maynard Pirsig, a professor of his at Minnesota and then Dean of the law school, brought him back home. And when William Prosser, yet another Minnesotan, asked him to come to Berkeley to teach in 1956, he came and stayed.

David was a true believer, living in a skeptical age. Unabashedly he defended the privilege for marital communications by invoking the idea that protection of such privacy is utterly essential to what he called “the perfect fulfillment of marriage.”1 (Nobody who even glimpsed David’s life with Dorothy could doubt either his conviction or the meaning and value of the thought.) He believed in work and considered it indispensable to the attainment of truth and justice; indispensable too, at least insofar as free will determines destiny, to personal happiness and sanity. (To my own law school class, he advised, “If you

---

† Associate Professor of Law, University of Wyoming. B.A. 1966, Haverford College; J.D. 1969, Boalt Hall School of Law, University of California, Berkeley.

think the practice of law will lead to an easy living, you should right now today consider seriously some other calling.

David was a committed Christian in a secular world. His faith guided his path. He spoke against decisions by the Supreme Court which he thought impeded religious expression and practice. His faith shaped his vision of the human condition, and in order to protect it against undue technological incursions he served for years on the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. His faith lay behind his convictions on the abortion issue and brought him into conflict not only with the Court, but with activists in the women’s movement.

He resisted the idea that worldly forces wholly define the quality of existence. To David, social decay was not merely a consequence of economic, political, or social conditions, but was also disturbingly symptomatic of eroding moral consciousness. He resisted too-behaviorist visions of the conditioned human animal. Once we were discussing the distinction between habit evidence, which the law generally allows, and character evidence, which the law often disallows, and I pointed out that a commentator had quipped that habit points toward Pavlov, and character toward Freud. “What utter nonsense,” David replied immediately. “If anything, habit points toward Pavlov or Freud; character points toward Saint Thomas.”

He was a scholar, as the bibliography in this issue of the Review attests. With the best of legal scholars, David took inspiration and example from classic creative, humanistic, and religious works. His splendid evidence casebook\(^2\) opens the discussion of relevancy with the Biblical story of King Solomon’s threat to cut the disputed baby in half; it provokes thinking on the problem of character evidence with a passage from \textit{L’Etranger} of Camus; it illustrates the problem of examination and cross-examination with an excerpt from another Biblical story—Susanna and the Elders. In class, Shakespeare and the Bible were his favorite nonlegal sources, and he regularly drove home his points by quoting useful passages.

He was a caring person. Disagreement he expressed gently; he heard out others patiently. His effect on those around him was enormous. Students responded at semester’s end with notes of appreciation; those whose arguments were outflanked by David’s counterarguments considered themselves not bested, but ahead in the game; those not persuaded to David’s view came away nonetheless understanding the meaning of grace in the process of dispute.

For those who knew him, the fineness of his personal example is the best of all he left behind.

Of all the characteristics that made one love Dave Louisell, I think that his powerful faith, in humanity and in God, will endure longest in the memory of those who knew him.

From his first entry into the life of Boalt Hall, and into my life, he was different in a refreshing and inspiring way. As novice law students back in late 1955, we did not know what to expect when informed that yet another legal tutor would be foresaking the Minnesota cold for our more pleasant climes. There had been the bluff and dominating Prosser, then the dynamo Riesenfeld. Would yet another such titan be visited upon us?

Louisell was not of that mold. Rather, an entirely singular personality appeared, cherubic in visage, deliberate of speech, with polished drawl—no whirlwind he. Yet it was but the briefest time before even we acolytes perceived that here was a man of substance possessed of a probing and orderly mind, with a keen appreciation of the art of advocacy and a joyous enthusiasm for the study of law. Though he questioned much, he was devoid of cynicism. He strove to find merit in the ideas of others. His was an approach of wonderment, and his most endearing trait was his utter fascination with legal issues and their resolution.

Dave Louisell made a most direct and needed impact on Boalt. Before him, the study of civil procedure was grounded in the Field Code, which now merits only the merest mention in legal history courses, but was then the new learning. Louisell brought to Boalt expertise in the federal rules, and he imparted his knowledge to all. Thereafter, none could say that our school was not in the first rank in civil procedure teaching and scholarship.

Establishing a warm friendship with Dave is among my most treasured recollections of life at Boalt in 1956-58. That friendship was to ripen and strengthen in the years that followed. How well I remember a visit to Yale in the early sixties as a guest lecturer for Dave's civil procedure course during his visiting year there. He was as ebullient as ever; always finding something of value in the thoughts of his students; ever fascinated by the unfolding problems revealed by the law.

† A.B. 1955, J.D. 1958, University of California, Berkeley; Member of the District of Columbia Bar.
Dave changed little as time passed. A few years ago he became involved with the developing field of bioethics—the attempt to engraff on the medical and scientific fields needed ethical principles to guide policy decisions. His interest grew out of his pioneering work in the trial of medical cases. In this inquiry, as always, he was the inquirer, never the pedant. He worked to broaden understanding, not spread dogma. His was an invaluable contribution to an important new initiative.

Only one threat beclouded Dave’s youth-like optimism and enthusiasm, but it pressed hard upon him. He suffered his beloved Dorothy’s affliction as if it were his own; yet even then he never wavered in his faith in a larger Providence whose infinite wisdom ordered all of our destinies. That his own end preceded hers, though only briefly, spared his noble spirit the ultimate pain that comes with the loss of one’s lifetime companion. Had he known that he would not remain to comfort her to the end, he would have accepted it, with anguish, but also with the wonderment that lay at the core of his faith.

Dave Louisell enhanced Boalt and the lives of those he touched. As scholar and mentor, he contributed in no small measure to the stature that the school now so proudly bears. As friend and colleague, his tolerance and optimism, his essential grace, and his devoted loyalty taught us how beauty and meaning can ennoble personal relationships. No man of faith would wish for a greater legacy.
David Louisell’s death was a great personal loss. I felt an immediate rapport with him when I joined the Boalt Hall faculty in 1963. I was then the only nonlawyer on the faculty and Dave went to great length to make me feel at ease and welcome. Because I was a new teacher at Boalt, my classroom teaching was subject to faculty observation. Although in my naïveté I thought that Dave Louisell came to my class because of his interest in the subject matter, I think he subtly encouraged me to believe that was so. Anyway, it was a memorable occasion. Judge David Bazelon, author of the famous Durham insanity rule, was visiting Berkeley, and he unexpectedly appeared at the same class session. By coincidence, the assigned subject for the class was the Durham rule. On a number of previous occasions, both in publications and lectures, I had expressed doubts about the value of the Durham insanity rule, which was then generally hailed by my psychiatric colleagues as the solution to all that ailed the relations of psychiatry and the criminal law. In the classroom, my best psychoanalytic composure hardly concealed my nervousness and fluster. But in some magical way, David Louisell made everything come out all right. A word here, a kindly and approving glance there, and somehow I knew I was on safe ground. He gave me the courage to say what I had to say. The learned judge said what he had to say, which was quite the opposite, and the students thought it was great.

Despite our strikingly different backgrounds and attitudes towards religion and politics, Dave and I found ourselves in instant rapport on all matters of mental health law and forensic psychiatry. I wasted no time in seeking his collaboration. Several years earlier I had reviewed for the California Law Review the Louisell and Williams Trial of Medical Malpractice Cases,¹ so I had some familiarity with David Louisell’s scholarly interest in medical matters. I had been accumulating a number of ideas concerning the function and reform of expert psychiatric testimony, but development of those ideas into publishable form was blocked by my lack of knowledge of evidence law and by my limited perspective of the functions of the expert witness.

¹ Professor of Law and Criminology, Boalt Hall School of Law, University of California, Berkeley. A.B. 1935, M.D. 1939, University of California, Berkeley; Graduate, 1952, San Francisco Psychoanalytic Institute.

¹. D. Louisell & H. Williams, Trial of Medical Malpractice Cases (1960).
Dave came to my rescue and we collaborated on two law review articles whose preparation provided many, many hours of the most delightful intellectual interchange. His influence on my thinking was profound and, in a sense, he has been a behind-the-scene collaborator in every subsequent paper and lecture I have produced.

Later, we shared an additional interest: the protection of human research subjects. I had served as chairman of the Berkeley campus' Committee for the Protection of Human Subjects. This committee was required to scrutinize rigorously all research of all departments on the campus where humans were used as subjects. The committee was constantly being confronted with the most difficult ethical and moral questions requiring sensitive negotiations for their resolution. Dave Louisell was the legal adviser for our committee. His deep perception of these very complex ethical and moral issues was recognized when he was appointed by the President to the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. As one of the eleven commissioners, Louisell played a very significant role in the development of national policies on biomedical research.

David Louisell was a scholar of the highest order, a dear friend and colleague, a perceptive, gentle, and sensitive teacher. His impact upon the many generations of Boalt Hall students and upon those of us so fortunate in sharing a faculty relationship with him was very great, and he will always be remembered with affection, admiration, and gratitude.
At first I knew Dave Louisell from only one perspective, that of casebook coeditor. John Kaplan, once of Northwestern, now at Stanford, but then visiting at Boalt Hall, brought Dave and me together in the mid-60's. It was just after Kaplan and I had published *The Trial of Jack Ruby*, and we wanted to do something else together: an evidence casebook. The new project was a heavy one, largely because we were going to conduct a thorough exploration of atypical noncase sources. We thought there should be three of us, and John said this fellow Louisell was a hard and dependable worker and a walking file of evidence cases and secondary materials, especially in the area of privileges.

After a lot of correspondence and preliminary digging, we arranged to get together at Louisell's Boalt Hall office for a face-to-face planning session. (It was winter, and I was a good bit more interested in going to California than Louisell and Kaplan were in coming to Chicago.) Up to this point I had never met Louisell; we had exchanged letters, bales of Xeroxes, outlines, drafts, and we had talked on the telephone.

Dave's office proved to be a set designer's model of what is generally conceived to be your standard professorial lair: a mad jumble of stacked books, examination papers (ungraded, I felt sure), law reviews, advance sheets, index cards, and, in the midst of it all, I swear, an unexplained, but an obviously-the-worse-for-wear baseball cap.

Louisell was a big, bulky bear of a man then, rumpled and a little distracted looking, garrulous and disconcertingly oratorical in speech, full of old jokes told very seriously, and brimming with accumulated knowledge about effective, even exciting, teaching materials. We immediately hit it off wonderfully well.

After that first meeting, I got to know Dave Louisell from a mix of perspectives. We worked smoothly together through three editions of the evidence book\(^1\) and three editions of a second effort, a collection of criminal evidence materials,\(^2\) and I had chances—not enough,

---

though—to talk with and learn from Louisell about other areas of mutual interest, particularly medical-legal problems, the causes of the legal profession's recurrent unpopularity, travel, and beach life.

So I can remember my admired collaborator in a variety of settings: devoted family man who loved and depended on a remarkable wife; dedicated teacher whose students were all members of his extended family; meticulous researcher and writer who stunned publishers and coauthors alike by always meeting deadlines; perfectionist; sometime-practitioner; practical joker; devourer of gourmet food who also knew a good hot dog when he bit into one at a baseball game (it was his cap).

Dave Louisell never disappointed me. It was pleasurable and rewarding to know him and to work with him. What more can one say of a man?

---


4. Louisell and I had a long talk several weeks before I gave a Cleveland-Marshall Fund lecture entitled "The Unpopularity of Lawyers in America," reprinted in 25 CLEV. ST. L. REV. 143 (1976), and as usual Dave's comments were contributive.

5. I retain a postcard which Louisell had made from a snapshot taken of him astride a protesting camel somewhere near Cairo, Egypt. Although Dave was not a cruel man, it is difficult to make out the camel in the photograph.

6. Louisell and I both owned beach houses, his at Carmel, mine at Holland, Mich., which were important to us not only as relaxing places, but as quiet working places. Much of Dave's important work on our two casebooks was accomplished at his Carmel house.
David Louisell was the glory of our law school. He was an American by ancestry, upbringing, spheres of activity, and mode of thinking and behaving. And he represented the best, the noblest, that this civilization can contribute to human endeavor. When I told his wife Dorothy\(^1\) that in the days following his death there was such universal mourning at Boalt Hall, she remarked that he would never have expected this. She is right. He had a rare, genuine humility.

That is also why, with all his firmly held convictions, he was the least judgmental of men. In the most serious argument, an opponent would never feel hurt; on the contrary, he would sense a deep personal respect and concern. Paradoxically, this prevalence of caring over self-assertion greatly enhanced his influence: people were ready to listen to and ponder his views.

He stood up for law and order—because, as he once said to me, there was no greater danger to society than lynching. Indeed, the worth of the individual was the dominant theme both of his writing and his interventions in judicial and political problems. Nor was there any split between his private and public life. I happen to know—not from him—that in the late sixties a former student of our school, carried away by radical idealism, got into very hot water and was at a loss how to find his way back. A friend of his asked David Louisell for help. He responded without hesitation, saw the young graduate a number of times, and gave him the right legal advice; and he did not charge him for it.

He had a profound mind and a wonderful feel for language. He was never facile and, in a large conversational group, might forgo his turn rather than make a quick, bright comment. The spice he used in his presentations was humour and irony rather than wit and satire. He was capable of enjoying himself; and he regarded the preservation of the quality of life in a growing world as one of the challenging tasks of our times.

\[^{1}\] Sadly, Dorothy Louisell, lady sweet and kind, also has been taken from us.

*Professor-in-Residence, Emeritus, and Director of the Robbins Hebraic and Roman Law Collection, University of California, Berkeley. Dr. Jur. 1932, Gottingen University; Ph.D. 1935, Cambridge University; M.A., D.C.L. 1955, Oxford University; LL.D. (Hon.) 1960, Edinburgh University; Dr.h.c. 1963, Paris University; LL.D. (Hon.) 1964, Leicester University; Dr. Hum. Lett. H.C. 1971, Hebrew Union College; Dr. Jur.h.c. 1972, Munich University.*
His faith in the goodness of God shone through his every word and action. Yet it was far from simple. No man unacquainted with dark conflict would have remarked to a therapist what a privilege it was to work with schizophrenics who had broken through to insights healthy people avoided. Next to Shakespeare, he thought that among European classics Dostoevski had probed most deeply into the soul. That, too, is significant.

He had a wide range of interests, academic and general, and the energy to pursue them thoroughly. Above all, he was warm, affectionate, gentle. His career was outstandingly successful, but to the last, for him, the highest prize he had won was Dorothy. He lived long enough to see both their sons grown to manhood and carve out great lives of their own; and he was profoundly happy with his daughter-in-law.
Two of David Louisell's longstanding professional interests fed the work to which he was personally most committed in the last decade of his life. He had become a master in the law of evidence and in the law of medical malpractice. In the one field he had sought to establish the tests for rational proof in court, the tests whose application might enable judge and jury to reach reality. In the other field he had learned to scrutinize the conflicting testimony of medical witnesses and to weigh impartially the conflicting claims of practitioners and patients. With an educated appetite for the truth and an ample experience in the fallibility of medical judgments, he came to write, speak, and think upon the topics of the biological revolution.

The biological revolution, as he himself defined the term, included "organ transplantation, permissive abortion, artificial insemination, sterilization, the pill, human (including fetal) experimentation, mass drugging for psychological and behavioral purposes, and the possibilities of formal euthanasia, test-tube babies and genetic manipulation including cloning." Human beings have always been engaged in deliberate alteration of their own and others' minds and bodies. What was new, as David Louisell recognized, was the scale, the extent, and the effectiveness of the measures now deployed, so that "revolution" was an appropriate description. He became an authority on the revolution.

His strengths, in addition to his professional experience with evidence and torts, were several. He had the common law lawyer's instinct for the concrete. He would not be seduced by imaginary possibilities. He dealt, as far as possible, with real cases. He knew the necessity of linedrawing in moral argumentation and in legal argumentation based upon it. Not for him the fanatical following-out of a single value, as though moral reasoning were a matter of positing a proposition and spelling out the logical implications. He understood clearly what is so often grasped poorly: that moral reasoning consists in balancing values. It can never be reduced to syllogisms. It can never be done by constructing curious hypotheticals. It is hopeless if done apart from experience.

† Professor of Law, Boalt Hall School of Law, University of California, Berkeley. B.A. 1946, LL.B. 1954, Harvard University; M.A. 1948, Ph.D. 1951, The Catholic University of America.

2. Id. at 6.
The way to experience is not solely through one's own life. To have experience one must live vicariously through history and through literature. David Louisell was attentive to both genres, prizing especially the testimony of the great English-speaking writers, and above all, Shakespeare. Habitually drawing on such sources for wisdom rather than embellishment, he incorporated a rich variety of values in his final assessments. No more apt objection could be made to a positive duty to prolong the life of the dying than the lines he chose from King Lear:

Vex not his ghost: O let him pass! he hates him
That would upon the rack of this tough world
Stretch him out longer.4

David Louisell was a Catholic Christian. His cheerful piety and optimistic trust in the order of the universe—two of his most persuasive characteristics—were also his assets as a moral thinker. Faith informed his outlook. Moreover, on specific points of morals, he did not hesitate to cite Catholic theology where it was not alien to his subject. It gave a further dimension to his use of experience. The difference between using ordinary means to prolong life and using means which entail considerable pain or expense was a difference he felt, as we all feel it. He had trouble explaining it fully, as we all have trouble. He took comfort in its endorsement by Pius XII.5 Yet he also knew that many issues could not be settled by the theologians, and he knew that the public forum was no place to invoke religious authority. He detested the glib liberalism that was prepared to discount a man's views because he was a believer, and he stood ready to make each judgment meet the tests of common experience.

Walter Jackson Bate, in his memorable life of that master moralist, Samuel Johnson, observes that the secret of Johnson's power was his refusal to put up with fashionable sham. Johnson had the ability, Bate writes, to attend to "that rarest of all things for confused and frightened nature—the obvious."6 David Louisell had that ability. Like Johnson, too, he did not disdain common sense, but welcomed it in piercing the sophistry of technicians.

Serving on the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (an Orwellian title), he dissented when the committee created the oxymoron "fetus ex utero" to describe the living creature on whom the majority wished to authorize experiments. "Up to now," he observed, such a being had been called "an infant."7

---

5. Id. at 734-36.
Of all his strengths in making his way in the new fields embodying
the revolution, perhaps the most important was his courage. All of the
cardinal virtues are needed to be a good moralist, but none more than
this, which is in Aristotelian terms "fortitude" and in American idiom
"guts." One of the last quotations David Louisell invoked was from
Henri Amiel: "Truth is violated by falsehood, but it is outraged by si-
lence."8 He was never silent nor ambiguous nor evasive when the trutht
called him to speak.

On no issue did he need more courage or go more against the fash-
ion of the decade than on abortion. There were, he readily agreed,
difficult cases where the utmost prudence and discretion was necessary
to reach the right legal balance between the life of the mother and the
life of her unborn child. These cases were not at the heart of today's
reality: "That reality," he declared forthrightly, "is a mass slaughter of
normal offspring grounded only in desire, or whim."9

In a multitude of ways David Louisell gave his life to the defense
of unborn life—in coauthoring a history of the common law and con-
stitutional protection of the unborn;10 in coauthoring an amicus curiae
brief on the side of the People in People v. Belous;11 in offering counsel
to groups fighting abortion; in testimony before Congress;12 in a power-
ful dissent to the recommendations of the national commission on
human subjects permitting experimentation on the unborn; and in
scholarly contributions to the Human Life Review. Possibly he was
most proud of helping to draft a constitutional amendment to erase Roe
v. Wade13 and its progeny. "The morning hours are spent," he wrote,
"but the hour for a common prolife cause is here, lest the shadows of a
long night engulf us."14

I have little doubt that, in the years ahead, David Louisell will be
recalled as much for his vision as for his sense of reality. In the words
Matthew Arnold chose as a tribute to his own father:

When the forts of folly fall
Find thy body by the wall.15

   (1976).
9. Louisell, The Burdick Proposal: A Life-Support Amendment, 1 Human Life Rev. 9, 12
   (1975).
10. Louisell and Noonan, Constitutional Balance, in The Morality of Abortion 220 (J.
12. Proposed Constitutional Amendments on Abortion: Hearings Before the Subcomm. on Civil
    and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 163-76 (1976)
    (statement of D. Louisell).
14. Louisell, supra note 9, at 15.
Amiable, rumpled old bear, he warmed the ground where he stood. He didn't know a hurtful word, but he had all the good ones, and gave a blessing with each. He shaped them to a larger vision, but he could dish out hardshell law with the best of them and did it with relish. To David, craft was precious, and he preached vocation and profession to believer and cynic. Do your best; with luck will follow sanity, salvation, and even justice. Work for the best, and it will come in one form or another.

His gentle manner was combined with a spine of Mesabi iron that kept him upright against the high tide of an alien ethic. This was a new world and a new time, but it wasn't David, and he pushed back. Sometimes he felt quaint and out of joint; in a sense he was. Like Jeremiah in the cistern, he was lonesome and caught in the mire—but he was real. And so long as the cry for justice reached his ear, he knew he was real.

Send us such another.

† Professor of Law, Boalt Hall School of Law, University of California, Berkeley. B.A. 1950, University of Minnesota; J.D. 1953, Northwestern University.