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34% Of Mitchell Grads Failed '71 Bar

The door to the "Gilt Edge Profession" was very difficult to unlock for many recent law school graduates. Results of the July Bar Exam were made public in mid-October and the results appear to be significant to William Mitchell students.

Sixty Mitchell graduates, including 5 exam repeaters, sat for the July exam. Of these, forty were admitted to the Bar, including one repeater. Thus only 66% of the Mitchell students who sat for the exam passed. In comparison 71.5% of the graduates of the University of Minnesota Law School and 65.2% of out-state graduates who sat for the exam were admitted to the Bar.

Overall statistics show that 279 potential lawyers sat for the July Bar Exam including twenty repeaters. Of these, 175 first timers passed. Seven of the twenty repeaters passed making a total of 182 new members of the Bar.

Controversy Still Rages Over Bar Examinations

Is It Worthwhile?

By Kay Silverman

The controversy over the value of the traditional bar exam has been raging for several decades, and in recent years its opponents have actively championed abolishment or replacement with a national uniform bar exam. Proponents of the traditional exam state that it forces schools to offer the topics covered by the exam, but gives them enough freedom to expand their curriculum in different areas of the law. Without a bar exam the schools would be under more pressures from the practising bar to offer only courses they approved of. The traditional exam also serves to measure the students ability and the schools ability in turning out good lawyers.

Opponents of the exam say that it is a useless test since most applicants eventually pass and it is merely an expensive inconvenience to the graduating law student. A bill was introduced in the last legislative session to abolish the bar exam and will be introduced again in 1973, by liberals, Sen. Winston Borden and Rep. Harry Sieban who have high hopes for its passage.

The major obstacle to this enactment would be the Minnesota Supreme Court itself which under M.S.A. 481.01 prescribes qualifications for applicants for admission to legal practice and appoints members of

the State Board of Law Examiners to administer the test with the advice of the State Bar Advisory Council. Without statutory authority the Supreme Court could assert its common law right to qualify lawyers for practice, and the State Board would not be dependent on the legislature for revenues since it is funded by the $50.00 bar exam fee and by part of the $25.00 yearly fee paid by practising lawyers in Minnesota. The administration of the test is governed by the Minnesota Court Rules promulgated by the Supreme Court. Rule m requires applicants to pass a written exam and there is a serious question as to whether or not the Supreme Court Rules would be affected at all by an abolishing enactment, and whether or not it could be found unconstitutional under the Minnesota Constitution Article III, sec. 1, which provides for the division of power between the legislative, executive and judicial branches of the state government. The argument being that it is inherent in the judiciary powers to determine who is qualified to practice law in the state courts, and that a legislative enactment limiting that power would be an abrogation of the separation of powers required by the constitution.

Proponents of a uniform test say that increasing uniformity of the law has increased mobility of lawyers and lessened the need for individual state bar exams. This type of exam it is argued would contribute to a more uniform educational system and as a result promote uniformity of law throughout the various states, so that lawyers could practice in states other than that of their residence. The Multistate Bar Exam is the result of the National Conference of Bar Examiners' Committee on Bar Examinations with planning and preparation financed by a grant from the American Bar endowment. The test, now offered in 23 states, is a one day multiple choice exam followed by a one day essay exam prepared and administered by the individual states. The Educational Testing Service of Princeton, N.J., which prepares and scores the Law School Admission Test, was chosen to administer the one day Multistate exam. Minnesota will not participate in the exam this year and the State Board of Law Examiners has no plans to do so in the future.

The major criticism of the Multistate exam is that the use of multiple choice questions does not adequately show a student's understanding of the law since it merely calls for conclusions to a question rather than showing the logical reasoning process which is the most important product of a student's law school experience.

Mitchell Seniors Gain Legal Aid Experience

By Cheri Brix

"Be Committed to something or you are just taking up space," might well be the motto of the nine William Mitchell students participating this year in the Legal Services of St. Paul and Minneapolis. All of the students involved - Robert Wall, Frank Villaume, James Taurinskas, Earl Reiland, Clifford Knippel, Richard Helin, Phebe Haugen, Glenn Froberg, and Cheri Brix - agree that their experiences helping people in need of legal assistance have been most rewarding and indeed challenging.

Legal Assistance of Ramsey County has had Mitchell volunteers on its staff since 1969, when two students on their own initiative approached the director volunteering their services. Ever since that time, there has been an active program, including academic credit, structured through the joint efforts of Mr. John Brauch, the present director in Ramsey County, and Dean Heidenreich.

By registering for the Poverty Law course, offered as an elective to fourth year students, those involved volunteer their services as "student practicing attorneys" at least one day a week, and at the same time receive credit toward their degree. The student attorneys then become actively involved in what Mr.

Brauch has termed "definitely mundane work." However, by means of their involvement, most of the students have been exposed for the first time to the human element, vis-a-vis, a legal problem. As Frank Villaume, presently working out of the Selby-Dale neighborhood office, commented, "this is the first practical experience I have had with the Law in my four years at William Mitchell."

Earl Reiland, an authorized corporate practitioner employed by Honeywell, feels that his involvement with Legal Assistance has made law school "worthwhile, by taking it out of the merely academic realm." In other words, Earl has realized that "there is a large segment of the population basically without legal representation." In many cases, this segment is comprised of those people who need such representation most, and what makes it even more dramatic is that now the student volunteers come together with these people face-to-face.

The work load of any one of the volunteers depends primarily on the time he has available to devote to the program. Typically, the volunteer is assigned to work with one of the full-time attorneys in the office. Under his direction, the student attorney conducts preliminary screening of the applicant to determine his eligibility for assistance. If he falls below the established poverty line, the applicant becomes a client, and the student begins to interview him regarding his legal problem. Some of the clients and their problems can be dismissed with a pat on the shoulder and a few kind words others must be handled through regular legal channels. The student volunteers have been certified under the senior practice rule to appear before the Bench, and, if necessary, are able to follow through for their clients up to and including any court appearances. According to Mr. Brauch, who is definitely in favor of the volunteer program, "after about six or eight weeks of supervision, the student attorneys are on their own!"

Believing that the Legal Services should provide “aggressive, effective representation to poor people,” Mr. Brauch, along with Dean Heidenreich, initiated a new program this year in Ramsey County. Three senior students (Robert Wall, Clifford Knippel, and Phebe Haugen) were selected in the sprint of their third year to help inaugurate this legal internship program. Each of these interns is a full-time, salaried student attorney. Basically, their duties and responsibilities are the same as that of the volunteers, only on a much broader scale. For example, Clifford Knippel, sure of the fact that when he obtains his law degree he will find a place where he can be committed to helping people, has become involved in the office with law reform work. Outside of the office, Cliff is attending the Continuing Legal Education seminars learning the basic elements of the law in various areas. Aside from this, he is actively involved in many core city community programs, attempting to effect change in our social patterns when and where he can.

In Hennepin County, this is the first year that any volunteer program has been actively worked out. According to Mr. Robert Hauer, one of the full-time attorneys in charge of the volunteers, “the experience that the volunteers gain is simply invaluable. Granted,” says Mr. Hauer, “the student attorneys help in interviewing clients and relieving the case load of the intake unit, but more important, the practical experience the students gain will help them where ever they go, whatever they do.”

When asked to comment on one of the “most exciting” things that has happened to him since his involvement with Legal Aid, Glenn Froberg answered, “undoubtedly, the most exciting thing was coming into the office one Monday morning and learning that in one hour I was to appear in court to prove up a default divorce.” Glenn, who is eager to put the knowledge he has gained over the past three years to

use, feels that Legal Aid, hos first actual experience working with the law, bridges the gap between book learning and actual practice.

Richard Helin, having suffered through the third year Civil Procedure course, feels that there should be a course in civil mechanics also. Dick followed the clerk from the Hennepin County office in and out of the courthouse while he was filing petitions and having orders signed, “just to see what it was all about.”

Taken as a whole, the student attorneys have become aware that there is a problem, for without Legal Aid its clients would have no means of representation. As Robert Well commented, “I highly recommend the involvement for the insight it gives, not only into people and their problems, but also into the need for universal social responsibility to help alleviate those problems.”

Images

Robert Wall, Frank Villaume, James Taurinskas, Earl Reiland, Richard Helin, Phebe Haugen, Glenn Froberg, and Cheri Brix

Christmas Dance

December 10, 1971, 8:30-1:00. Murray Hall – St. Thomas College. Students and Faculty. Free beer, mix and snacks. Casual dress. Rock and Roll supplied by The Prodigal. Tickets: $1.50.

Contempt Of Court

President Nixon's nomination of William Rehnquist to the U.S. Supreme Court is consistent with his past display of utter contempt for the Court as a judicial body. Nixon's politically motivated search for candidates who will conform to his peculiar style of judicial conservatism, as well as insure the Southern vote, is disgusting to lawyers and laymen alike.

Prior to making his most recent nominations, Nixon stated on national television:

"It is my belief that it is the duty of a judge to interpret the Constitution and not to place himself above the Constitution. . .. He should not twist or bend the Constitution in order to perpetuate his personal and political views."

However, one week before he made this statement, Nixon submitted the names of Herschel Friday, a Little Rock lawyer who distinguished himself by defending the segregationist policies of Arkansas school boards long after Brown v. Board of Education, and W. Va. Senator Robert Byrd, an ex-organizer for the Klu Klux Klan, to the A.B.A. for its approval.

Nixon's recent nomination of Rehnquist is a further attempt to place a man on the Supreme Court who will twist and bend the Constitution to perpetuate Nixon's personal, political and social views. As Assistant Attorney General and all-round conservative hardliner, Rehnquist has argued the Administration's position that wiretapping without a search warrant is proper since "self-discipline on the part of the Executive Branch will provide an answer to virtually all the legitimate complaints against excesses of information gathering." In effect, Rehnquist would substitute the President's whims for the protection afforded by the Fourth Amendment. In doing so he does not merely bend the Constitution - he eliminates it.

Rehabilitation -A False Premise?

The last few years have seen considerable discussion of the topic of prison reform. In the aftermath of recent outbreaks of violence at San Quentin and Attica, the rhetoric has tended to become more strident and less objective on either side of the question.

Many proponents express dismay and bewilderment that after all the studies, reports, statements and experiences of the past few years, so little has been accomplished.

As Corrections Commissioner Fogel indicates in an interview printed in this issue, it could be that many advocates of reform proceed on the basis of some false assumptions, one of them being that there is general agreement that the purpose of prisons is rehabilitation rather than retribution.

Historically, punishment has been the stated objective of most prison systems. Only fairly recently has the idea that prisons should be centers of rehabilitation rather than punishment become really "respectable" and influential.

In the past, Americans have generally been able to achieve those national goals on which there has been general agreement. The very fact that legislatures have been so slow to move in this direction is an indicator that the general public remains unsold on the proposition. As letters to newspapers show, many are not only unconvinced that rehabilitation is possible, but also have a gut reaction against anything that smacks of what they consider to be coddling those who have victimized other members of human society.

Until such time as the public becomes truly convinced that rehabilitation is a proper· function for a prison, the present situation is likely to continue.

In trying to win public support, proponents of reform would be well-advised not to indulge in the hostile, acrimonious name-calling and extravagant rhetoric common to extremists of all types. Such conduct serves mainly to generate headlines, hostility to the cause espoused, polarization of the population, and a climate in which little or no progress can be made.

Those who both truly desire prison reform and value a democratic society will realize that progress will not really result from cheap and easy tactics, and will put forth the unspectacular daily effort needed to inform themselves with some solid facts, to engage in thoughtful, reasoned persuasion of friends, neighbors and associates, and finally to convince the general taxpaying, voting public that rehabilitation is both a proper and necessary function of a correctional system, and that the necessary efforts must be made to implement this decision.

J.W.

0. E. C. Rescheduling

Two illustrations of classrooms side by side. The first depicts a professor lecturing to an empty room with the caption: "Now under Minnesota law, where the decedent dies intestate, the homestead will descend. ... "

The second illustration shows a classroom full of students but there is no professor present. Caption: "You don't think we're supposed to be meeting in a different classroom again, do you?"

Letters To The Editor

[The Opinion invites the students, faculty and alumni of William Mitchell to submit their ideas on any subject which would be current interest to the readers of this paper. Letters should be typewritten and addressed to the Opinion, c/o of the William Mitchell College of Law, or placed in the Opinion's mailbox in the office. Ed.]

Freshman Impressions

Sirs;

It is not with little irony that 1971's first evening of school was illuminated by the same sun which witnessed the perfidy in upstate New York. Only three nights before I had been oriented to the hazing to which one must submit himself before being admitted into the fraternity of lawyers: a blunt Dean smirked about our prospective gloom punctuated with sadism, and I squirmed uneasily when an Orienter lectured my section about the study of law and in the same breath advised that certain unnamed friends of the school might be instrumental in delaying a summons into soldiery. Righteousness overruled by self-interest, remained doubly quiet and counted my blessings.

On the morrow I set out somewhat dazed for my first night's classes. For it stated in the evening paper that the lawyers' third cousins, correction's officers, had so botched their job that it became necessary for a thousand little men arrayed in badges and big sticks to begin a methodical extirpation of an irritating and rabble-rousing minority. And how much more queer it appeared when the executioners of justice killed eight of their own enforcers in the lust to mete out the law.

My co-students were rapt in attention as one dead case after another was exhumed for their edification: a class of novice biology students dissected pickled frogs while the shadow of Frankenstein's creation darkened the podium.

"First year law student," I kept repeating to myself, and then I thought of the forthcoming "beer bust" in the citadel of illicit tryst and technology's damnation, the Twin Motor Inn. Jesus, I moaned, the hazing begins in earnest. Certainly the only way I could survive was to be buried in case books and remain true to name.

Anonymous

S. B. A. President's Brief

By Bruce Armstrong

There seems to be a wide divergence of opinion as to the value of the evening law school within the general public. At one end of the divergence is the second rate trade school whose prime responsibility is thought to consist of relieving poor, naive, innocent college graduates of a few thousand dollars while guaranteeing them that they will be accomplished trial attorneys immediately upon graduation. At the other end of the spectrum are views of schools that are turning out highly skilled lawyers who have an excellent legal education and are prepared to bear the responsibilities of the legal profession with their day-school graduate brothers. Unfortunately, the latter view is usually held by a relatively small number of persons who have become associated for one reason or another with William Mitchell, John Marshall, or George Washington, or one of the other evening law schools that is dedicated to excellence in the legal profession. The low opinion of the evening law school held by the public at large is due in many

cases to the failure of the student to present an image to the public that accurately portrays the true character and purpose of the evening student.

It is extremely easy to respond to demands on time and energy with the answer "I'm sorry, I don't have time. You see, I'm an evening law student." No doubt there is an element of truth running through that answer which is generally down to a pat phrase by the time the student is in his fourth year. Yet, if there is no time now for some of these activities, there will never be any time for them. The responsibilities of any person attending law school is greater than those falling upon a person studying for any other profession with the possible exception of medicine.

The evening Law Student should be an active in local and community affairs. Night Law Students also have excellent opportunity to work day projects for the benefit of the community, such as legal aid and legal assistance. In many, if not most cases, the time is there, it is the desire that is lacking.

One of the most convenient places that a student can devote some time and effort is right in his own school, the Student Bar Association. The Student Bar Association concentrates on the area outside of the classroom. It attempts to promote the self-development of the law students by organizing activities designed to supplement the formal education. You will shortly be seeing posters announcing the first in a series of public speakers from this State and Nation which we think you will find of interest. We sincerely hope that you will take time and put forth the effort to come and listen to these people and interact with them. We will also be working with the law wives organization to sponsor a Christmas Party which we think you will enjoy.

As the Student Bar Association functions and becomes a part of the organization of the school, one of the major problems is that of student apathy. This apathy is largely caused by what students consider to be a lack of time. Once again, let me point out, the time is there, it is the desire that is lacking.

Staff Writers Wanted

The next issues of the Opinion will be published in February and April of next year. In order to meet these deadlines, the Opinion need the help of those students who have an interest in writing and the extra time in which to do it. If you wish to join the Opinion staff, place your name and telephone number in the Opinion mail basket located in the office.

S. B. A. Report

Your Reps In Action

By John Nichols

The Board of Governors of the Student Bar Association has begun committee work on a number of programs which, it is hoped, will ultimately involve a large number of William Mitchell students. Each committee chairman has expressed hope that any interested student will contact him if the student can render any help or advice.

Of particular interest to upperclassmen is the committee, chaired by Paul Simonson, which is attacking the annual problem of graduate placement. This committee performs an especially vital function because William Mitchell College itself has never instituted a sustained program to find jobs for graduates. Simonson reported this year his committee will not only attempt to match students with a particular type of firm through the personal resume vehicle but also will set up a "recruiter's night"

during the second semester. All interested law firms or companies will be asked to send a delegate to interview prospective lawyers for their staffs. A dinner is also expected to be served so that members of the practicing bar, recruiters and students will engage in informal discussions. It is hope that programs of this sort can be expanded in future years, so as to enhance the chances of a William Mitchell graduate obtaining a job at a salary commensurate with both his legal training and practical work experience.

The community action committee has also selected a project for overall student participation. The program involves the rendering of legal advice by William Mitchell students to minority persons using the facilities of, and in conjunction with, the Northside Settlement House on the Minneapolis near north side. Steve Kluz, committee chairman, said he expects the program to begin full operation during November. Interested students will be asked to donate 4 hours of their time once or twice a month. Major legal questions encountered will be in the areas of domestic relations, consumer affairs and welfare law. John Desteian, William Mitchell freshman and Minneapolis policeman, is expected to provide a good deal of the co-ordination with other public agencies that will be required if the program is to succeed. It is hoped that a program of this nature will give all William Mitchell students a chance to exercise the legal skills they have acquired as students. Senior student participants are expected to qualify for court appearances pursuant to the new Minnesota senior practice rules.

A committee has been appointed to revise the William Mitchell Student Bar Association Constitution. John Kennedy, committee chairman, indicated that changes are needed to provide for proportional representation on the Board of Governors by all classes as well as changes to provide for the movement of the spring election to an earlier time in the spring so that some degree of continuity can be obtained between incoming and outgoing members of the Board of Governors. The Constitutional changes will be submitted to the student body for formal ratification late in October or early in November.

Other committees are expected to have results within the near future. John Hughes, speaker committee chairman, will have speakers of both local and national prominence appearing at the law school throughout the year. In terms of social activities, the entertainment chairman for a Christmas party is expected to be announced soon. The Christmas party, featuring live music, will be open to all William Mitchell students and their dates or wives. Students are asked to watch the bulletin boards for the date and time of the party.

Law Wives Plan Christmas Dance

The Student Bar Association has joined together with Law Wives this year planning what we hope will be a most successful Christmas Informal Dance. Murray Hall at St. Thomas is the scene of action and was specifically chosen because of its location. We are in the process of selecting a versatile, dancing, rock band for entertainment. The dance is Friday, December 10, and begins after Friday night's classes. Casual attire and free beer will help to create an atmosphere of fun and relaxation. A well earned and deserved evening is in store for all. Keep your eyes open for posters with information on time and tickets.

Mrs. Peter Wandmacher has been busy arranging our November meeting. We have scheduled Creative Activities Night for November 3. Booths will be set up for all the various handicrafts: Macramé, sewing, knitting, decoupage and various other creative talents. Girls will be signing up for informal classes to be taught by our own talented Law Wives. This is opening an entire new area for our organization and responses thus far have been overwhelming.

Fund raising projects are still being considered for the year. One idea with great potential is a Boutique Sale. Another is the selling of Anita Beck Christmas cards. A decision will be made at the November meeting and we are open for any fresh ideas for a Fund Raising Project.

Images

Law Wives' officers are from left: Barbara Nichols-President, Myrna Huebsch-Vice President, Mary Crandall-Recording Secretary, Jan Arlins-Corresponding Secretary, Nancy Klein-Treasurer. In addition to the officers, Law Wives' board members include from left: Margo Riskedahl, Barbara Reiland, Stephanie Appert, Paige Hagstrom, Beverely Bauer and Pat Gries.

Showing their weaving talent on Creative Activities Night were Cheri Peterson (on left) and Mary Stack.

Cathy Miller demonstrates the variety of objects which can be transformed into "objects d'art" with decoupage.

A New Cause Of Action

by Edgar Rood

Prosecutor: … and the People will endeavor to prove beyond a doubt that the auto industry has engaged in wanton disregard for the public welfare; that the auto industry has become in the last have century an evil monarch in its own right…

Judge: In all due respect to your sincerity, young man, the Court finds you more of a poet than a prosecutor. Proceed with your case.

P: Mr. Defense Attorney, did you drive alone to this court room today?

D: Indeed I did!

P: Did you not find it inefficient – if not downright lonely – that there were five empty seats in your car?

D: How quaint!

P: Quaint or perverse? Do you not find it uncommonly extravagant to require the space of six to transport the weight of one?

D: Your Honor, if this display were not so humorous, I might ask you to dismiss this case.

P: And what sane purpose is served by this exceedingly expensive diversification in colors, fins, taillights and fender-grills? Do such practices as increasing a geometric angularity of a headlight conform to the needs of a competitive market? The auto was designed as a vehicle for transportation on four simple wheels – not on positracted, polygripping, uniroyal, radialled and whitewalled studs!

D: ‘What the People wants, the People gets!’

P: The People are cajoled, sold, and ripped-off! What in Heaven’s name is this insane practice of putting 350 horses in the command of a laboring slob who must fight bumper-to-bumper on his way to work. What possible purpose is served by the annual restyling of the auto – if not a subtle play upon the caprice and self-consciousness of the consumer. Why must we continue to poison ourselves with noxious exhaust fumes when the auto industry has had the option for more than a generation to

implement the use of electricity, SP gas, or atom power? One hears talk of the population explosion: yet I tell you that the automobile is born twice as fast as children in these United States! Short of the complete abolition of the auto and its replacement by a mass transit system, it is high time that the auto corporations come under the complete control of the People and their representatives in Congress.

D: Just what are you trying to prove?

P: Murder! That you willing aid and abet the murder of 50,000 people per annum.

D: Zounds. This has gone too far. I move for an immediate dismissal of this patently absurd case.

J: Case dismissed for insufficiency of cause of action! Bailiff, clear the courtroom!

New And Used Bookstores Show Disparity In Profits

The New Bookstore, contrary to some of the rumors current around school, is not run by the S.B.A. nor by West Publishing Company.

For years it has been operated by Mitchell students who have generally also been employees of West Publishing Company, although the operation of the bookstore has not been either a part of, nor a condition of, their employment by West Publishing Company. The present managers, second year students John Hughes and Jim Reuter, were recommended to the Dean by prior managers. The Dean either accepts or rejects the recommendations and employs the managers on an independent contractor basis to operate the bookstore.

The New Bookstore operates as a normal business, stocking those books specified by the faculty, selling them at list price or less, shipping back unsold books, paying state sales taxes, and keeping adequate records and accounts, all of which involves considerable time and effort during the summer and on weekends in addition to school days.

The Dean has indicated that most publishers of legal textbooks establish list prices at 20% markup over cost. The New Bookstore, while selling most texts at these publisher's list prices, handles mimeographed materials, state statutory materials and C.L.E. publications at cost.

Half of the gross profits go to the school and the other half, after certain expenses and some losses, is divided by the managers themselves as compensation for their services. The manager's share of the gross profits in recent years has been as follows: 1967, $2337.56; 1968, $2031.42; 1969, $2217.17; 1970, $2550.33; and 1971, $4274.46.

The Used Bookstore, initiated several years ago by the S.B A. as a service to prospective buyers and sellers, and intended to replace the notice-on-the-bulletin-board method, has not been a marked success.

The Used Bookstore has operated on a consignment basis, with all income derived from a 10% commission on those books actually sold. This year, checks for sales proceeds were distributed to 89 successful sellers.

The commission is divided between the two students who have managed the bookstore, this year third-year students John Clifford and Dennis Moriarty. Operations this year netted each of them only $55.

Virtually nobody has been satisfied with the Used Bookstore. Students complain of uncertain business hours. The managers have had their own problems: prior managers have left the records in such disarray that it was impossible to properly sort matters out; students continued to use the bulletin board method or intercepted could-be customers at the door to make sales which benefited from the existence of the bookstore but which avoided any commission; and that the chief use made of the bookstore has been made by students seeking copies of old examinations, a service which generated no revenue. Neither manager feels that the compensation derived has made the effort worth their time.

As a result, the Used Bookstore has been turned over to the S.B.A. Board of Governors, which had expressed dissatisfaction with the existing situation. They are now trying to develop a workable method for the future operation of the Used Bookstore.

Faculty Interview: Maynard Pirsig

[Ed. note: Professor Maynard Pirsig joined the faculty at the commencement of the current school year but he is no newcomer to the field of legal education. Pirsig received his L.L.B. from the University of Minnesota Law School in 1925 and a year later he became an instructor at the University Law School. He became a full professor in 1933 and was appointed Dean of the Law School in 1948. Pirsig resumed his position as professor of law at the University in 1955 and remained there until his retirement in 1971.

Professor Pirsig is the chief author of the 1963 Minnesota Criminal Code and he helped write the Youth Conservation Act which became law in 1947. Among other works, he has authorized Pirsig's Dunnell on Minnesota Pleading, Legal Profession, Minnesota Pleading, Juvenile Court, Cases and Materials on Judicial Administration and Cases on Professional Responsibility.]

Interviewer: After being actively involved in the field of legal education for almost half a century do you believe that the system used to educate law students has kept pace with our changing society?

Pirsig: Yes. The system today brings to the student a better, more precise understanding of the legal rules and their relationship to the purpose of the legal system. Further, law schools today have come to the realization that students should not be isolated, as they have been from actual practice. There is a far greater emphasis today on what has come to be called "clinical education," i.e., having students go to court, into law offices, county attorney's offices and legal assistance programs.

I. Then do you believe that today's law schools are producing good lawyers?

P. Todays legal education produces a good analytical lawyer. However, I believe that the so-called full time law schools are too far removed from the legal profession. Through clinics and other outside activities the students and faculty ought to have closer ties with the practicing bar and the judges than has been true on past occasions.

I. Are you satisfied with the present system of educating lawyers?

P. If I were satisfied it would mean that I had gone stale. I believe that in dealing with legal education two questions should be kept in mind. First, what is it that you want the student to have in the way of a legal education-is it merely a knowledge of the law or should the law schools undertake the task of providing a deeper concept of what the lawyers role in society is? I personally believe that the law schools ought to be concerned about the goals of our legal system which by necessity are directly related to the goals of our society.

With this in mind the second question then becomes-how can we best accomplish these goals? As to the way in which William Mitchell can best answer this question, I would need far more information than I have now. I can say, however, from what I have seen, and the people I know on the faculty, the school has picked good men, some outstanding men and I think that it is one of the best part time law schools in the country-if it wasn't I would not be here.

I. What do you think a law schools objectives should be?

P. Law schools should make the lawyer conscious of his role, the important role that he will play in our society and hopefully inspire within him some dedication to that role. Lawyers must take an active role not only in their profession but in their community. People look to lawyers to provide leadership which, incidentally, this country needs badly.

I. Why do you believe the legal profession should assume a role of leadership in this country?

P. The lawyer is at the heart of the social system. He sees all the ills through his practice. He knows the legal structure by which our whole society is governed. No other profession is involved so intimately with the ills of our society and yet has the background and personal traits that a lawyer has to do something about it.

I. How would you compare the full time legal instructor with the practitioner-teacher?

P. Full time faculty members have more time to devote to research and are encouraged by their schools to do so. The practitioner-teacher brings to the classroom the benefit and value of his own experience in the actual practice of the law. Often the practitioner-teacher comes from the area of practice that he is teaching. This is a tremendous benefit to the students. Both the full time instructor and the practitioner-teacher bring certain advantages to the classroom and both have a place in the legal education system.

I. What comparisons if any would you make between the students at William Mitchell and those at the University of Minn. Law School?

P. I have found somewhat to my surprise that the students are quite similar at both schools. The responses I have gotten in class are about the same. Students at both schools appear to be interested in what I am saying and manifest this interest with the provocative questions that they ask me.

I. Finally, how would you compare the seniors that you are instructing with the freshmen under your tutelage.

P. Seniors are more mature in their thinking. They have a background from which they can discuss things. Actually, you are asking me to compare lawyers with future lawyers. Freshmen are all too often struggling to grasp legal principals and find themselves in this whole complicated scheme of things.

I. Thank you.

Image

Professor Pirsig

The Dean's Column

In A Nutshell

"Indeed, to this quick-witted youth the whole noble science of the law was contained in a nutshell." Melville, Bartleby the Scrivener

In 1853, the date of the publication of Herman Melville's short story from which the above quotation was taken, it was perhaps possible that a person could compress all of the law "into a nut-shell." Even today the most important legal publishing company in the world publishes a nut-shell series of paper-bound volumes dealing with various substantive areas of the law.

No one really thinks, however, that it is possible today to compress the law into a manageable form such that one person can have a good command of all areas of the law. Specialization is a matter of recognized fact although the formal recognition and certification of specialists is still some distance in the future. The practicing bar has been most apprehensive about proposed plans for the recognition of specialties. Notwithstanding the bar's reluctance to adopt a system of specialization the situation as it now exists sooner or later must be changed.

Consider the current anomalous situations:

1. Following a successful law school career a man or woman may, upon passing the bar examination, become licensed to practice law. He is not entitled to hold himself out as a specialist or an expert in any one field. Ethical rules prevent his doing so. However, because he is able to hold himself out on his letterhead, his business cards and in his telephone listing as an attorney at law, he is saying to the public that he is competent in every field of the law.

He is entitled to represent a client in the most complex antitrust litigation even though he has never taken a course in antitrust law; he is entitled to draw a trust agreement for a client with a million dollar estate even though he has at best a nodding acquaintance with trust and tax law; he is entitled to appear on behalf of a person charged with a crime who faces a fine or loss of liberty even though he has taken only one course in criminal law early in his law school career.

2. The lawyer who has practiced law in one field for many years but who may have virtually no experience or knowledge in another field still tacitly holds himself out as being competent to represent clients in every area. Although that lawyer has devoted his life to family law problems and nothing else he is, so far as the general public knows, still able to form a corporation or advise a client on a problem of labor law.

3. The man who has qualified to practice law by passing a bar examination soon after graduation from law school but who has never practiced engaging instead in business or some field unrelated to law may, upon, retirement open an office, hang up a sign and hold himself out to the public as being qualified to practice law even though he has not opened a statute book, read an appellate court decision or conferred with a client for twenty five years.

4. The lawyer who has developed skill, knowledge and experience in one field of the law may not tell the general public about it.

To the knowledgeable layman these things must seem intolerable. And so they are. Until fairly recent times it was commonly thought that anyone trained as a lawyer had gained sufficient experience in legal

thinking so that he could master any area of the law, even one in which he was not experienced, through research and review. When life was simple this may have been true. Legal problems today are not so simple. Taxation, antitrust, criminal procedure and other areas have become so complex that the finest lawyer may have difficulty in mastering one of these areas if he has no experience in it.

The bar must come to grips with the problems of specialization and provide ways to allow practitioners to hold themselves out as specialists; but beyond this the bar must encourage and promote specialization. Anyone who reads the extensive literature on the subject must conclude that the public interest and the interest of the bar itself demand that this be done.

Some form of continuing supervision and certification for all lawyers must be adopted. Whether this might take the form of an examination, demonstration of experience or something else protection of the public requires it.

These issues are exceedingly remote to law students of today. The student's real concern is with completing law school, passing the bar examination and finding a job. Nevertheless he must keep in mind that the profession exists to serve the public and that the public interest demands specialization. A continuing failure to recognize, deal with and solve the problem can only lead to a continuing diminution of public respect for and confidence in the organized bar.

S.D. Indian Victim of Frontier Justice

By Stephen Bergerson

What appears to be an unmitigated abuse of constitutionally guaranteed rights and an abuse of the criminal justice system has been uncovered in a South Dakota community of 3,100.

An Indian resident of the community was arrested and charged with the burglary of $130 worth of clothes from a car. He subsequently spent nine months-273 days-in the county jail without being allowed to consult with an attorney or appear before a judge or justice of the peace. The county prosecutor has since alleged that he was under the understanding that an attorney from a neighboring community was representing the suspect and had asked for a preliminary hearing. That attorney has replied that he never had intentions of, nor indicated that he would, handle the case.

The suspect had made arrangements to have a $500 bond guaranteed but was told by the justice of the peace that he could not be released on bond for the reason that he was also being held for parole violation, which was in fact true, as he was on parole after serving 15 months of a two-year burglary sentence when arrested. The Parole and Pardons Board, instead of revoking his parole and recommitting him to the state penitentiary, took no action because their "procedure in such a case" is to "wait until the other charges are settled" before making a decision whether or not to revoke a parole.

The suspect claims that several letters which he had written to a Circuit Judge, in which he asked for help, were pigeon-holed by jailers. He claims he was able to reach the Judge only after smuggling a letter out. Five months had elapsed when the Circuit Judge received the letter and appointed an attorney. No further action was taken for three additional months, after which time the attorney filed a writ demanding that the suspect be released without bond. In addition, the writ pointed out that there were no court records on the case, and that the case had not yet been placed on the court calendar.

Five days subsequent to the filing of the writ, and without a preliminary hearing having yet been held, the prosecution filed several documents with the clerk of court. One of these documents stated that there was "sufficient cause" to believe that the accused had committed the burglary. Another stated that the suspect had been bound over to the circuit court for trial. It was dated and signed by the justice of the peace. However, the date on the document was a date which was two days before the suspect had even been arrested. The justice has since acknowledged that no preliminary hearing was conducted, but has refused to comment on why he prepared the document.

No allegation has been made that the defendant waived his right to an attorney or preliminary hearing. On the contrary, the defendant has asserted that he was aware of those rights and "wasn't going to give them up when I didn't do what I was accused of."

As a result of the writ the suspect was ordered released without bond. However, upon receiving notification of the defendants release, the parole officials, after nine months, suddenly decided to reinstate parole revocation proceedings (even though the other charges had not been settled). The defendant has consequently been recommitted to the South Dakota State Penitentiary and a hearing has been scheduled pursuant to another writ submitted by yet another attorney who has taken over the case.

"Attica Will Have Little Effect On Prison Reform"

By Stephen Bergerson

Minnesota's outspoken Commissioner of Corrections, David Fogel, said in an interview that he attributes the violence and disruption that reached such a bloody peak at Attica to what he called the basic reason anyone usually turns to violence, even in free society.

"People generally do not resort to violence if they see some progress being made or have an opportunity to have people listen to them and to negotiate their own fates." Fogel said. He illustrated by referring to a letter to the editor of the New York Times from an inmate's wife who posed the question "If you don't negotiate at knifepoint and you don't negotiate normally, what is left but violence?"

He refuted as implausible the theory being advanced by some prison officials that the unrest is due to a new type of highly volatile, politicized, revolutionary prisoner. He said that explanation does not account for the prison riots of the 30's, 40's, 50's and early 60's. Fogel believes it is one of the traditional whitewashes which attempts to "cover up the horrendous conditions in the prison system by pointing to outside radicals."

In response to the suggestion being made that a solution to the uprisings would be to isolate the so-called 'hard core problem prisoners' Fogel replied that it is the "tired old explanation of what to do when you don't know how to handle something," but that it "doesn't deal with the problem, the problem doesn't go away." He believes that the only difference is that these prisoners, as well as the others, have, like other segments of society, become more aware of their rights, and are attempting to secure them.

He disagrees with the argument that the increased permissiveness in the prison system leads to greater expectations of prisoners which may induce uprisings when these expectations do not materialize. "That could be a plausible argument if the prisons that were exploding were the more permissive prisons, but

that's not so." He emphasized that quite the contrary is true, that the prisons which are exploding are those that are least permissive, of which Attica was one.

He feels racism in the prisons is a "very significant problem" and is a part of the "new consciousness" of the extensions of liberty in this country and of the emphasis on ethnic status. In view of the fact that most prisons are composed of nearly all white "keepers" as contrasted to the high proportion of non-white "kept," a serious problem is present.

As to the amount and timeliness of the use of force at Attica, his observation is that it is not very fruitful to try and second guess, but "what it's done for everybody is to prompt them to take another look at their own methods for dealing with situations like that." He believes that each case must be dealt with individually and that no one philosophy can be universally applied, although, "it would not necessarily be my style to rush in with gunfire or other uses of force."

Fogel thinks the ultimate impact that Attica will have on prison reform on a nation-wide basis will be slight, because of the polarization which it will create between advocates and opponents of prison reform. It will create "a lot of rhetoric and practically nothing" insofar as progressive reform.

"Even if there was a lot of rhetoric and somebody wanted to do something nobody would know quite where to grab hold first ... there's no capacity to accept change right now, so I think it's going to remain on a rhetorical level."

He believes before reform will materialize on a national basis "we need a massive public information campaign" to "lay out the absolute truth of what our prison system can and cannot do, who it should be for and who it should not be for. People must understand the fiscal imbalance and criminal justice as a result of the sewer-like prison and what it does to money. We need to create not only a public awareness but a readiness for change," by having a victim-compensation bill to remove retribution and vengeance as a public motivation. He is actively supporting such a bill for Minnesota. Several states do have such acts.

However, he stated he "very much looks forward to changing the system" and believes the possibility is de-politicized here in Minnesota where reform is a bipartisan effort and "opportunities to become a model state, I think are great."

It is also necessary, he believes, that the massive prison must be de-institutionalized. "That means, actually taking some men out that don't belong in. In addition a "diversion project" is needed "so that judges have opportunities to send people to something other than maximum custody."

"And the institution itself," Fogel is convinced "ought to be as much like a community as possible," and "law students ought to be particularly tuned into this. We have got to turn around the notion that a man is a slave to the state. That's an old 19th century concept of case law . . . but now in the last several years there's been a reversal of the judicial hands-off doctrine of prison administration."

"The best way to teach nonlaw abiding citizens to become law-abiding citizens," Fogel said, "is to treat them in a law-abiding way. We need to back up our whole correctional program to local communities," with the community itself developing community-based, state subsidized corrections, such as retreat houses, because "all the State can do is put prisoners in thousand-bed Bastilles." One such 25-bed retreat home has already been funded to be constructed in St. Paul.

He also thinks "we need to take a differential look at who the prison population is" because under the present system, "everybody gets the same treatment . . . it's like treating everybody for cancer, when some have only a hangnail or sore throat-it's nonsense. We need a rifle-shot approach to rehabilitation instead of the present buckshot method," Fogel said.

Another necessary ingredient for reform, Fogel believes, is to decriminalize the criminal law, because "There are too many offenses. The Medical profession should take its responsibility in dealing with drugs. The prisons are clogged with drug offenders."

Fogel would also like to see an ombudsman, who would report to the governor and who would be available to listen to prisoners, parolees, their families, and employees of the corrections system itself. This would be by way of providing an outside source and to allow these people to be "actors in their own fates," which Fogel feels strongly about. He advocates placing responsible former offenders in these positions.

Fogel pointed out that a ten-year survey is being conducted to determine what the job market in society is going to be so that prison industries and programs can be geared toward that market. "After all, why else would you train anybody in prison if there are no such jobs for him when he gets out?" Fogel asked.

When asked why reform is not more rapid in spite of the obvious failure of the prison system, Fogel retorted, "Mainly because the field itself has been unable to correct itself, and the correctional officials have been alibiing. It's a lazy field. We haven't been very self-critical, we haven't been honest with the public. People are defensive about their jobs, they've built little secluded empires . . . the walls have gone higher, not necessarily to keep the prisoners in, but to keep the public out, and the public doesn't give a damn, frankly. They're very apathetic."

"It's a low priority for legislators. You get more money after an Attica than before. Legislators have no constituency to answer to among prisoners, parolees and ex-convicts."

Fogel added, however, that he was hopefully optimistic in view of the fact that people of younger ages will soon be moving into administrative positions in corrections and other legally affiliated systems. He stated that that was one of the factors which have inspired him to remain in the corrections system.

Image

David Fogel

My Lawyer

When grappled in the law's embrace,

Who first betrayed an anxious face.

And fain should shield me from disgrace,

MY LAWYER.

Who told me I should not confess,

That he would all my wrongs redress,

And set me free from all distress?

MY LAWYER.

When sick in jail I senseless lay,

Who took my watch and ring away,

Lest prowling thieves on me should prey?

MY LAWYER.

Who to my wealth tenacious clung,

And for me wagged his oily tongue,

MY LAWYER.

Who told me was dreadful smart,

And always took his client's part?

MY LAWYER.

Who, in court, with peerless pride,

My rights affirmed, my guilt denied,

And swore the State's Attorney lied?

MY LAWYER.

And when twelve men, in one compound,

For me a guilty verdict found,

Who came to staunch my bleeding wound?

MY LAWYER.

Who said my time within the wall,

Would exceedingly be brief and small,

The minimum, or none at all?

MY LAWYER.

And when the judge my doom proclaimed,

And 150 long years of exile named,

Who looked indignant and ashamed,

MY LAWYER.

When at the sheriff's stern command,

I, for the chain, was told to stand,

Who longest shook and squeezed my hand?

MY LAWYER.

Who, when of prison clothes I'm stripped,

And from these walls on homeward shipped,

Will get himself immensely whipped?

MY LAWYER.

Reprinted from Joliet-Stateville Time, Illinois State Penitentiary, June, 1968

Rights And Remedies Of Prison Inmates

(article contains footnotes)

By Margaret A. Leary

Prisoners seldom make the casebooks except for questions of criminal law and the conviction process itself. Although the courts have long stated that a man doesn't leave all his civil rights behind when he enters a jail or penitentiary, the traditional judicial approach of keeping "hands off" the administration of prisons prevented the courts from considering methods of alleviating or eliminating unconstitutional treatment of prisoners once they were lawfully incarcerated.

Rising public awareness of prison conditions, new approaches in penology, and legislative and administrative inability to cope with the obvious failure of the prison system have combined to cause a near-resolution in judicial attitudes to prisons.

The revolution is proceeding unevenly, for tradition, practicality and the whole role of prisons in society introduce many conflicting elements that must be balanced. The first is the old doctrine of abstention. Federal courts generally refused to review state prison rules, as well as treatment of prisoners.

Abstention is justified by some on the grounds that judges lack the expertise that professional prison administrators possess. Courts would have difficulty supervising detailed orders. Connected with this is a fear that court-imposed limits may hinder prison discipline and flood courts with unfounded claims by prisoners. Further, court action could conceivably dampen legislative initiative by satisfying public demand for reform.

One commentator1 fears that new rights and the extended use of habeas corpus will result in pandemonium in the whole legal system as well as in the prisons. He cites the great increase in the number of writs sought in Federal courts. It could be argued just as well, however, that these writs represent real grievances which should be heard, and which can't be heard unless the judiciary continues to expand its willingness to listen.

Another view is that since courts consign men to prison, the courts should monitor the consequences of the confinement. "Prison reform can and should be initiated by the judiciary itself," since no one else seems able to.2

The most accurate statement probably lies between these two: while judicial intervention can't be the only answer to the prison dilemma, it is vital to achieving minimal justice and at best may provide both

an escape valve for prisoners and extra time for legislators and penologists to reconsider the whole rationale of our punishment system.

Prisoners' grievances include interference with their right of access to courts, counsel, and legal materials; censorship of mail and reading matter; limits on religious practices and political activities; racial segregation; and extreme forms of disciplinary punishment. The latter will serve here as the focal point for examining new remedies which prisoners are developing, for disciplinary measures were once considered judicially untouchable.3

The major remedies available are the federal writ of habeas corpus; statutory claims under the 1871 Civil Rights Act 4 for deprivation of rights under color of law and criminal action for conspiracy against the rights of citizens and deprivation of rights under color of law.5 The latter has not been much used because of the limiting requirement of "specific intent" on the part of state officials to deprive a person of federal rights.6

HABEAS CORPUS

Federal habeas corpus is a limited remedy because it requires exhaustion of both state administrative and judicial remedies. As the Minnesota cases discussed below show, habeas corpus has become more useful since its expansion to include the manner of confinement as well as the initial legitimacy of the proceedings leading to the conviction.7

IN MINNESOTA

By emphasizing the duty of courts not to interfere unnecessarily with legislative or administrative functions, our court in State ex reI Richter v. Swenson8 held that the writ was not available to an inmate who had been put in solitary confinement for participating in the 1953 riot at Stillwater. Richter's claim was that the prison regulation under which he had been isolated was unconstitutional for being ex post facto, since it had been promulgated by the Commissioner of Public Welfare to take effect a month after the riot. Therefore, the new rule inflicted a more burdensome punishment on him than was in existence either when he was sentenced or when the riot occurred.

The established law in Minnesota was found to be that the sole function of habeas corpus is to relieve from unlawful imprisonment; i.e. detention other than by final judgment of a competent tribunal. "Courts are without jurisdiction to interfere with prison management and governing rules or supervision by public officials who are charged with that responsibility."9 A second 1954 case reached the same decision.10

The reasoning in both cases was such as to preclude any consideration of what was actually happening to a prisoner. Once the two conditions (of commitment through valid judgment and of rules made by public officials in charge of the prison) were met, the prisoner had no access to courts except to question the validity of the judgment.

But ten years later the court first recognized circumstances under which the second condition - actions of prison officials - could be brought into question. The habeas corpus remedy was "broadened to permit inquiry into alleged violations of freedoms considered to be basic and fundamental" in State ex rel Cole v. Tahash.11 In brief, a convict can obtain a hearing in district court by petition on a prima facie showing of a course of cruel and unusual treatment. Although Cole failed to make such a showing (he was moved from reformatory to state prison to a security hospital and then back to prison), the court

left no doubt as to the requirements: at minimum, a verified statement detailing a) facts respecting the treatment claimed to be cruel and unusual; b) the time and place of such treatment; c) the identity of the person or persons considered responsible.

To that extent Richter and Koalska were modified.

The remedy is further described in State ex re Crosby v. Tahash.12 Petitioner failed to meet the requirement of a prima facie showing when he claimed that officials were derelict in not acting to save him from harm by other prisoners (Crosby wanted the officials to announce that he was not the author of obscene notes that were circulated with Crosby's pen-name signed to them).

But the opinion went on to state:

"Under circumstances giving rise to the inference that the infringement of constitutional rights would be continued or repeated unless relief were granted," the district court "could and should" hold a hearing, determine the facts, and "issue such an order as the court deemed necessary . . . to safeguard the constitutional rights of the prisoner."

42 U.S.C §1983

A §1983 action, which is usually based on a deprivation of rights guaranteed by the First, Eighth, or Fourteenth Amendments, is not limited by the exhaustion doctrine. "Indeed, the objectives of the Civil Rights Act would be defeated if we decided that this federal claim grounded on an alleged violation of the federal constitution would have to stagnate in the federal court until some nebulous or non-existent remedy was pursued like a will o' the wisp in the state court.13

A prisoner need show only the deprivation of a constitutional right and that imprisonment per se does not necessitate that particular deprivation. Persons confined in state prisons are within the protection of §1983.14 Claims of unconstitutional treatment within a state prison are based, inter alia, on the Eighth Amendment's prohibition of cruel and unusual punishment, which applies to the states through the Due Process clause of the Fourteenth Amendment.15

Many cases have struggled to reach a workable definition of "cruel and unusual" to apply to punishment imposed by courts and statutes. Prisoners, however, base their claims on actions of prison administrators which occur in addition to the court imposed sentence. Several recent cases have met this issue squarely and shown no hesitation in ordering wardens to cease using whips, lengthy solitary confinements, and other punishments either out of proportion to the seriousness of the violation of prison regulations or cruel per se.

"Strip cells" in Soledad inspired a California court 16 to find guidelines for what constitutes cruel and unusual punishment. Plaintiff (6'1") was confined to a 6' x 81 cell which had no furniture, no inside light, was never cleaned, and was seldom ventilated. He was confined there at the discretion of lower level personnel; the first eight days he was kept naked. The standards delineated were:

1) Circumstances which shock the general conscience or are intolerable to fundamental fairness as judged in the light of developing concepts of elemental decency.17

2) Punishment greatly disproportionate to the offense.18

3) Chastisement which goes beyond what is necessary to achieve legitimate penal aims.19

These three theories for finding unconstitutional punishment have been applied frequently since then. Perhaps the ultimate has been reached in Holt v. Sarver 20 in which the entire Arkansas penal system was found unconstitutional. The system consists of two farms, were run almost completely by trusties (rather than members of the "free world"). The result was rampant corruption and a total lack of communication with the outside. The men slept in open barracks. There was no meaningful rehabilitation or preparation of prisoners for release.

The Arkansas district court21 found in 1970 that the prison conditions were cruel and inhuman, and that racial segregation there violated the equal protection clause of the Fourteenth Amendment. The court ordered the prison brought up to federal constitutional requirements, required a written progress report in six weeks from the commissioner of corrections, and reserved jurisdiction to take appropriate further steps if the report was unsatisfactory. Even this strong court action is limited by the state's financial resources, as the opinion recognizes.

Martin Sostre, who has been since the 1950's bringing his own lawsuits to secure freedom of religion for prisoners, brought a complex §1983 suit over his treatment in Green Haven. He had been confined indefinitely to solitary for refusing to cease communicating with his lawyer on matters which the warden thought not directly related to Sostre's case; and for refusing to answer the warden's questions about what the "RNA" was (Sostre would only reply that the initials might be connected with the New Deal somehow.) Neither act by Sostre violated prison regulations. He was confined without receiving written notice of either the charges or the possible punishment. There was no charge that he was precipitating violence or attempting to escape.

The district court22 awarded Sostre broad relief, including an injunction which laid out minimal due process, and punitive and compensatory damages of over $13,000. Judge Motley's opinion found the conditions of his confinement sufficiently dehumanizing to be unconstitutional. The Second Circuit Court of Appeals overruled most of the District Court holding in

February.23 The two opinions illustrate the effect of the differences between willingness and reluctance to intervene in prison affairs. First, the two courts interpreted the facts quite differently. Second, the Court of Appeals found that punishment had to be "barbaric" to be unconstitutional; that because federal judges lack expertise they should defer to prison officials' judgment; and finally that the District Court's "trappings of formal due process" are not always necessary when a disciplinary action may result in withholding, or loss of earned, "good time" (used to reduce the time served).

Sostre was denied money damages, although the finding agreed that he had been unlawfully confined to punitive segregation for possession of literature and for writing.

A Texas district court has also rejected Judge Motley's standards. There, prisoner was confined fifteen days at a time, with indefinite repetition after a two day rest; he received one meal every 72 hours. The court admitted that the Texas system was not up to national standards, but said that only prison administrators, and not the court, are qualified to decide how to treat prisoners. "We can rely on the good faith … of prison officials to effect the spirit of the Constitution." The rationale approaches an abrogation of the judicial duty to uphold the Constitution.

A better statement of the function of judicial review appears in one of many cases dealing with the right of Black Muslims to practice their religion in the face of officials' contention that restrictions were

necessary to keep order in the prisons.25 "While the judgments of prison officials are entitled to considerable weight because they are based on first hand observance of the events of prison life and upon a certain expertise in the functioning of a penal institution, prison officials are not judges ... We do not denigrate their views, but we cannot be absolutely bound by them." 26

Recently a Federal District Court initiated a series of conferences between prisoners and authorities in order to reach an agreement when a prisoner sought injunctive relief27 from being segregated from the general population in a "behavioral control unit." Placement in the "BCU" resulted in a denial of access to basic institutional activities and facilities. This approach may be more functional than choosing either non-intervention or full scale involvement. In that case not only the two adversaries but also the general prison population were involved in drawing up and approving new regulations.

The immediate problem facing the legal system is to find a constitutional balance between postconviction powers of the courts, prison regulations necessary to keep order, and the rights of prisoners. As these cases show, the balance is not easily reached.

The immediate problem is dwarfed by its context: a prison system which is an institutionalized collection of the failures of all our other institutions.

If "the degree of civilization in a society can be judged by entering its prisons,"28 then it is probably true that "courts must intervene . . . to restore the primal rules of a civilized community in accord with the mandate of the constitution."29

Abuse as well as outright anarchy can be controlled if not curtailed. Perhaps the law can serve, at the very least, to gain time and draw attention to deprivations which are more severe than many comprehend. To do so, courts must no longer avoid judging the validity of particular methods of prison administration.

Footnotes

1. C. E. Friend, Judicial intervention in prison administration, 9 Wm. & Mary L. Rev. 178 (Fall 1967).

2. T. J. Clements, Judicial responsibility for prisoners, 4 Creighton L. Rev. 47 (1970-71).

3. Williams v. State, 194 P. 2d 32 (8th Cir. 1952). Snow v. Rock, 143 F. 2d 718 (9th Cir. 1944); cert. den. 323 U.S. 788 (1944).

4. 42 U.S.C. §1983 (1964).

5. 18 U.S.C. §241, 242 (1964).

6. Evans v. U.S. 325 U.S. 91, 65 Sup. Ct. 1031, 89 L.Ed. 1495 (1945).

7. Johnson v. Avery, 393 U.S. 483, 89 Sup. Ct. 747, 21 L.Ed. 2d 718 (1969). The leading case on the old application (only to obtain immediate release from prison) is McNally v. Hill, 293 U.S. 131, 55 Sup. Ct. 24, 79 L.Ed. 2d 238 (1934).

8. 243 Minn. 42, 66 N.W. 2d 17 (1954); cert. den. 348 U.S. 893.

9. Id. at 19.

10. Koalska v. Swenson, 243 Minn. 46, 66 N.W. 2d 337 (1954); cert. den. 348 U.S. 908.

11. 269 Minn. 1, 129 N.W. 2d 903 (1964).

12. 278 Minn. 37, 153 N.W. 2d 125 (1967).

13. Wright v. McMann, 387 F. 2d 519 (2d Cir. 1967).

14. Cooper v. Pate, 378 U.S. 546, 84 Sup. Ct. 1733, 12 L. Ed. 2d 1030 (1964).

15. Robinson v. California, 370 U.S. 660, 82 Sup. Ct. 1417, 8 L.Ed. 2d 758 (1962).

16. Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966}.

17. Lee v. Tabasb, 352 P. 2d 970, 972 (8th Cir. 1965).

18. Robinson v. California, supra n. 15 at 676.

19. Weems v. U.S., 217 U.S. 349, 370 (1910).

20. 442 F. 2d 304 (8th Cir. 1971).

21. 309 F. Supp. 362 (E.D. Ark. 1970).

22. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y., 1970).

23. Sostre v. McGinnis, 442 F. 2d. 178 (2d Cir. 1971).

24. Novak v. Beto, 320 F. Supp. 1206 (Tex. 1970).

25. Brown v. Peyton, 437 P. 2d 1228 CC.A.Va. 1971).

26. Id. at 1232.

27. Morris v. Travisono, 310 F. Supp. 857

28. Dostoevsky, The House of the Dead.

29. Jordan v. Fitzbarris, supra no. 16 at 680. (D.R.I. 1970).

ATTENTION ALUMNI

Alumni news will no longer be carried in the Opinion. An Alumni Newsletter will be published by the school four times a year and will contain all notices and news items with regard to William Mitchell alumni. Alumni are requested to submit any news which they feel would be of interest to fellow alumni, as well as notices of employment, to:

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