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Civil Rights and Civil Liberties (with S. Fritzsche & G. Muller)

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CIVIL RIGHTS AND CIVIL LIBERTIES

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THE SEVENTH CIRCUIT Court of Appeals has a deserved reputation as being receptive to civil liberties and civil rights claims. During the period from June 30, 1973, to September 30, 1974, the court issued decisions which to a considerable extent sustained that reputation. The purpose of this article is to review these rulings and to attempt to draw some conclusions as to where the court has been and where it is likely to go.

It is quite difficult to speak of a Seventh Circuit Court of Appeals in terms of a discrete, defined entity. A considerable number of judges from other circuits and districts have participated in decisions of this circuit; indeed, twenty-five judges sat in the fifty-five different cases reviewed.[1] Thus, generalizations about the court as an unvarying institution are difficult to make. Another factor to be noted in the administration of the court is the apparent specialization of the judges in certain areas of the law. Judges Stevens, Pell, Cummings, and Fairchild heard virtually every public employees' rights case. Chief Judge Swygert was often seated in first amendment cases, and he and Judge Sprecher often joined in hearing civil rights appeals.

A time period of little more than a year, and a variably manned court, do not make for arriving at dispositive generalizations. Moreover, it is important to recognize that judicial opinions reflect, at least in some measure, the arguments and briefs of the litigants. Thus, an omission or a conclusion may well be a response to the issues pre-

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1. The Seventh Circuit Court of Appeals has eight regular judges allocated to it. However, for much of the time period being addressed, there were two vacancies. With the seating of Judges Tone and Bauer no vacancies remain. The composition of the court in the civil rights and civil liberties cases under consideration has fluctuated greatly and has included: Judge Barnes (Ninth Circuit), Judge Christensen (District of Utah). Mr. Justice Clark (retired from Supreme Court), Judge Jameson (District of Montana), Judge Larramore (Court of Claims), Judge Matthes (Eighth Circuit), Judge Moore (Second Circuit), Judge Murrah (Tenth Circuit), and Judge O'Sullivan (Sixth Circuit).

sented to the court, rather than an index to the court's own posture. Some tentative conclusions are in order, however. It seems fair to conclude that the Seventh Circuit Court of Appeals vigorously adheres to the primacy of the right of free speech, a posture hardly surprising given the general development of the law in the first amendment area. In contrast, the court seems particularly resistant to the claims of public employees, demonstrating a significant reluctance to find in their favor. In the civil rights area, the court has demonstrated a willingness to move to the outer edges of the law, if that movement was necessary or desirable to eradicate racial discrimination. The court's posture as to sex discrimination is more problematic. In the employment field, the court acted affirmatively to secure women's rights. Its sole abortion decision, however, while on its face turning on a technical issue rather than a substantive one, was a serious setback to women's rights.

More generally, the court seems to have a strong practical bent. Few decisions exhibit lengthy legal discourse. Rather, the court demonstrated a pragmatic response to the problems it confronted, devising what it considered appropriate solutions in the context of these problems. This, of course, is a generalization with significant exceptions, yet it appears to be a fair one.

These generalizations are drawn through analysis of the court's decisions in the areas of: first amendment freedoms, employee rights, both in the public and private sector, housing rights, the right to privacy, educational rights, governmental immunity and public officers liability, and consumer rights.

THE FIRST AMENDMENT

Whatever ambiguities the court created or sustained in other areas of civil liberties, it demonstrated a rigorous, aggressive protection of first amendment claims. In almost every decision issued, the court held in support of the claimant of free speech rights. Particularly significant was the court's decision in *Slate v. McFetridge*,[2] which arose from the disorders at the Democratic Convention in Chicago in the summer of 1968. Slate, representing a number of political organizations seeking to hold a rally for an "Open Convention", contacted officials of the Chicago Park District on July 12, 1968, to obtain a public meeting place which would accomodate up to one hundred thousand people. The following day he confirmed the request by letter and mentioned three possible sites. No response was had from the defend-

2. 484 F.2d 1169 (7th Cir. 1973).

ants until another letter from the plaintiffs prodded them to arrange for a meeting on July 31. At this meeting, though the facts were not entirely undisputed at trial, it became clear that Soldiers' Field was unavailable; however, no decision as to any other facility was made. After more prodding by the plaintiffs, the defendants finally, on August 13, 1968, denied the request for any and all facilities. The next day suit for injunctive relief was filed.

The plaintiffs' motion for a preliminary injunction was denied on August 19, 1968, thereby forcing the plaintiffs to cancel their rally. The complaint was subsequently amended to include a request for damages. After the trial the judge refused to direct a verdict for plaintiffs on the basis of the defendants' failure to duly process the permit application; the case went to the jury on the sole issue of whether the defendants could reasonably bar the plaintiffs' exercise of first amendment rights. Judgment was had for the defendants, and the plaintiffs appealed the denial of their motion for a directed verdict, as well as the refusal of the trial judge to instruct the jury on the requirements of due process in safeguarding first amendment rights. The Seventh Circuit Court of Appeals reversed.

The court of appeals assumed that the communications between the plaintiffs and the defendants were ambiguous as to whether only Soldiers' Field, or alternative facilities, as well, were requested. Nevertheless, the defendants' unreasonable delay in responding to the plaintiffs' request violated the requirements of due process which accompany the rights guaranteed by the first amendment. The defendants' failure to notify the plaintiffs of the unavailability of Soldier's Field was not a harmless error, since prompt denial would have given plaintiffs ample time to pursue other facilities.

In so holding, the court looked to *Freedman v. Maryland*,[3] which requires, in the first amendment context, that administrative procedures must be speedy so as to assure prompt judicial resolution of the controversy, thereby minimizing "the deterrent effect of an interim and possibly erroneous denial of a license."[4] The court vigorously condemned the defendants' delay:

3. 380 U.S. 51 (1965).

4. *Id.* at 58. At the time at which the denial occurred, contrary rulings had not yet been handed down. *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1964); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968); Collins v. Chicago Park District, 460 F.2d 746 (7th Cir. 1972). Thus, the court was unwilling to hold the defendants to the standards enunciated in such rulings. In so holding, the court stated:

> [F]ederal courts have reached a general consensus that liability for damages under 42 U.S.C. § 1983 must be determined by the legal standards in existence

> Whatever the reasons for the delay of 16 days were, . . . they cannot justify the tardy response on any view of the facts . . . . Barry's [one of the defendants] failure immediately to notify plaintiffs of this fact as the hours remaining before the Convention time ticked away was a bald abuse of authority and an outright violation of the mandate in *Freedman* of prompt administrative action.[5]

Thus, the court held the defendants liable as a matter of law for damages and remanded the case to the district court.

Slate is a significant vindication of first amendment rights. The substance of the court's decision singularly punctuates the necessity of prompt administrative determinations when first amendment rights are at stake. "A licensing authority is granted a reasonable period to rule on a permit application largely because time is needed for negotiations and the making of arrangements for and with the applicant. Surely this purpose is not served by allowing the official well over two weeks to sit on his hands."[6] Equally important was the court's establishment of the rule that damages are proper relief for the infringement of constitutional rights. The Seventh Circuit had been notable for its nonrecognition of the inherent value of constitutional rights,[7] and this made it particularly difficult to sustain suits against the Federal Government for denials of constitutional rights in this circuit. Although there is room for dispute that the remand was for the determination of damages arising solely from injury to intangible constitutional liberties, *Slate* at least moves strongly in that direction.

In *Jacobs* v. *Board of School Commissioners*,[8] the court again issued a decision firmly protective of first amendment claims. The action was brought by several high school students in Indianapolis who published an underground newspaper, the *Corn Cob Curtain*, and

at the time of an alleged violation of constitutional rights. Retroactive application of fresh precedent has no place in fixing the standard of conduct for damage suits under Section 1983. Thus, the narrow reading by a public official of a case on constitutional law must be upheld unless patently unreasonable and without arguable support in logic or policy. Nevertheless, we cannot fail to recognize that any case has boundaries of fair application which go beyond situations presenting the facts squarely before the deciding court on the occasion of decision. Every decision is possessed of a penumbra of analogues.

5. 484 F.2d at 1177.

6. *Id.*

7. *See, e.g.*, Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965). *Contra*, Cortright v. Resor, 325 F. Supp. 797, 809 (E.D.N.Y. 1971), *rev'd on other grounds* 447 F.2d 245 (2nd Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); West Neighborhood Corp. v. Stans, 312 F. Supp. 1066, 1068 (D.D.C. 1970); Murray v. Vaughn, 300 F. Supp. 688, 695-6 (D.R.I. 1969). No jurisdictional prerequisite exists for suits filed under 42 U.S.C. § 1983, the usual statutory base for civil rights and civil liberties suits against state and local government officials.

8. 490 F.2d 601 (7th Cir. 1973).

sought to distribute it among fellow students throughout the city school system. Under rules and regulations promulgated by the Board of School Commissioners which specified permissible literature and governed its distribution, the authorities suppressed the paper. The students then filed suit in the district court, seeking injunctive and declaratory relief. While the action was pending, and in an attempt to conform to the judge's stated belief that the attacked rules and regulations were unconstitutional, the school administration amended them. This was to no avail, however, since the trial court still ruled against the defendants, finding the amended rules to be unconstitutional.

The appellate court affirmed the lower court decision, offering a detailed analysis of the amended rules and regulations held to be unconstitutional.

The first proviso of the amended rules stated: "No student shall distribute in any school any literature that is . . . either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal education processes, functions or purposes in and of the Indianapolis schools, or injury to others." The plaintiffs attacked this provision as both overbroad and vague, and the district court so ruled. The appellate court agreed, reasoning that although the penalties for violating the rule were not criminal in nature, they were "sufficiently grievous to mandate careful scrutiny for vagueness."[9] The regulation could not withstand that scrutiny "[w]here the boundaries between prohibited and permissible conduct are ambiguous," as the court would not "presume that the curtailment of free expression is minimized."[10] The second challenged proviso stated: "No student shall distribute in any school any literature that is . . . not written by a student, teacher, or other school employee; provided, however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted." The defendants contended that student distribution of materials written by non-students and outside organizations tended to produce disorder and interference with school functions. The court rejected this argument, noting: "Predictions about imminent disruptions . . . involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter."[11] The third challenged rule

9. Id. at 605.
10. *Id.* at 606.
11. Id. at 606-07, *citing* Police Department of Chicago v. Mosley, 408 U.S. 92, 100 (1972).

barred the distribution of anonymous literature. Again the court found it constitutionally deficient: "[w]ithout anonymity, fear of reprisal may deter peaceful discussion of controversial but important school rules and policies . . . ."[12] Moreover, the school board had offered no sufficient justification for the rule, as it could not "reasonably forecast that the distribution of any type of anonymous literature within the schools would substantially disrupt or materially interfere with school activities or discipline."[13]

Still another rule prohibited the sales of materials and solicitation of funds within the schools unless the funds were for the benefit of the school itself. Such regulation would achieve indirectly what could not be directly done, reasoned the court, since without receipts of contributions on school grounds the students would not be able to raise sufficient monies for the publication of the paper. Furthermore, continued the court, additional provisos, not challenged in the suit, relating to time, place and manner of distribution adequately served the purpose of restricting the commercial activity which was incidental to the exercise of free speech. The last challenged proviso prohibited any distribution of literature while classes were being conducted in the school in which the distribution was to be made. The court questioned whether "the Board could reasonably forecast that the distribution of students' newspapers anywhere within a school at any time while any class was being conducted would materially disrupt or interfere with school activities and discipline,"[14] and reasoned that " 'we must weigh heavily the fact that communication is involved [and] the regulation must be narrowly tailored to further the State's legitimate interest.' "[15] The court concluded "that the defendants have not satisfied their burden of demonstrating that the resolution banning distribution at all these times is narrowly drawn to further the state's legitimate interest. . . ."[16]

Lastly, the court considered the defendant's argument that the publications were obscene, indecent, vulgar, and profane. Taking into account the intervening decision of *Miller v. California*[17] and "[m]aking the widest conceivable allowances for differences between adults and high school students with respect to perception, maturity, or sensitivity, the material pointed to by Defendants could not be said to fulfill

12. Id. at 607.
13. Id.
14. *Id.* at 609.
15. *Id., citing* Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972).
16. *Id.*
17. 413 U.S. 15 (1973). See discussion of *Miller, infra* at 346.

the *Miller* definition of obscenity."[18] Relying on its earlier holding in *Scoville v. Board of Education of Joliet*,[19] the court held: "Although there is a difference in maturity and sophistication between students at a university and at a high school, we conclude that the occasional presence of earthy words in the *Corn Cob Curtain* cannot be found to be likely to cause substantial disruption of school activity or materially to impair the accomplishment of educational objectives."[20]

Jacobs is a potent affirmation of first amendment rights. Important, also, is the court's ruling that the plaintiff students did not have to be represented by a guardian ad litem. Both the trial court and the Seventh Circuit Court of Appeals held the appointment of a guardian under the Federal Rules of Civil Procedure was not mandatory, and that the plaintiffs were competently represented. Implicitly, perhaps, the court recognized the right of a minor to retain counsel of his choice—a right extremely relevant, and as yet not established, in other contexts.[21]

The uncomfortable line drawn between pure speech and commercial speech[22] was the focus of the court's attention in *Barrick Realty*

18. 490 F.2d at 610.
19. 425 F.2d 10 (7th Cir. 1970).
20. 490 F.2d at 610.
21. Most children who are the subjects of custody battles do not have the right to counsel of their own choice. *But see* Anonymous v. Anonymous, 70 Misc. 2d 584, 333 N.Y.S.2d 897 (1972).
22. The commercial speech doctrine was enunciated in Valentine v. Chrestensen, 316 U.S. 52 (1942), where the Court held that commercial advertising is not speech within the meaning of the first amendment. The theory appears to be that commercial advertising is more conduct than speech, and that government restraint is merely a business regulation. *See, e.g.*, Banzhaf v. FCC, 405 F.2d 1082, 1102 (D.C. Cir. 1968); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1196 (1965). In *Valentine* the Court dismissed the fact that the advertising was mixed with protest material, leaving open whether any ideational content was sufficient to require the application of first amendment principles and, if so, how much of such content was necessary. In dicta in Jones v. Opeleika, 316 U.S. 584 (1942), *reversed* 319 U.S. 103 (1943), the Court addressed this issue. The case arose out of the conviction of a Jehovah's Witness member for selling pamphlets in the street without a license. The Court upheld the ordinance as a valid regulation of business, stating: "When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing." *Id.* at 597. In response to the dissenters, the *Jones* majority stated: "[I]t is because we view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances . . . valid." *Id.* at 598. Thus, the Court apparently would apply a balancing test, and even the presence of some ideational content would be insufficient to invoke first amendment principles, at least if that content were less than fifty percent.

The Court seemed to veer in its course when, in Jamison v. Texas, 318 U.S. 413 (1943), it unanimously reversed the conviction of a Jehovah's Witness who had been convicted for distributing handbills which advertised a religious meeting and included one sentence stating that pamphlets were available for a fee. The Court characterized

v. City of Gary, Indiana.[23] At issue was a city ordinance banning the use of "for sale" signs in residential zones of the city.[24] The plaintiffs challenging it were a realty company, its president, and a homeowner who listed his home for sale by the company. The district court ruled for the defendant, and the appellate court affirmed. The history of the regulation showed that it was aimed at panic selling, and that its purpose was to halt resegregation. The court reported that "[i]t was passed in response to the presence of numerous 'For Sale' signs in some white neighborhoods, which caused whites to move *en masse* and blacks to replace them."[25] The court was not prepared to simply rely

the handbill as "clearly religious", 318 U.S. at 416, and cited *Valentine* for the proposition that the states could only control "purely commercial" activity. *See also* International Society for Krishna Consciousness, Inc. v. Conlisk, 374 F. Supp. 1010 (N.D. Ill. 1973). Confusion was further added by the Court's decision in Murdock v. Pennsylvania, 319 U.S. 105 (1943), where the Court confronted the same situation as in the first *Opeleika* ruling. In *Murdock*, the Court reversed the convictions. The decision can be read as either holding that only purely commercial activity is unprotected by the first amendment, or that the activities in *Murdock* were in fact purely religious and therefore did not raise an occasion for balancing.

Since *Murdock* the Court has employed a balancing approach (*compare* Martin v. Struthers, 319 U.S. 141 (1943) *with* Breard v. Alexandria, 341 U.S. 622 (1951)) while reading *Valentine* very literally. In New York Times v. Sullivan, 376 U.S. 254 (1964), for example, the Court rejected the contention that the first amendment did not apply to allegedly libelous statements which were part of a commercial ad, construing *Valentine* as being based upon "the factual conclusion that the handbill was 'purely commercial advertising' . . . ." 376 U.S. at 265-6. *See also* Ginzburg v. United States, 386 U.S. 463, 474 (1966).

More recently, the Court handed down a significant decision in Pittsburgh Press Company v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) upon which the *Barrick Realty* court particularly relied. The majority in *Pittsburgh Press* found that want ads were commercial speech because they were simply proposals of employment, not expressing social or political opinions. The Court rejected the Pittsburgh Press' argument that the distinction between commercial and other kinds of speech for first amendment purposes should be abrogated.

The law is obviously murky. And significant problems remain: when does so-called commercial speech contain ideational content; if such content exists, how much is necessary to invoke first amendment protection; to what extent do commercial ads foster social values and life styles, or at the least, debate over commercial products? Certainly, in the day of Ralph Nader, when an ad may condemn a product, we need not strain too far to question whether this is not really protected speech. On a more philosophical plane is the question of the inherent validity of the value judgment being made in consigning commercial speech to a lower standard of speech. In commenting on *Valentine*, one author observed that "[t]he opinion which the Court offers . . . can be justified only on the theory that the constitution places freedom of political propaganda more highly than it values the freedom to organize cooperation by means of trade. . . ." Gardner, *Free Speech in Public Places*, 36 B.U.L. REV. 239, 246-7 (1956). Goldstein, "Commercial Advertising and the First Amendment," a working paper for the ACLU (1973).

23. 491 F.2d 161 (7th Cir. 1974).

24. *See generally* Comment, *The Constitutionality of a Municipal Ordinance Prohibiting 'For Sale,' 'Sold,' or 'Open' Signs to Prevent Blockbusting*, 14 ST. L.U.L.J. 686 (1970).

25. 491 F.2d at 163-4.

on the commercial nature of the signs banned by the ordinance:

> The fact that the "For Sale" signs convey a commercial message is not in itself sufficient to meet the First Amendment attack. The history of the Gary ordinance indicates that the "For Sale" signs communicate a message to neighbors and visitors, as well as to prospective purchasers. (Footnote omitted). In a sense, the very purpose of the ordinance is censorial. First Amendment as well as commercial interests are therefore affected by this ordinance.[26]

Notwithstanding its sophisticated perception of the potential for censorship, the court reversed intellectual gears, so to speak, by further reasoning that the signs were not " 'pure speech' ", and invoked decisions involving mixed speech and conduct. The decisions cited,[27] however, both involved picketing and thus hardly seem ready analogues for the court's conclusion. Employing a balancing approach, the panel further concluded that the regulation was permissible since there was a valid city interest in restricting commercial activity in residential neighborhoods, compounded by the city's interest in encouraging and maintaining stable integrated neighborhoods.

The court addressed the plaintiffs' equal protection claim, which was that there was no reason to apply the ordinance to only certain kinds of property. It interpreted this as essentially a substantive due process argument, and indicated that the ordinance here clearly was not sufficiently arbitrary or capricious to properly invoke that doctrine. Similarly, the plaintiffs' arguments focusing on a claimed burden on property rights and on infringement of the right to travel, were summarily disposed of.

Finally, the court turned to the plaintiffs' thirteenth amendment claims. They contended that the amendment was breached because the ordinance made it more difficult for blacks to move into previously all-white neighborhoods. The court rejected that suggestion, concluding that a policy which, in pursuit of securing stable integrated neighborhoods, limited the number of blacks moving into these neighborhoods was constitutionally acceptable. The court did make clear, however, that if there had been an allegation that the ordinance was unconstitutional as applied because it was in fact being used to preserve all-white neighborhoods from any significant integration, the ordinance and its application would properly be subject to "the strictest scru-

26. *Id.* at 164.

27. Cox v. Louisiana, 379 U.S. 559 (1965); Cox v. Louisiana, 379 U.S. 536 (1965).

tiny."[28] However, the district court had expressly found that any such allegation was wholly without evidentiary support.

Barrick Realty does not offer any doctrinal contribution to an understanding of the commercial speech doctrine. The court comes to what is probably an unexceptionable conclusion, notwithstanding its assertion that the "For Sale" signs were not solely commercial speech. While a harder case might more tautly delineate the tension between unprotected commercial speech and protected pure speech, this does not appear in *Barrick Realty*.

In *Amato v. Divine*,[29] the court addressed the impact of *Miller v. California*.[30] It did not fare well, however, since the Supreme Court reversed the ruling.[31] Amato had been convicted in state court of selling obscene materials. His conviction was affirmed by the Wisconsin Supreme Court,[32] and certiorari was denied by the United States Supreme Court.[33] Subsequently, he filed a petition for a writ of habeas corpus in federal district court, and this was granted. The court of appeals affirmed. Between the district court decision and that of the court of appeals, the Supreme Court decided *Miller*.

Miller established three guidelines for analysis. First, the permissible scope of regulation of obscene materials was the depiction or description of sexual conduct. Second, the offensive conduct had to be specifically defined by the regulating state law, as written or construed. And third, the trier of fact had to determine "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law, and whether . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[34] In analyzing the statute under which Amato had been convicted, the court concluded that the proscription of materials which were lewd, obscene, or indecent fell short of the specific definition required by *Miller*. Thus, notwithstanding the fact that the materials Amato sold were obscene within the standards set by *Miller*, the lack of specificity of the regulation required an affirmance of the

28. 491 F.2d at 165. See further discussion *infra* at 397-99.
29. 496 F.2d 441 (7th Cir. 1974).
30. 413 U.S. 15 (1973).
31. 43 U.S.L.W. 3294 (Nov. 18, 1974).
32. State of Wisconsin v. Amato, 49 Wis. 2d 638, 183 N.W.2d 29 (1971).
33. Amato v. Wisconsin, 404 U.S. 1063 (1972).
34. 413 U.S. at 25.

habeas writ. On its face, the court's decision appears to provide little with which to take exception. Nonetheless, the Supreme Court vacated the judgment and remanded on November 18, 1974, for further consideration in light of *Hamling v. United States*,[35] and *State ex. rel. Chobot v. Circuit Court*.[36]

The court again addressed the classic first amendment issue of the exercise of speech in the public forum in *Impeach Nixon Committee v. Buck*,[37] which arose out of the refusal of the Chicago Transit Authority to accept the paid political message of the plaintiff Committee. The Impeach Nixon Committee had sought to have posted in the CTA's buses, trains, and stations placards stating "To Impeach Nixon . . . Call . . . ." The CTA, a public agency, refused to accept them, notwithstanding its regular acceptance of the advertising of political candidates, its acceptance in the past of a public message urging an end to the Vietnam War, and its recent acceptance of posters supporting a yes vote in a referendum on the issue of establishing a regional transit authority.

The district court denied the plaintiffs' motion for a preliminary injunction. The court of appeals, however, reversed, finding that the CTA's acceptance of other public and political messages established that the CTA's vehicles and stations were public fora. The plaintiffs' message was therefore entitled to equal treatment in gaining access to these arenas of discussion.

Judge Pell's dissent focused on two issues, one procedural, one substantive. He was of the opinion that the denial of the preliminary injunction by the district court was a discretionary exercise, and there was no specific finding by the appellate court of abuse of that discretion. Additionally, he felt that the sparsity of the factual record developed below was further basis for the reviewing court to refuse to reverse the determination below. Turning to the substance of the plaintiffs' message, Judge Pell regarded public speech concerning a president's impeachment as being of a different nature than that hitherto accepted by the defendants. This was because in his view impeachment was solely a congressional prerogative, and public discussion was therefore irrelevant to effective exercise of first amendment rights.

Judge Pell's position raises the troubling spectre of censorship, for it proposes that the courts engage in assessing what is—and what is

35. 94 S.Ct. 2887 (1974).
36. 61 Wis. 2d 354, 212 N.W.2d 690 (1973).
37. 498 F.2d 37 (7th Cir. 1974).

not—suitable subject matter for public discussion and debate. The majority position, on the other hand, appears more closely in accord with basic first amendment and equal protection principles. Nevertheless, on October 21, 1974, the Supreme Court granted the CTA's petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded the case for ascertainment of whether a case or controversy still existed and, if so, for reconsideration in light of *Lehman v. City of Shaker Heights.*[38] The relevance of *Lehman* is obscure, since in that case the municipal transit authority, which the Court held was not required to carry political advertising, had in fact never carried anything but commercial ads, thus obviating the equal protection issue, as well as the issue of whether a public forum for pure speech existed.

In *Perry v. CBS, Inc.*[39] the court addressed another in the lengthening list of cases assessing the conflict between the first amendment and an individual's claims of privacy and of defamation. The court affirmed the lower court's ruling for the defendants. The plaintiff in *Perry* was the black actor Stepin Fetchit, whose real name was Lincoln Theodore Monroe Andrew Perry. He claimed that he had been defamed and his privacy invaded by a television program entitled "Black History: Lost, Stolen, or Betrayed." In the program Perry was described as playing movie roles depicting the stereotyped "lazy, stupid, crap-shooting, chicken-stealing negro."[40] The narrator further mentioned his real name and went on to state the amount of money he had earned for his roles.

The court rejected the contention that Perry had been defamed:

> We agree that a jury could have found the intended meaning of the commentary was that Perry had sold out his race for money. A different but innocent construction, however, that could reasonably have been drawn was that Perry's excellent character portrayal reinforced the stereotype view that many white persons had of blacks during the nineteen-thirties and that white moviegoers were willing to pay two million dollars for that reinforcement.[41]

Moreover, the court deemed Perry a public figure, and thus, under *New York Times v. Sullivan,*[42] comment about him was privileged unless made with actual malice, which had not been proven. In so reasoning, the court addressed an argument not altogether capable of easy resolution. Perry argued that indeed he was no longer a public figure,

38. 94 S.Ct. 2714 (1974).
39. 499 F.2d 797 (7th Cir. 1974), *cert. denied,* 95 S. Ct. 150 (1974).
40. *Id.* at 799.
41. *Id.* at 800.
42. 376 U.S. 354 (1964).

and that his subsidence into obscurity had restored to him the private individual's right to privacy. The court avoided grappling with the notion that public figure status can disappear. Rather, it simply regarded Perry as still being sufficiently in the public limelight to bar his claim.

Perry also sought to hold the advertiser which had sponsored the program liable, even though the producer, CBS, was protected. The court correctly rejected this tack:

> To follow this logic would leave the First Amendment a meaningless phrase in most areas of the media. It would result in advertisers in magazines, newspapers, and television being sued for statements in which they had no hand. The free and robust debate fostered by the Constitution would quickly wither at the hands of censors for advertisers. The effect would be to shackle the First Amendment in its attempt to secure the 'widest possible dissemination of information from diverse and antagonistic sources.'[43]

Perry succinctly posed the conflicting claims under the first amendment's guarantee of free speech and the right to privacy emanating from the penumbras of the first, third, fourth, ninth, and fourteenth amendments. Reflecting the posture enunciated by the Supreme Court in *New York Times v. Sullivan*, and its progeny, the court affirmed the primacy of the first amendment.[44]

The Seventh Circuit has maintained a vigorous adherence to the primacy of rights emanating from the first amendment. On that basis alone, the court merits its reputation as a strong civil liberties tribunal. Concededly, though, the historic preferred position of first amendment rights mandates this adherence. It is perhaps other areas of civil liberties, then, that afford better indicia of the court's posture.

EMPLOYEES AND EMPLOYERS

In most areas the Seventh Circuit Court of Appeals has evinced an emphatic regard for the civil liberties or civil rights claimant. However, its posture in the field of employees' rights is much more ambiguous. Indeed, unless a public employee alleges an infringement of his free speech rights, it appears, on the basis of the decisions reviewed, that he will find little succor in this circuit.

Public Employees

The court issued several opinions addressing the constitutional claims of public employees. The first of these was *Adams v. Walker*

43. 499 F.2d at 802.
44. *But see* Gertz v. Robert Welch, Inc., 94 S. Ct. 2997 (1974).

(*Adams I*)[45] which arose out of the removal of the state liquor control commissioner, a position filled by executive appointment for a term of six years. The district court issued a preliminary injunction in favor of Adams, who claimed that his discharge failed to meet constitutional standards of procedural due process, and the Governor appealed. The court of appeals denied the defendant's request for a stay of the lower court order pending disposition of the appeal on the merits. In so doing, the court simply applied standard doctrine, reasoning that the prerequisites for securing a stay were not established.

One might have thought, on the basis of the decision in *Adams I*, that the court was inclined to rule for the employee. But in its subsequent ruling on the merits, in *Adams v. Walker* (*Adams II*),[46] the court decided for the defendant. A somewhat different panel was sitting than that which heard *Adams I* and when the ruling was handed down three opinions issued—that of Judge Cummings, the new panel member, for the court, a concurrence by Judge Stevens, and a dissent by Judge Pell. Together, these three opinions confront some of the vital problems in assessing the claims of discharged public employees, but the ultimate result is a less than pellucid guide for future litigants.

Judge Cummings applied the analysis enunciated by the Supreme Court in *Board of Regents v. Roth*,[47] examining Adams' claims for the existence of either a liberty interest or a property interest. His conclusion was that Adams had neither. The judge first looked to the 1970 Illinois Constitution, which provides that the Governor may remove for incompetence, neglect of duty, or malfeasance in office any officer who may be appointed by the Governor. It was this language which the defendant had employed in discharging Adams. In Judge Cummings' view, the construction of this provision was controlled by an early Illinois Supreme Court decision[48] construing virtually the same provision in the 1870 Illinois Constitution. That earlier court had rea-

45. 488 F.2d 1064 (7th Cir. 1974).
46. 492 F.2d 1003 (7th Cir. 1974).
47. 408 U.S. 564 (1972). The Court in *Roth* reversed the Seventh Circuit Court of Appeals decision, Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971), and held that non-tenured public employees do not have a right to procedural due process when terminated unless they are deprived of a liberty interest or a property interest. A liberty interest would be infringed if the employer made "any charge against . . . [the employee] that might seriously damage his standing and associations in the community, or which would impose such a disability as to bar obtaining other employment." 408 U.S. at 573-4. A "property interest" must be something more that an "abstract need" or a "unilateral expectation" of employment. *Id.* at 577. Rather, there must be a "legitimate claim of entitlement." *Id.*
48. Wilcox v. People *ex rel.* Lipe, 90 Ill. 186 (1878).

soned that the Governor was vested with the authority to determine whether cause for removal existed and to act accordingly in summarily discharging an appointee. For Judge Cummings, this ruling effectively disposed of any contention that the Governor did not have the power to remove Adams. Notwithstanding the fact that Adams' position had a statutorily prescribed term of six years, Judge Cummings was of the view that the commissioner had no property interest warranting the protections of procedural due process upon discharge. Adams occupied a "sensitive position,"[49] and thus was a policy-making official who could be summarily dismissed under an exception to the usual rule barring removal of tenured employees without due process protections. "While the parameters of this exception to the normal protection given public employees have not been defined, and even though it would seem to be a small category . . . , the considerations which justify the exception are certainly relevant here."[50] The court concluded that "before we could determine that an individual had been ceded a property right in a policy-making position, we would expect a clear statement by the legislature or the Illinois courts."[51] The specification by statute of a six year term of office was not a sufficiently clear statement to that effect.

The court likewise concluded that no liberty interest of Adams was infringed, notwithstanding that his discharge had been accompanied by what at least on their face would seem to be serious accusations, e.g., charges of incompetence, neglect of duty, and malfeasance. To Judge Cummings, recitation of these charges was merely invocation of the "talismanic"[52] phrase prescribed by the Illinois Constitution. And at any rate, "general characterizations of behavior must be read in context."[53] Given that appreciation of the accusations made against Adams, the reasoning further pursued by the court was expectable, although unsupported by any cited authority. "We are satisfied that plaintiff has failed to state a claim under either branch of the *Roth* liberty test. An unelaborated charge of 'incompetence, neglect of duty and malfeasance in office' is of a different order of magnitude than

49. 492 F.2d at 1007.

50. *Id.* The court initially addressed the status of policy-making officials *vis-a-vis* their procedural due process claims in Illinois State Employees Union Council 34 v. Lewis, 473 F.2d 561 (7th Cir. 1972). During the time period considered in this review, the court faced the problem again in Indiana State Employees' Ass'n v. Negley, 501 F.2d 1239 (7th Cir. 1974), *infra* at 368-69.

51. 492 F.2d at 1007.

52. *Id.*

53. *Id.*

charges of dishonesty, immorality, disloyalty, Communism, subversive activities, alcoholism or narcotics violations."[54] As further basis for the conclusion that Adams lacked a substantial claim, the court noted that "nothing in his complaint even remotely suggests a legal barrier to future employment analogous to denial of admission to the bar, disqualification from all government employment, . . . or sending substantial adverse information to a professional licensing agency."[55]

Judge Stevens concurred, both to clarify his earlier position in *Adams I* and to address two additional issues he perceived in the case. He explained that in *Adams I* he had incorrectly assumed that the legislative provision for a six year term gave Adams a property interest. He now realized that the Illinois Supreme Court had effectively ruled out that interpretation of Adams' position. As for Adams' liberty interest, Judge Stevens concurred with Judge Cummings' analysis, and offered two further insights. He, too, utilized a variable assessment of stigmatizing charges, looking to the context of the charge to gauge its effect. To him, a finding of malfeasance in the case of an applicant for admission to the bar would impair a liberty interest. But a charge of malfeasance in a political context was of a much lower order of condemnation. Indeed, the very fact that the context was a political one raised another factor of concern—the conflict between the first amendment and the rights of public employees.

> [I]f the term is used in a context in which important political figures routinely use uncomplimentary language about one another —a context in which First Amendment interests override a State's interest in enforcing its own law of defamation—it would be most anomalous to conclude that the subject of the robust comment has been deprived of an interest which at once is protected by the Fourteenth Amendment to the Federal Constitution but which the First Amendment prohibits the State from protecting.[56]

Judge Stevens' other concern derived from his perception that if indeed a hearing were required when the Governor was involved, there would be a very real risk that for the hearing not to be meaningless, it would necessarily "involve an excessive invasion by the federal judiciary into the making of policy by the State."[57]

Judge Pell, dissenting, found an impairment of Adams' property interest and particularly of his liberty interest. In looking to the former, the judge relied particularly on *Shurtleff v. United States*[58] to

54. *Id.* at 1008-09.
55. *Id.* at 1009.
56. *Id.* at 1010.
57. *Id.*
58. 189 U.S. 311 (1903).

reason that while the Governor might have the power to remove an appointee for unspecified reasons, where he in fact removed him for statutorily (or constitutionally) specified causes, due process required notice and a hearing. Since the Governor had indeed invoked the specific grounds for removal mandated by the Illinois Constitution, procedural rights were due here. Judge Pell's principal concern, however, was the impairment of Adams' liberty interest. In his view, a charge of malfeasance was indeed stigmatizing and damaging to a person's good name, reputation, honor, and integrity—all criteria invoked in *Board of Regents v. Roth.* Indeed, the stigmatization was especially critical here because Adams was a lawyer.

> It seems clear to me on the basis of . . . authorities concerning the legal impact of a charge of malfeasance in office combined with today's emphasis on ethical propriety on the part of lawyers that the possibility of disciplinary proceedings directed toward a person who had been removed from public office on a charge of malfeasance in that office is no vague or idle threat but is a real and distinct potentiality.[59]

Judge Pell was astute to highlight and reject the variable stigma approach employed by Judges Cummings and Stevens. He did not conceive it "to be necessary to determine the order or magnitude or the relative stigmatic impact of the charge of malfeasance in office as contrasted with being disloyal, alcoholic, immoral, Communistic, et cetera."[60] Indeed, "[e]ach 'unsavory label' carries its own brand of stigma and . . . the mark made by 'malfeasance in office' is not inconsiderable."[61] As for the observation of Judge Cummings that the complaint failed to allege any loss of job opportunities, Judge Pell responded that "the exact potential impact of the stigma on a lawyer's professional career scarcely needs spelling out."[62]

The three opinions in *Adams II* obviously raise troubling issues which courts must confront when public employees—particularly high level officials—complain of unlawful discharge and seek to invoke constitutionally mandated due process procedures. Unfortunately, *Adams II* offers little by way of clear-cut guidance for the future.

Judge Cummings' opinion evinces a significant reluctance to support public employees' claims. While both he and Judge Stevens viewed the charge of malfeasance in office as acceptable within the context of political office-holders, they provided little by way of ex-

59. 492 F.2d at 1016.
60. *Id.* at 1017.
61. *Id.*
62. *Id.* at 1016.

plaining why such conclusion holds true. There was no political campaign at the time of Adams' discharge, so the heat of political rhetoric hardly afforded excuse for the charges made. Nor was Adams himself an elected office-holder. While a stigmatizing accusation in one context may be innocuous in another, neither Judge Cummings nor Judge Stevens provided any standards to make that delineation. And certainly Judge Pell was not entirely amiss in viewing charges of neglect, incompetence, and malfeasance as fairly substantial condemnation, no matter what the context. Judge Stevens expressed concern about the conflict that would arise were protections provided under the fourteenth amendment which are denied the public official under the first. Yet perhaps he carried logic farther than it need go. Public officials are indeed the proper subjects of robust and uninhibited public dialogue and comment. The offsetting premise is that the public figure will be able to commandeer at least some subsequent attention for his rebuttal. But the commentary here was not made by the public; it was the official's own employer who undertook the role of public critic. Assumedly the public will give considerable credence to the employer, who would be expected to have particular awareness of the employee's abilities. One need not strain too far to conclude that when an employer condemns an employee, a different set of values and interests arise and the employee calumnized by his superior must have some recourse to adequately defend himself. Similarly, Judge Stevens' fear of trenching into the province of executive policy perhaps goes too far. If policy reasons exist for the dismissal of a public official by his superior, as Judge Pell points out, the superior could discharge him without specifying discrete reasons for the dismissal. In that instance, the court would need not intrude, nor would policy need be invaded by a hearing. But where specific accusations of a pejorative nature are made, then certainly individual rights have some need for protection as against the claimed mantle of executive policy-making.

Adams II can hardly be viewed as a decision in sympathy with the rights of public employees. Perhaps, at best, its impact will be narrow, since it can be read as applying strictly to policy-making public officials.

Following *Adams I*, and prior to *Adams II*, the court ruled in *Suarez v. Weaver*.[63] Dr. Suarez was a participating physician in the medical assistance program of the Illinois Department of Public Aid. His employment was still probationary when, in March of 1971, he was

63. 484 F.2d 678 (7th Cir. 1973).

informed by letter that his participation in the program was being terminated. The letter referred to "serious irregularities" in his practices in the past and addressed "excessive utilization of certain drugs" which he was prescribing for patients. While no general publication was to be made of the letter, it would remain in his file. Moreover, the charges had been forwarded to the state agency responsible for licensing and disciplining physicians.

The district court ruled against the doctor, finding no entitlement to due process protections upon his termination. The court of appeals, however, reversed. Recognizing that "the distinction between charges which trigger procedural protection and those that do not has yet to be drawn with any degree of precision,"[64] here, "whatever line-drawing problems may arise in future cases, . . . [the court was] satisfied that the charges . . . sufficiently implicate[d] plaintiff's reputation as a practicing doctor and as a citizen."[65]

The means for harmonizing *Suarez* with *Adams II* are certainly not readily obvious. Judge Cummings' statement in *Adams II* that *Suarez* involved a charge "which gave rise to an inference that he was violating the narcotics laws, and this information was sent to the state licensing authorities,"[66] is no more than a synopsis of *Suarez*, devoid of any explanation for the contrary results in the two cases. Granted, *Adams II* involved a public official. But if stigmatization is the critical factor which invokes a right to procedural due process, one is hard pressed to detect what finite lines make the stigma imposed upon Adams constitutionally insignificant, while that experienced by Dr. Suarez meets the mark. Indeed, in Adams' situation, the critical charges were broadcast across the state; the charges concerning Dr. Suarez were certainly given far less general currency. Yet the private charges engendered constitutional response and the public ones failed to do so.[67]

64. *Id.* at 680.
65. *Id.* at 681.
66. 492 F.2d at 1008.
67. Some essay at explaining *Suarez* is offered by the court in an unpublished opinion. Christensen v. Board of Education Township High School District No. 203, No. 73-1152 (7th Cir. Dec. 26, 1973). The plaintiff was a non-tenured teacher who claimed that the non-renewal of his contract stigmatized him. The court responded by stating:

> [T]he reasons for plaintiff's nonretention [footnote omitted] merely indicate that the School Board was dissatisfied with the plaintiff's performance as a teacher. *Suarez v. Weaver*, . . ., is quite different. In that case, the reasons assigned for the nonrenewal of a physician's contract were irregularities connected with the extent to which he was prescribing narcotics. That charge,

In *Confederation of Police v. Conlisk*[68] the court dealt with a somewhat different aspect of public employees' rights. The decision is in line with clear precedent set by the Supreme Court, and thus affords no special insights into the particularized stance of the Seventh Circuit Court of Appeals. In *Conlisk*, the court addressed the suspension and discharge of police officers following an internal police department investigation procedure. They were penalized in accordance with a departmental regulation because they had invoked their privilege against self-incrimination when testifying before a grand jury. The trial court granted the officers' motion for summary judgment, and the court of appeals affirmed. The court relied on *Gardner v. Broderick*[69] and *Uniformed Sanitation Men's Ass'n, Inc. v. Commissioner of Sanitation*[70] for guidance, and understood these decisions to establish that

> a public employer may discharge an employee for refusal to answer where the employer both asks specific questions relating to the employee's official duties and advises the employee of the consequences of his choice, i.e., that failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings.[71]

The court observed that the police officers, when called before the police department internal investigating unit after their grand jury appearance, were not asked narrow, specific questions relating to their official duties. Rather, each was asked only whether he had invoked his privilege against self-incrimination at the grand jury. "At no time, either at the grand jury or at the . . . [internal] inquiry, were the po-

> together with the fact that it was conveyed to the agency responsible for licensing and disciplining Illinois physicians, constituted damage to the doctor's reputation and a serious threat to his continued eligibility to practice his profession. The present case involves no such serious consequences. On the contrary, it is clearly controlled by our second opinion in *Shirck v. Thomas.*

In Shirck v. Thomas, 486 F.2d 691 (7th Cir. 1973) the court found no deprivation of a liberty interest arising out of a teacher's non-retention due to her performance in her work, " 'particularly her failure to coordinate her teaching with that of the other German teacher so that students who needed to transfer at the end of a semester would not be handicapped.' " 486 F.2d at 692, quoting from Shirck v. Thomas, 447 F.2d 1025, 1026 (7th Cir. 1971), *judgment vacated*, 408 U.S. 940 (1972).

In the second *Shirck* decision, the court reasoned that the defendants' action did not "create any legal disability impairing her eligibility for other employment. There was no public 'posting' of plaintiff's name which might have created any kind of 'stigma' upon 'her good name, reputation, honor, or integrity'. . ." 486 F.2d at 692. Moreover, in accord with Perry v. Sindermann, 408 U.S. 593 (1972), "[t]he fact that nonretention has unquestionably made plaintiff less attractive to other employers does not amount to a constitutional deprivation of 'liberty.' " 492 F.2d at 693.

68. 489 F.2d 891 (7th Cir. 1973), *cert. denied*, 94 S. Ct. 1971 (1974).
69. 392 U.S. 273 (1968).
70. 392 U.S. 280 (1968).
71. 489 F.2d at 894.

lice officers informed that any information which they gave would not be used against them in criminal proceedings."[72] Thus, the departmental rule was unconstitutional.

In *Garcia v. Daniel*[73] the plaintiff had been discharged from the Cook County Department of Public Aid for having given a false explanation of an absence from work. Garcia did not challenge this administrative ruling, but he did request damages, consisting of unpaid wages for the period between his discharge and the departmental hearing. The district court dismissed Garcia's complaint, and the court of appeals affirmed. The reasoning was straightforward—the purpose of the hearing was to provide the employee with an opportunity to clear his name. The result was a confirmation of his firing, and Garcia did not challenge the hearing's findings. Since he was not entitled to reinstatement, nor indeed had he even alleged any damage to his reputation or ability to pursue a profession as a result of the hearing being provided some time subsequent to the discharge, there was no basis for damages.

The court issued a firm assertion of the first amendment rights of public employees in *Aurora Education Association East v. Board of Education of Public School District No. 1131.*[74] The plaintiff Association, engaged in collective bargaining with the School Board, adopted a resolution that if there were no satisfactory contract settlement the teacher members of the Association would not return to their classrooms. Thereupon the Board terminated the collective bargaining negotiations and offered individual one year contracts to the teachers, in which it was stated that "by urging, advocating, recommending, and asserting the right to strike by its members"[75] the Association no longer qualified as bargaining representative of the teachers. In so doing, the Board relied upon its policy excluding from all bargaining rights any organization asserting the right to strike. The appellate court reversed the dismissal below, viewing the Board policy as infringing first amendment rights to speak and to entertain beliefs. Recognizing the distinction between the question of public employees' right to organize and strike, and their right to maintain that such rights should exist, the court stated: "[T]he teacher, like any other citizen,

72. *Id.* at 895.

73. 490 F.2d 290 (7th Cir. 1973). Since *Garcia*, the Supreme Court has ruled that discharged public employees are not entitled to pre-termination hearings. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974).

74. 490 F.2d 431 (7th Cir. 1973), *cert. denied*, 94 S. Ct. 2388 (1974).

75. *Id.* at 433.

is free to think as he likes, and to express those views academically provided action is not advocated but merely adumbrated."[76]

While the opinion is a typical confirmation of public employees' rights under the first amendment it offers one unusual feature. The court held that the School Board was not a municipal corporation, and therefore could be sued under 42 U.S.C. § 1983, the most commonly used statutory basis of civil rights and civil liberties actions. The holding is somewhat anomalous, since most courts have held that school boards are not "persons" for purposes of section 1983, and that they therefore cannot be sued under the statute.[77]

While the holding in *Jeffries v. Turkey Run Consolidated School District*[78] was not a departure in terms of either support or rejection of public employees' claims, the opinion's tone certainly offered no signal of concern for such claims. Mrs. Jeffries, a non-tenured schoolteacher, claimed that the School District decision not to renew her contract was based on arbitrary and capricious reasons. The trial court dismissed her complaint and the court of appeals affirmed. The court reached the conclusion, relying upon *Board of Regents v. Roth* and *Perry v. Sinderman*,[79] that Mrs. Jeffries had no constitutional right to procedural due process. The main thrust of the court's attention, however, was the teacher's claim that the School District's decision was completely without basis in fact or logic, and thus was an arbitrary and capricious action in violation of her constitutional right to substantive due process. The court implied that it, like most commentators and courts today, has little use for the concept of substantive due process. Addressing Mrs. Jeffries' contention using her own terms, the court reasoned that since she had no liberty or property interest, she had no more claim to substantive due process than to procedural due process. While *Jeffries* offered little by way of aid to a discharged, non-tenured public employee, it clearly did not rule out all claims. The plaintiff did not contend that her discharge was for a constitutionally impermissible reason, such as exercise of first amendment rights. Thus, the field was still open for the assertion of various impermissible bases for discharge, such as age discrimination.[80]

76. *Id.* at 434.

77. *See, e.g.*, Potts v. Wright, 357 F. Supp. 215 (E.D. Pa. 1973); Webb v. Lake Mills Community School District, 344 F. Supp. 791 (N.D. Iowa 1972); Wood v. Mt. Lebanon Township School District, 342 F. Supp. 1293 (W.D. Pa. 1972); Abel v. Gousha, 313 F. Supp. 1030 (E.D. Wis. 1970).

78. 492 F.2d 1 (7th Cir. 1974).

79. 408 U.S. 593 (1972).

80. *See, e.g.*, Murgia v. Commonwealth of Massachusetts Board of Retirement, 376 F. Supp. 753 (D. Mass. 1974). *See also* Note 159, *infra.*

In *Miller v. School District No. 167, Cook County, Illinois*[81] however, the court issued a resounding rejection of a teacher's claim that his dismissal was based on impermissible grounds. In so doing, it articulated a hostile attitude toward public employees' rights. Miller made three claims, two of which the court summarily rejected. The first was that the reasons given by his employer for his termination imposed sufficient stigma to necessitate a pre-termination hearing. Relying upon its prior ruling in *Shirck v. Thomas*,[82] the court promptly rejected that contention. The teacher's second claim was that the School District's reasons for his discharge were untrue and its dismissal of him was arbitrary because it was completely unsupported by any acceptable reason. Relying on *Jeffries* and the rejection there of the substantive due process argument, the *Miller* court responded in a like manner.

The sole issue left for consideration, and the one upon which the court focused considerable attention, was Miller's claim that he had been dismissed because of his beard and long sideburns. As the court saw it, Miller, who was non-tenured, was not claiming that his hirsute appearance was intended to convey any message, nor that he was dismissed for exercising his right to free speech, nor that he was denied equal protection vis-a-vis females. However the teacher's appearance and style of dress were neither offensive nor objectionable. Acceding to the notion that individual choice in matters of appearance is an aspect of freedom or liberty, the court nevertheless was of the view that "if one's interest in appearing as he chooses is a constitutionally protected interest in liberty, it is of a much lesser magnitude than a 'fixed star in our constitutional constellation'."[83] Not only was this a narrow perception of the penumbra of rights caught up in the concept of a right of privacy, further perplexity is created by the fact that the Seventh Circuit Court of Appeals has otherwise been quite emphatic in sustaining matters of appearance as significant constitutional liberties.[84] Here, the court was particularly guided by *Ham v. South Carolina*,[85]

81. 495 F.2d 658 (7th Cir. 1973).

82. 485 F.2d 691 (7th Cir. 1973), *See* note 67 *supra.*

83. 495 F.2d at 664.

84. *See, e.g.*, Holsapple v. Woods, 500 F.2d 49 (7th Cir. 1974), *infra* at 405-06; Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972); Crews v. Cloncs, 432 F.2d 1261 (7th Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

85. 409 U.S. 524 (1973). In *Ham*, the Court addressed the claim that the state trial judge had erred by refusing to interrogate prospective jurors concerning possible prejudice against the defendant because he was black and because he wore a beard. The Court assumed that indeed some jurors might have been prejudiced on account of the defendant's race, and held that the trial court had erred. But as to the contention regarding questions concerning beards, the Court ruled otherwise, stating:

> Given the traditionally broad discretion accorded to the trial judge in conducting *voir dire*, . . . and our inability to constitutionally distinguish possible prej-

and saw that decision as cutting into the significance of personal appearance as a protected right. The court further reasoned that a variety of considerations can justify limitation on one's choice of appearance, including "a desire to avoid specific forms of antisocial conduct, an interest in protecting the beholder from unsightly displays," and "a desire to encourage respect for tradition . . . ."[86] Thus, society has a "legitimate interest in placing limits on the exercise of an individual's choice of styles of appearance and behavior."[87]

With this broadscale delineation of societal interests, the remainder of the court's chain of reasoning is not surprising. The court reasoned that because Miller alleged that he was competent, "it is not unreasonable to assume that the availability of other teaching opportunities will make it unnecessary for him to make any basic change in his chosen appearance."[88] In a footnote, the court went on to observe that even if other employment were unavailable, "[i]t is not inconceivable that moderate tonsorial changes might be sufficient to satisfy a majority of the members of a school board."[89] The court thus indicated that it would employ an assumption that other jobs were available, although in *Adams II* it was unwilling to assume that the employee could *not* get another job. Moreover, it was willing to opine that the employee could modify his appearance to appease his employers. One might rebut these contentions by pointing to statistics which show that indeed there are far more teachers seeking employment than there are jobs available.[90] One might also observe that generally one is not required to effectively sacrifice one's constitutional rights, if they indeed exist, to protect them.

Further comment by the court emphasized its unreceptive stance. It is generally thought that the 'right-privilege' distinction is well-buried. But the *Miller* court, in a footnote, offered this observation:

> The so-called abandonment of the right-privilege distinction represents a change in appraisal of the significance—not of the essential

udices against beards from a host of other possible similar prejudices, we do not believe the petitioner's constitutional rights were violated when the trial judge refused to put this question. 409 U.S. at 528.

While *Ham* can be read as demonstrating a greater consideration for denial of rights on the basis of race than on the basis of appearance, it does not follow that the right to choose one's own appearance is simply a minor interest, far below the constitutional rights grounded on securing racial equality.

86. 495 F.2d at 664.

87. *Id.*

88. *Id.* at 665.

89. *Id.* at 666 n.30.

90. *See, e.g.*, Wasem & Elder, *Illinois Public School Teacher Supply and Demand*, ILLINOIS J. OF EDUC. (3d Q. 1973).

> accuracy—of Mr. Justice Holmes' observation that a man "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[91]

Applying that perception to Miller's claim, the court continued in a subsequent footnote, stating: "The 'deprivation' involved here merely requires the public employee to pay the same price for nonconformity as must the private employee. Stated somewhat differently, the deprivation is a refusal to give the non-conforming public employee a preferred status as compared with his counterpart in the private sector."[92] The court by this reasoning seems almost to be standing the case law on its head. Rather than emphasizing the typical and accepted recognition that the Constitution reaches public employers and thus bars their infringement of their employees' constitutional rights, it seems to be of the view that since the Constitution does not protect private employees, public employees can expect little more protection than their private enterprise counterparts.

The court's conclusion naturally followed from this: "[T]he constitutional interest which plaintiff seeks to vindicate is not of the first magnitude and the impairment of that interest is a relatively minor deprivation at best."[93] The court's progression of reasoning was predictable as it addressed the next question before it—whether an evidentiary hearing was required to assess the teacher's claims. Its answer was in the negative, and the court delivered that answer with expansive language further signaling the low level of constitutional protection which public employees command.

> If a school board should correctly conclude that a teacher's style of dress or plumage has an adverse impact on the educational process, and if that conclusion conflicts with the teachers' interest in selecting his own life style, we have no doubt that the interest of the teacher is subordinate to the public interest. We must assume, however, that sometimes such a school board determination will be incorrect. Even on that assumption, we are persuaded that the importance of allowing school boards sufficient latitude to discharge their responsibility effectively—and inevitably, therefore to make mistakes from time to time—outweighs the individual interest at stake.[94]

Rounding out its restrictive exposition of constitutional claims, the court offered the thought that the children's interests were a part of the equation: "[They] have a valid interest in not being compelled to as-

91. 495 F.2d at 665 n.27.
92. *Id.* at 666 n.29.
93. *Id.* at 665-6.
94. *Id.* at 667.

sociate with persons they or their parents consider objectionable. In the classroom, since their presence is compelled, they necessarily must look to the school board for protection of their interest."[95] Without having heard from the children the court imputed to them gratuitously created concerns, and then vested in the School Board the authority to protect those purported interests. This approach ignored the children, notwithstanding the paternalistic goal announced. Moreover, it seems somewhat anomalous that the children themselves have a protected right to wear their hair as long as they choose—a right with which a school board cannot interfere,[96] while justification for denial of that right to teachers is offered in the name of students.

One is hard-pressed to find much of a redeeming nature in the *Miller* decision. The only suggestion for a measure of optimism that public employees' rights do have some vigor remaining lies in the court's conclusion that "we merely hold that as long as no greater interest than that involved in this controversy is at stake, the decision is one the school board is entitled to make."[97] Perhaps *Miller* will be regarded by the court as "just another hair case." Indeed, at least some of the court's closing comments about the difficulty of federal courts undertaking a review of individual school board rulings on employee grooming suggest that the narrow view will prevail. But certainly the restricted reading of the schoolteacher's claims in *Miller,* and the court's readiness to vest in his employer broadscale powers, auger poorly for success in future claims of constitutional deprivation by public employees.[98]

In *Washington v. Board of Education, School District 89*[99] the court addressed the claim of a former acting school superintendent that he had been transferred and demoted because of his exercise of first amendment rights. Unlike the plaintiff in *Jeffries,* the plaintiff in *Washington* asserted "that he was reassigned for constitutionally impermissible reasons,"[100] although he did not contend that he was denied procedural due process, since he had no promise of the position of princi-

95. *Id.*

96. Holsapple v. Woods, 500 F.2d 49 (7th Cir. 1974), *cert. denied,* 95 S. Ct. 185 (1974).

97. 495 F.2d at 668.

98. The court issued another, brief opinion in Miller v. School District Number 167, Cook County, Ill., 500 F.2d 711 (7th Cir. 1974), denying Miller's petition for rehearing. The teacher had invoked the intervening decision in Arnett v. Kennedy 416 U.S. 134 (1974), and argued that on the basis of that ruling, he had a property interest under the Illinois statute concerning probationary teachers. The court rejected that argument in an unsigned opinion.

99. 498 F.2d 11 (7th Cir. 1974).

100. *Id.*

pal or acting principal beyond the year in which he was demoted. The court of appeals concluded that as significant fact questions were outstanding and the dismissal by the trial court had precluded fact-finding, reversal and remand were necessary.

In *Suckle v. Madison General Hospital*,[101] like *Suarez*, the court addressed the claims of a discharged physician. The plaintiff, a neurosurgeon, was a member of the medical staff at one hospital, and Chief of Staff at the defendant hospital. Due to his over-utilization of beds (apparently implying that he was prescribing unwarranted hospital care), the defendant's board of directors decided not to renew his appointment. The doctor filed suit, contending that the hospital's dismissal procedures were inadequate and violative of the due process clause. The trial court ruled for the defendant, noting that the critical event was an offer to the plaintiff of an opportunity to appear before the medical staff, which he had refused. In the trial court's view, this barred judicial relief, since the hearing rejected by the doctor probably would have provided all the process due him.

The court of appeals affirmed the district court holding. In its view, the doctor had neither a liberty interest nor a property interest impaired. Again the court looked to the context in which the case arose to determine whether a stigmatizing charge had been made and concluded that mere charges of inadequate and poor performance were not constitutionally offensive; thus there was no warrant for making an "exception to the rule . . . merely because plaintiff is a surgeon.[102] Rather than resting on the lack of a protected interest, however, the court was willing to surmise that the doctor, had the issue been raised below, might have been able to show that he did indeed have a property interest which had been impaired. The court relied on the offer of the hearing by the defendant as the basis for its affirmance. As the court saw it, it was "controlling that the offer of a hearing set forth no procedural details which clearly precluded compliance with due process.[103] To the plaintiff's contention that the trial court's decision in effect required him to speculate what the response to his request for additional safeguards might have been, the court responded: "We hold that when such a hearing is offered, the offeree should assume that it will be a fair hearing until the offeror indicates otherwise."[104]

101. 499 F.2d 1364 (7th Cir. 1974).
102. *Id.* at 1366.
103. *Id.* at 1367.
104. *Id. Cf.* Pordum v. Board of Regents of State of New York, 491 F.2d 1281 (2nd Cir. 1974).

The *Suckle* decision is not particularly notable. It reflects a common sense approach born of the need for judicial economy: one cannot seek due process procedures as relief awarded by a federal court where those very procedures might already be available in the setting out of which the claim arises. What makes *Suckle* worthy of comment, rather, is its further highlighting of the court's ambivalence in treating public employees' claims of damage done them. In *Adams II* and in *Suckle*, the court was unwilling to regard the charges made as being stigmatizing; in *Suarez* it was willing to so hold. Yet there seems no ascertainable standard for understanding how the court drew the line. Granted, a variable approach for assessing the quality of the charge in the context within which it is uttered is useful, probably even necessary. But the absence of any standard makes for poor guidance for future litigants.

Another aspect of ambiguity is reflected in the court's inconsistent invocation of the factor of other jobs being available to the aggrieved employee. In *Adams II,* the court was unwilling to assume other jobs were not available, since the plaintiff had not so pleaded. In *Miller* the court was willing to assume on its own that other jobs were available. In *Suarez,* the difficulties in securing other employment were apparently very significant in reaching the conclusion that the unpublicized charges were stigmatizing; yet in *Suckle* the availability or nonavailability of other employment was not an issue. Obviously, the other-job issue is an important one to the court, but the employee is left somewhat adrift in determining what standards apply in assessing whether other jobs are available or what burden the fired employee bears to demonstrate the lack of other employment.

Brubaker v. Board of Education,[105] moved into a classic area of public employees' rights, the conflict between the claim to freedom of speech and the employer's restrictions on this freedom. Another dispute involving an Illinois teacher resulted in the leading Supreme Court statement in this area, *Pickering v. Board of Education.*[106] *Brubaker,* unfortunately, represents a far less sympathetic development, and must be considered a severely constricted reading of first amendment rights. The plaintiffs were three eighth grade schoolteachers who had distributed in their schools, particularly in their own classrooms, copies of a brochure published by the makers of the movie "Woodstock." The brochure contained poetry and other material, some of which contained

105. 502 F.2d 973 (7th Cir. 1974).
106. 391 U.S. 563 (1968).

familiar four-letter words and some of which addressed involvement in drugs and sexual encounters. After parents complained about the material, the Board of Education summarily dismissed the teachers before the end of the school term. In the case of one of the three, his contract had one more year to run after the end of the current term. The teachers vainly protested, seeking a hearing before the Board. Securing no relief, they filed a civil rights action, claiming a violation of their first and fourteenth amendment rights.

After the plaintiffs had moved for summary judgment, the trial court ordered the Board to give them a hearing, pursuant to the mandate of the Seventh Circuit Court of Appeals' decision in *Roth v. Board of Regents*.[107] At this hearing, two expert witnesses testified on behalf of the plaintiffs, lauding the suitability of the Woodstock brochure as a teaching material. Nonetheless, the Board reaffirmed its early dismissal decision. The activity then returned again to the trial court, which ruled for the defendants on their motion for summary judgment.

The court of appeals affirmed, with an undisguised attitude of hostility to the plaintiff's claims. The court asserted: "We do not believe that however much the reach of the First Amendment has been extended and however eager today's courts have been to protect the many varieties of claims to civil rights, the Appellee School Board *had to put up with* the described *conduct* of Appellants."[108]

This hearkening to the notion of "conduct" already cast the teachers' claims into a lesser constitutional light, evoking notions of "speech plus," rather than the pure exercise of speech which on their face the claims seemed to present—a reading which nothing in the court's opinion disputes. Conceivably, the court perceived an element of "conduct" added on to speech in the rather unexceptionable fact that the plaintiffs sought relief through litigation, "conduct" heretofore thought of as integral to the assertion of constitutional rights and in no way leading to a diminution of pure speech claims. As the court saw it, the plaintiffs erred in failing to express regret about their first amendment exercise, and they compounded the error by filing suit:

> We think it right also to observe that upon learning of the Board's reaction to what had happened, none of the Plaintiffs expressed any regret over the matter; neither did any of them seek reinstatement by assurance that corrective measures would be taken. They made no effort to come to a friendly solution with the Board. Their first step was employment of a lawyer who demanded a pub-

107. 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972).
108. 502 F.2d at 983-84 (emphasis added).

> lic hearing. This lawsuit followed almost a year thereafter. Whatever their ambivalence as to whether what they did was at most an innocent mistake or done after deliberation, their lawsuit insists and relies solely upon a position that what they did—providing, with their apparent approval, the "Woodstock" poetry—was but an exercise of academic freedom guaranteed them by the United States Constitution.[109]

As for the substantive question of the protected nature of the speech at issue, the court further signaled its attitude with an expression of gallantry, when it observed: "It is probably a fair inference that by second or third year high school most American males have become familiar with, and at times employ, these and like words. Is it only a forlorn hope, however, that most of our young ladies will never employ that kind of speech?"[110]

Notwithstanding that the plaintiffs had offered favorable expert testimony, and that they claimed that the Board had concluded the brochure was obscene without any expert analysis, the court quickly disposed of the plaintiffs' contention as to the Board's unsupported dismissal, noting that "experts should not be needed to support a conclusion that is obvious."[111] Similarly, the claimed lack of standards by which teachers could measure their conduct was coldly received by the court. Seeming to find some burden incumbent on the plaintiffs, the court asserted: "They do not attempt definition of the relevant and ascertainable standards which they say the Board should have promulgated."[112] Moreover, the court was not about to "fault a school board for not anticipating that eighth grade teachers might distribute to their students, without explanation or assigned reason therefor, poetry of the caliber"[113] of that in the brochure.

Having in no uncertain terms disposed of the teachers' first amendment claims, the court next addressed their claims for back pay and attorneys' fees. The plaintiffs contended that notwithstanding the ultimate conclusion that their dismissals were lawful, they were still entitled to an award for the pay that they would have received from the date of termination to the end of the school year. One of the three, Sievert, further claimed an award for the next school year, since his contract extended on for that period, even though he was nontenured.

109. *Id.* at 982.
110. *Id.* at 976.
111. *Id.* at 984. *Accord*, Hamling v. United States, 94 S. Ct. 2887, 2899 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54 n.6 (1973).
112. 502 F.2d at 984.
113. *Id.*

Their position was that although eventually they were given the reason for their terminations, they were initially refused a hearing. Moreover, the court-ordered hearing did not provide them with due process.

The court rejected the plaintiffs' contentions. As the court reconstructed the chronology of events, the teachers had been given "written notice of the reasons for termination . . ., a court ordered plenary hearing on the matter was had and the school board, a District Court, and this court, hold that appellants were terminated for just cause."[114] It would simply stretch due process too far to "rule that where school authorities are made aware of a non-tenured teacher's misconduct, they must continue such teacher in service until a full dress hearing has been provided, or pay the terminated teacher's salary until such hearing can be arranged,"[115]—at least here, "where the propriety of their termination has been fully vindicated by the record made upon such hearing."[116] As for the question of whether the termination of the plaintiffs without a prior hearing denied them due process, the court found *Arnett v. Kennedy*[117] to be dispositive. Finally, the court rejected the claim for attorneys' fees, noting: "[T]he board acted at all times in good faith; it did not intend to be oppressive as to the rights of appellants. We similarly find no benefit being conferred on 'other members of an ascertainable class,' . . . ."[118] Judge Fairchild dissented from the holding that the discharges did not violate the teachers' first amendment rights, although he concurred regarding the question of attorneys' fees and back pay. Indeed, he was the only judge who addressed the substantive first amendment issues, emphasizing the "[f]reedom to discuss controversial or unpopular ideas . . ."[119] "The Woodstock brochure was not so offensive that its classroom use was obviously improper. The school board had not promulgated any standards against which plaintiffs could measure this type of literature to determine whether board policy forbade its use."[120] Clearly, in light of the expert testimony praising the questioned material, its use could hardly be considered "conduct generally condemned by responsible men."[121] Moreover, the brochure was not obscene in the legal sense; it consisted of inoffensive factual accounts of the Woodstock festival, and "even as-

114. *Id.*
115. *Id.*
116. *Id.*
117. 416 U.S. 134 (1974).
118. 502 F.2d at 990.
119. *Id.* at 991.
120. *Id.* at 992.
121. *Id.*

suming the continuing validity of the variable obscenity doctrine, and making the widest allowances for the age of plaintiffs' students, neither the brochure as a whole nor the poem 'Getting Together' begin to satisfy the *Miller* criteria."[122] Judge Fairchild would have reversed and remanded the case for determination of the amount of back pay due the plaintiffs as a result of their unlawful discharge.

There is little good to say about the *Brubaker* decision, save for Judge Fairchild's dissent. The language of the court exhibited a hostility to the first amendment claims presented, and the substantive doctrine enunciated confirmed that hostility. The court's due process analysis also presents problems. At least one of the teachers had more than a year remaining on his contract; the other two had two months left to teach. Yet they were summarily dismissed without any procedural exercise at all. *Suarez v. Weaver* addressed a similar question, and the court concluded there, as it did here, that an ultimate confirmation of the lawfulness of the discharge precluded any remedy for the loss of pay occurring prior to the discharge hearing. While *Arnett v. Kennedy*, as the *Brubaker* court pointed out, has established that a pretermination hearing is not required to satisfy constitutional due process standards, it would seem that this is still an area of much confusion. Obviously, even if a hearing is to be held after the discharge, there must be some reasonable time limit on the employer's delay. Unless some penalty is imposed for undue delay, employers may act with extreme slowness.

Indiana State Employees Ass'n v. Negley[123] was a variation on *Illinois State Employees Union v. Lewis*,[124] in which the Seventh Circuit Court of Appeals was, in the words of the *Negley* court, "breaking new ground in determining that certain patronage dismissals are prohibited by the First Amendment."[125] In *Lewis* the court disapproved on first amendment grounds patronage dismissals of non-policy-making public employees, while affirming the right of a public executive to use political affiliation or philosophy as a basis for discharging policy-making officials. *Adams II* demonstrated the slipperiness of this notion, and *Negley* highlighted the problem again. The sole question which the court addressed in *Negley* was whether the district court had correctly

122. *Id.* at 992. *Cf.*, Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973); Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972).

123. 501 F.2d 1239 (7th Cir. 1974).

124. 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).

125. 501 F.2d at 1243. *See generally* Spak, *Constitutional Law*, 50 CHI.-KENT L. REV. 248, 258-62 (1973).

ruled in holding that the terminated plaintiffs occupied policy-making positions and therefore were lawfully discharged. The court, reasoning that the "extended and accurate analysis of the facts by the district court . . . satisfies us that the court possessed a firm grasp of the issue and that its ultimate holding was the result of a careful study of the evidence and the applicable legal principles",[126] concluded that the district court finding that the plaintiffs were policy-making employees was not clearly erroneous and therefore affirmed.

While *Negley* simply represents adherence to precedent, and affords no particular doctrinal analysis, since its focus is on the factual findings of the trial court, the court's discussion reveals some of the same uneasiness reflected in Judge Campbell's concurrence in *Lewis*. Characterizing the issue before it as "this troublesome question inherent in cases involving the status of public employees,"[127] the court here extensively quoted from Judge Campbell's opinion, closing with his observation in *Lewis*:

> The difficulty arises in attempting to fashion an appropriate and workable judicial standard for distinguishing between 'policy-making' and 'non-policy making' positions. . . . In my judgment, the constitution would permit a public official to hire or dismiss on the basis of political association any employee engaged directly or indirectly in the formulation or implementation of the policies of the particular governmental office or agency. A more precise standard is difficult to articulate and thus the true impact of today's decision must necessarily await case by case determination.[128]

Judge Campbell's assessment of the ambiguity of the *Lewis* standards, reflected in the court's opinion in *Negley*, is an apt one. Little guidance is afforded by these decisions, and given the reluctance of the courts to delve deeply into executive policy-making functions, it is unlikely that many employees seeking to challenge their firing by claiming to be non-policy makers will prevail, if any substantial ambiguity as to their job functions exists.

Bence v. Breier[129] reflects a far more receptive attitude to the claims of public employees than that usually evinced by the court. Perhaps this was at least in part attributable to the panel being totally

126. 501 F.2d at 1242.
127. *Id.*
128. *Id.* at 1243, quoting from Illinois State Employees Union v. Lewis, 473 F.2d 561, 578 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973). *See generally* Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297 (1974). *See also* Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974).
129. 501 F.2d 1185 (7th Cir. 1974).

different than that in any of the other public employee cases (Judges Castle, Campbell and Jameson). Perhaps, also, the fact that one of the claims sounded in the first amendment—to which the court has shown more receptivity than other public employees' claims—accounts for the holding. The plaintiffs were Milwaukee policemen and their Association. The action was filed to compel the Milwaukee Police Department to remove official reprimands issued against the two individual plaintiffs from its personnel files. The trial court ruled that the departmental rule on which the reprimands were based was unconstitutionally vague, and the court of appeals affirmed. The regulation at issue before the court proscribed "conduct unbecoming an officer and detrimental to the service." The court vigorously rejected any notion that this rule passed constitutional muster. It found no basis "for concluding that the conduct which the Chief of Police sought to proscribe is inherently unsusceptible to language expressing more specific prohibitions".[130] Moreover, "any vagueness inherent in the rule was not born of the [possibly acceptable] necessity of broad application of a uniform rule to large populations engaged in multitudinous activities".[131] Instead, "the standard here was . . . to apply to an essentially homogeneous group of employees performing essentially similar job functions".[132] The court was very emphatic in rejecting a relaxed standard of due process for employee regulations. In a lengthy footnote, it disavowed the reasoning of *Waters v. Peterson*[133] that " '[w]here criminal prosecution is not at issue, a broad regulation can be given content by the authorities through its proper application' ".[134] And the court further rejected "the intimation that the importance of Due Process varies with the severity of the punishment meted out to the employee".[135] Moreover, it was of the view that a "reprimand, even when it 'betoken[s] a determination that there has been a poor judgment,' . . . unjustifiably besmirches an employment record that may otherwise be satisfactory and thus may limit promotion possibilities and salary advancement".[136]

The court's conclusion was that the regulation of the Milwaukee Police Department was unconstitutionally vague. The terms "unbecoming" and "detrimental to the service" had "no inherent, objective

130. *Id.* at 1189.
131. *Id.* at 1190.
132. *Id.*
133. 495 F.2d 91 (D.C. Cir. 1973).
134. 501 F.2d at 1189 n.2.
135. *Id.*
136. *Id.*

content from which ascertainable standards defining the proscribed conduct could be fashioned".[137] Thus, they opened the way to enforcement with unfettered discretion, while offering no guidance to those members of the Police Department seeking to avoid the regulation's proscription. And finally, "because this vague rule does abut on sensitive first amendment freedoms, it may operate to chill the exercise of those freedoms".[138]

As a separate, subsidiary ground for affirmance, the court reasoned that even if the departmental regulation were not unconstitutionally vague on its face, its application in the context of the circumstances would be constitutionally impermissible. The plaintiff policemen had simply exercised protected free speech rights in communicating about a labor dispute.

Judge Jameson dissented from the court's holding that the departmental regulation was unconstitutionally vague. In his view, the proper test for vagueness should have been less stringent than that imposed by the majority, since the regulation governed the conduct of employees who by virtue of their employment would or should be familiar with their duties. But Judge Jameson did concur that the regulation's application in the circumstances of this case was constitutionally impermissible.

The *Bence* decision is a strong, affirmative confirmation of the rights of public employees. Its resistance to a diminished test of vagueness, proferred by dissenting Judge Jameson, its rejection of a variable due process approach turning on the severity of the punishment, and its realistic assessment of the harm of a reprimand recorded in an employee's file, all signify a generous appreciation of constitutional guarantees in the field of public employees' rights. Were this a decision of the regular members of the Seventh Circuit Court of Appeals, it would be a welcome augury for the future. But the panel was unique, with not even one regular member of the Seventh Circuit court sitting. Its portent for future decisions is thus regrettably much more problematical.

Private Employees

Several decisions of the Seventh Circuit Court of Appeals addressed the claims of private employees grounded in Title VII of the

137. *Id.* at 1190.
138. *Id.*

Civil Rights Act of 1964.[139] Three decisions, however, are otherwise based—*Freitag v. Carter*, *Rasulis v. Weinberger*, and *Hodgson v. Greyhound Lines, Inc.*

In *Freitag v. Carter*[140] the gravamen of the complaint was the absence of any provision for notice and hearing in the City of Chicago's public chauffeur licensing ordinance. The trial court granted the plaintiff's motion for summary judgment, and the court of appeals affirmed in part and reversed in part. Freitag had applied for a public chauffeur's license at the office of the Public Vehicle License Commission, this permit being a prerequisite to securing employment as a cab driver. In the course of its investigation of Freitag, the Commission learned that he had previously been a patient in a state mental hospital. Because the city ordinance listed absence of "infirmity . . . of mind" as one of the requirements for issuance of the license, the Commission denied his application. The appellate court was obviously impressed by the fact that Freitag's illness was 14 years past, and it offered the view that the rating by the Chicago Police Department—to which the Commission had submitted Freitag's name—as a "bad risk" because of his past mental treatment "would appear to reflect an archaic attitude in the field of mental health".[141] Moreover, the court noted, "the defendants never gave plaintiff any mental tests nor were there facts before the Commissioner to indicate any present questionable mental status".[142]

The court was clearly of the opinion that Freitag's claims to formal notice of the reasons for denial of the license, and a hearing at which he could cross-examine witnesses and present evidence, were proper. "A governmental licensing body which judges the fitness of an applicant must afford that applicant adequate notice and a hearing."[143] The court did not have to go further than that assertion and the correlative conclusion that Freitag had been denied these rights, since a supervening amendment to the city ordinance provided for those procedural protections which Freitag sought.

The *Freitag* decision is in line with precedent[144] and is not notable

139. 42 U.S.C. § 2000e-2 (1964), as amended by the Equal Opportunity Act of 1972, 86 Stat. 103 (1972).
140. 489 F.2d 1377 (7th Cir. 1973).
141. *Id.* at 1380.
142. *Id.*
143. *Id.* at 1382.
144. *See, e.g.*, Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926). *Cf.*, Bell v. Burson, 402 U.S. 535 (1971).

for breaking any new ground. What is worthy of note is the fact that the court edged close to two issues of considerable civil libertarian concern. The first of these is the matter of discrimination against former mental patients. There is little question that such discrimination exists across a wide spectrum of activities.[145] The court did not directly address this discrimination, but it indicated a commendable impatience with indiscriminate bars to employment or characterizations of ability grounded on the label of 'former mental patient'. Additionally, the court moved close to an area less developed than the case law concerning the discharge of public employees, the problem of governmental bars to access to employment. Innumerable statutes, ordinances, and regulations impose bars on hiring ex-felons, drug addicts, persons over a certain age, and former mental patients. There are few decisions addressing the constitutional grounds of such indiscriminate bars to employment,[146] but it is likely that there will be more. The *Freitag* opinion implicitly recognizes the power government has, not only over those whom it has already hired or rendered eligible for employment, but also over those who are seeking entry into the employment market.

Rasulis v. Weinberger[147] was a much less sympathetic response to governmental barriers to employment. The plaintiffs were physical therapists, licensed pursuant to state law by the State of Illinois. They sought injunctive and declaratory relief against the Secretary of Health, Education and Welfare to bar him from giving any force to a federal regulation which effectively made the plaintiffs ineligible to treat patients in nursing homes and receive reimbursement therefor under the Medicare Act. They also challenged identical standards in a regulation applying to hospitals. The two were subsequently consolidated in a regulation setting standards for physical therapists in all health care institutions. The trial court entered summary judgment for the defendant, and the appellate court affirmed.

The regulation at issue established professional standards which physical therapists had to meet in order to qualify for Medicare reim-

145. *See, e.g.*, Lombard v. Board of Education of City of New York, 502 F.2d 631 (2nd Cir. 1974).

146. *See, e.g.*, In Re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Smith v. Texas, 233 U.S. 630 (1914); Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973); Butts v. Nichols, 381 F. Supp. 573 (S.D. Iowa 1974); White v. Flemming, 374 F. Supp. 267 (E.D. Wis. 1974); Andrews v. Drew Municipal Separate School District, 371 F. Supp. 27 (N.D. Miss. 1973). *Cf.*, Pordum v. Board of Regents of State of New York, 491 F.2d 1281, 1287 n.14 (2nd Cir. 1974).

147. 502 F.2d 1006 (7th Cir. 1974).

bursements, including membership in a professional organization and educational minima. The plaintiffs did not meet these requirements, but they were licensed by the state on the basis of training or experience equivalent to the state licensing act's formal educational and testing requirements. The plaintiffs argued that the federal regulation was violative of due process: "the classification, insofar as it is based upon membership in . . . [the professional associations], so imperfectly distinguishes the competent therapists from the incompetent that it must be struck down".[148]

The court readily responded with the invocation of the least stringent test possible: "The Due Process Clause prohibits only those classifications within a Federal social welfare program that are patently arbitrary and totally lacking in rational justification."[149] The regulation here at issue was "similar to many state medical and dental licensing statutes that have been consistently upheld against challenges on due process or equal protection grounds."[150] The requirement of membership was reasonable, since that was an "indicator of competence."[151] The fact that "certain members of a class subject to a regulation may suffer greater economic loss than others does not render the regulation violative of due process if it is fair and equitable to the class as a whole."[152]

Rasulis may be no particular aberration from the case law, but it certainly demonstrates little insight or thoughtfulness. The power of government to license persons for occupations is pervasive, and the exercise of that power is equally so.[153] It affords little to grant procedural due process protections when a license is denied, if arbitrariness and unfettered discretion operate in setting the standards for its being granted. The court here demonstrated no appreciation of the potential for governmental abuse. Rather it relied on licensure decisions rendered in 1889,[154] and 1926.[155] Invoking the notion that "[e]ducational requirements and proficiency examinations are time-tested means of assuring that practitioners meet minimum standards of

148. *Id.* at 1009.
149. *Id.*
150. *Id.* at 1010.
151. *Id.*
152. *Id.*
153. *See, e.g.*, Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097 (1973); *cf.*, Hallmark Clinic v. North Carolina Department of Human Resources, 380 F. Supp. 1153, 1158 (E.D.N.C. 1974).
154. Dent v. West Virginia, 129 U.S. 114 (1889).
155. Graves v. Minnesota, 272 U.S. 425 (1926).
156. 502 F.2d at 1010.

competence",[156] the court omitted any examination of the validity of the plaintiffs' state licenses as alternative indicia of competence. Instead it was content to allow the existence of the federal regulation to forestall any further analysis. Hopefully, *Freitag* will have more ultimate impact than *Rasulis* in the developing law of licensure and access to employment.

Hodgson v. Greyhound Lines, Inc.[157] presents a different facet of the access to employment problem. Here, the court was construing the Age Discrimination in Employment Act,[158] in the context of a policy of Greyhound Lines barring the hiring of bus drivers over the age of 35. The concerns of the court were grounded in the federal statute, obviously, but it would not be surprising to see the same type of reasoning employed in this decision spill over into other, constitutionally based attacks on age discrimination.[159] The decision is a major one, constituting one of the most definitive treatments of the federal Act. Unfortunately, the court adopted a very narrow construction which certainly appears to considerably cut into the statutorily proclaimed intent of the Act.[160] In so doing, the court reversed the decision of the trial court,[161] which had ruled in a well developed and thoughtful opinion that Greyhound's policy violated the Act.

The Act, covering persons aged forty to sixty-five, makes it unlawful to "fail or refuse to hire . . . any individual because of such individual's age,. . .".[162] It further bars efforts "to limit, segregate, or classify . . . employees in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age".[163] On appeal Greyhound argued that the district court had imposed an improper burden of proof, and that as a matter of law the evidence demonstrated that Greyhound's hiring policy was, in terms of the statutory exception built into the Act, a "bona fide occupational qualification reasonably neces-

157. 499 F.2d 859 (7th Cir. 1974).
158. 29 U.S.C. §§ 621 *et seq.* (1970).
159. There have been several such attacks ruled on by the courts in recent years. *See, e.g.*, Murgia v. Commonwealth of Massachusetts Board of Retirement, 376 F. Supp. 753 (D. Mass. 1974); Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974); Retail Clerks Union, Local 770 v. Retail Clerks Int. Ass'n, 359 F. Supp. 1285 (C.D. Cal. 1973); Cookson v. Lewiston School District No. 1, 351 F. Supp. 983 (D. Mont. 1972); Weiss v. Walsh, 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd without opinion*, 461 F.2d 846 (2nd Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973); McIlvaine v. Pennsylvania State Police, 6 Pa. 505, 296 A.2d 630 (1973). *See generally* Comment, *Mandatory Retirement—A Vehicle for Age Discrimination*, 51 CHI-KENT L. REV. 116 (1974).
160. *See, e.g.*, 29 U.S.C. § 621 (1970).
161. Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230 (N.D. Ill. 1973).
162. 29 U.S.C. § 623(a)(1) (1970).
163. *Id.* § 623(a)(2).

sary to the normal operation of the particular business . . .".[164] In the court's view, the concern before it exceeded "that of the welfare of the job applicant and must include consideration of the well-being and safety of bus passengers and other highway motorists".[165] Indeed, this perception of the sensitivity of bus driving, in light of the responsibility for others' lives which the job entails, was the underpinning for the whole opinion. As the panel saw it, "the essence of Greyhound's business is the safe transportation of its passengers".[166] Thus, the court reasoned, the burden on Greyhound was simply to "establish that the essence of its operations would be endangered by hiring drivers over forty years of age".[167] In further exposition bearing on this minimal burden imposed on the employer the court continued:

> Stated differently, Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of harm to its passengers. Greyhound need only demonstrate, however, a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice.[168]

The court then reviewed the evidence and concluded that Greyhound had indeed met its burden and had "amply demonstrated that its maximum hiring age policy is founded upon a good faith judgment concerning the safety needs of its passengers and others. It has established that its hiring policy is not the result of an arbitrary belief lacking in objective reason or rationale."[169]

Greyhound appears to be a serious blow to the effective utilization of the Age Discrimination in Employment Act as a mechanism to eradicate discrimination on the basis of age. The court showed little appreciation for the vice of such discrimination, and its review of the evidence showed little inclination to heed the extensive record made by the government in rebutting the utility of chronological age as an employment criterion. Moreover, the standard of proof applied by the court must seriously weaken the Act. It leaves open to the employer the option to discriminate on the basis of a subjective judgment concerning older workers' performances and the employer is safe when it acts in "good faith". At the least, the court has added a gloss

164. *Id.* § 623(f)(1).
165. 499 F.2d at 861.
166. *Id.* at 862.
167. *Id.*
168. *Id.* at 863.
169. *Id.* at 865.

to the statute not existing before: for instances where 'dangerous' occupations are at issue—a categorization not encompassed in the language of the Act—a minimal burden of proof is going to apply to employers to justify their discriminatory practices. Before approaching the question of whether the policy constitutes a "bona fide qualification", in the words of the Act, the court will first address the kind of job at issue on the basis of dangerousness.

In 1973/74 the court decided three employment cases challenging race discrimination under Title VII of the Civil Rights Act of 1964. The court in *Motorola v. McLain*[170] came down on the side of the Equal Employment Opportunity Commission's having broad investigatory authority under section 709(a) of the Civil Rights Act of 1964. In *Motorola*, two charges in two separate cases had been filed against the company. The EEOC requested, among other things, the company's most recent EEO-1 form, showing the make-up of the work force, and a tour of the plant facilities. In response to the defendants' argument that this information was not relevant to the individual charge under consideration, the court quoted *McDonnell Douglas Corp. v. Green*: [171] "[s]tatistics as to the petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks . . . ." Thus, the court recognized the probative value statistics have in cases dealing with racial discrimination, a recognition crucial to successful prosecution of civil rights claims, which otherwise could be established only by evidence of subjective bias (which is almost impossible to prove) or by patterns of activity very difficult to recreate.

Waters v. Wisconsin Steel Works[172] was by far the most significant of the court's Title VII rulings addressing race discrimination. The plaintiffs were two black bricklayers who claimed that the defendants, Wisconsin Steel Works of International Harvester and the United Order of American Bricklayers and Stonemasons, Local 2, discriminated against them. The primary claim was that of plaintiff Waters, whom the company had laid off in accordance with provisions in the collective bargaining agreement calling for last-hired, first-fired layoffs. Waters first inquired about employment at the company in 1957 and was told that it was not hiring bricklayers. The second time he inquired, in

170. 484 F.2d 1339 (7th Cir. 1973), *cert. denied*, 94 S. Ct. 1935 (1974).
171. 411 U.S. 792, 804 (1974), quoted at 484 F.2d at 1345.
172. 502 F.2d 1309 (7th Cir. 1974).

1964, he was hired but laid off two months later on the basis of the seniority system. He was subsequently re-hired in 1967 and laid off a short time later. Samuels, the other plaintiff, claimed that the partial nullification of a severance agreement discriminated against him. The company and union had negotiated the agreement in 1965, when a number of bricklayers were being laid off and it appeared that they would not be rehired within a two-year period, after which their contractual seniority rights would lapse. The agreement gave to the eight white bricklayers being laid off the option of accepting severance pay and losing their contractual seniority rights, or retaining those rights without the severance pay. All eight chose the former. Subsequently, Samuels applied for employment. After that, the union and company re-negotiated the agreement, adopting an amendment which restored the white bricklayers' contractual seniority rights, thereby nullifying a part of the prior agreement. As a result of this, the white bricklayers were recalled without reapplying for jobs at Wisconsin Steel. Samuels claimed that the agreement nullification discriminated against him because, but for the nullification, he would have been higher on the recall roster than the eight whites by virtue of the date of his employment application. Waters also claimed that he would have been hired sooner but for the amendment.

The trial court, in an unreported decision, found for the plaintiffs on almost every issue. It ruled that prior to April, 1964, the effective date of Title VII, the company discriminated in the hiring of bricklayers in violation of 42 U.S.C. § 1981; that the seniority system had its genesis in this period of racial discrimination and was therefore in violation of section 1981 and Title VII; that Waters' layoff on the basis of that agreement was therefore violative of both section 1981 and Title VII; and that the agreement amendment placing the white bricklayers ahead of the black applicants also violated both statutes. The defendants appealed on all these issues, and the plaintiffs cross-appealed on the limitation of back pay to five thousand dollars for each of them and from five thousand dollar attorneys' fee award.

The Seventh Circuit reversed the district court's conclusion that the seniority system violated Title VII and section 1981 and that the nullification agreement discriminated against plaintiff Samuels. It did rule, for reasons difficult to ascertain, that the nullification agreement discriminated against Waters. Some of the court's rulings on preliminary issues were important. An earlier decision in this litigation had held that a plaintiff could sue directly under section 1981 only if he pleaded "a reasonable excuse for failure to exhaust EEOC reme-

dies."[173] Here, the court reversed itself almost completely, stating that it was "inclined to agree with the recent decisions which hold that exhaustion of Title VII remedies, or reasonable excuse for failure to do so, is not a jurisdictional prerequisite to an action under § 1981."[174] Additionally, it ruled that failure to exhaust contractual remedies under a union collective bargaining agreement was not a jurisdictional prerequisite to either a section 1981 or a Title VII action.

More importantly, the court affirmed the finding of past discrimination based upon showings that there were no black bricklayers employed by the company prior to April of 1964, and that blacks had applied for bricklaying jobs, especially black laborers attempting to transfer within the department from laborer to bricklayer positions. The defendants had argued that the "single statistic" of no black bricklayers was not sufficient to establish discrimination, especially when the applications by blacks had been made when there were no job openings. The court responded: "Although we doubt the validity of this contention we think that the statistical data joined by the evidence indicating repeated attempts by blacks to obtain employment as bricklayers substantiates the trial court's finding of discrimination."[175]

The court further ruled that the severance agreement amendment was discriminatory as to Waters because it "projects the company into a realm of presently perpetuating the racial discrimination of the past."[176] Its reasoning at this point is rather mysterious. Both Waters and Samuels claimed that the nullification agreement was discriminatory because it placed white bricklayers above them on the recall roster. They did not claim that the nullification somehow perpetuated past discrimination. Their claims on this issue were identical, yet the court ruled only for Waters on it. Perhaps, this disparity indicates some discomfiture of the court with the ruling against Waters on the seniority issue, the most important issue in the case.

The court also ruled that once a Title VII violation was found, the burden of showing that it was justified by a "business necessity" shifted to the company.[177] The court adopted the standard, favorable

173. Waters v. Wisconsin Steel Works, 427 F.2d 476, 487 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970).

174. 502 F.2d at 1315.

175. *Id.* at 1316-17. For other indications by the Seventh Circuit that statistics themselves are a sufficient basis for a finding of discrimination, see United States v. United Brotherhood of Carpenters & Joiners, Local 169, 457 F.2d 210 (7th Cir. 1972).

176. *Id.* at 1321. The court upheld union liability under section 1981 simply on the grounds that it was a party to the agreement.

177. *Accord*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

to civil rights litigants, that "an employment practice 'can be justified only by a showing that it is necessary to the safe and efficient operation of the business.' "[178] The court also reversed the attorneys' fee award on the ground that it was completely arbitrary and therefore an abuse of discretion. It adopted the standards set forth in the Code of Professional Responsibility of the American Bar Association.[179]

Notwithstanding these significant rulings, the ultimate disposition of the case was a defeat for civil rights litigants, since the court ruled adversely to Waters on the key issue in the case. It held that a last-hired, first-fired seniority system was protected from attack under Title VII, section 703(h),[180] even if it had its genesis in a period of racial discrimination. Courts have consistently held that departmental seniority systems (separate seniority systems for each department in a facility) are not exempted from the coverage of Title VII by virtue of section 703(h) in situations involving a challenge by black employees in a given department who are discouraged or prevented from transferring to a better department which had excluded or otherwise discriminated against blacks in the past, when their seniority rights are not transferrable from their old department to the new one.[181] The court here distinguished these cases on two grounds. First, it stated that the legislative history of Title VII made clear that an employment seniority system[182] of the sort at issue in *Waters* was not to be affected by Title VII. The difficulty with this position, however, lies in the fact that the legislative history which the court quoted makes no distinction between employment and departmental seniority systems (although the examples utilized the employment system), and indeed no other court has found that legislative history sufficient to warrant a denial of relief merging the various departmental systems. Second, and more important, the court reasoned that in departmental cases the victims of prior discrimination are easily identifiable, i.e., the minority workers in the

178. 502 F.2d at 1321.

179. *Id.* at 1322.

180. [I]t shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race. 42 U.S.C. § 2000e-2(h) (1970).

181. *See* Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971); United States v. Bethlehem Steel Corp., 446 F.2d 652, 657-59 (2d Cir. 1971); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

182. One seniority system for the entire facility.

department with lower pay or benefit positions, while they are not so identifiable in the plant-wide seniority case. The panel quoted at length from dicta in *Local 189, United Papermakers and Paperworkers v. United States*:[183]

> . . . [R]equiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment.

This language does not appear to be necessary for a decision in this case, as the court assumed that Waters himself was a victim of prior discrimination, and thus there would be no problem of identifying him. Also, this reliance upon *United Papermakers* and *Paperworkers* raises very troubling questions. First, the merging of different departmental systems is always fictional to a degree, since there is no guarantee that blacks working in the less desirable departments and excluded from the more desirable ones would have continued their employment if they had been hired first in that more desirable department. Moreover, orders remedying past hiring and promotion discrimination by the use of goals and timetables always benefit minority group members who have not been identified as victims of past discrimination, even in the face of considerable legislative history indicating that Title VII would not empower courts to impose goals and timetables. The courts ordering this relief have simply seen no need for a matching of incidents of past discrimination with beneficiaries of remedial orders.[184]

183. 416 F.2d 980, 994-95 (5th Cir. 1969), quoted at 502 F.2d at 1319. This discussion in *Local 189* was actually dicta because the issue in that case was the validity of a departmental, rather than an employment, seniority system, and the departmental system was invalidated in that case.

184. *See, e.g.*, Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm, 482 F.2d 1333 (2nd Cir. 1973); Pennsylvania v. O'Neill, 473 F.2d 1029 (3rd Cir. 1973); United States v. Wood, Wire and Metal Lathers, Local 46, 471 F.2d 408, 413 (2nd Cir. 1973), *cert. denied*, 412 U.S. 939 (1973); Castro v. Beecher, 459 F.2d 725, 737 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315, 329 (8th Cir. 1971) (*en banc*), *cert. denied*, 406 U.S. 950 (1972); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 173 n.47 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); Afro American Patrolmen's League v. Duck, 366 F. Supp. 1095 (N.D. Ohio 1973).

The Seventh Circuit has twice upheld the imposition of affirmative action plans designed to remedy past discrimination in the construction trades by requiring contractors to seek more minority employees and not merely by requiring those contractors to em-

Additionally, there is a considerable lack of equity, as one of the few other courts that dealt with this issue has recognized,[185] in permitting employment seniority systems to go unchallenged when the company, rather than segregating employees, has failed to hire blacks at all.

> It would certainly be difficult to rationalize an interpretation of the Act [Title VII] whereby companies and unions that maintain segregated plants would be required to alter seniority rules to afford blacks a fair opportunity to compete for formerly all-white jobs, but plants that totally excluded blacks would be permitted to apply seniority rules that foreclosed blacks from that same opportunity.[186]

The *Waters* panel finished its discussion of the legality of the employment seniority system by stating:

> Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the "last hired first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences.[187]

However, it is difficult to see how that system does not perpetuate past discrimination if, but for that system, a black who had not been discriminated against would not have lost his job ahead of whites who had received a windfall benefit of discrimination in their favor. It would appear to perpetuate that discrimination as much as the nullification agreement did. Certainly, the court seems to ignore its previous command that courts in Title VII cases have the power and duty "to eliminate the vestiges of past discrimination."[188]

Indeed, in another seniority case decided this term, the court stated that it had previously remanded a case "with directions to grant such injunctive relief as may be required to eliminate discriminatory systems and any residual effect."[189]

ploy identified minority individuals to whom they had previously denied employment. Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); United States v. United Brotherhood of Carpenters and Joiners, Local 169, 457 F.2d 210 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 63 (1972).

185. Watkins v. United Steelworkers of America, 7 CCH EM. PRAC. DEC. ¶ 9130 (1974). *Cf.* Franks v. Bowman Construction Co., 495 F.2d 398, 417-18 (5th Cir. 1974).

186. 7 CCH EM. PRAC. DEC. at 6744.

187. 502 F.2d at 1320.

188. United Brotherhood of Carpenters and Joiners, Local 169, 457 F.2d 210, 216 (7th Cir. 1972).

189. Bowe v. Colgate-Palmolive Co., 489 F.2d 896 (7th Cir. 1973). *See also* Bowe

The panel also concluded, in a footnote, that the employment seniority system was not violative of section 1981, having passed muster under Title VII. This disposition also deserved far more scrutiny than it received. The Supreme Court has stated that section 1981 and Title VII are parallel or overlapping remedies against discrimination,[190] and it has been held, for example, that while Title VII does not prohibit discrimination on the basis of alienage,[191] aliens could properly bring a section 1981 claim of discrimination based on lack of citizenship.[192] Even if the legislative history of Title VII were determinative of the Title VII claim, it should not be a bar to a section 1981 action. As a federal district court noted in *Watkins v. United Steelworkers of America*, section 1981 "is not restricted by the legislative history of Title VII enacted 98 years later."[193]

It is difficult to reconcile the Seventh Circuit's treatment of section 1981 with its treatment of section 1982 in *Clark v. Universal Builders.*[194] *Baker v. F & F Investment*[195] held that section 1981 and section 1982, both deriving from a single section in the Civil Rights Act of 1866, were to be construed similarly. The *Clark* panel, which like the *Waters* panel, included both Judges Swygert and Sprecher, did not even look to Title VIII, the housing parallel to the employment discrimination title in the Civil Rights Act, or its legislative history. Rather, it read section 1982 as broadly as possible so as to eliminate all vestiges of discrimination, even if they had not been in the first instance of the defendant's own making. It is difficult to perceive why people who utilize a discriminatory housing situation created by others are perpetuating discrimination, but a company that discriminated in the first instance is not perpetuating discrimination.

The court in *Waters* also stated: "We did not doubt that a policy favoring recall of a former employee with experience even though white before considering a new black applicant without experience comports with the requirements of Title VII and § 1981."[196] If the court meant that prior experience with the company which had en-

v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1968): "[T]he clear purpose of Title VII is to bring an end to discriminatory practices and to make whole . . . those who have suffered from [them]."

190. Alexander v. Gardner-Denver Co., 93 S. Ct. 1011, 1019 (1974).

191. Espinoza Manufacturing Co. v. Farah, 414 U.S. 86 (1974).

192. Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974).

193. Watkins v. United States Steelworkers of America, 7 CCH EQ. PRAC. DEC. ¶ 9130 (1974).

194. 501 F.2d 324 (7th Cir. 1974), *infra* at 390-95.

195. 489 F.2d 829 (7th Cir. 1973), *infra* at 400.

196. 502 F.2d at 1320.

gaged in past discrimination was necessary, clearly this company policy perpetuates discrimination as much as the last-hired, first-fired seniority system.

Finally, in *Batiste v. Furnco Construction Co.*,[197] the court ruled the following: the plaintiffs did not elect their remedies by filing FEPC charges and permitting their claims to be adjudicated there; the action could proceed as a class even though not all class members had filed EEOC complaints; an individual could be added as a named plaintiff more than 30 days after he had received his right-to-sue letter, since the 30-day requirement would not be a bar under § 1981;[198] and, the FEPC decision was not res judicata for the federal court.

The court issued four opinions concerning statutorily-based claims of sex discrimination. The first of these was *LeBeau v. Libby-Owens Ford Company*.[199] The plaintiffs had filed a sex discrimination suit against their employer, their local union, and their international union. The suit was based on a claim which had earlier been filed with the Equal Employment Opportunity Commission. In the trial court, the international union's motion to dismiss had prevailed. The employer and the union then also moved to dismiss, contending that the international union was an indispensable party to the action. The trial court agreed and granted their motions as well. The appellate court thus was confronting a factually based appeal, construing the relationships between the parties to determine whether the international union was indeed an indispensable party. Its conclusion was that it was not, and as to this issue it reversed. It did affirm the judgment below granting the international's motion to dismiss.

The court clearly was concerned lest the plaintiffs be foreclosed from any relief, and thus it was astute to exercise equitable powers to avoid such an outcome: "[e]ven assuming that the International Union is a party to be joined if feasible pursuant to [Federal] Rule [of Civil Procedure] 19(a),"[200] the offsetting considerations made the dismissal below as to the other parties erroneous.

> Appellants . . . would be substantially prejudiced by a dismissal of their suit. At the least such a decision would require them to file

197. 503 F.2d 447 (7th Cir. 1974).

198. 42 U.S.C. § 2000e-5(3) (1970), the panel stated, requires that suit be filed within 30 days after a right-to-sue letter is issued. Actually, the time period is 90 days. *See* 42 U.S.C. § 2000e-5(1)(2) (1970). The 30 day requirement of 2000e-5(e) applies to filing of a charge with the EEOC after a state or local agency with which the charge had originally been filed terminates the proceedings.

199. 484 F.2d 798 (7th Cir. 1973).

200. *Id.* at 802.

> another complaint with the EEOC naming both unions and LOF as respondents and then, with the Commission's consent, to again file suit. Some or all relief may then be barred by limitation, and in any event, substantial delay would be entailed. In addition, the International Union might, as it did here, seek a dismissal for lack of personal jurisdiction. If the International Union prevailed, appellants would be permanently barred from all relief.[201]

In *Rose v. Bridgeport Brass Co.*,[202] the trial court had rendered summary judgment for the defendants. Ms. Rose had filed suit against her employer, the local union, and the international, claiming sex discrimination and failure of the unions to provide fair representation. As a procedural matter, the court reversed the grant below of summary judgment as to one of the plaintiff's claims because it perceived factual questions at issue. However, as to two of her other claims it affirmed, since these very same claims had been submitted to, and decided by, an arbitrator, and in the court's view:

> It has been settled beyond peradventure that a federal court may not upset the findings of a labor arbitrator insofar as they involve interpretations of a collective bargaining agreement. To allow a contractual claimant who has lost at arbitration an opportunity to relabel his claims to state civil rights violations and secure their readjudication this time in a federal court, is to erect a deterrent to arbitration by employers in clear contravention of national labor policy.[203]

In so reasoning, the court appears to have provided a clarification, if not a limitation, of its earlier rule in *Bowe v. Colgate-Palmolive Co.*,[204] where it explicitly recognized that an employee need not forego arbitration of contractual grievances to obtain redress in federal court for Title VII claims based on the same acts forming the factual predicate for the contract dispute. The court construed its earlier ruling in *Bowe* as still having viability where different remedies are available by means of arbitration as opposed to litigation. Here, however, the arbitrator's findings interpreting the contract were binding, and these findings precluded any relief—both by means of the arbitration process and through litigation. Thus, the issue could not be litigated, once having been arbitrated. Alternatively, "[h]ad Rose won at arbitration, . . . [the court] would not have held her barred from bringing the instant suit, provided, of course, that relief beyond that awarded by the arbitrator was sought."[205] Judge Stevens dissented in part. He would

201. *Id.*
202. 487 F.2d 804 (7th Cir. 1973).
203. *Id.* at 810.
204. 416 F.2d 711 (7th Cir. 1969).
205. 487 F.2d at 810.

have affirmed as to that part of the judgment below which the court reversed, since he did not agree that any issue of fact requiring a trial had been raised.

Later the same year the court again addressed the *Colgate-Palmolive* litigation. *Bowe v. Colgate Palmolive Co.*[206] involved job restrictions and a seniority system at one of the defendants' plants which produced results discriminatory against women employees. In 1967 the district court found that discrimination had occurred and awarded damages to twelve plaintiffs whose claims it considered properly before it.[207] On the first appeal, the appellate court expanded the class entitled to pecuniary recovery and decided, contrary to the district court, that the company's exclusion of women, but not men, from jobs requiring the lifting of more than 35 pounds was unlawful. It remanded with directions to grant such injunctive relief as was required to eliminate the discriminatory system and the residual effects of it. Those discriminatorily laid off were to be compensated and the district court was directed to ascertain the feasibility of computing the damages to those who, while not laid off, were denied the opportunity to secure higher paying jobs. On remand, the district court issued a preliminary injunction opening all jobs regardless of sex. Its final judgment order required adjustments in the seniority of seventeen women employees, awarded damages to fifty-four, and required certain options to be given all women employees. The appeal here addressed the claims of some of the plaintiffs, who contended that the seniority adjustments and the job assignment options were inadequate and that the back pay awards were insufficient.

The court of appeals in this second opportunity to address the issues in the case affirmed the judgment granting injunctive relief, but reversed on the matter of back pay, concluding that it did not adequately compensate all members of the class for past discrimination.

In the past there had been separate seniority rosters for men and women, as well as separate jobs for men and women. In 1966, the separate rosters were combined and the designations of separate jobs for men and women were also abandoned. The 35 pound lifting limitation in practical effect resulted in the better paying jobs still being closed, for the most part, to women. After the first appeal, all jobs were opened to women. But because the seniority rules required that a new entrant in any department had to start last on the list, women

206. 489 F.2d 897 (7th Cir. 1973).
207. Bowe v. Colgate-Palmolive Company, 272 F. Supp. 332 (S.D. Ind. 1967).

employees largely remained in the department where they had been employed previously.

The district court order entered after the remand allowed each female employee to enter a new department with seniority equivalent to that in her old department. The transfer option had to be exercised within 60 days. Additionally, each female employee was permitted to select a secondary department in which she could have department seniority for one year, as of the effective date of the enactment of Title VII or her date of employment, whichever was later. Thus, if she were forced out of a department within one year, she could bid on jobs in her secondary department with 1965 seniority.

The appellants here contended that the adjustments and options granted were insufficient to eliminate the residual effects of past discrimination, and they sought a seniority system based solely on date-of-employment seniority. The court's conclusion was that the transfer option was an adequate equalizing remedy. And as for the contention that the 1965 seniority granted in the secondary department failed to equalize the positions of female and male employees, the court responded by noting that most male employees who had seniority in more than one department had less seniority than the 1965 date. Moreover only 10% of the male employees even had seniority in more than one department. Finally, the court rejected the claim that date-of-employment seniority was necessary, although it recognized the possible imperfection of the solution achieved:

> A primary purpose of relief from residual effects of past discrimination, accorded to minority workers in other Title VII actions, has been to insure that they do not continue to be locked out of previously restricted jobs or departments. There is evident no inherent reason why this purpose is better served by a carryover of date-of-employment rather than department seniority. If date-of-employment seniority were to be required in the present case, it would be superimposed on over twenty years of gains and losses in departmental status of both males and females often reflecting no discrimination.[208]

The appellate court did, however, find deficiencies in the district court's award of back pay. A principal flaw was the selection of the test period. For it to be valid, the court stated, "the period must be one in which both current and residual discrimination was no longer in operation."[209] Here, the test period was inadequate. In addition,

208. 489 F.2d at 901.
209. *Id.* at 902.

there were other inadequacies which the court noted, all leading to the conclusion that there had to be a new computation of both differential and back pay awards.

In *Williams* v. *General Foods Corp.*,[210] the plaintiff was appealing from the grant of summary judgment to the defendant company and from the dismissal of her complaint against the local and international unions. Her claims were based on alleged sex discriminations by the company and denial of fair representation by the unions. The court reversed the summary judgment order but affirmed the dismissal as to the unions.

The *Williams* decision turned on the conflict between Title VII and the Illinois Female Employment Act.[211] The latter was female protective legislation barring women employees from working more than 48 hours per week or more than 9 hours a day. To avoid its violation, the company had scheduled only men for early start-up overtime, which consisted of reporting two hours early on Mondays. The Equal Employment Opportunity Commission had ruled that good faith reliance on state female protective laws constituted a legitimate exception to Title VII. Even so, the company requested of the Illinois Department of Labor an exemption from the state act, so that it could permit women to work early start-up overtime in full compliance with Title VII. That request was denied on the basis that Illinois law was not preempted by Title VII. Subsequently, the EEOC rescinded its earlier ruling and declared that it would take no position regarding the relation between Title VII and state legislation. The company and the unions then decided that they would open up early start-up time to women, but in order to avoid running afoul of the Illinois law, the women would be required to leave work an hour early on Mondays. It was the denial of this extra hour of work which led to the filing of a charge with the EEOC.

Obviously, the company was in a quandary, which was exacerbated when the EEOC announced that reliance on state protective legislation would no longer be considered a defense against a Title VII violation. Meanwhile, the Illinois Department of Labor maintained that no exemption would be granted from the restriction on working hours of women. After the EEOC notified Williams that conciliation efforts had failed, suit was filed, requesting declaratory and injunctive relief, the monetary equivalent of wages which would have been earned had

210. 492 F.2d 399 (7th Cir. 1974).
211. ILL. REV. STAT., ch. 48, § 5 *et seq.* (1973).

the company permitted women to work early start-up overtime, plus attorneys' fees and costs.

The district court, in granting the company's motion for summary judgment, concluded that because the company relied on the Illinois Act, it lacked the discriminatory intent required by section 706(g) of the Civil Rights Act. But the appellate court held that the "standard of liability under Title VII is simply 'engaging in unlawful employment practices.' 42 U.S.C. §2000e-2."[212] Thus, the "[c]orporation's intention . . . [was] not pertinent."[213] Since the trial court had expressly found it undisputed that the company distributed overtime opportunities unequally between its male and female employees, Williams' motion for summary judgment should have been granted, and the court reversed. However, the court did affirm as to the lower court's ruling regarding the unions. One basis for so doing was the fact that Williams had failed to file a charge against the unions before the EEOC. In addition, "[n]either the complaint nor the record evidences supporting facts showing union discrimination in representation."[214]

Having thus disposed of the merits, the court considered whether the conclusion that the company had intentionally engaged in an unlawful employment practice warranted injunctive relief and the award of back pay. As to the former, the court was of the view that since the discriminatory policy mandated by the Illinois Female Employment Act had been ended by the company over three years ago, and there was little likelihood of recurrence, the denial of injunctive relief by the district court was not improper. And as to back pay, the court was impressed by the legal paradox in which the company had found itself, caught in an inescapable conflict between state and federal law. Given the company's efforts to affirmatively seek resolution of the statutory dilemma, the equities warranted the lower court's denial of back pay.

Finally, the court took a restrictive stance regarding the award of attorneys' fees, notwithstanding that Title VII expressly provides that a court may in its discretion award the prevailing party reasonable attorneys' fees as part of costs.[215] While the district court on remand could award such fees, the appellate court went on to note that a denial thereof would also be warranted, given the circumstances of the case.

212. 492 F.2d at 404.
213. *Id.*
214. The court carefully distinguished Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970).
215. 42 U.S.C. § 2000e-5(k) (1970).

HOUSING RIGHTS

Clark v. Universal Builders,[216] was the most important civil rights case the Seventh Circuit decided during 1973/74 and one of the most important it has ever decided. Chief Judge Swygert wrote the opinion, which is bold and far-reaching and opens up an entirely new field of civil rights law—racial discrimination in the consumer field.

Clark was an action for damages and contract revision by a class of blacks who purchased newly constructed homes on the South Side of Chicago during the period 1958 through 1968. The defendants were the building contractor and land company sellers. Both *Clark* and a companion case, originally entitled *Contract Buyers League v. F&F Investment*[217] were originally before Judge Will of the Northern District of Illinois. He refused to dismiss either case, on the ground that both complaints stated claims under the Civil Rights Act of 1866,[218] federal antitrust laws, and Illinois antitrust laws. The plaintiffs' primary theory was that section 1982 was violated because the contract sellers in both cases took advantage of prior discrimination in the housing market to exploit blacks by charging them higher prices on less favorable conditions than the sellers could get but for that prior discrimination. Subsequently, the *Clark* case was reassigned to District Judge Perry and the *F&F Investment* case was eventually assigned to District Judge McGarr. After a six week trial in *Clark*, the court granted a directed verdict for the defendants on the ground that the picture plaintiffs painted of defendants was one of "exploitation for profit, and not racial discrimination,"[219] and therefore a section 1982 violation had not been proved.

The court of appeals reversed, holding that liability under section 1982 was not limited to instances in which housing sellers had sold the same or similar housing to whites under more favorable terms and conditions than they had to blacks. Rather, the court adopted the plaintiffs' theory of liability under section 1982. It ruled that the plaintiffs' evidence proved a prima facie case of a discriminatory housing market. Blacks were denied the more plentiful opportunities in the white, pri-

216. 501 F.2d 324 (7th Cir. 1974).

217. 300 F. Supp. 210 (1969), *aff'd on other grounds*, 420 F.2d 1191 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970). This was a class action by black contract-purchasers of homes, this time on the West Side of Chicago. The defendants were real estate companies which sold existing housing, lending institutions which refused to make mortgage money available to the plaintiffs, and government agencies which refused to insure mortgages in white areas for the plaintiffs.

218. 42 U.S.C. § 1982 (1970).

219. 501 F.2d at 327.

marily suburban, market by the action of many sellers, and were thereby limited to a black housing market offering less opportunities.

The court stated that *Jones v. Mayer*,[220] the main authority relied upon, required section 1982 to be read sweepingly. It suggested that

> . . . there is no difference in results between the traditional type of discrimination and defendants' exploitation of a discriminatory situation. Under the former situation blacks either pay excessive prices or are refused altogether from purchasing housing while under the latter situation they encounter oppressive terms and exorbitant prices relative to the terms and prices available to white citizens for comparable housing.[221]

The defendants' argument that other sellers were the "active agents of discrimination" was rejected with reasoning so broad as to call into question any dealings between sellers and buyers in any black market. The court's discussion of the issue deserves to be quoted at length:

> We find repugnant to the clear language and the spirit of the Civil Rights Act the claim that he who exploits and preys on the discriminatory hardships of a black man occupies a more protected status than he who created the hardship in the first instance. Moreover, defendants' actions prolong and perpetuate a system of racial residential segregation, defeating the assimilation of black citizens in the full and equal participation in a heretofore all white society. Through the medium of exorbitant prices and severe, long-term land contract terms blacks are tied to housing in the ghetto and segregated inner-city neighborhoods from which they can only hope to escape someday without severe financial loss. By demanding prices in excess of what whites pay for comparable housing, defendants extract from blacks resources much needed for other necessities of life, thereby reducing their standard of living and lessening their chances of escaping the vestiges of a system of slavery and oppression.
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> * * *
>
> Charging prices greater than white citizens pay for comparable housing means that blacks are required to dedicate a greater portion of their income to housing than white citizens, leaving less to spend on other necessary items such as education, medical care, food, clothing, home improvements, and recreation. As a result, the exploitation of the dual housing market assists in the relegation of blacks to a continuing position of social inequality and inferiority while those who exploit the dual housing market enjoy the benefits of enormous wealth exacted from black citizens.
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> * * *
>
> When a seller in the black market demands exorbitant prices and onerous sales terms relative to the terms and prices available to white citizens for comparable housing, it cannot be stated that a

220. 392 U.S. 409 (1968).
221. 501 F.2d at 330.

> dollar in the hand of a black man will purchase the same thing as a dollar in the hands of a white man. Such practices render plaintiffs' dollars less valuable than those of white citizens—a situation that was spawned by a discarded system of slavery and is nurtured by vestiges of that system. Courts in applying §1982 must be vigilant in preventing toleration of this deplorable circumstance.[222]

Obviously the court's opinion was based upon a broad reading of what Congress, in enforcing the thirteenth amendment through the adoption of section 1982, intended to forbid and what federal courts were given the power to rectify. And its thrust certainly establishes that sellers of housing and housing-based goods and services, including financing, cannot base their pricing policies on what the market will bear. *Clark* requires that "the bench mark for guiding a seller's conduct in the black market is reasonableness,"[223] and the court stated unequivocally that the seller "ventures into the realm of unreasonableness" when he demands "prices far in excess of a property's fair market value and far in excess of prices for comparable housing available to white citizens."[224]

Application of this principle to other types of markets—home insurance, for example—which do not depend entirely upon where people live is unclear. The broadest reading would be that sellers of goods and services to blacks are in a position to exploit blacks, even when those buyers have access to a white or unitary market for the goods or services in question, and thus these sellers can be held accountable for this exploitation.

At the other end of *Clark's* construction would be the argument that the *Clark* standard of reasonableness applies only when the black consumer lacks reasonable access to a white or unitary market. Only then, this reading would provide, would sellers actually be exploiting the captive black consumer, since only in this instance would the black consumer have no reasonable alternative to the exploitation. An example of this would be the retail food market. Higher profit margins and unjustified price differentials between similar items offered by

222. *Id.* at 331, 331 n.5, 333-34. In upholding the constitutionality of section 1982, the Supreme Court stated that "[N]egro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to 'go and come at pleasure' and to 'buy and sell where they please' would be left with 'a mere paper guarantee' if Congress were powerless to insure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hand of a white man." Jones v. Mayer, 392 U.S. 443 (1968).

223. 501 F.2d at 333.

224. *Id.*

stores in black and white areas would be unlawful exploitation under 42 U.S.C. § 1981, a provision of the Civil Rights Act of 1866 paralleling section 1982,[225] because persons purchasing food traditionally buy it from shops within their neighborhood and cannot be expected to make long trips outside the ghetto to purchase such items. However, the argument would continue, *Clark* would not apply to purchases of large items, such as cars and furniture, since consumers of these items could reasonably be expected to shop around for lower cost items in retail outlets outside their segregated residential area.

This second reading of *Clark* may not be sustainable because it is too narrow. While the court obviously spoke in terms of housing, it made no distinction between the housing market for blacks and other markets for goods and services. Nowhere was there a suggestion that blacks have any duty to avoid predatory practices of retailers who exploit them by going outside the ghetto area to purchase goods on more reasonable terms and conditions. Whether housing or some other product, the exploitation perpetuates discrimination against blacks in both instances and equally deprives them of other resources the court found so necessary for the assimilation into society that the thirteenth amendment envisioned.

The breadth of *Clark* is punctuated by its application not only to the unscrupulous, but to the fair-minded, seller as well. The court stated emphatically that it is the results that matter:

> . . . [N]either prices nor profits—whether derived through well-intentioned, good faith efforts or predatory or unethical practices —may reflect or perpetuate discrimination against black citizens. We agree with Judge Will's statement that "there cannot in this country be markets for profits based upon the color of a man's skin."[226]

The *Clark* decision is a far-reaching one, creating a standard of care in the housing field—and elsewhere perhaps—where none had existed before. Moreover, its procedural rulings were very significant. In ruling that the plaintiffs had introduced sufficient evidence (or had offered evidence which should have been admitted) to establish a prima facie case, and therefore that the defendants' motion for a directed verdict should have been denied, the panel permitted the intro-

225. In 1973 another panel of the Seventh Circuit, in Baker v. F & F Investment, 489 F.2d 829 (7th Cir. 1973), stated that rules of liability for damages under section 1982 apply to section 1981 actions, since sections 1981 and 1982 are not to be construed differently, relying on Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973). Both sections originated from the first section of the Civil Rights Act of 1866.

226. 501 F.2d at 332.

duction and use of important expert testimony not only establishing the basic facts of the case but also establishing, in effect, the pre-existing racial discrimination which the defendants were found to be perpetuating. For example, a sociologist was permitted to testify not only on residential segregation and the greater supply of housing for whites than blacks, but also on the existence of a dual market—more particularly, that suburban housing opportunities were unavailable to blacks.

The court also ruled that the plaintiffs had established a prima facie case under what it called the traditional theory of discrimination by comparing pricing policies of defendants, in different corporate forms, in their South Side operations and in suburban operations. The court ruled that a showing of a higher gross profit and higher mark-up in the black operation was sufficient to prove discrimination in traditional terms, although the suburban and inner-city housing were in no way comparable. It was the use of "a comparative statistical analysis of accounting data reflecting defendants' sales operation and pricing policies"[227] which met the comparability requirement. The court determined that this analysis was "probative of plaintiffs' claim that defendants sold houses to blacks on price terms different from those sold to white buyers similarly situated. Indeed, as the Eighth Circuit has stated, 'statistical evidence can make a prima facie case of discrimination.' "[228] The court's treatment of expert testimony with respect to this aspect of the case was also important. It ruled that the trial judge improperly excluded testimony by an econometricist who analyzed the gross profit and mark-up policies of the defendants and whose "interpretive opinion" was that the difference in gross profits and the difference between sales price and fair market value were the result of racial factors. The trial judge had ruled that such an opinion was inadmissible because "discrimination is not a technical matter,"[229] but the court ruled that the opinion was worth whatever weight the jury assigned it.

Interestingly, what the court characterized as the "traditional theory of liability" is just as untraditional as what it called the "exploitation theory."[230] As discussed, the former is based upon a showing that a builder recovers a higher profit on housing he sells to blacks than that which he sells to whites. The latter theory is based upon a showing that a builder charges blacks more for homes than other sellers charge whites for similar housing (in terms of characteristics of

227. *Id.* at 338.
228. *Id.* at 337.
229. *Id.* at 339 n.21.
230. *Id.* at 334.

structures, comparability of neighborhoods, access to facilities, and the like). While the "exploitation" theory is certainly untraditional, the so-called "traditional" theory is itself untraditional. The wrong in each case is that the builder is exploiting the market. Just like developers who work exclusively in the ghetto, the builder (as in *Clark*) who also happens to work the white market is simply charging what the market will bear. And the panel found this to be a sufficient relic of slavery to rule that section 1982 forbade it.

One month after *Clark*, the court issued another ruling on housing discrimination, again evidencing substantial concern about residential segregation. In *Gautreaux v. Chicago Housing Authority*[231] the court ruled that equity principles required the district court to order a metropolitan public housing desegregation plan as a remedy for the previously-found discriminatory site and tenant selection policies of the Chicago Housing Authority. It rejected the contention that *Milliken v. Bradley*[232] barred the trial court from ordering inter-jurisdictional relief when such an order was necessary to vindicate federal constitutional rights. "[T]he law was clear that political subdivisions of the States may be readily bridged when necessary to vindicate"[233] these rights. *Bradley* was not a substantive constitutional decision inconsistent with this construction; rather, it dealt with "equitable limitations on remedies."[234]

As the *Gautreaux* court read *Bradley*, there was an impractical and unreasonable over-response in that litigation to the intra-district violation, given the difficult logistical, administrative, and financial problems a judge would have to deal with, and given the deep-rooted tradition of neighborhood schools. In the school desegregation situation, only an inter-district violation would justify an inter-district remedy. But housing desegregation was an entirely different matter, and the equitable limitations on remedies in school desegregation cases were simply not applicable. Pursuing this reasoning, the court opined that, as with the desegregation of parks, for example, the desegregation of public housing was not at all impractical. There was "no deeply rooted tradition of local control of public housing."[235] Additionally,

231. 503 F.2d 930 (7th Cir. 1974).

232. 94 S. Ct. 3112 (1974). This was the Detroit school desegregation case, in which the Court reversed the Sixth Circuit Court of Appeals' affirmance of an inter-district, metropolitan-wide school desegregation plan to remedy racial segregation in the public schools of Detroit.

233. 503 F.2d at 934.

234. *Id.* at 936.

235. *Id.* The court cited Watson v. City of Memphis, 373 U.S. 526, 532-534

the administrative problems were insignificant as compared to those in the situation *Bradley* addressed. Moreover, there was evidence of suburban discrimination in public housing site selection. Lastly, the parties agreed that an in-city remedy would not work, since resegregation was a reality and had to be considered in drawing up a plan. The court noted that "a continuance of present trends in black and white census tracts would lead to at least a 30% black occupancy in every census tract in Chicago by the year 2000,"[236] a figure apparently considered the dividing line between a white or integrated area, and an area changing from white to black. The court also noted that a witness who was a demographer further testified that "by providing desegregated housing opportunities in new suburban areas, the rate of white exodus from the city would diminish."[237]

Judge Tone dissented on the grounds that *Bradley* required that inter-district relief be ordered only when there was an inter-district violation. Perhaps in response to this, the majority emphasized in its order denying a rehearing that

> it is reasonable to conclude from the record that defendants' discriminatory site selection within the City of Chicago may well have fostered racial paranoia and encouraged the 'white flight' phenomenon which has exacerbated the problems of achieving integration to such an extent that intra-city relief alone will not suffice to remedy the constitutional injuries. The extra-city impact of defendants' intra-city discrimination appears to be profound and far-reaching and has affected the housing patterns of hundreds of thousands of people throughout the Chicago metropolitan region.[238]

This recognition that intra-city public housing may be a factor causing metropolitan residential segregation is an important one. It should, especially when coupled with the recognition of a dual housing market which caused metropolitan residential segregation in *Clark*, and with the standard set forth in *Clark* that perpetuation of past discrimination is unlawful, have significant precedential effect on other litigation seeking residential desegregation. In its own more limited area, the *Gaut-*

(1963), holding that because "[d]esegregation of parks and other recreational facilities does not present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools, . . . it is patent . . . that the principles enunciated in the second *Brown* decision have absolutely no application [to parks]." *Id.* at 937.

236. *Id.* at 938. When the district judge had earlier ordered in-city public housing desegregation, he ordered that no new public housing units were to be built in census tracts with more than 30% black occupancy until after 700 units had been built outside such areas, and then, only one quarter of the new units built therein or within one mile could be built within such areas. *See* Gautreaux v. CHA, 304 F. Supp. 736 (N.D. Ill. 1969).

237. *Id.*

238. *Id.* at 939-40.

reaux opinion is just as precedent-setting as *Clark*. Indeed, no other court has ordered metropolitan public housing desegregation in intra-city public housing desegregation cases.[239]

The other housing discrimination decisions the court handed down in the past year were considerably less significant than *Clark* and *Gautreaux*. But they do, standing together, indicate a substantial sensitivity on the part of the Seventh Circuit to questions of housing discrimination and residential segregation, as well as a willingness to require the district courts to order relief which would, insofar as possible, remedy those situations.

In *Barrick Realty Co. v. City of Gary*, the court, as previously discussed in terms of the decision's first amendment implications, upheld a Gary, Indiana ordinance forbidding the use of "for sale" signs in residential areas of the city. In reaching that conclusion, the court strongly supported housing integration, stating:

> [T]he right to open housing means more than the right to move from an old ghetto to a new ghetto. Rather, the goal of our national housing policy is to "replace the ghettos" with " 'truly integrated and balanced living patterns' " for persons of all races. . . . It is clearly consistent with the Constitution and federal housing policy for Gary to pursue a policy of encouraging stable integrated neighborhoods and discouraging brief integration followed by prompt resegregation, even if an effect of that policy is to reduce the number of blacks moving into certain areas of the city.[240]

The last sentence of the quotation has disturbing implications. The Second Circuit Court of Appeals[241] is the only one to have ruled that a local housing authority's duty to integrate under the Civil Rights Acts[242] justified a tenant selection practice in which minority group persons

239. *See, e.g.*, Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part and rev'd in part*, 473 F.2d 910 (6th Cir. 1973); Blackshear Residents Org. v. Housing Authority of the City of Austin, 347 F. Supp. 1138 (W.D. Texas 1971); Hicks v. Weaver, 320 F. Supp. 619 (E.D. La. 1969). *Cf.* Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (metropolitan but intra-jurisdiction desegregation plan ordered, the housing authority having jurisdiction over all of Fulton County, Georgia, including both Atlanta and its suburbs). *Cf.* Mahalay v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1257 (N.D. Ohio 1973), *rev'd*, 500 F.2d 1087 (6th Cir. 1974), in which the court of appeals reversed a trial court ruling that the refusal of suburban municipalities to enter into cooperation agreements with CMHA, having jurisdiction over the entire county including Cleveland and its suburbs, unlawfully perpetuated residential segregation.

240. 491 F.2d at 164-65.

241. Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973).

242. Particularly Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Fair Housing Act (Title VIII of the Civil Rights Act of 1968), 42 U.S.C. § 3608 (d)(5). The leading case extrapolating the duty is Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970).

otherwise entitled to public housing units (because they had been relocated from the area in which the units were built) were denied units which were given to whites instead.[243]

In light of this crunch between the substantive public policy favoring integration and the constitutional and statutory principles of equal and non-racial treatment, the opinion in *Southeast Chicago Commission v. HUD*[244] is particularly interesting. The Chief Judge wrote the opinion, which addressed a challenge to a decision by the Federal Housing Administration to commit funding of section 236 money[245] to Lake Village Apartments, at the northern edge of the Kenwood community on Chicago's South Side. A community organization and residents in the Hyde Park-Kenwood area of Chicago, an integrated neighborhood, challenged the commitment on the ground that it violated HUD's Project Selection Criteria[246] and, independent of the Criteria, the 1964 and 1968 Civil Rights Acts. The commitment was made before the Project Selection Criteria were adopted, and the court ruled that the Criteria were not retroactive, rights having vested and retroactive intent being absent. The court stated that HUD's administrative findings that there was a reasonable probability that the project would be integrated and that, even if it were not, a segregated project would have no impact upon the racial character of the Hyde-Park and Kenwood neighborhoods were not "clear error[s] of judgment."[247] The panel went on to hold that HUD could find that the disadvantage of increasing or perpetuating racial concentration was outweighed in a given instance by the need for physical rehabilitation or additional minority housing.

Thus, in one case where the issue of integration versus an increase

243. Cases such as *Shannon*, which ruled that the construction in black areas of (functionally) public housing to be occupied by blacks was unlawful when the relevant governmental officials did not consider the effect on racial segregation the housing would have, do not, on their face at least, diminish the availability of housing for blacks. Assumedly, the funds allocated to the project in *Shannon* could be used elsewhere, in a white area, and therefore the locational element of housing choice would be expanded. Unfortunately, however, the reality is that the *Shannon* decision would have just as severe an effect on dimunition of black housing opportunities as the *Otero* decision, since lack of affirmative marketing has resulted in whites occupying almost exclusively all subsidized housing built in white areas.

244. 488 F.2d 1119 (7th Cir. 1973).

245. 12 U.S.C. § 1715z-1 (1970).

246. The Criteria, 24 C.F.R. §§ 2000.700 et seq., were adopted by HUD in response to the Third Circuit's opinion in *Shannon*. The Criteria are standards which are to guide FHA when making commitments of subsidized housing money. One criterion to be weighed is the effect that the development of the project would have on integration in the area in which it is to be located.

247. 488 F.2d at 119.

in the supply of minority housing opportunities was joined, the court indicated that the interest in integration need not be the overriding factor. Given this, the *Barrick Realty* panel's disturbing dictum should perhaps best be read in light of its statement that "the record does not indicate that the ordinance has frustrated the ability of prospective buyers to find the homes in Gary which are for sale."[248]

The interest in the supply of black housing opportunities, and the equal treatment implications a cut-off of that supply would have, as opposed to the interest in resegregation, was manifested even more starkly in *Morales v. Haines*.[249] As it appears from the trial court decision,[250] a developer had built 400 homes under section 235 of the National Housing Act[251] in Harvey, Illinois. All, or almost all, of the homes were occupied by blacks, and they were concentrated in one area of the city. In 1970 the developer received all necessary FHA commitments to build 90 more of these homes, but the municipality refused to grant the developer the necessary building permits. The plaintiff, a black who had entered into a contract to purchase one of the 90 homes in question, sued. The city defended particularly on the ground that there already was too much low cost housing in the city. The trial court ruled for the plaintiff on the ground that the refusal to issue the building permits violated the equal protection clause, since it was based upon a "classification which is clearly impermissible under the fourteenth amendment, the financial means of the prospective owner."[252] It did not deal with the fact that the percentage of blacks Harvey had grown from 6.8% in 1960 to 30.9% in 1970, although the *Gautreaux* court later apparently considered that black occupancy higher than 30% would have a resegregation effect.

The plaintiff appealed the district court's denial of actual and punitive damages and attorney's fees. The court of appeals vacated and remanded the case, ordering the district court to find whether there was a presence or absence of racial discrimination, an affirmative finding of which would entitle the plaintiff to both compensatory and punitive damages and an award of attorney's fees under 42 U.S.C. §§1981 and 1983 and the 1968 Fair Housing Act.[253] Without discussion, it affirmed the judgment below in all other respects.

248. 491 F.2d at 164.
249. 486 F.2d 880 (7th Cir. 1973).
250. Morales v. Haines, 349 F. Supp. 684 (N.D. Ill. 1972).
251. 12 U.S.C. § 1715z (1970).
252. 349 F. Supp. at 686. *Cf.* James v. Valtierra, 402 U.S. 137 (1971).
253. 42 U.S.C. §§ 3601 *et seq.* (1970).

Thus the court, whether the interest was black housing which would integrate areas, or exploitation of the black housing market in segregated areas, or the development of black housing in transitional areas, consistently held in favor of the black plaintiffs.

The remaining housing cases the court decided during the past term were consistent with this pattern of sustaining the claims of black housing consumers. *Baker v. F & F Investment Company*[254] addressed the district court dismissal of certain defendants. The defendants were the Federal Housing Administration, the Veteran's Administration, and the Federal Savings & Loan Insurance Corporation. The black plaintiffs alleged that the first two were liable for damages because, by failing to make mortgage money available to blacks, they forced the plaintiffs to buy homes in segregated Chicago neighborhoods from real estate speculators and blockbusters at exorbitant prices. The plaintiffs alleged that the FSLIC was liable as successor-in-interest of properties sold by its insured lenders to the plaintiffs. The court held that the federal government, like a private person, was liable for damages under 42 U.S.C. §1982. Its reasoning was simple and direct. The federal government is covered by section 1982;[255] section 1982 prohibits all discrimination;[256] and damages are available under section 1982.[257] The court went on to hold that the agencies were not protected from suit by the doctrine of sovereign immunity, since consent to sue was found in the sue-and-be sued provisions of the applicable statutes, and the Federal Tort Claims Act[258] did not provide an exclusive remedy to the plaintiffs.

In more routine housing cases, involving individual instances of discrimination by realtors against blacks, panels of the court construed both section 1982 and the Fair Housing Act broadly.[259] In *Seaton v. Sky Realty*[260] the court held that an award for compensatory damages under section 1982 and actual damages under 42 U.S.C. § 3612 were the appropriate remedies for humiliation, which could be established from testimony or inferred from circumstances. No medical evidence of mental or emotional impairment was necessary. "Mr. Seaton was subjected to a racial indignity which is one of the relics of slavery which

254. 489 F.2d 829 (7th Cir. 1973).
255. District of Columbia v. Carter, 409 U.S. 418 (1972); Hurd v. Hodge, 334 U.S. 24 (1948).
256. Jones v. Mayer, 392 U.S. 443 (1968).
257. Sullivan v. Little Hunting Park, Inc., 386 U.S. 229 (1967).
258. 28 U.S.C. §§ 1346(b) and 2671 *et seq.* (1970).
259. *See* Johnson v. Jerry Pals Real Estate Co., 485 F.2d 528 (7th Cir. 1973).
260. 491 F.2d 634 (7th Cir. 1974).

42 U.S.C. § 1982 was enacted to eradicate."[261] An award of punitive damages was also affirmed, the panel stating that the applicable standard was willful or wanton or the like.

In *Jeanty v. McKey & Poague*,[262] the court similarly ruled that compensatory damages included not only out-of-pocket expenses but also could be had "for emotional stress and humiliation."[263] Again, the court ruled that the wanton and willful, ill will, or malice standard should be used in awarding punitive damages. The court also held that a four hundred dollar attorney's fee award should be reconsidered and, additionally, granted one thousand dollars in attorney's fees to the plaintiffs for the appeal. The court further held that the rental agents were liable for their discriminatory acts even if such acts were at the owner's request.

It can hardly be questioned that the Seventh Circuit Court of Appeals acted vigorously and aggressively in eradicating housing discrimination. Its decisions evidence a commitment to equality virtually unmarred by any caveats or exceptions. On the basis of these rulings alone, the court must be considered a leader among the circuits in civil rights and civil liberties.

THE RIGHT TO PRIVACY

The creation and development of a constitutional concept of privacy has been an ill-defined expansion in the civil liberties arena. *Griswold v. Connecticut*[264] is generally regarded as the modern wellspring for this concept; since that decision, privacy has been employed as a touchstone in a number of areas. The Seventh Circuit Court of Appeals issued three rulings in the past term which turned, to a greater or lesser degree, on privacy claims.

The first of these decisions was an unfortunate one for the proponents of full opportunity to obtain the facilities and services necessary for abortions.

There are at present more than twice as many non-governmental hospitals as federal, state and local governmental hospitals in the United States. It is obvious that if all private hospitals were permitted to refuse to allow abortions and sterilizations, the availability of these

261. 491 F.2d at 636.
262. 496 F.2d 1119 (7th Cir. 1974).
263. *Id.* at 1121.
264. 379 U.S. 926 (1964).

procedures would be severely limited and in many areas impossible to obtain, particularly in locales where private or parochial hospitals are the only medical facilities available. This is the generalized factual predicate to the court's ruling in *Doe v. Bellin*,[265] where the issue was whether private hospitals are under the duty to provide abortions. The specific facts in *Bellin* involved a woman whose physician was willing to perform the procedure. Two of the local hospitals were operated by the Catholic Church and their administrators were unwilling to allow the abortion to be performed. The sole remaining hospital, the one involved in the suit, received state and federal Hill-Burton funds. The court reversed the lower court's ruling, whereby a preliminary injunction had been issued prohibiting the defendants from denying use of their facility.

The ultimate issue, the court stated,

> is whether the defendants, who are regulated by the state of Wisconsin and have accepted financial support pursuant to the Hill-Burton Act . . . , may refuse to perform abortions without offending the Civil Rights Act. . . . We hold that they may, since the record does not indicate that their refusal was directly or indirectly influenced by the State or persons acting under color of State law.[266]

The court agreed that a woman's right to make the decision to have an abortion is protected by the fourteenth amendment. Therefore, "a statute which makes the performance of an abortion a crime . . . or which requires the medical profession to observe unnecessary abortion-restricting rules is invalid"[267] under the Supreme Court's ruling in *Roe v. Wade*.[268] However, the court further noted:

> There is no constitutional objection to the decision by a truly private hospital that it will not permit its facilities to be used for the performance of abortions. We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves.[269]

The court pointed out that the Georgia abortion law invalidated in *Doe v. Bolton*[270] contained a provision giving the hospital the right not to admit abortion patients, and "since the court reviewed the entire statute in such detail, it is reasonable to infer that it considered such

265. 479 F.2d 756 (7th Cir. 1973).
266. 479 F.2d at 757.
267. *Id.* at 759.
268. 410 U.S. 113 (1973).
269. 479 F.2d at 759-60.
270. 410 U.S. 179 (1973).

authorization unobjectionable."[271] As for the significance of the hospital's receiving government funds, the court was of the view that this did not tip the balance to justify a conclusion that state action existed.

> We find no basis for concluding that by accepting Hill-Burton funds the hospital unwittingly surrendered the right it otherwise possessed to determine whether it would accept abortion patients. . . . There is no claim that the state has sought to influence hospital policy respecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits.[272]

The court at no point addressed itself to the fact that no other hospital was available to the woman and her doctor. Yet in areas served by only one non-denominational hospital, it would seem to more closely comport with reality to treat the hospital's refusal to perform abortions differently than in places where alternative facilities are readily available. Additionally, the court dealt with the defendant hospital as if it had an absolute and total policy of refusing to allow any abortions. However, the hospital actually had elaborate rules specifying under what circumstances abortions could be performed, and it had a policy of allowing abortions if continued pregnancy would threaten the woman's life or health, if there were a likelihood of fetal deformity, or if the pregnancy were the result of rape or incest. This is noteworthy because apparently the refusal to perform the plaintiff's abortion was the product of policy based on conscience. Even though the Church amendment to the Public Health Service Act[273] now gives private hospitals receiving public monies the right to refuse to perform abortions or sterilizations, if such would be contrary to religious beliefs or moral convictions, it seems at least somewhat anomalous to allow such conscience claims by public institutions. It could well be argued that the acceptance of public monies, a voluntary act, carries with it the acceptance of the limitations of the establishment clause of the first amendment. And just as it is contrary to that clause that public funds are given to private and parochial schools so that they may propagate and practice their religion, the payment of public monies to private hospitals barring the performance of abortions could be construed as indirectly supporting their religious principles and practices.

The Seventh Circuit Court of Appeals' decision is bare of any recognition of this first amendment problem, but is based solidly on the absence of the state action required for a civil rights suit. Since several courts have ruled otherwise by finding state action in suits

271. 479 F.2d at 760.
272. *Id.* at 761.
273. Health Programs Extension Act of 1973, P.L. 93-45, Title IV, § 401(b), 87 Stat. 95.

against private hospitals which receive public monies,[274] ultimate resolution by the Supreme Court seems likely for at least two issues: what constitutes state action, i.e., does mere acceptance of public monies suffice; and to what extent can the conscience clause be invoked by institutions on behalf of their administering or sponsoring groups. Until such resolution, the right to privacy, which encompasses a woman's right to an abortion, cannot be effectively asserted and implemented by many of the women within the confines of the Seventh Circuit.

It should be noted, however, that while the *Bellin* court clearly ruled adversely to one of the key claims of proponents of full abortion rights, it did establish more positive doctrine on another issue involved in the abortion arena. The defendants argued that the plaintiff's case was deficient for failure to join the putative father as a party. But the court responded by stating that it found nothing in the Supreme Court's decision "to support the suggestion that the woman's right to make the abortion decision is conditioned on the consent of the putative father."[275]

In *United States v. Turner*,[276] the court handed down a decision allowing significant encroachment on individual privacy. Turner appealed from the district court order granting enforcement of an Internal Revenue Service summons compelling him to produce the names and Social Security numbers of clients whose tax returns he had prepared. The court of appeals affirmed. The subpoena from the IRS arose out of a nationwide program aimed at identifying unscrupulous and incompetent tax preparers, as well as the collection of additional taxes or the refund of overpayments due on improperly prepared returns. The court was of the view that the IRS had a valid civil purpose for its investigation; moreover, it noted that the Service had represented that no criminal prosecution against Turner had been recommended. At issue, as the court framed the matter, was "the conflict between a government's demand for information for the ostensible purpose of operating a legitimate regulatory scheme and the individual's interest in privacy."[277] The court had to determine whether Turner had a

274. *See, e.g.*, Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974); Sams v. Ohio Valley General Hospital Ass'n, 413 F.2d 826 (4th Cir. 1969); Cypress v. Newport News General and Non-Sectarian Hospital Ass'n, 375 F.2d 648 (4th Cir. 1967); Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

275. 479 F.2d at 759.

276. 480 F.2d 272 (7th Cir. 1973).

277. 480 F.2d at 277.

valid claim of fifth amendment privilege against self-incrimination, and this determination required a balancing of the competing interests of privacy and of operation of the government's regulatory scheme.

The balance which the court struck clearly came out on the side of the government. There was no "substantial risk of self-incrimination similar to the virtual admissions of criminal activity compelled"[278] in other cases. Nor did the nature of the evidence sought from Turner "indicate that he had an expectation of protected privacy or confidentiality which the fifth amendment would protect."[279] Thus, the court concluded:

> [T]he summons is directed at an essentially civil area of inquiry—the determination of the civil tax liabilities of Turner's clients—where the revelation of clients' identities will pose only a "mere possibility of incrimination" that is insufficient to defeat the strong policies in favor of disclosure.[280]

Turner hardly presents a sympathetic regard for privacy interests. Indeed, it appears to conflict with considerably more sympathetic rulings by the Fourth Circuit Court of Appeals in *United States v. Theodore*,[281] and by the Sixth Circuit Court of Appeals, which stated in *Bisceglia v. United States*: "The IRS is not authorized to issue a summons to a third party to compel production of that party's records except in furtherance of an investigation of the possible tax liability of specified taxpayers."[282]

Holsapple v. Woods[283] presents one of the small ironies arising out of the Seventh Circuit decisions in the past year. At issue was the suspension of a high school student whose hair length was in excess of that allowable under the grooming code of his school. The district court ruled for the student, and the appellate court affirmed, holding in accordance with well-established case law in this circuit that "the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution."[284] *Holsapple* was decided in May of 1974, yet little more than a month earlier the court had resoundingly rejected the constitutionally based claims of a school teacher discharged from his employment be-

278. *Id.*
279. 480 F.2d at 277-8.
280. *Id.* at 278.
281. 479 F.2d 749 (4th Cir. 1973).
282. 486 F.2d 706, 710 (6th Cir. 1973), *cert. granted*, 94 S. Ct. 1931 (1974).
283. 500 F.2d 49 (7th Cir. 1974), *cert. granted*, 95 S. Ct. 185 (1974).
284. *Id.* at 51-2. *Accord*, Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1970); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

cause of his hirsute appearance.[285] In *Holsapple*, the court was very clear in asserting that school children have more rights under the Constitution than do their teachers—who are ostensibly the transmitters of the ideas and values which the children attend school to learn and absorb. Judge Pell, in a very brief concurrence, noted that his joining in the opinion was solely due to there already being well-established apposite authority in the circuit. Otherwise, he viewed the issue of hair length in high schools as not rising to sufficient constitutional significance to warrant the federal courts' attention.

STUDENTS' RIGHTS

Holsapple v. Woods addressed the rights of students in the context of what can be considered their privacy claims. In *Jacobs v. Board of School Commissioners*, the issue was high school students' first amendment rights. *McDonald v. Board of Trustees of the University of Illinois*[286] considered still another aspect of students' rights, the due process standards applicable to expulsion. Rather, than writing an opinion, however, the court simply adopted the opinion of District Judge Marshall in affirming his decision. Thus, it is necessary to analyze the district court ruling to assess the posture of the appellate court.

The plaintiffs in the three cases which were consolidated were second year students at the University of Illinois College of Medicine. They were charged with cheating on the freshman comprehensive examination. After an evidentiary hearing before the college's Committee on Student Discipline, in which the students were represented by counsel, they were adjudged guilty and expulsion was recommended. The students appealed to the Senate Committee on Student Discipline, which affirmed the findings of the college committee. Thereupon, they were expelled. Their expulsion triggered the filing of civil rights actions in federal court, claiming deprivation of property and liberty without due process.

The district court clearly was sensitive to "the question of the extent to which the Court . . . could intrude into and exercise a supervisory hand in the resolution of the essentially academic disputes"[287]

285. *See* Miller v. School Dist. No. 167, *supra* at 359-62.
286. 503 F.2d 105 (7th Cir. 1974).
287. McDonald v. Board of Trustees of the University of Illinois, 375 F. Supp. 95, 97 (N.D. Ill. 1974).

it confronted. It was in this posture that it proceeded to address the evidence adduced by means of cross-motions for summary judgment. The critical question for resolution was determination of the appropriate evidentiary standard applicable to weighing the facts before the court. The plaintiffs contended that the finding that each of them cheated was unsupported by substantial evidence. The defendants, although not conceding that the college committee's findings lacked the support of substantial evidence, contended that those findings were at the least supported by some evidence, and that that was the proper standard of review under the due process clause.

The court concluded that the defendants' position was correct, citing three decisions of the Supreme Court.[288] In its view, the substantial evidence test "probes deeper into the record than does a review for fairness which is the essence of a due process inquiry."[289] It rejected the decisions cited by plaintiffs with the reasoning that in virtually all of them the disciplining of the students arose as a result of conduct allegedly protected by the first amendment. Arguably, in such context the substantial evidence test would apply, but it "would be imposed to protect against an infringement of the First Amendment, not as a general due process standard."[290] Here, however, the expulsions arose out of conduct not falling within the scope of any constitutional protection. The court completed its exposition by holding that the administrative proceedings conformed with the requisite minimal standards of procedural due process, and thus a ruling for the defendants must follow.

EDUCATION

The only school desegregation case the court decided during the past term was *United States v. Board of School Commissioners of the City of Indianapolis*.[291] The court had previously ruled on the question of liability,[292] and the sole question here was the scope of remedy.

288. International Brotherhood, etc. v. Hardeman, 401 U.S. 233 (1971); Thompson v. City of Louisville, 362 U.S. 199 (1960); United States ex rel. Vatjauer v. Commissioner of Immigration, 273 U.S. 103 (1927).

289. 375 F. Supp. at 103.

290. *Id.*

291. 503 F.2d 68 (7th Cir. 1974).

292. 474 F.2d 81 (1973), *cert. denied*, 413 U.S. 920 (1973). The *Indianapolis* litigation and the court's decision in United States v. School District 151 of Cook County, 404 F.2d 1125 (7th Cir. 1968) should be compared with Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963) for a nice illustration of the changes in the Seventh Circuit's responsiveness to demands of vindication of the rights of minorities.

As interim relief, the district court had ordered that each school should have a minimum black enrollment "in the area of" 15%.[293] It further adopted the desegregation proposal of a two-person commission to which the court had assigned the Indianapolis Public Schools' (IPS) professional planning staff after the court found that the IPS plan was insufficient. The trial judge also ordered IPS to seek federal funds to expedite desegregation. With respect to permanent relief, the court concluded that intra-city relief would have the effect of accelerating white flight from the city and resegregating the city and the school system. The judge therefore decided that an inter-district remedy should be ordered.

On appeal, IPS challenged both the interim and permanent relief. With respect to the former, it argued that its own desegregation plan was sufficient, that a more comprehensive intra-city plan would only resegregate the city, that the district court did not have the authority to appoint a commission to formulate a plan, that the district court did not have the authority to order IPS to apply for federal desegregation funds, and, that the court had erred on a number of procedural issues. IPS also challenged the metropolitan relief, which had been issued before *Milliken v. Bradley*[294] was decided.

The court of appeals affirmed the interim relief. Citing *Davis v. Board of School Commissioners*,[295] *Swann v. Charlotte-Mecklenburg Board of Education*,[296] and *Green v. County School Board*,[297] it emphasized the necessity of an effective desegregation plan that would work immediately and, on the basis of *Swann*, stated that the use of a commission was appropriate because of the default of the school authorities in drawing up an effective plan.

Thus once again, when the court was confronted with a situation in which residential resegregation and the expansion of black opportunities were in conflict, it rejected the notion that the social policy contained in the Fair Housing Act[298] in favor of integrated communities could be a bar to relief remedying past discrimination:

> So-called 'white flight' is not an acceptable reason for failing to dismantle a dual school system. '[I]t cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual school system. . . .'

293. 503 F.2d at 75.
294. 94 S. Ct. 3112 (1974).
295. 402 U.S. 33 (1971).
296. 402 U.S. 1 (1971).
297. 391 U.S. 430 (1968).
298. 42 U.S.C. § 3601 *et. seq.* (1968).

> Where system-wide dualism has been found, as here, '. . . [the] School Board has the affirmative duty to desegregate the entire system "root and branch." ' and 'the District Court must . . . decree all-out desegregation . . . .'[299]

The court also ruled that the trial judge properly excluded sociological evidence that mandatory busing programs might have adverse sociological and psychological consequences for the children and might enhance, rather than diminish, prejudice, and testimony that integration might heighten racial identity and did not reduce prejudice. The panel stated that *Brown v. Board of Education*[300] did not rely upon sociological and psychological material, as some commentators have claimed. Rather, quoting Judge Sobeloff, concurring in *Brunson v. Board of Trustees*,[301] the court stated:

> 'The inventors and proponents of this theory grossly misapprehend the philosophical basis for desegregation. It is not founded upon the concept that white children are a precious resource which should be fairly apportioned. It is not, as Pettigrew suggests, because black children will be improved by association with their betters. Certainly it is hoped that under integration members of each race will benefit from unfettered contact with their peers. But school segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of *Brown*. Were a court to adopt the Pettigrew rationale it would do explicitly what compulsory segregation laws did implicitly.'

On the basis of *Milliken v. Bradley* the panel reversed the district court's holding that inter-district relief beyond the boundaries of Marion County should be ordered. The suit was filed originally in 1968. The district court found *de jure* discrimination that year.[302] In 1969 the Indiana Legislature passed, and the governor signed, the Uni-Gov Act,[303] which consolidated all the governments in Marion County but did not consolidate IPS and the 10 suburban school systems within Marion County. The panel ordered the district court to "determine whether the establishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*."[304]

Even in the face of *Milliken*, the court was unwilling to foreclose the possibility of metropolitan relief, although there were no facts in

299. 503 F.2d at 80.
300. 347 U.S. 483 (1954).
301. 429 F.2d 820, 824, 826 (4th Cir. 1970), quoted at 503 F.2d at 85.
302. 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973).
303. BURNS IND. STAT. ANN. § 48-9213 (1970 Cum. Supp.).
304. 503 F.2d at 86.

the record other than the establishment of the Uni-Gov boundaries which might have warranted that relief under *Milliken.* Rather than ruling on the question, when all the relevant facts appeared to be before it, it chose to defer the decision as to whether that boundary reestablishment was sufficient under *Milliken* to warrant an inter-district remedy. Apparently, the panel wanted the district court to grapple with the question of what quantum and kind of evidence was necessary to show that racially discriminatory acts of the state or local schools districts "have been a substantial cause of inter-district segregation."[305]

GOVERNMENTAL IMMUNITY AND PUBLIC OFFICERS' LIABILITY

In several decisions the Seventh Circuit considered claims raising the issues of governmental immunity and the liability of public officers. Its responses do not readily lend themselves to any overriding generalization, but the decisions are significant since public officials are inevitably the defendants in civil liberties litigation.

Hampton v. City of Chicago, Cook County, Illinois,[306] arose out of the Chicago police raid on Black Panther headquarters, during which Panther members Mark Clark and Fred Hampton were killed. In four separate complaints, the plaintiffs—the surviving relatives of Hampton and Clark, and other persons who were arrested as a result of the raid—claimed actual and punitive damages under the 1871 Civil Rights Act and under Illinois law. The twenty-nine defendants included fourteen Chicago police officers involved in the raid. As to these fourteen, the district court denied a motion to dismiss, but it granted the motion as to the other defendants. The plaintiffs appealed and the court of appeals reversed and remanded in part, and affirmed in part, in a decision generally restrictive in its interpretation of the immunity doctrine.

The fifteen dismissed defendants included the State's Attorney (Hanrahan) and three Assistant State's Attorneys (Jalovec, Sorosky, and Maltreger); the Mayor of Chicago (Daley) and the Superintendent of Police (Conlisk); seven police officers who participated in investigations after the raid; the City of Chicago; and Cook County. The sole issue before the court, given the procedural posture of the case as an appeal from a motion to dismiss, was whether any sufficient claims for relief had been alleged as to the defendants. With regard to Hanrahan and Jalovec, the plaintiffs' complaints set out a series of allegations aris-

305. *Id.* at 86 n.23, quoting Milliken v. Bradley, 94 S. Ct. 3112, 3127 (1974).
306. 484 F.2d 602 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974).

ing out of the raid on the Panther apartment, with the overriding allegations that the raid and the use of force had the purpose of depriving Hampton of his constitutional rights because of his race and his political beliefs, and that the officers shot and killed Clark without any authority of law, thereby denying him due process of law.

Dismissal by the trial court stemmed from its view that the Illinois Tort Immunity Act[307] barred such a suit. The court of appeals was clear in its reasoning that indeed such was not the situation: "Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 or §1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise."[308] In the case of legislators and judges, the court, without citing authority, stated that "the doctrine [of immunity] may not be circumvented by allegations of improper motive; rather, the availability of immunity depends on the character of the conduct under attack"[309]—i.e., whether the public official was acting in his judicial or legislative capacity. But as to the scope of immunity enjoyed by state prosecutors, the parameters were less clear. "[A]t least some of his traditional functions must be immune from suit under §1983",[310] and these included those functions which are " 'quasi-judicial' as opposed to investigatory activities normally performed by laymen, such as police officers".[311] But here, the court concluded: "Even though defensible if conducted in good faith with probable cause, the State's Attorney's alleged participation in the planning and execution of a raid of this character has no greater claim to complete immunity than activities of police officers allegedly acting under his direction."[312] Thus the trial court erred in holding that the immunity doctrine required dismissal of the plaintiffs' claims as to Hanrahan and Jalovec.

With regard to the seven defendant police officers whose motions to dismiss were granted, the allegations consisted of claims of unlawful charges, arrests, and/or imprisonment. As the court saw it, these allegations, if true, "plainly" authorized "relief [under § 1983] against each person who, acting under color of state law, is responsible for these wrongs."[313] Additionally, the alleged conspiracy in which they

307. ILL. REV. STAT., ch. 85, § 1-101 *et seq.* (1973).
308. 484 F.2d at 607.
309. *Id.* at 608.
310. *Id.*
311. *Id.*
312. *Id.* at 609.
313. *Id.*

particpated was actionable under section 1985(3) of the 1871 Civil Rights Act. While the court was less than confident that the charge was more than tenuous, "since it merely alleges that 'some or all' of the defendants participated, and the causal connection between the conduct of several appellees and the alleged injury to plaintiffs is doubtful at best",[314] nevertheless it could not be said that no set of facts could be proved in support of the allegations which would warrant relief. Therefore, dismissal by the district court was improper.

The court next addressed the dismissal of the complaints as to Mayor Daley and Superintendent Conlisk. It had been alleged that they were liable pursuant to 42 U.S.C. section 1986 for the consequences of the alleged conspiracy. The court upheld the dismissal below, for under section 1986 "[l]iability . . . is dependent on proof of actual knowledge by a defendant of the wrongful conduct of his subordinates", and the plaintiffs' allegations that Daley and Conlisk, " 'due to their positions of authority and responsibility, . . . knew of the conspiracy' ",[315] were insufficient. The court did not explain why this was so. Assumedly, the interpretation of the allegation was that Daley and Conlisk should have been held to have imputed knowledge of the actions of their employees, and this obviously did not equate with the required actual knowledge.[316]

Finally, as to the two governmental entities, the City of Chicago and Cook County, the court upheld the dismissals, with the expectable and proper reasoning that neither were "persons" within the meaning of 42 U.S.C. section 1983.

Hampton is essentially a procedural decision. The court was dealing with an appeal from a motion to dismiss, and therefore never reached the substantive questions of actual liability of any of the defendant public officers. But in rejecting the claimed immunity of these officials, the court made clear that public officers—at least prosecutors —are not to escape liability simply on the basis of the office they occupy.

314. *Id.* at 609-10.
315. *Id.* at 610.
316. It is well established that the doctrine of respondeat superior does not apply in civil rights cases. *See, e.g.*, Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973); Richardson v. Snow, 340 F. Supp. 1261 (D. Md. 1972); Nugent v. Shepard, 318 F. Supp. 314 (D. Ind. 1970). This applies as well to 42 U.S.C. § 1985. *See, e.g.*, Boyden v. Troken, 352 F. Supp. 722 (N.D. Ill. 1973). And it has been held that no claim for relief under section 1986 can be maintained unless a valid claim has first been established under section 1985. *See, e.g.*, Johnston v. National Broadcasting Co., Inc., 356 F. Supp. 904 (S.D.N.Y. 1973); Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967).

In *John v. Hurt*[317] the plaintiff was suing his defense counsel, a court appointed attorney who he claimed had incompetently represented him in a state court burglary trial. The attorney was the county public defender, who John claimed was acting under color of state law. The trial court dismissed the complaint. The court of appeals assumed that the public defender could be deemed to be acting under color of state law, and it further allowed for the possibility that the plaintiff's proof might demonstrate such incompetency as to amount to deprivation of sixth amendment rights. Nevertheless, the court deemed the attorney immune from liability for damages: "In part because of the same factors which lead us to think that state and appointed public defenders can act under color of state law, we conclude that public defenders, like state prosecutors, and state and city attorneys, enjoy a qualified immunity for acts performed in the discharge of their official duties."[318] Thus the court consciously and intentionally extended immunity to public defenders, doing so in part because this would "encourage their free exercise of discretion in the performance of professional obligations, as well as aid in the recruitment of able men and women for public defender positions."[319]

The court then looked to the allegations of the complaint and concluded that they did not indicate the acts complained of fell beyond the scope of the defendant's immunity. Thus the court affirmed the dismissal of John's complaint. Obviously, the court here was intentionally creating law for what it viewed as worthwhile policy reasons. Given that intent, it was not likely to construe the plaintiff's allegations other than it did. However, its unwillingness to read them so as to reverse and remand perhaps is somewhat out of kilter with its liberality shown in reading the plaintiffs' allegations in *Hampton*, where the court was unprepared to allow claims of immunity to bar potentially provable claims of deprivation.

In *Schlafly v. Volpe*,[320] the court examined at length the doctrine of sovereign immunity. At issue was a challenge to a 1968 Federal Department of Transportation freeze on federal highway funds to Madison County, Illinois highway construction projects because of a violation of equal employment opportunity requirements. The suit was grounded in section 602 of the 1964 Civil Rights Act,[321] which requires

317. 489 F.2d 786 (7th Cir. 1973).
318. *Id.* at 788.
319. *Id.*
320. 495 F.2d 273 (7th Cir. 1974).
321. 42 U.S.C. § 2000d-2 (1970).

that certain procedural prerequisites, such as notice and hearing, be complied with before funds are cut off. The plaintiffs alleged that there was neither notice nor hearing. The defendant federal agency raised by way of defense the doctrine of sovereign immunity.

As set forth in the opinion, suits against the sovereign are prohibited under the rules laid out in *Larson v. Domestic and Foreign Commerce Corp.*,[322] unless officials have acted beyond the scope of their authority, or the authority under which they are acting is unconstitutional. The court ruled that this suit was against the sovereign, although technically only against federal officials, since federal funds would have to be made available if the relief were to be granted. The court ruled that the plaintiffs properly alleged ultra vires conduct and that therefore the first condition in *Larson* was met. This led to the more difficult problem in the case, however—dealing with *Larson's* exception to the exceptions just set forth. As the court stated: "In what has become *Larson's* famous and debatable footnote 11, the court added: 'Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief . . . will require affirmative action by the sovereign or the disposition of unquestionably sovereign property . . . .' "[323]

In interpeting this footnote for the first time in the Seventh Circuit, the court substantially limited the import of the doctrine by ruling that the operative word in the *Larson* footnote was "may," and that the exception to the exception should apply only in the rare case, i.e., "where to do otherwise would impose 'an intolerable burden on governmental functions, outweighing any considerations of private harm' ".[324] The court went on to rule that *Larson* did not bar liability of the agencies here.

Moreover, the court indicated that in the future it might be willing to hold that the Administrative Procedure Act,[325] standing alone, provided sufficient consent for the sovereign to be sued. In this case, it simply held that when the substantive statute, here Title VI of the 1964 Civil Rights Act, "which defines the government's authority to take specific action, also provides for judicial review of such action in accordance with the administrative provisions of the APA,"[326] the sovereign

322. 337 U.S. 682 (1948).
323. 495 F.2d at 278.
324. *Id.* at 280.
325. 5 U.S.C. § 702 *et seq.* (1970).
326. 495 F.2d at 282.

has consented to be sued. Since the judicial review provisions of Title VI were taken practically verbatim from the APA, it would appear that the APA alone, having the same provisions, could constitute a waiver of the defense.

In *Holton v. Boman*,[327] the court again addressed a civil rights action charging a prosecutor with acts constituting deprivation of the plaintiff's constitutional rights. The plaintiff had moved for leave to file an amended complaint against a county prosecutor, basing his action upon 42 U.S.C. sections 1981-83 and 1985(3). The trial court denied the motion and the court of appeals reversed and remanded. Holton's claim was that the county prosecutor had refused to assist him in regaining his property, which was in the alleged unlawful possession of other persons. Stating the facts in a cryptic manner, the court described Holton's complaint:

> He has set out specific dates upon which Winans in conjunction with the other defendants is alleged to have engaged in furtherance of a conspiracy to deprive him of his tractor-trailer. More precisely, Holton alleges that upon his request Winans refused to assist him in regaining possession of his tractor-trailer and refused to take official action against those in whose alleged unlawful possession his property was being held.[328]

The court construed *Hampton* as establishing that "this Circuit . . . [has] held that a prosecutor is not absolutely imune from liability for damages even if it can be concluded that he was acting within the scope of his prosecutorial duties".[329] Here, granting that "a prosecutor may not be subjected to liability in every instance where he refuses to prosecute", nevertheless "when he is properly alleged to be guilty of conduct of a character not in the field of his prosecutorial authority or duty, the pleading against him may not be dismissed as not stating facts which if proven would subject him to liability".[330] Obviously, the court was not conceding that all refusals of a prosecutor to act are actionable. Indeed, the court specifically asserted that "[h]e should have a broad discretion to determine when his prosecutorial activity should be invoked".[331] And it further noted that where his refusal is in good faith he is immune from liability. Yet the court did not indicate that Holton pleaded lack of good faith; thus on its face the opinion seems to be both confirming wide prosecutorial discretion, while up-

327. 493 F.2d 1176 (7th Cir. 1974).
328. *Id.* at 1179.
329. *Id.*
330. *Id.*
331. *Id.*

holding a cause of action merely setting out that the prosecutor did not do as the plaintiff wished him to do. Moreover, it is unclear how the court concluded that the pleading alleged conduct of a character not in the field of prosecutorial authority or duty unless a refusal to act is equated with conduct not in the field of authority or duty. *Holton* is a confusing decision which is difficult to pin down. It clearly does not open up prosecutors to wholesale suit for exercising their discretion. Yet, at the same time, it certainly invites a movement in that direction, perhaps only because the court does not specifically outline the plaintiff's allegations nor its thinking as to these allegations.

In *United States v. Hoffman*[332] the appellants, defendants in the action below, were railroad police officers charged with various civil rights violations. They did not challenge the sufficiency of the evidence to show that they had committed a number of assaults and batteries upon persons found on or near the property of Penn Central Railroad. They did claim that the evidence was insufficient to support a finding that they had acted under color of state law with specific intent to deprive persons of rights secured by the United States Constitution. As the court read the record, it fully established that defendants had indeed acted under color of state law. The court found the existence of state action but no particular insights can be drawn from the decision because the holding of the court was entirely predicated on the facts of the case.

The court again addressed the issue of liability of prosecutors and police in *Christman v. Hanrahan*.[333] Again, as in *Hampton*, Judge Stevens wrote the opinion. But here the result was less protective of individual rights against officials' acts. Evidence favorable to the accused had been suppressed by the prosecution at his murder trial. Before the end of the trial, however, the evidence was revealed to the court and the jury. Subsequently, an acquittal was entered. Christman sued for damages under 42 U.S.C. section 1983. The district court dismissed his complaint, and the court of appeals affirmed. In so doing, the court took a restrictive stance in assessing the plaintiff's claims which certainly does nothing to advance basic notions of fair treatment, nor to deter the denial of such by prosecutors and police. The apparent reason for disclosure of the previously suppressed evidence was the discovery by Christman's attorney during the trial that the evidence, a statement by the victim's wife that she was unsure of her initial identi-

332. 499 F.2d 879 (7th Cir. 1974).
333. 500 F.2d 65 (7th Cir. 1974), *cert. denied*, 95 S. Ct. 626 (1974).

fication of Christman, existed. She had given this statement to the police, but the police report which had been produced prior to trial had been altered to omit any reference to it. Christman charged both the police and the prosecution with complicity in the alteration and in the deliberate suppression of the evidence.

For purposes of its consideration, the court accepted the plaintiff's allegations as true. But it concluded that no deprivation of constitutional rights had occurred. In reaching this conclusion, the court first entertained two possible theories:

> On the one hand, we might say that an accused person has a federal right to immediate disclosure, upon request, of material evidence favorable to his defense; any temporary failure to honor such a request, even if totally harmless, would violate that right. On the other hand, we might define the federal right at stake as the right to a fair trial and not regard the temporary withholding as of federal significance—regardless of its consequences as a basis for discipline as a matter of state law—unless it tainted the fairness of the criminal trial viewed as a whole.[334]

Relying heavily on *Brady v. Maryland*,[335] the court adopted the latter position, i.e., "the mission [of the due process clause] would be avoidance of an unfair trial to the accused, and no violation would result unless the misconduct had some prejudicial impact on the defense".[336] In so doing, the court was fully aware that the alternative position would mean that the due process clause would be read so as to "provide broad generalized protection against misdeeds by the police or prosecution".[337]

As the court interpreted *Brady*, it was not aimed at deterring prosecutorial misconduct. Rather, its thrust was a concern about ensuring fairness of trials, and in achieving that goal, the issue was whether material evidence was suppressed. Here, an unfair trial, or at least result, did not ultimately ensue from the prosecutor's suppression of the information, since even assuming, as the court did, that the "information was material as tending to impeach an important witness", the fact that the plaintiff was acquitted established that "[t]he delay, even though inexcusable, did not deprive the accused of due process of law".[338]

The court's decision certainly takes a narrow view of the claim

334. 500 F.2d at 67.
335. 373 U.S. 83 (1963).
336. 500 F.2d at 67.
337. *Id.*
338. *Id.* at 68.

before it. There was intentional suppression of material evidence by the prosecutor and the police; no question of good faith existed. Luckily, Christman's attorney learned of the potentially helpful evidence. Had he not, however, the state court proceeding might have come out far differently. Yet, the court, looking only to the ultimate result, acquittal, in a sense exalted luck to a critical part of the constitutional equation. Its decision affords no deterrence for future wrongful acts by prosecutors and police, as it appears that the only incentive which an otherwise duplicitous prosecutor will have for acting responsibly is the possibility that his adversary will discover his secret, not that he need worry about damages.

Finally, in *Tritsis v. Backer*,[339] the court addressed a claim for damages made against federal law enforcement officers. The suit was grounded in alleged claims of deprivation of constitutional rights. In *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*,[340] the Supreme Court had ruled that damages may be recovered for violations by federal officers of the fourth amendment. But the officer would prevail, the court of appeals here held, if he "could show that he acted in good faith and with a reasonable belief in the validity of the arrest and search."[341] As the court saw it, the defendants' affidavits set forth this defense, and Tritsis raised no genuine issue of fact as to their good faith or reasonable belief.

In *United States v. Board of School Commissioners of Indianapolis*[342] the court also addressed the issue of sovereign immunity. It rejected an argument by the state officials and one of the local townships that the eleventh amendment barred prosecution of an action against the state without the state's consent or waiver of it. The court did not distinguish between suits for damages and injunctive relief. It stated broadly that "the amendment bars suits not only against the state when it is named a party but when it is a party in fact," citing *Edelman v. Jordan*.[343] But it then cited *Scheuer v. Rhodes*,[344] decided subsequent to *Edelman*, for the proposition that the eleventh amendment does not protect state officials confronted with the claim that they deprived others of a federal right under color of state law.

Few areas of the law are as ambiguous as that involving the doc-

339. 501 F.2d 1021 (7th Cir. 1974).
340. 403 U.S. 338 (1971).
341. 501 F.2d at 1024.
342. 503 F.2d 68 (7th Cir. 1974).
343. 412 U.S. 937 (1973).
344. 413 U.S. 919 (1973).

trine of immunity.[345] The court's decisions in the period under review appear to offer little by way of clarification. Perhaps, though, the court should not be held to a burden of clarity which it seems few other courts have sustained. At the least, the court demonstrated a significant reluctance to expand the immunity doctrine, and indeed it acted to narrow it.

VOTERS' RIGHTS

The Seventh Circuit Court of Appeals has been a consistently vigorous protector of the rights of voters and of political candidates.[346] Its decisions in 1973/74 generally reflected that steady commitment —a commitment, unfortunately, which has seen less fulsome maintenance by the Supreme Court of late.[347]

Between June of 1973 and October of 1974, the Seventh Circuit issued four opinions concerning the ballot. In the first of these, *Smith v. Cherry*,[348] the court reversed the district court dismissal and remanded. Smith, a candidate in the primary election for state senator, lost to the incumbent, Cherry. Subsequent to the primary, but prior to the general election, Cherry withdrew and the defendant ward committeemen designated Palmer as the Democratic candidate. Smith's suit was premised on the theory that the voters in the district were denied their right to vote in violation of the first and fourteenth amendments, by reason of defendants' scheme to " 'render the primary a sham, and arrogate to the defendant Committeemen the selection of the nominee' ".[349] Smith himself claimed his rights under the first and fourteenth amendments were infringed by impairment of his freedom to participate in the primary.

The court rejected the suggestion that abstention was in order. The issue was whether the Illinois election statute was being administered unconstitutionally. The court noted that the statute was clear on its face and had already been construed by the Illinois Supreme Court. Moreover, "abstention seems particularly inappropriate here where the case will become moot upon the expiration of Senator Palmer's [the substitute candidate's] term. The delays inherent in ab-

345. *Compare* Gardels v. Murphy, 377 F. Supp. 1389 (N.D. Ill. 1974) *with* Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974).
346. *See, e.g.*, Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970).
347. *See, e.g.*, Storer v. Brown, 415 U.S. 724 (1974).
348. 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).
349. *Id.* at 1100.

stention could therefore abrogate the remedy sought".[350] Moving to the merits, the court was clear that constitutional rights were indeed infringed if the plaintiffs proved their claims: "If the plaintiffs prove an agreement that Cherry would be a stand-in candidate, and show a reasonable possibility that Cherry's sham candidacy affected the outcome of the election, then the district court should order new primary and general elections."[351]

In the second election case, *Puerto Rican Organization for Political Action v. Kusper*[352] the claim sounded in the Voting Rights Act of 1965[353] and the 1970 amendments thereto. The controversy arose out of the Chicago Board of Elections Commissioners' refusal, or failure, to provide voting assistance in Spanish to Puerto Ricans unable to read or understand English.

The court affirmed the trial court's entry of a preliminary injunction which imposed upon the Board various obligations to assist the plaintiff voters. These included the placement of directions for using voting machines in Spanish on specimen ballots. These ballots, along with posters in Spanish about assistance available to voters, and cards in Spanish describing model voting machines, were to be placed in various polling places. Additionally, the district court order directed the Board to make all reasonable efforts to appoint bilingual election judges, and to place them in specified polling places for the then upcoming election.

The court of appeals looked to the Voting Rights Act as its guide. The Act, and its 1970 amendments, outlaw literacy tests, and further specifically address the plight of Puerto Ricans by ruling out any conditioning of the right to vote on the ability to read, write, or understand English. These provisions, along with some others, result, as the court said, in "[t]he combined effect of the 1965 act and the 1970 amendments to prohibit the states from conditioning the right to vote of persons who attended any number of years of school in Puerto Rico on their ability to read or understand the English language."[354]

The court's empathy for the exercise of the franchise found expression in its treatment of what it deemed the critical issue, the meaning of "the right to vote". The defendants took the position that this

350. *Id.* at 1101.
351. *Id.* at 1103.
352. 490 F.2d 575 (7th Cir. 1974).
353. 42 U.S.C. § 1973 (1965), as amended by Voting Rights Act Amendments, 42 U.S.C. § 1973aa (1970).
354. 490 F.2d at 579.

was simply the right to enter a voting booth and cast a ballot. The plaintiffs argued a broader construction—in essence, the right necessarily implies the right to vote effectively. It affords little to a voter to be able to vote if he does not know who or what he is voting for, whether he is blind, illiterate, or cannot read English. The court embraced the plaintiffs' argument, agreeing that " 'the right to vote encompasses the right to an effective vote.' "[355] It necessarily followed, then, that a Spanish-speaking Puerto Rican is "entitled to assistance in the language he can read or understand."[356]

Independent Voters of Illinois v. Kusper[357] raised another of the seemingly perpetual challenges to election practices in Chicago. The plaintiffs sought to secure access to the Board's records and voter registration cards to perfect an objection to the nominating petition of another candidate. Whle the litigation was complex, the outcome was pallid in terms of judicial action. The court of appeals affirmed the trial court's dismissal because of supervening state legislation enacting into law the relief the plaintiffs sought. Had this not occurred, the court would have viewed the issue before it as being "the question whether there exists for these plaintiffs a federal right, constitutional or otherwise, to the discovery of evidence in the custody of a state which might be used, pursuant to procedures established by state law, to challenge the candidacy of persons aspiring to hold public office."[358]

The basis of *Cousins v. City Council of the City of Chicago*[359] was a challenge to the validity of the 1970 reapportionment of Chicago's aldermanic wards on the grounds of racial and ethnic gerrymandering. The 1974 decision was the court's second occasion to address these claims, having before reversed and remanded[360] and this being an appeal from the second trial. At the second trial, the district court ruled in part for the defendants. It found that the evidence failed to establish that the boundaries of any of the wards except the seventh were the product of purposeful or invidious racial or ethnic discrimination. But it further found that the defendants did intend to change what they believed was a black majority in the 1961 seventh ward into a white majority. Thus, the court redrew the boundary between the seventh and eighth wards so that each had a slight black majority, and ordered a special election, held on November 27, 1973, in the modified seventh

355. *Id.* at 580.
356. *Id.*
357. 490 F.2d 1126 (7th Cir. 1974).
358. *Id.* at 1130.
359. 503 F.2d 912 (7th Cir. 1974).
360. Cousins v. City Council of City of Chicago, 466 F.2d 830 (7th Cir. 1972), *cert. denied*, 409 U.S. 893 (1972).

ward. The plaintiffs appealed from the judgment, except for certain parts thereof, including those with respect to the seventh and eighth wards. They also appealed from the denial of an award of attorney's fees. The defendants cross appealed from certain portions of the judgment, including those affecting the two wards. The task for the court was to determine whether the trial court's "findings were clearly erroneous . . . mindful of . . . [the] duty of specially close scrutiny. . . ."[361]

In its earlier opinion, the court, recognizing the difficulty of direct proof in this type of case, had suggested that persuasive circumstantial proof that the ward boundaries were the result of purposeful discrimination would be "a demonstration that one or more maps could be drawn, 'following an objective standard, rationally related to redistricting and indifferent to race' producing greater voting strength for minority groups. . . ."[362] At the second trial, the plaintiffs had produced such map, but it produced only one more black majority ward than the actual redistricting the defendants had created. The court's conclusion was that even though Alderman Keane (in charge of redistricting) chose some ward lines on the basis of racial motivations, nevertheless,

> [i]t is difficult to say that the differences between the number of wards with certain percentages of black residents in the 1970 map and in the Singer map are sufficient to be highly persuasive that there was purposeful minimization of black voting strength in the 1970 map, and even in the light of the evidence of awareness of race and consideration thereof by Keane, it is our judgment that the finding of the district court is not clearly erroneous.[363]

Thus, the court rejected the plaintiffs' claim that the overall districting ran afoul of the Constitution. The court next turned its attention to specific boundaries, those of the seventh and eighth wards, and of the fourteenth and sixteenth wards. Utilizing by necessity a fact-oriented approach, the court concluded that the trial court's ruling for the plaintiffs as to racial gerrymandering of the seventh ward was clearly erroneous. The court did offer this caveat, however, in a footnote:

> This action does not present the question whether this degree of reduction would be constitutionally cognizable where a plaintiff alleged that the value of his or her vote within a particular ward had been impaired by invidious racial gerrymandering of the boundaries of that ward. The plaintiffs here are not dissatisfied with the

361. 503 F.2d at 914.
362. *Id.* at 14, quoting from Cousins v. City Council of City of Chicago, 466 F.2d 830, 843 (7th Cir. 1972), *cert. denied*, 409 U.S. 893 (1972).
363. *Id.* at 915.

> wards in which they live, but have standing because they belong to a group living in many wards whose voting strength is allegedly purposefully diluted.[364]

The plaintiffs on appeal further claimed that the district court erred in not finding a fatal diminution of minority voting strength in the drawing of the fourteenth and sixteenth wards. The trial court had found that the 1970 district map was racially motivated so as to ensure that two white aldermen would continue to reside in white wards. But it further found that the revisions made in the draft map, which preceded the 1970 map and which was unobjectionable, ensuring the position of white incumbents of white wards did not produce a smaller number of black majority wards than had existed before the revisions. And because of this, the court affirmed as to the trial court's ruling on the fourteenth and sixteenth wards. "Because the question raised by this action is whether the defendants purposefully minimized black voting strength and is not merely whether defendants' line-drawing was affected by racial considerations, this critical finding, if not clearly erroneous, is fatal to plaintiffs' claim."[365] The court concluded that the trial court's finding was not clearly erroneous.

The court's next focus was the plaintiffs' claims concerning Puerto Ricans, and the Spanish-speaking population of Chicago generally. With regard to Puerto Ricans, the court agreed, as the district court had found, that there was purposeful line-drawing based on racial or ethnic motivations. But again, the critical issue was whether there was "a cognizable dilution of Puerto Rican voting strength".[366] The court's conclusion was in accord with that of the district court—there was no discernible loss of Puerto Rican voting strength. The court's ruling as to claims concerning the Spanish-language group in general was also an affirmation of the lower court. What is unusual in this portion of the court's consideration turns on a matter of procedure. During the second trial, the plaintiffs had attempted to broaden the minority group from that of Puerto Ricans to the Spanish language group. The trial court concluded that the plaintiffs' failure to amend their complaint to conform with this additional proof and to add a named plaintiff representing the Spanish-language group prevented consideration of the merits. The appellate court took no exception, holding that "the district court acted [properly] within its discretion. . . ."[367] No further

364. *Id.* at 919 n.18.
365. *Id.* at 920.
366. *Id.* at 921.
367. *Id.*

discussion is offered, but it would appear that possibly Federal Rule of Civil Procedure 15 affords basis for a contrary ruling. Whether this procedural disposition was critical is dubious, at any rate, since the court further observed that the evidence which was introduced did not show a meaningful diminution of voting strength.

The final portion of the court's opinion was addressed to legal questions. In its earlier decision, the court had indicated that deviations from compactness could be relevant in establishing invidious discrimination, but that otherwise lack of compactness presented state law questions. On this appeal, the plaintiffs argued that the district court had erred by not shifting to the defendants the burden of establishing the absence of discrimination following the plaintiffs' introduction of historical and statistical evidence. The plaintiffs further objected to the district court's requirement that their burden was to be measured by the "clear and convincing standard".

The court rejected the plaintiffs' attempt to shift the burden to a lower standard. Looking to Supreme Court decisions addressing racial-gerrymandering in multi-member districts, it reasoned: "We think that if the cases reveal an unwillingness of the Supreme Court to shift the 'burden of justification' [as urged by plaintiffs here] in causes involving the somewhat 'suspect' multinumber districts, such an allocation would be even less likely in the context of a challenge to single-member districts."[368] Thus, the court concluded that the "strict scrutiny" test,[369] whereby the burden of justification is on the state, did not apply here. As for the plaintiffs' argument concerning the appropriate burden of persuasion, the court was of the view that the question did not call for resolution here, since it was "confident that the district court's assumption that a preponderance of the evidence would have been insufficient unless the proof could be found clear and convincing made no difference in the finding made".[370]

Judge Stevens added a brief concurring opinion. While agreeing with the assumption expressed in the court's opinion that a 35 per cent minority might be sufficiently significant to justify consideration of the number of wards containing such a minority, he did not want his concurrence in the majority opinion to imply that he "would necessarily equate a 35 per cent minority with working control of a political subdivision. It is merely one among several yardsticks which the proponent

368. *Id.* at 922.
369. *See, e.g.*, San Antonio School District v. Rodriguez, 411 U.S. 1, 16-17 (1973).
370. 503 F.2d at 924.

of a gerrymandering claim is entitled to put forward; its significance would obviously vary from case to case".[371]

Cousins is obviously a carefully drafted opinion, closely assessing the factual circumstances involved in each claim. While doctrinally it makes no noteworthy breakthroughs, it appears to vindicate the warning enunciated by Judge Stevens at the close of his concurring opinion: "Although there are disturbing aspects of this case, and although, unlike those cases, the constitutional claim fails in this case, a thorough review of the evidence makes the required result perfectly clear. Those who would hereafter engage in gerrymandering must anticipate equally careful analysis of comparable claims in the future."[372]

CONSUMERS' RIGHTS

The plaintiffs in *Phillips v. Money*[373] were the owners of a car which was detained by Money, who claimed a lien for his services. They brought suit, claiming that the state lien laws denied due process and were unconstitutional. While this area of the law is ambiguous, the court did not reach the merits in this case. The critical issue for it was whether the action of Money, a service station owner, met the requirement of state action. The court's conclusion was that "detention pursuant to a common law or statutory mechanic's lien by a private individual in possession of the motor vehicle does not constitute 'state action' within the meaning of the fourteenth amendment."[374] In reaching this holding, the court employed a balancing process, reasoning that "the enactment of statutes or recognition of the common law [permitting retention of possession by a garageman for claimed unpaid charges] is not to be deemed affirmative support such that 'state action' occurs, and the state merely establishes the legal context in which individuals conduct their private affairs."[375]

In an essay of dictum, the court, assuming state action was present, found the fact situation before it distinguishable from *Fuentes v. Shevin*[376] and *Mitchell v. W. T. Grant Co.*[377] As it read the latter decision, and the position of the *Fuentes* dissenters which it understood the *Mitchell* majority to have applied, it is necessary to take into ac-

371. *Id.* at 925.
372. *Id.*
373. 503 F.2d 990 (7th Cir. 1974).
374. 503 F.2d at 992.
375. *Id.* at 994.
376. 407 U.S. 67 (1972).
377. 94 S. Ct. 1895 (1974).

count the interests of both creditor and debtor in the contested property to determine what procedures are constitutionally sufficient. Here, the surrender to Money of the car was voluntary, resulting in his having both a legal property interest, in the form of a lien, and actual possession. "Interference with the status quo would be necessary to enable the owner to regain possession prior to final judgment."[378] Under these circumstances, the state system of allowing the repairman to retain possession and imposing on the owner the burden of litigating to challenge his rights was not fundamentally unfair.

CONCLUSION

The Seventh Circuit Court of Appeals addressed a full load of civil liberties and civil rights appeals in the period extending from June 30, 1973, to September 30, 1973. In large measure, civil libertarians and civil rights proponents cannot fault the court for its rulings. Most of the decisions reflect a welcome empathy and responsiveness to deprivations of constitutional and statutory rights.

Predictions are always risky, and that risk is present in this context. Different factual patterns present different occasions for resolution. Yet, it seems fair to conclude that this court of appeals is unlikely to depart from its generally affirmative posture—at least if it heeds its own precedents.

378. 503 F.2d at 994.