Golden Gate University Law Review

Volume 6
Issue 2 *Ninth Circuit Survey*

Article 10

January 1976

Constitutional Law

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CONSTITUTIONAL LAW

PART ONE: INTRODUCTION

In the past six years the Burger Court has established new guidelines for lower courts to follow in the constitutional law area. This past term the Court of Appeals for the Ninth Circuit has had occasion to interpret these guidelines in cases involving prisoners' rights, school desegregation, exclusionary zoning, freedom of speech and freedom of the press. In the realm of prisoners' rights the Ninth Circuit applied Supreme Court guidelines in considering the extent to which prisoner mail may be censored or suppressed,[1] the requirements for a prison law library,[2] and the constitutionality of regulations that disallow press interviews with specific individual inmates.[3] Also, the court examined prison disciplinary procedures[4] and inter-prison administrative transfers, and considered a juvenile's right to rehabilitation.[5]

With respect to school desegregation, the court dealt with a district court's continuing jurisdiction over a school board and the request for a substitution of a freedom of choice plan for an existing plan.[6] In other areas of discrimination, the court examined the discriminatory effects of zoning ordinances which allegedly resulted in the exclusion of poor people from one city,[7] racially segregated schools in another[8] and violations of the right to travel and due process in yet a third city.[9]

During the survey period, the court considered seven cases

1. *See* McKinney v. De Bord, 507 F.2d 501 (9th Cir. Nov., 1974).
2. *See* Gaglie v. Ulibarri, 507 F.2d 721 (9th Cir. Dec., 1974).
3. *See* Yarish v. Nelson, 502 F.2d 943 (9th Cir. Sept., 1974).
4. *See* Clutchette v. Procunier, 510 F.2d 613 (9th Cir. Feb., 1975), *cert. granted sub nom.* Enomoto v. Clutchette, 421 U.S. 1010 (1975); Wheeler v. Procunier, 508 F.2d 888 (9th Cir. Dec., 1974).
5. *See* Vun Cannon v. Breed, No. 72-1716 (9th Cir., June 19, 1975).
6. *See* Spangler v. Pasadena City Bd. of Educ., 519 F.2d 430 (9th Cir. May, 1975), *cert. granted*, 44 U.S.L.W. 3271 (U.S. Nov. 11, 1975) (No. 164).
7. *See* Ybarra v. City of The Town of Los Altos Hills, 503 F.2d 250 (9th Cir. Sept., 1974).
8. *See* Ybarra v. City of San Jose, 503 F.2d 1041 (9th Cir. Dec., 1974).
9. *See* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. Aug., 1975), *cert. denied*, 44 U.S.L.W. 3467 (U.S. Feb. 23, 1976) (No. 923).

involving first amendment rights. In the freedom of speech area, the court applied new Supreme Court standards to obscenity cases[10] and to a case involving the question of whether a teacher's speech and acts went beyond the right protected.[11] The freedom of the press cases involved a newsperson's privilege before a grand jury[12] and the privilege vis-a-vis the right to a fair trial.[13]

I. PRISONERS' RIGHTS

Sed quis custodiet ipsos custodes?

Juvenal, Satires IV 1.347

Historically, "federal courts have adopted a broad hands-off attitude toward problems of prison administration."[14] In the past, the Ninth Circuit has conformed to this approach by either holding that an inquiry into prison administration was not a function of the courts,[15] or by granting correction authorities wide discre-

10. *See* United States v. Dachsteiner, 518 F.2d 20 (9th Cir. Jan., 1975), *cert. denied*, 421 U.S. 954 (1975); United States v. Henson, 513 F.2d 156 (9th Cir. Mar., 1975); United States v. Jacobs, 513 F.2d 564 (9th Cir. Sept., 1974); United States v. Miller, 505 F.2d 1247 (9th Cir. Nov., 1974), *cert. denied*, 422 U.S. 1024 (1975).

11. *See* Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. July, 1975). *Gray* is discussed in Part Two of this article.

12. *See* Lewis v. United States, 517 F.2d 236 (9th Cir. May, 1975).

13. *See* Farr v. Pitchess, 522 F.2d 464 (9th Cir. Aug., 1975), *petition for cert. filed*, 44 U.S.L.W. 3162 (U.S. Sept. 22, 1975) (No. 444).

14. Procunier v. Martinez, 416 U.S. 396, 404 (1974). This succinct characterization of the judicial attitude toward the administration of prisons can also be found in Fritch, Civil Rights of Federal Prison Inmates 31 (1961) (document prepared for the Federal Bureau of Prisons). The courts have observed that incarceration brings about the "necessary withdrawal or limitations and rights, a retraction justified by the considerations underlying our penal system," Price v. Johnston, 334 U.S. 266, 285 (1948), and have gone so far as to describe a prisoner as "the slave of the state," Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 1026 (1871).

However, more recent judicial actions in this area foreshadow a growing willingness of the courts to evaluate the propriety of administrative decisions by correction officials. *See, e.g., Ex parte* Hull, 312 U.S. 546 (1941); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944). In *Hull*, the Court invalidated a state prison regulation which impaired a prisoner's right to apply to the federal courts for a writ of habeas corpus. 312 U.S. at 549. *Coffin* recognized the fact that a person legally in prison "retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law." 143 F.2d at 445. For a more exhaustive discussion of this emerging judicial trend and the past "hands off" approach see Hollen, *Emerging Prisoners' Rights*, 33 OHIO ST. L.J. 1 (1972); Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 227 (1970); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962) [hereinafter cited as *Rights of Prisoners*]; Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963); 52 J. URBAN L. 188 (1974).

15. *See, e.g.*, Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir. 1951).

tion in matters of internal prison administration.[16] Today, the hands-off policy has been discarded in many areas for two reasons: (1) prisoners have been more successful in their use of section 1983 of the Civil Rights Act;[17] and (2) courts have recognized a need to question the discretion of correction authorities.[18]

A. Prison Mail

The control of mail to and from prisons has been considered a necessary element of penal administration.[19] Therefore, prison officials, at will, have censored and suppressed incoming and outgoing mail.[20] Beginning in 1970, however, some federal courts began regulating the censorship of mail.[21] Four years later, in *Procunier v. Martinez*,[22] the Supreme Court established a balancing test to be used in evaluating issues raised by the censorship of prison mail.

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16. *See, e.g.*, Smith v. Schneckloth, 414 F.2d 680 (9th Cir. 1969) (per curiam). For an indictment of judicial abdication in the reviewing of prison administration see G. Shaw, The Crime of Imprisonment 14 (1946).

17. 42 U.S.C. § 1983 (1970), which provides:

> Every person who under color of any statute . . . of any state . . ., subjects or causes to be subjected, any citizen . . . to the deprivation of any right, privilege, or immunities secured by the Constitution and laws, shall be liable to the injured party . . . .

18. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974). For a general discussion of prisoners see authorities cited after the discussion of *Coffin v. Reichard* at note 14 *supra*.

19. *See* Schack v. Wainwright, 391 F.2d 608 (5th Cir.), *cert. denied*, 392 U.S. 915 (1968); McClosky v. Maryland, 337 F.2d 72 (4th Cir. 1964).

20. *See* Federal Bureau of Prisons Policy Statement 7300.21 (December 20, 1967). This statement allowed mail to only be sent to persons on an approved list or to courts or state and federal officials. Furthermore, censorship has been approved by some courts without any discussion of the reasons for its justification. Courts which have given reasons for validating censorship justified it on the grounds that it prevented plans for escape, prisoners from engaging in illegal outside activities, unwarranted criticism of prison officials and the introduction of pornography into prisons. *See* Hollen, *supra* note 14, at 33-40; Jacob, *supra* note 14, at 238 nn.52-53. For a more exhaustive discussion of censorship in prisons see Brant, *Prison Censorship Regulations Versus the Comstitution*, 19 Loyola L. Rev. 25 (1973); Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 A.B.A.J. 1051 (1970); Comment, *Judicial Recognition of Prisoners' Constitutional Right to Send and Receive Mail*, 76 Dick. L. Rev. 775 (1972); Note, *Prison Mail Censorship and the First Amendment*, 81 Yale L.J. 87 (1971); 79 Dick. L. Rev. 352 (1975).

21. *See, e.g.*, Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970). The court held that censorship of a prisoner's mail for the purpose of suppressing criticism of the institution served no rational purpose and infringed upon first amendment rights. 317 F. Supp. at 788. For similar conclusions see Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971); Smith v. Robbins, 328 F. Supp. 162 (S.D. Me. 1971).

22. 416 U.S. 396 (1974). For a compilation and discussion of courts' approaches to censorship prior to *Martinez* see Annot., 47 A.L.R.3d 1192 (1973); Annot., 47 A.L.R.3d 1150 (1973), and articles cited at note 20 *supra*.

Martinez decided that the censorship of an inmate's mail must be attended by minimum due process safeguards against error and arbitrariness. In determining whether a prison regulation constituted an impermissible restraint on first amendment rights, the Court held that the regulation must further an important or substantial governmental interest which is unrelated to the suppression of expression, and that the regulation must be narrowly drawn.[23] The preservation of internal order and discipline, the maintenance of institutional security and the rehabilitation of prisoners are interests to which the Court has attached importance.[24] Once mail is censored the inmate is entitled to procedural due process, *i.e.*, notification of the censorship and an opportunity to protest to an official other than the one who censored the mail.[25]

In *McKinney v. De Bord*,[26] the Ninth Circuit had occasion to look at the censorship of a prisoner's outgoing mail. This case involved a prison regulation[27] limiting the number of books prisoners may have in their cells. The appellant had filed suit under section 1983, complaining that prison officials were improperly withholding his letters to a law book publisher. The letters were withheld in order to prevent the violation of the prison regulation.

In applying the balancing test established by *Martinez*, the *McKinney* court held that the censorship of the mail was valid because it furthered an important governmental interest—the prevention of a violation of an institutional rule. However, since the court felt that the minimum procedural safeguards mandated

23. 416 U.S. at 413.

24. *Id.* at 412.

25. *Id.* at 417-18. For discussions of the standard of review for prison mail censorship regulations see Gates v. Collier, 501 F.2d 1291, 1310-14 (5th Cir. 1974) (censorship of all incoming and outgoing mail unconstitutional); Finney v. Arkansas Bd. of Corrections, 505 F.2d 194, 210-12 (8th Cir. 1974) (procedure for determining who is to be put on a mailing list held invalid); 6 SETON HALL L. REV. 167 (1974).

26. 507 F.2d 501 (9th Cir. Nov., 1974) (per Choy, J.). Petitioner had previously sought redress for his grievances in *In re* Harrell, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970), *cert. denied*, 401 U.S. 914 (1971).

27. The regulation, not cited in the opinion, limited the number of books to sixteen. For a further discussion of this case see text accompanying notes 37-39 *infra*. Judge Choy declined to discuss the validity of the regulation because petitioner's release from prison rendered certain issues moot, and because the portion of McKinney's complaint which indirectly challenged the validity of the regulation was held to state no claim upon which relief could be granted. 507 F.2d at 503-04. The dismissal of the complaint under FED. R. CIV. P. 12(b)(6) was thus affirmed. For a discussion of this questionable result see the Criminal Law and Procedure article.

by *Martinez* should not apply retroactively, and since the censorship in *McKinney* predated *Martinez*, the court held that "good faith enforcement of the then valid prison rules" would immunize officials from liability under section 1983.[28] The case was remanded on the issue of whether there was a good faith enforcement of the then valid mail censorship regulation.

The court, in determining that the mail censorship regulation was valid, incorrectly applied the *Martinez* balancing test. The *Martinez* court set forth in a footnote certain criteria which can be used to identify governmental interests significant enough to justify the censorship of prisoner mail.[29] If the criteria mentioned in *Martinez* are examined closely, it is obvious that the Court was concerned with preventing activities which are either violative of prison security or criminal in nature. By focusing on only one of the criterion—"[does] the letter [concern] plans for acts in violation of institutional rules"—the *McKinney* court took the criterion out of context and thereby approved of censorship which did not advance one of the governmental interests characterized by the Supreme Court as significant. Surely, a prison rule which makes it unduly difficult for prisoners to order the legal materials they need to serve as surrogate attorneys does nothing to preserve internal order, maintain institutional security or rehabilitate inmates. Also, while orderly prison administration is an important governmental interest, the purpose of the regulation suppressing McKinney's outgoing mail could have been accomplished with a more narrowly drawn regulation; certainly prison officials will be able to control the number of books prisoners have in their cells without stifling a fundamental right.[30]

28. 507 F.2d at 505. In a recent Ninth Circuit opinion, Navarette v. Procunier, No. 74-2212 (9th Cir., Feb. 9, 1976), Judge Koelsch cited *McKinney* for the proposition that "a prisoner does not shed his first amendment right to free expression upon entering the prison gates." *Id.* at 2. In McCray v. Sullivan, 509 F.2d 1332 (5th Cir. 1975), the Fifth Circuit decided, unlike the Ninth Circuit, that the *Martinez* guidelines regarding prison mail regulations should be applied retroactively. *Id.* at 1336.

29. The criteria indicate that censorship is justified when letters contain: (1) threats of physical harm; (2) threats of blackmail or extortion; (3) contraband; (4) plans to escape; (5) plans for acts in violation of institutional rules; (6) plans for criminal activity; (7) coded passages; or (8) obscenity. 416 U.S. at 416 n.15. The Court indicated that the policies followed at other "well-run" penal institutions would be relevant to a determination of the need for a particular type of censorship restriction on incoming mail. *Id.* at 414 n.14. In particular, the Court made reference to the Federal Bureau of Prisons Policy Statement 7300.14. *Id.*

30. The effects of prison mail censorship regulations were considered by Justice Marshall in his concurring opinion in *Martinez*. 416 U.S. at 422. He felt that the reading of outgoing mail by a prison employee would enable the employee to submit disciplinary

B. Legal Materials and Law Libraries

Effective access to the courts has been recognized as a highly valued right which prison authorities should not impair.[31] To implement this right courts have considered the adequacy of prison law libraries as well as the use of inmates as surrogate attorneys.[32] The courts have also considered the rights of inmates to use prison libraries or to acquire libraries of their own.[33]

Last term, in *Gaglie v. Ulibarri*,[34] a Ninth Circuit panel examined the adequacy of a particular law library. The *Gaglie* court found the law library inadequate even though it met standards set by a Federal Bureau of Prisons Policy Statement.[35] The

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reports on the prisoner if the employee found a rule violated. This could result in a loss of privileges and affect the inmate's parole chances. The Justice would therefore require a showing of a substantial government interest merely to open and read the mail. *Id.* at 423, 424-25. However, the Supreme Court has not taken such a view, deciding instead that freedom from censorship is not equivalent to freedom from inspection. *See* Wolff v. McDonnell, 418 U.S. 539 (1974). For a discussion of some of the issues raised in *Martinez* see Sostre v. Preiser, 519 F.2d 763 (2d Cir. 1975). Dealing with institutional rules, *Preiser* held that "even if the institutional purpose is legitimate and substantial," it should be pursued by means that do not stifle fundamental liberties when other, less restrictive, means exist. *Id.* at 764; 79 Dick. L. Rev. 352, 363 (1975); 52 J. Urban L. 188, 193 (1974); *cf.* Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969).

31. *See* Johnson v. Avery, 393 U.S. 483 (1969); *Ex parte* Hull, 312 U.S. 546 (1941); Hesselgesser v. Reilley, 440 F.2d 901 (9th Cir. 1971). It has been said that "the Constitution protects with special solicitude, a prisoner's access to the courts." Sostre v. McGinnis, 442 F.2d 178, 189 (2d Cir. 1971), *citing* Johnson v. Avery, *supra*; *Ex parte* Hull, *supra*. For a further discussion of access to the courts see Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961); 60 Am. Jur. 2d *Penal & Correctional Institutions* § 49 (1972); Resource Center on Correctional Law & Legal Services, *Providing Legal Services to Prisoners*, 8 Ga. L. Rev. 363 (1974); Note, *Prisoners' Rights—Access to Courts*, 23 Kan. L. Rev. 544 (1975); *Rights of Prisoners*, *supra* note 14; *cf.* Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975).

32. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969); Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. California, 404 U.S. 15 (1971). According to *Gilmore* the lack of an adequate prison library—one that assured reasonable access to the courts—is violative of the equal protection clause because it deprives indigent prisoners of one of the tools necessary for effective access. 319 F. Supp. at 109. Quoting Johnson v. Avery, *supra* at 487, the court recognized that jailhouse lawyers are used to obtain effective access to the courts. 319 F. Supp. at 110. One article, discussing *Gilmore* and the one word affirmation of it by the Supreme Court, felt that the Court seemed to indicate it agreed with an ABA declaration that "states must provide a substantial library—one which an average practicing lawyer would need to deal . . . with the variety of cases . . . prisoners have." Resource Center on Correctional Law and Legal Services, *Providing Legal Services to Prisoners*, 8 Ga. L. Rev. 363, 374-75 (1973), *discussing* ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies 51 (1967).

33. *See, e.g.*, Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961). *Hatfield* held that there was no affirmative duty to insure access to a prison library at all times. *Id.* at 640-41.

34. 507 F.2d 721 (9th Cir. Dec., 1974) (per Crocker, D.J.)

35. Federal Bureau of Prisons Policy Statement 2001.2B (May 8, 1972).

library only provided for federal court decisions dating from May, 1972, to the present. According to *Gaglie*, a library is inadequate if it does not have Supreme Court opinions from 1936 to date and the opinions of the federal courts of appeals and the district courts from 1960 to date.[36] Significantly, the court concluded that inmates had only limited access to library materials, notwithstanding the availability of help from law students. This conclusion reveals that the Ninth Circuit has set a high standard with which to measure the adequacy of prison libraries.

It should be noted that in *McKinney* the issue of effective access to the courts was an implicit part of appellant's claim.[37] The appellant may have violated the regulation limiting the number of books in his cell because he believed the law library at Folsom was inadequate for his role as a jailhouse lawyer. Although the *McKinney* court dismissed issues relating to prison conditions as moot in light of McKinney's release from prison before his appeal, it impliedly validated the regulation when it condoned the censorship of appellant's mail.[38] While regulations limiting the number of books that inmates can keep in their cells have been upheld on the ground that prisoners have no right to acquire personal law libraries,[39] a certain tension exists between *Martinez* and *Gaglie* if they are both viewed from an "effective access to the courts" perspective. The importance of the right to such access is unquestioned, and inadequate law libraries concededly frustrate effective access. In light of the fact that jailhouse lawyers such as McKinney, who serve an important role in providing inmates

36. 507 F.2d at 722. The opinion does not reveal how the United States District Court of Arizona reached this arbitrary determination in its granting of summary judgment to the petitioner. This conclusion was reached, though, notwithstanding appellants' argument that a minimum security prison, such as the prison in question in *Gaglie*, does not need an extensive law library since inmates remain only a short time. For an interpretation of *Gaglie* on the issue of access to prison libraries see Chochrek v. Cupp, —Ore. App.—, 541 P.2d 495 (1975).

37. This is apparent from the case's history in the California courts. *See In re* Harrell, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970). For a full discussion of *McKinney* see text accompanying notes 19-30 *supra*.

38. 507 F.2d at 503.

39. *See, e.g.*, Hatfield v. Bailleaux, 290 F.2d 632, 640-41 (9th Cir. 1961). Chochrek v. Cupp, —Ore. App.—, 541 P.2d 495 (1975). However, in *Johnson v. Avery* the Supreme Court said that "where state regulations applicable to inmates of prison facilities conflict with paramount federal constitutional or statutory rights, the regulations may be invalidated." 393 U.S. at 487. Furthermore, the Fourth Circuit has held that the right of access to the courts must be attended by the "undelayed, uncensored [and] unlimited use of the mails." McDonough v. Director of Patuxent, 429 F.2d 1189 (4th Cir. 1970), *citing* Coleman v. Peyton, 340 F.2d 603 (4th Cir. 1965).

with access to the courts, need adequate libraries, it can be questioned whether the interests advanced by the book regulation are important enough to warrant mail censorship. If the appellant's right to effective access to the courts had been considered together with his first amendment rights, the balance between the competing interests might have shifted in McKinney's favor.

C. Interviews by the Press

Yarish v. Nelson[40] involved a complaint by a press reporter seeking to enjoin enforcement and declare unconstitutional a California Department of Corrections regulation[41] which absolutely prohibited press interviews with individual inmates. In a per curiam opinion, the court relied on the Supreme Court decisions rendered in *Pell v. Procunier*[42] and *Saxbe v. Washington Post Co.*[43] to uphold the constitutionality of the regulation.

The Supreme Court considered the same regulation in *Pell*, and a similar one in *Saxbe*, and held that such a regulation did not violate any of the press' first amendment guarantees.[44] As long as

40. 502 F.2d 943 (1974) (per curiam). A California court of appeal dealt with similar issues in Yarish v. Nelson, 27 Cal. App. 3d 893, 104 Cal. Rptr. 205 (1972).

41. California Department of Corrections Administrative Manual § 415.071, which provided that "[p]ress and other media interviews with specific individual inmates will not be permitted." After *Yarish* section 415.071 was amended and renumbered. It now allows, at the discretion of the Director of Corrections and the warden of the prison involved, for individual inmates to be interviewed. *See id.* § 415.21 (1975). As of July, 1976, the Federal Bureau of Prisons will also allow individual interviews.

42. 417 U.S. 817 (1974).

43. 417 U.S. 843 (1974). *Saxbe* resolved a conflict among the circuits by adopting the reasoning the Ninth Circuit had articulated in Seattle-Tacoma Newspaper Guild, Local 82 v. Parker, 480 F.2d 1062 (9th Cir. 1973). In so doing, *Saxbe* rejected the position the District of Columbia Circuit had advanced in Washington Post Co. v. Kleindienst, 494 F.2d 994, 1006-07 (D.C. Cir. 1974) (effective news reporting requires personal interviews).

44. 417 U.S. at 834-35; 417 U.S. at 850. The Supreme Court decision in *Pell* also held that the regulation did not unduly restrict a prisoner's freedom of speech and expression rights. 417 U.S. at 827-28. *Pell* held that, as long as alternative means of communication existed, such as the mails, prison officials can validly exercise their discretion in an effort to advance legitimate prison administration interests. *Id.* at 823-24, *citing* Cruz v. Beto, 405 U.S. 319, 321 (1971). These interests include prison security and prisoner rehabilitation.

The regulations at issue in *Pell* were prompted by prisoner unrest. Both the Federal Bureau of Prisons and the California Department of Corrections concluded that interviews had two damaging consequences: (1) interviews with disruptive inmates encouraged others to seek such notoriety, thereby increasing disciplinary problems; and (2) prisoners interviewed became celebrities resulting in their lack of amenability to rehabilitation. Pell v. Procunier, 417 U.S. 817, 831-32 (1974). At least one writer has expressed disagreement with these conclusions. *See* J. Mitford, Kind and Usual Punishment 11-15 (1973). Ms. Mitford believes that the hostility corrections officers have

the press had the same access enjoyed by the general public, the Court felt it need not give the press a special right of access to prisoners. The Court, citing *Branzburg v. Hayes*,[45] found the press had no absolute right to gather information.

Justice Powell, in his dissent,[46] felt the ban precluded the press from carrying out its constitutionally established function of informing the people. In the past, courts granted newspersons freedom to disseminate various types of information and ideas, and only when there was deemed to be a need for secrecy have members of the press been curtailed.[47] The majority opinions in *Pell* and *Saxbe* emphasized that the ban on press-inmate interviews was "not part of any attempt by the Federal Bureau of Prisons to conceal from the public the conditions prevailing in federal prisons."[48] However, as Justice Powell recognized, such a view ignores the role played by the press in exposing prison conditions.

D. Disciplinary Actions and Due Process

In response to a conflict among the circuits,[49] the Supreme Court examined the application of due process to prison disciplinary procedures in *Wolff v. McDonnell*.[50] The Court ruled that, if a disciplinary action had the effect of producing a "grievous loss"[51]

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toward the news media underlie the regulations. For capable discussions of the two Supreme Court cases see Comment, *Prisons and the Rights of the Press to Gather Information: A Review of Pell v. Procunier and Saxbe v. Washington Post Co.*, 43 U. Cin. L. Rev. 913 (1974); 60 Cornell L. Rev. (1975).

45. 408 U.S. 665 (1972).

46. Pell v. Procunier, 417 U.S. 817, 835 (1974) (concurring in part and dissenting in part); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (dissenting). Justice Powell's dissent for *Pell* and *Saxbe* follows the *Saxbe* opinion.

47. 417 U.S. at 857-58. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972). *See generally* 60 Cornell L. Rev. 446, 456 (1975).

48. 417 U.S. at 848. For a similar observation in *Pell* see 417 U.S. at 830.

49. Most of the disagreement involved the allowance of counsel, witnesses and cross-examination for the prisoner at a disciplinary hearing. Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974), Baxter v. Palmigiano, 487 F.2d 1280 (1st Cir. 1973), and United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), were usually in agreement on giving such due process protections, while Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972), Meyers v. Alldredge, 492 F.2d 296 (3d Cir. 1974), and Braxton v. Carlson, 483 F.2d 933 (3rd Cir. 1973), were opposed. Many of the lower courts had also been giving prisoners due process protections. *See, e.g.*, Souza v. Travisono, 368 F. Supp. 959 (D.R.I. 1973), *modified*, 498 F.2d 1120 (1st Cir. 1974); White v. Gillman, 360 F. Supp. 64 (C.D. Iowa 1973); Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973).

50. 418 U.S. 539 (1974).

51. For the purposes of deciding *Wolff*, the Supreme Court defined grievous loss as the loss of good time credits which, having been granted to the inmate by the state, can

to an inmate, procedural due process protections were required. These protections must include: (1) advance written notice of the proceeding; (2) a written statement of the evidence to be relied upon, together with a written statement of the reasons for the discipline; (3) a right to call witnesses and present evidence as long as institutional security and order are maintained; and (4) an impartial tribunal.[52]

In examining the right to confrontation and cross-examination, and the right to counsel, the Court refused to mandate the former and held the latter to be proper only in those instances where inmates are illiterate or incapable of adequately presenting their cases.[53] However, *Wolff* did acknowledge that correction authorities have the discretion to permit inmates to use counsel (or counsel-substitute), and confrontation and cross-examination at disciplinary proceedings. Although some federal courts only adopted *Wolff*'s four minimum due process require-

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only be taken away by due process. The Court relied heavily on its opinion in Morissey v. Brewer, 408 U.S. 471 (1972), which involved the application of due process to parole revocation hearings.

52. 418 U.S. at 563-67. A study by the ABA in 1974 found that correction authorities had been applying the due process safeguards of *Wolff*. *See* ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES WITH AN ANALYSIS OF THE IMPACT OF WOLFF V. MCDONNELL (1974) [hereinafter cited as ABA SURVEY]. According to the ABA Survey, 47 states had provided notice and many had given prisoners the right to call witnesses in their defense. *Id.* at 56-57.

As to the extension of the safeguards to hearings held for lesser penalties than the loss of good time credits, the Court felt they might not be required. However, some courts have extended the safeguards to the loss of privileges, Clutchette v. Procunier, 328 F. Supp. 767, 776 (N.D. Cal. 1971), *aff'd*, 497 F.2d 809 (9th Cir. 1974), *modified on denial of rehearing and rehearing en banc*, 510 F.2d 613 (9th Cir. Feb., 1975), to administrative segregation, West v. Cunningham, 456 F.2d 1264 (4th Cir. 1972), and to confinement in an isolation unit where normal privileges are not available, Black v. Warden, 467 F.2d 202 (10th Cir. 1972).

53. 418 U.S. at 567-70 (1974). The ABA had found that 28 states permitted the right to confrontation and cross-examination, with three states allowing only confrontation. ABA SURVEY, *supra* note 52, at 58-59. Furthermore, 41 states permitted retained or appointed counsel. *Id.* at 60. Some district courts had recognized confrontation and cross-examination as critical to proceedings when the interests of the inmate involved are substantial. *See, e.g.*, Inmate 24394 v. Schoen, 363 F. Supp. 683 (D. Minn. 1973); Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971). Courts have also recognized the right to retain counsel. *See, e.g.*, Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973), *vacated and remanded*, 418 U.S. 908 (1974), *amended opinion filed*, 510 F.2d 534 (1st Cir. 1974), *rev'd*, 96 S. Ct. 1551 (1976); Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973) (when a criminal violation).

ments,[54] the Ninth Circuit decision in *Clutchette v. Procunier*[55] has apparently stimulated a trend toward refining and expanding these requirements.[56]

The *Clutchette* court recognized the adverse effect that any mark on one's record might have on the possibility of obtaining parole. It therefore expanded *Wolff*'s interpretation of "grievous loss" from loss of good time credits to loss of all privileges which can be removed by disciplinary hearings. The court also found that *Wolff* prescribes no guidelines for determining when correction officers have abused the discretion *Wolff* confers upon them. This finding provided opportunity for Judge Hufstedler to read flexibility into *Wolff*.

The *Clutchette* court held that any proceeding which can lead to the withdrawal of privileges should be attended by certain minimum safeguards, such as a written notice to the prisoners of the intent to remove their privileges, together with a statement of the allegations, a reasonable time before discipline is imposed and an opportunity to respond to the allegations.[57] Additionally, if inmates are denied the privilege of confrontation and cross-examination in a proceeding that could result in a serious sanction, the failure to explain to them the reasons for the denial would be considered "a prima facie case of abuse of discretion."[58]

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54. *See, e.g.*, Jackson v. Wise, 390 F. Supp. 19 (C.D. Cal. 1975). This Ninth Circuit district court argues that *Clutchette* is incorrect in allowing confrontation and cross-examination in a non-parole revocation setting, and thus that *Wolff*'s minimum due process safeguards are sufficient. *Id.* at 21. For a complete discussion of prisoners' first amendment and procedural due process rights see Comment, *Backwash Benefits For Second Class Citizens: Prisoners' First Amendment and Procedural Due Process Rights*, 46 U. COLO. L. REV. 377 (1975) [hereinafter cited as *Prisoners' Rights*].

55. 497 F. 2d 809 (9th Cir. 1974), *modified on denial of rehearing and rehearing en banc*, 510 F.2d 613 (9th Cir. Feb., 1975) (per Hufstedler, J.). Note: As this article went to press the Supreme Court reversed *Clutchette*. Baxter v. Palmigiano, 96 S. Ct. 1551 (1976).

56. *See, e.g.*, Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3122 (U.S. July 7, 1975) (No. 35); Palmigiano v. Baxter, 510 F.2d 534 (1st Cir. 1974); Graham v. State Dep't of Correction, 392 F. Supp. 1262 (W.D.N.C. 1975); Tai v. Thompson, 387 F. Supp. 912 (D. Hawaii 1975); Daigle v. Hall, 387 F. Supp. 652 (D. Mass. 1975); Walker v. Hughes, 386 F. Supp. 32 (E.D. Mich. 1974). For a brief discussion of this trend and the effect of *Clutchette* see Niles, *The Hawaii Prison Inmates' Emerging Right to Due Process*, 10 HAWAII L.J. 115 (1974).

57. 510 F.2d at 615. For a brief discussion of the opinion see *Prisoners' Rights*, *supra* note 54, at 413, 430 n.252.

58. 510 F.2d at 616. This is so when a disciplinary hearing is held and "a serious sanction can be imposed (excluding a proceeding for an infraction that is also a crime) . . . ." *Id.*

If prisoners are unable to competently handle their cases, counsel or counsel-substitute should be provided. Furthermore, *Clutchette* requires that a prisoner be afforded counsel (and not merely counsel-substitute) and the privilege against self-incrimination when there is a likelihood of a state criminal prosecution for violation of a prison rule.[59]

On the issue of confrontation and cross-examination, the court subordinated administrative interests to the rights of prisoners and, in effect, followed Justice Marshall's reasoning in his dissenting opinion[60] in *Wolff*. In doing so it shifted to state authorities the burden of showing that their exercise of discretion furthers the interests and goals of the correctional system. *Clutchette* thus appears inconsistent with the Supreme Court's holding in *Wolff* in that it places greater limitations on the discretion of prison officials.[61] However, the *Clutchette* court seems to find solace in the fact that the *Wolff* majority felt its holding was an accommodation to circumstances then existing, rather than something "graven in stone."[62]

59. This privilege comes into being when a custodial interrogation occurs before a prison disciplinary hearing, 497 F.2d at 823. One circuit had held that the fifth amendment privilege against self incrimination extends to an incarcerated suspect, whether or not interrogation is intended to obtain evidence for further prosecution. *See* Palmigiano v. Baxter, 510 F.2d 534, 536 (1st Cir. 1974), *rev'd*, 96 S. Ct. 1551 (1976). Both *Clutchette* and *Palmigiano* would apply Miranda v. Arizona, 384 U.S. 436 (1966), to custodial interrogations. *Palmigiano* would grant counsel or counsel substitute to all inmates who request it. 510 F.2d at 537, *citing* Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970). At least one court has applied the reasoning of *Palmigiano* and *Clutchette* to prison transfers. *See* Jones v. Manson, 393 F. Supp. 1016 (D. Conn. 1975). For an able discussion of *Miranda* in the context of prisons see Turner & Daniel, *Miranda In Prison: The Dilemma of Prison Discipline and Intramural Crime*, 21 BUFFALO L. REV. 759, 764-73 (1972).

Neither *Clutchette* nor *Wolff* have been applied retroactively. *See, e.g.*, Wheeler v. Procunier, 508 F.2d 888 (9th Cir. Dec., 1974) (involving a transfer). Although citing *Wheeler*, one district court within the Ninth Circuit has circumvented it by granting the right to adequate notice and a hearing based on the decisions of other federal courts. *See* Fitzgerald v. Procunier, 393 F. Supp. 335, 338-39 (N.D. Cal. 1975), *citing* Allen v. Nelson, 354 F. Supp. 505, 513 (N.D. Cal. 1973), *aff'd per curiam*, 484 F.2d 960 (9th Cir. 1973); Sostre v. McGinnis, 442 F.2d 178, 198, 203 (2d Cir. 1971).

60. Wolff v. McDonnell, 418 U.S. 539, 580 (1974) (Marshall, J., dissenting). His dissent is discussed in *Prisoners' Rights*, *supra* note 54 at 430-31 n.252.

61. *Clutchette*, however, does not deny that prison officials need discretionary power, or that "process due can be flexible to meet exigencies." 510 F.2d at 615. A dissenting opinion was filed by Judge Kilkenny. He believed that the decision should have been vacated and remanded for a hearing on whether the disciplinary rules and procedures in effect met only *Wolff*'s four requirements. *Id.* at 616.

62. 418 U.S. at 572. The *Clutchette* court recognized and commented on this in the introduction to the opinion. *See* Clutchette v. Procunier, 510 F.2d 613, 615 (9th Cir.

E. Juvenile Transfers and Right to Rehabilitation

Traditionally, courts have held that juveniles have an affirmative right to rehabilitation.[63] The rationale for such holdings has been the belief that rehabilitation is the goal of the juvenile justice system.[64] Juveniles who are transferred from detention homes to penal institutions will be entitled to a due process hearing if the transfer entails a "grievous loss," *i.e.*, the right to rehabilitation.[65]

In *Vun Cannon v. Breed*,[66] the Ninth Circuit examined the inter-prison transfer of a juvenile and the subsequent losses occasioned by the transfer. *Vun Cannon* involved a class action by a ward of the California Youth Authority who had been transferred to the Deuel Vocational Institute (DVI). He alleged that the transfer violated his due process and equal protection rights, and he sought to have California Penal Code section 2037[67] declared unconstitutional. A Ninth Circuit panel found that the transfer may

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Feb., 1975). The question posed by *Clutchette* on certiorari was:

> Did appeals court's guidelines exceed minimum standards prescribed in *Wolff v. McDonnell*, thereby violating *Wolff*'s command that development of procedural due process be left to discretion of prison officials?

44 U.S.L.W. 3022 (U.S. July 22, 1975) (No. 1194). For a summary of questions discussed during oral argument see 44 U.S.L.W. 3437 (U.S. Feb. 3, 1976).

63. For cases involving juveniles see *In re* Gault, 387 U.S. 1, 23 n.30 (1967); Kent v. United States, 383 U.S. 541, 555 (1966); *In re* Elmore, 382 F.2d 125 (D.C. Cir. 1967); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967); White v. Gillman, 360 F. Supp. 64 (C.D. Iowa 1973); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), *cert. denied*, 417 U.S. 976 (1974). *See generally* Bazelon, *Implementing the Right to Treatment*, 36 U. Chi. L. Rev. 742 (1969); Morris, *"Criminality" and the Right to Treatment*, 36 U. Chi. L. Rev. 784 (1969); Comment, *A Jam In The Revolving Door: A Prisoner's Right to Rehabilitation*, 60 Geo. L.J. 225 (1971).

64. Another rationale is that the state is acting as "parens patria." Creek v. Stone, 379 F.2d 106, 109, 111 (D.C. Cir. 1967) (as long as statutory authority is present). In contrast the goals of the criminal justice system are seen as punishment, deterrence and retribution. *See* Kent v. United States, 383 U.S. 541, 554 (1966); Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354, 1364 (D.R.I. 1972).

65. *See, e.g.*, White v. Gillman, 360 F. Supp. 64, 66 (S.D. Iowa 1973), *citing* Morrissey v. Brewer, 408 U.S. 471 (1972). Pre-*Wolff* attempts by non-juveniles to invalidate transfers have been denied. *See, e.g.*, Padilla v. Ackerman, 460 F.2d 477 (9th Cir. 1972) (transferee had a state remedy); Hillen v. Director of Dep't of Social Servs. & Housing, 455 F.2d 510 (9th Cir. 1972). After *Wolff* transfers of all prisoners must be attended by due process safeguards if a "grievous loss" is suffered. *See, e.g.*, Gomes v. Travisono, 510 F.2d 537 (1st Cir. 1974), *citing* Wolff v. McDonnell, 418 U.S. 539, 571 (1974). *But see* Montanye v. Hames, 44 U.S.L.W. 5051 (U.S. June 25, 1976), and Meachum v. Fano, 44 U.S.L.W. 5053 (U.S. June 25, 1976), where the Supreme Court has denied due process protections to transferred inmates.

66. No. 72-1716 (9th Cir., June 19, 1975) (per Koelsch, J.).

67. Cal. Penal Code § 2037 (West 1970) provides in part:

> There may be transferred to and confined in the Deuel Voca-

have violated the inmate's due process and equal protection rights, and thus reversed a lower court dismissal of the action and ordered a three-judge district court convened to evaluate the constitutionality of the statute.

The *Vun Cannon* court observed that California Penal Code section 2037 was not the only authority for the transfer; Welfare and Institutions Code section 1737.1 also authorizes such transfers.[68] While transfers pursuant to the latter provision are attended by due process safeguards, transfers under the former are not because the transfer is "administrative." Based on this fact, appellant's claim that the dual statutory scheme created an improper classification for administrative transferees was held "not patently insubstantial."[69] *Vun Cannon* also applied *Wolff* and *Clutchette* to find that the transferee's loss of the right to rehabilitation was not so improbable as to deny jurisdiction by a three-judge district court. The court found that a transfer to DVI may involve a grievous loss in the form of incarceration that is less rehabilitative and more punitive, debilitating and dangerous; if such is the case, due process safeguards would attach. *Vun Cannon*, however, did not recognize that a juvenile has an absolute right to rehabilitation.[70] Nevertheless, the decision establishes a break with past Ninth Circuit decisions by its recognition that due process applies to inter-prison transfers.[71]

> tional Institution any male subject, to the custody, control and discipline of the Director of Corrections or the Youth Authority, [when it is felt that the subject will] be benefited by confinement in such an institution.

68. CAL. WELF. & INST'NS CODE § 1737.1 (West 1972) provides in part:

> Whenever any person who has been . . . convicted of a public offense and committed to the authority appears to the authority . . . after having become an inmate of any institution or facility subject to the jurisdiction of the authority, to be an improper person to be retained in any such institution or facility, . . . the authority may return him to the committing court. In a case of a person convicted of a public offense said court may then commit him to a state prison or sentence him to a county jail as provided by law for punishment of the offense of which he is convicted.

69. No. 72-1716, slip op. at 4.

70. Courts which have dealt with this issue have found the right absolute where statutory authority for such a goal is present. *See* cases cited at note 63 *supra*. Such statutory authority is present in California. *See* CAL. WELF. & INST'NS CODE § 1700 (West 1972), stating that the goal of the Youth Authority is rehabilitation and treatment.

71. No. 72-1716, slip op. at 4. Ninth Circuit decisions before *Wolff* and *Clutchette* include Fajeriak v. McGinnis, 493 F.2d 468 (9th Cir. 1974), and Padella v. Ackerman, 460 F.2d 477 (9th Cir. 1972). Both allowed transfers, but denied relief.

II. DISCRIMINATION

A. School Desegregation

In *Spangler v. Pasadena City Board of Education*,[72] a case of first impression, the Ninth Circuit considered a district court's denial of several motions which a school board had made in an effort to terminate the court's supervision of a desegregation plan and substitute the board's alternate plan. The existing plan provided that no school in the district shall have a "majority of any minority" students. This plan (the "Pasadena Plan") was the result of a district court's finding, in 1970, that there was substantial evidence that overt acts by the school board had caused racially imbalanced schools.[73]

The *Spangler* court found that the district court's decision to retain jurisdiction over the school board was not clearly erroneous because, once de jure segregation is shown, a district court's vast equity power enables it to take whatever actions it deems necessary to eliminate racial discrimination.[74] In the school desegregation area, this power operates until a school district is adjudged

72. 519 F.2d 430 (9th Cir. May, 1975) (per Ely, J.), *cert. granted*, 44 U.S.L.W. 3279 (U.S. Nov. 11, 1975) (No. 164). The questions presented on certiorari were:

> (1) Is judicial decree valid which requires fixed racial balance for all schools within school system,
> (2) Is school system required to amend its judicially validated desegregation plan to accommodate for annual demographic changes for which it is in no way responsible,
> (3) Must unitary school system which allegedly had been in compliance with school desegregation decree for four years remain subject indefinitely to control of trial court that entered decree,
> (4) Does decree imposing racial balance preclude school board from acting to prevent school system from becoming an all-minority school system, and
> (5) Does inclusion of "freedom of choice" element in proposed desegregation plan make it invalid per se?

44 U.S.L.W. 3124 (U.S. July 30, 1975) (No. 164). For the lower court decision see Spangler v. Pasadena City Bd. of Educ., 375 F. Supp. 1304 (C.D. Cal. 1974).

73. Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970). For an interesting opinion by the California Supreme Court on the issue of discrimination in the Pasadena school system see Jackson v. Pasadena, 59 Cal.2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963). The court seems to have held that, at least in California, the de jure/de facto distinction is invalid.

74. 519 F.2d at 436, *citing* Green v. County School Bd., 391 U.S. 430, 437-38 (1968). The court went on to say that "[w]hen viewed from the prespective of . . . [a] long line of Supreme Court authority, we cannot conscientiously hold that the district judge abused his broad equitable discretion in refusing to modify or dissolve his Decree." 519 F.2d at 437.

"unitary"; the district court did not consider the Pasadena school system unitary, and the *Spangler* court agreed. The court arrived at this conclusion notwithstanding the fact that "white flight" from the public schools made compliance with the 1970 decree increasingly difficult.[75] The court therefore instructed that a "full and genuine implementation" of the Pasadena Plan must achieve some stability before the district court can relinquish its supervision.[76]

In a lengthy dissent, Judge Wallace argued that if the majority had correctly applied relevant case law, it would have found that the district court was, in essence, attempting to eliminate de facto as well as de jure segregation through the use of prescribed mathematical ratios.[77] Since district courts are only empowered to supervise the elimination of segregation occasioned by a school board's actions and policies, and since ratios are merely a means of initially promoting the elimination of such de jure segregation, and not an end in themselves, the district court should have focused on the presence or absence of the kind of intentionally segregative acts which constitute de jure segregation, rather than primarily on the fact of imbalance.[78] Judge Wallace felt that the district court must have lost sight of this focus, for it never determined: (1) whether de jure segregation had ceased (*i.e.*, whether the remaining imbalance was due to "intentionally segregative state action"); and (2) whether any racial imbalance which would exist under the school board's alternate plan would be caused by such state action. Without such determinations, Judge Wallace was not prepared to evaluate the appropriateness of continued district court supervision. He would therefore have continued the district court's supervision with instructions to make the required

75. 519 F.2d at 435. By "white flight" the court meant the exodus of white students from public schools to private schools or their movement from the city. The court found this to be no excuse for failure to comply with the Pasadena Plan. *Id.*, *citing* Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968). However, one district court in the Fifth Circuit has accepted "white flight" as a justification for a school board's inability to comply fully with a desegregation order. *See* Boyd v. Pointe Coupee Parish School Bd., 332 F. Supp. 994 (E.D. La. 1971). For a discussion of the issue and desegregation in general see A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 127-36 (1970).

76. 519 F.2d at 437. Judge Chambers implied that stability would be achieved after the next reassignment of pupils. *Id.* at 440-41 (concurring opinion).

77. *Id.* at 441-46. For a discussion of the intent behind some of the school board's actions see the district court's opinion at 375 F. Supp. 1304 (C.D. Cal. 1974) (ordering compliance). Spangler v. Pasadena, 384 F. Supp. 846 (C.D. Cal. 1974), is also illuminating.

78. 519 F.2d at 441-42.

determinations. Judge Wallace stressed that his position would not allow the perpetuation of de jure segregation in any way, for the lower court's supervision would not be removed unless the school board satisfied a "heavy burden of proof" in its attempt to demonstrate that existing imbalance cannot be attributed to such segregation.[79]

Judges Ely and Wallace did not differ significantly over an issue raised by the school board's alternate plan. The *Spangler* majority characterized it as a "freedom of choice" plan, and thus felt that segregation would be fostered by its adoption.[80] The Ninth Circuit has held that freedom of choice plans burden parents with the school boards' responsibility of effectuating the transition to racially nondiscriminatory school systems.[81] The *Spangler* court also shared the Supreme Court's view that, while freedom of choice plans could possibly promote desegregation in some situations, experience has shown their effectiveness to be minimal.[82] A freedom of choice plan is therefore unacceptable where alternative school desegregation methods exist.[83]

The *Spangler* court relied on *Swann v. Charlotte-Mecklenburg Board of Education*[84] and *Kelly v. Guinn*[85] for its strict interpretation of the "no majority of any minority" formula.[86] However, a closer reading of *Swann* itself, and that portion of *Kelly* relying on *Swann*,

79. *Id.* at 446.

80. *Id.* at 439. For a compilation of cases finding "freedom of choice" plans unacceptable see *id.* at 439 n.12.

81. *See* Kelly v. Guinn, 456 F.2d 100, 108-09 (9th Cir. 1972), observing that the plans burdened people "with a responsibility which *Brown II* [347 U.S. 483 (1954)] placed squarely on the School Board." *See also* Green v. County School Bd., 391 U.S. 430, 441-42 (1968).

82. 519 F.2d at 439, *citing* Green v. County School Bd., 391 U.S. 430, 440 (1968).

83. 519 F.2d at 439, *citing* Green v. County School Bd., 391 U.S. 430, 441 (1968). *Green* did not hold that all freedom of choice plans were unacceptable or unconstitutional; in fact, some may even be effective. But if the plan proves ineffective and there are "reasonably available other ways . . . [it] must be held unacceptable." 391 U.S. at 441. While the freedom of choice plan in *Spangler* had never been implemented, it would probably lead to resegregation if implemented. However, the *Spangler* court did not consider this since they concluded that a unitary system did not exist, and therefore that the district court had not abused its discretion.

84. 402 U.S. 1 (1971).

85. 456 F.2d 100 (9th Cir. 1972).

86. 519 F.2d at 434. The court's use of the formula will be characterized as a strict interpretation because it appears that the court will not allow even one school to have more than 50 percent minority enrollment. This is tantamount to the use of quotas as an end in themselves. For an able discussion supporting this view and opposing prevailing Supreme Court thinking see Comment, *Race Quotas*, 8 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 128 (1973).

indicates that a desegregation plan may use mathematical ratios only as a starting point for shaping an equitable remedy.[87] Mathematical ratios are not, according to *Swann*, a substantive constitutional right. And, under *Milliken v. Bradley*,[88] a remedy directed toward any particular racial balance is not justified. If the Pasadena City Board of Education's actions under the district court's formula had been evaluated in light of the flexible approach of *Swann*, imbalance alone would not have been sufficient to support the conclusion that de jure segregation still existed. One year after implementation of the Pasadena Plan only one school violated it (by 1.9 percent).[89] Three years after implementation five of the 35 schools in the district failed to comply, with violations ranging from 1.3 percent to 10.2 percent.[90] This was at a time when non-white enrollment in the school district increased from 46 percent to 58 percent, and white enrollment declined from 58.3 percent to 42 percent.[91] Violations of the plan may therefore be inevitable; indeed, compliance may be mathematically impossible. This fact underscores the importance of rejecting an inflexible reliance on formulas as the principle index of whether de facto segregation persists.

A federal act,[92] which incorporated certain dictum from

87. 402 U.S. at 22-31; 456 F.2d at 110. Commenting on quotas and the *Swann* opinion, Chief Justice Burger stated that if lower courts "read this Court's opinions as requiring a fixed racial balance or quota, it would appear to have overlooked specific language [in *Swann*] to the contrary." Winston-Salem Forsyth County Bd. of Educ. v. Scott, 404 U.S. 1221, 1227 (1971). *See also* Balsbaugh v. Rowland, 447 Pa. 423, 290 A.2d 85 (1972) (no inherent right to a neighborhood school).

88. 418 U.S. 717, 746-47 & n.22 (1974) (mere fact schools will have a majority of blacks does not mean they are not desegregated). For further discussion of this issue see 43 U. CIN. L. REV. 922, 928 (1974).

89. 519 F.2d at 443. In October, 1970, the first academic year of the plan no school had a majority of non-whites. In October, 1971, one school had 51.9% enrollment of non-whites. In October, 1972, four schools had a majority enrollment of non-whites, with the following percentages: 53.9%, 53.4%, 52.0%, 50.1%.

90. *Id.* In October, 1973, five schools exceeded the 50% ceiling by the following percentages: 60.2%, 56.8%, 55.3%, 52.9% and 51.3%.

91. TIME, Sept. 22, 1975, at 13.

92. 20 U.S.C. § 1707 (Supp. IV, 1974) (extending and amending the Elementary and Secondary Public Education Act of 1965, tit. 1, 79 Stat. 27, *codified in* scattered sections of 20 U.S.C.). Section 1707 provides:

> When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has *no* vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, such school population changes so occurring shall not,

Swann,[93] established guidelines for courts to follow in determining when they may end their jurisdiction over a school system which has become unitary. Based on these guidelines, a flexible use of ratios, and the relevancy of intent,[94] the *Spangler* court

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per se, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan.

Id. (emphasis added). For a discussion of what constitutes "no vestiges" see Comment, *School Desegregation After Swann: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421, 436-40 (1972). Spangler v. Pasadena City Bd. of Educ., 519 F.2d 430 (9th Cir. May, 1975), construes the statute's prohibition as coming into effect after a desegregated unitary system is established, and thus as inapplicable to an existing plan not yet determined *by the courts* to be unitary, as was the case in *Spangler*. *Id.* at 436 n.6.

93. 402 U.S. at 31-32. The dictum is cited in full in Spangler v. Pasadena City Bd. of Educ., 519 F.2d 430, 436 (9th Cir. May, 1975). For a discussion of the *Swann* dictum, quotas, and the relinquishing of jurisdiction see Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); United States v. Texas, 509 F.2d 192 (5th Cir. 1975); Flax v. Potts, 464 F.2d 865, 868 (5th Cir.), *cert. denied*, 409 U.S. 1007 (1972); Carr v. Montgomery County Bd. of Educ., 377 F. Supp. 1123 (M.D. Ala. 1974), *aff'd*, 511 F.2d 1374 (5th Cir.), *cert. denied*, 44 U.S.L.W. 3297 (U.S. Nov. 18, 1975) (No. 476); Bivins v. Bibb County Bd. of Educ., 331 F. Supp. 9 (M.D. Ga.), *rev'd*, 460 F.2d 430 (5th Cir. 1972). The dissent to the court of appeals' decision in *Carr* discussed many of the issues raised in *Spangler*. 511 F.2d at 1375. In affirming the district court's decision, however, the *Carr* majority rejected the reasoning of the dissent, which was similar to the reasoning employed by the *Spangler* majority. The conditions in *Carr* were worse than those in *Spangler*, with some almost all-Black schools existing, even though the school system in question, in 1973, was 47% black and 55% white. *Id.* The Supreme Court's denial of certiorari stated that the "continued existence of some substantially predominantly black schools is genuinely nondiscriminatory." 44 U.S.L.W. at 3297. This suggests that the decision in *Spangler* will be remanded for the determinations Judge Wallace called for in his dissenting opinion.

94. In considering whether to relinquish jurisdiction the district court incorrectly believed intent to be irrelevant. 375 F. Supp. at 1307 n.10. This view is contrary to both Supreme Court and Ninth Circuit decisions. *See* Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Johnson v. San Francisco Unified School Dist., 500 F.2d 349, 351 n.1 (9th Cir. 1974) (dictum); Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579 (9th Cir. 1973). *See also* Hart v. Community School Bd. of Educ., 512 F.2d 37 (2d Cir. 1975) (explaining *Johnson*). Contrary to *Spangler*, *Milliken* upheld the distinction between de jure and de facto segregation. 418 U.S. at 745. *Keyes* held that, absent evidence of de jure segregation, courts could not remedy segregated school systems. 413 U.S. at 207-13.

In *Keyes*, though, Justice Douglas, in a separate opinion, said there is no difference between de facto and de jure segregation for the purposes of the equal protection clause because many subtle acts by school boards are not classic de jure segregation, but in reality segregation results from state action. *Id.* at 216. He cited Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972), as an example, although the court there believed the segregation in question was de jure in the conventional sense. Justice Powell, concurring and dissenting, also believed the de jure/de facto distinction should be abandoned, citing Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). 413 U.S. at 231. For some interesting discussions of the de jure/de facto distinction, some of which were noted in Spangler v. Pasadena City Bd. of Educ., 519 F.2d 430, 431 n.1 (9th Cir. May, 1975), see Amaker, *Milliken v. Bradley: The Meaning of the Constitution in School Desegregation Cases*, 2 HASTINGS CONST. L.Q. 349 (1975); Craven, *Integrating the Desegregation Vocabulary–Brown Rides North, Maybe*, 73 W. VA. L. REV. 1 (1970); Fiss, *Racial Imbalance in*

should not have sustained the district court's decision;[95] rather, it should have remanded the proceedings for a determination of whether intentional segregative acts by the school board were responsible for the racial imbalance in Pasadena's schools.

B. Discriminatory Zoning

The United States Commission on Civil Rights has found that racial polarization is continuing unabated.[96] Such polarization is enhanced by the movement of industry and jobs to the suburbs, the exclusionary land use practices of suburban communities, and the proliferation of connecting freeways.[97] Zoning ordinances have provided for the planned growth of communities. Yet, some of the results of this type of planning have been the exclusion of certain groups from living in or partaking equally of the services of a community, either because of their race or economic status.[98]

Most zoning ordinances are to some extent exclusionary. Nevertheless, courts uphold these ordinances when it is shown that they are not arbitrary or unreasonable and that they advanced a legitimate state interest.[99] However, when zoning ordinances have the effect of excluding or discriminating against an ethnic minority, they will not be upheld unless they serve a compelling state interest.[100]

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the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564 (1965); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 Calif. L. Rev. 275 (1972); Kaplan, *Segregation Litigation and the Schools*, 58 Nw. U.L. Rev. 1, 157 (1963); *Symposium, The Courts, Social Science and School Desegregation*, 39 Law and Contemporary Problems (1975).

95. The *Spangler* court appears to agree with the district court's view that, in this case, intent is irrelevant. 519 F.2d at 434-35 n.5. Note: As this article went to press the Supreme Court reversed *Spangler*. Pasadena City Bd. of Educ. v. Spangler, 44 U.S.L.W. 5114 (U.S. June 28, 1976).

96. United States Commission on Civil Rights, Equal Opportunity in Suburbia (1974).

97. *Id.* at 11-12, 30-31, 44-46. *See also* Kushner & Werner, *Metropolitan Desegregation After Milliken v. Bradley: The Case For Land Use Litigation Strategies*, 24 Cath. U.L. Rev. 187 (1975).

98. Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 Syracuse L. Rev. 509, 519 (1971). *See generally* Cutler, *Legality of Zoning to Exclude the Poor*, 37 Brooklyn L. Rev. 483 (1971); Comment, *Low Income Housing in the Suburbs: The Problem of Exclusionary Zoning*, 24 Fla. L. Rev. 58 (1971); Comment, *The Responsibility of Local Zoning Authorities to Nonresident Indigents*, 23 Stan. L. Rev. 774 (1971).

99. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *See also* Comment, *Construction Industry Ass'n of Sonoma County v. City of Petaluma: Constitutional Limitations Placed on Controlled Growth Zoning*, 5 Golden Gate L. Rev. 485 (1975) [hereinafter cited as *Petaluma* Comment].

100. *See* United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974). *City of*

In recent years courts have increasingly considered zoning ordinances which have the effect of excluding poor people from suburban communities.[101] An example of such an ordinance is one that contains a large minimum lot size requirement.[102] In *Ybarra v. City of The Town of Los Altos Hills*,[103] the Ninth Circuit upheld such an ordinance.

Ybarra was brought by two Mexican-Americans who claimed that a minimum lot size requirement violated the due process and equal protection clauses of the fourteenth amendment. According to the applicable zoning ordinance, the land in question could only be used for primary dwellings and no lot could be smaller than one acre; plaintiffs had bought an option on several lots and planned to build a low-income housing project. The housing project could only be built if the land was rezoned or if the ordinance

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Black Jack cites, among other decisions, Village of Belle Terre v. Boraas, 416 U.S. 1, 5 (1974), for this assertion. 508 F.2d at 1186. However, a closer reading of *Belle Terre* indicates that the Supreme Court was referring only to statutes that discriminate on their face. For a decision in accord with *City of Black Jack* see Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 413 (7th Cir.), *cert. granted*, 44 U.S.L.W. 3354 (U.S. Dec. 12, 1975) (No. 616). According to *Village of Arlington Heights*:

> [R]egardless of the Village Board's motivation, if this alleged discriminatory effect exists, the decision violates the Equal Protection Clause unless the Village can justify it by showing a compelling interest.

517 F.2d at 413, *citing* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1963). In recent dictum the Supreme Court has expressed disapproval with the decision in *Village of Arlington Heights*. *See* Washington v. Davis, 44 U.S.L.W. 4789, 4793-94 (U.S. June 7, 1976).

101. For a discussion of this trend see O. BROWDER, R. CUNNINGHAM & J. JULIN, BASIC PROPERTY LAW 1283-87 (2d ed. 1973). For a discussion of the inaction of the courts on this issue see Comment, *Exclusionary Zoning: An Overview*, 47 TUL. L. REV. 1056 (1973). *See generally* Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972); Davidoff & Davidoff, *supra* note 98; Mallach, *Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation*, 6 RUTGERS-CAMDEN L.J. 653 (1975); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *A Wrong Without a Remedy: Judicial Approaches to Exclusionary Zoning*, 6 RUTGERS-CAMDEN L.J. 727 (1975).

102. For discussions by courts sustaining such ordinances see Steel Hill Dev. Inc. v. Town of Sanborton, 392 F. Supp. 1134 (D.N.H. 1974) (three acre minimum upheld); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (two acre minimum upheld); Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516, (1942) (one acre minimum upheld). *Contra*, Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971) (one or two acre minimum and severe limitation on multi-family units held invalid); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (two and three acre minimums, with 80% of township zoned for latter, held unreasonable and therefore unconstitutional). The large-lot zoning cases prior to 1964 are collected and discussed in Annot., 95 A.L.R.2d 716 (1964).

103. 503 F.2d 250 (9th Cir. Sept., 1974) (per Solomon, D.J.).

was invalid. Rather than seek rezoning[104] plaintiffs brought suit. They argued that the ordinance had the effect of discriminating against the poor, in their view a suspect class, and thus that a compelling state interest had to be shown to justify it.

Affirming a dismissal of the action, the *Ybarra* court concluded that only a rational state interest—in this case preservation of the town's rural environment—need be shown.[105] This conclusion resulted from the court's finding that, in plaintiffs' case, their economic status did not create a suspect class under the test enunciated in *San Antonio Independent School District v. Rodriguez*.[106] Under this test, two characteristics must exist before economic status is considered a suspect class:

> [One] because of their impecunity they were completely unable to pay for some desired benefit, and [two] as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.[107]

The *Ybarra* court decided that plaintiffs' contentions failed under the second aspect of the test because low-cost housing, which may not have been available in the city, was available in the county.[108] The court therefore clearly indicated that it is unpersuaded by, or at least not likely to acknowledge, the numerous public policy and economic considerations commentators have advanced in their efforts to convince courts that large-minimum-lot-size zoning ordinances which fail to provide for low-cost housing should be invalidated.[109]

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104. This is usually regarded as a necessary preliminary administrative step. *See* Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975).

105. 503 F.2d at 254, *citing* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Appellant's had also tried to enforce CAL. GOV'T CODE § 65302(c) (West 1975), which states that "[a] housing element of the plan 'shall make adequate provision for the housing needs of all economic segments of the community.' " The court held appellants lacked standing since they were not residents of Los Altos Hills. 503 F.2d at 254. On the CAL. GOV'T CODE § 65302(c) see OPS. CAL. ATT'Y GEN. 382 (1972); Clark & Grable, *Growth Control in California*, 5 PACIFIC L.J. 570, 589 (1974); Kleven, *Inclusionary Ordinances–Policy and Legal Issues in Requiring Private Developers to Build Low-Cost Housing*, 21 U.C.L.A.L. REV. 1432 (1974).

106. 411 U.S. 1 (1973).

107. *Id.* at 20.

108. It thus appears that within the Ninth Circuit only a lack of low-cost housing resulting from countywide zoning would deny plaintiffs a "meaningful opportunity" to enjoy "benefits" derived from living in a particular area.

109. *See* authorities cited in note 101 *supra*.

The court further held that application of the ordinance did not result in racial discrimination, notwithstanding the fact that, by excluding the poor, a town can effectively exclude certain racial minorities. The court pointed out that discrimination against the poor is not discrimination against race merely because there is a statistical correlation between poverty and race.[110] The court found that the ordinance discriminated equally against all poor persons, and thus held that it does not offend the Constitution. This holding is contrary to the position taken by other circuits, which have held the plaintiff need only prove that racial discrimination will actually or predictably happen.[111] These differing views will probably be reconciled by the Supreme Court, which confronts the issue this term.[112]

Implementation of zoning ordinances has also resulted in racially segregated schools.[113] In *Ybarra v. San Jose*,[114] the Ninth

110. 503 F.2d at 253.

111. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974). There is no need to show the action resulting in racial discrimination was racially motivated. *Id.* at 1185. For a useful discussion about how to prove discriminatory effect see *id.* at 1186. For similar discussions as to discriminatory effect see Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974); United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 808 (5th Cir. 1974); Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970); Aloi, Goldberg & White, *Racial and Economic Segregation By Zoning–Death Knell for Home Rule*, 1 U. TOLEDO L. REV. 65 (1969).

In *Ybarra*, the trial court found that the ordinance prevented Mexican-Americans from living in Los Altos Hills only if they were poor; race was not considered a factor since wealthy Mexican-Americans could live there. This overlooks the importance of discriminatory *effect*, as discussed in the opinions cited above. *See* United States v. City of Black Jack, *supra* at 1186. The appellants in *Ybarra* relied on wealth discrimination rather than race. There also appears to have been no evidence admitted regarding the percentage correlation between the ethnic minority and poverty. Although such evidence may not have affected the outcome in *Ybarra*, the Ninth Circuit has, in the past, seemed to indicate such evidence would be important. *See* Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291, 295 (9th Cir. 1970). "If, apart from voter motive, the result of this zoning by referendum is discriminatory [by denying decent housing and an integrated environment to low-income residents of Union City], in our view a substantial constitutional question is presented." *Id.* For a discussion of Mexican-Americans as a suspect class within the historical confines of the fourteenth amendment see Hernandez v. Texas, 347 U.S. 475 (1954); Greenfield & Kates, *Mexican-Americans, Racial Discrimination and the Civil Rights Act of 1966*, 63 CALIF. L. REV. 612 (1975).

112. The issue should be discussed in Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir.), *cert. granted*, 44 U.S.L.W. 3354 (U.S. December 12, 1975) (No. 616). For an indication of how the Court might deal with the issue see James v. Valtierra, 402 U.S. 137 (1971); Washington v. Davis, 44 U.S.L.W. 4789, 4793-94 (U.S. June 7, 1976).

113. *See* Kushner & Wener, *supra* note 97, at 215-16.

114. 503 F.2d 1041 (9th Cir. Dec., 1974) (per curiam).

Circuit recognized this possibility and thus reversed a dismissal of a civil rights action. Relying on *Milliken v. Bradley*[115] and *Swann v. Charlotte-Mecklenburg Board of Education*,[116] the court held that a cause of action existed, and that relief should be granted if the plaintiffs can prove that intentionally segregative acts by the state, in its control of land use, resulted in racial discrimination.[117] *Ybarra v. City of The Town of Los Altos Hills* was distinguished as having failed to support any claim of racial discrimination.

Land use control and its exclusionary effects was again at issue when the Ninth Circuit examined a district court's invalidation of a five-year housing and zoning plan restricting housing development to certain locations and to a growth rate of 500 dwelling units per year. *Construction Industry Association v. City of Petaluma*[118] reversed the district court's opinion and found the "Petaluma Plan" to have a "rational relationship to a legitimate state interest," and to be a lawful exercise of a power lawfully delegated to the City of Petaluma.

Citing *Village of Belle Terre v. Boraas*[119] and *Ybarra v. City of the Town of Los Altos Hills*, the court held that the city's interest in preserving its small town character, in maintaining open spaces and a low density of population, and in providing for an orderly pace of growth was a valid one.[120] Furthermore, the court recognized that, because low-cost housing was provided for, no income class or racial minority would be excluded. The *Petaluma* court also recognized that a large percentage of minorities fall within the low and middle income brackets, and thus stressed how less restrictive the Petaluma Plan was than those upheld in *Village of Belle Terre* and *Ybarra*. The court further stated that the State of California's interest in furthering the general welfare of

115. 402 U.S. 1 (1971).

116. 418 U.S. 717 (1974).

117. *Id.* at 1043, *citing* Milliken v. Bradley, 418 U.S. 717 (1974) (Stewart, J. concurring); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 7 (1971). On remand the district court did not find intentionally segregative acts.

118. 522 F.2d 897 (9th Cir. Aug., 1975) (per Choy, J.), *cert. denied*, 44 U.S.L.W. 3467 (U.S. Feb. 23, 1976) (No. 923). The district court's opinion can be found at 375 F. Supp. 574 (N.D. Cal. 1974). For an in depth discussion of the district court's opinion see *Petaluma* Comment, *supra* note 99. For a discussion of *Petaluma* see 9 LOYOLA L.A.L. REV. 192 (1975). The author confronts the right to travel issue, which the court held it need not discuss since the plaintiffs lacked standing to assert that right.

119. 416 U.S. 1 (1974) (land-use restriction to one-family dwelling).

120. 522 F.2d at 908-09. The court felt these interests were valid due to the broad concept of public welfare that *Village of Belle Terre* and *Ybarra* exhibited.

the region, or of the entire state, was more properly a matter for state legislative attention.[121]

III. FIRST AMENDMENT RIGHTS

A. FREEDOM OF SPEECH[122]

For almost one hundred years it has been assumed that obscene material is outside the protection of the first amendment.[123] However, not until the 1957 decision in *Roth v. United States*[124] did the Supreme Court establish a test for the lower courts to use in dealing with obscenity cases. In 1973, because of the Court's own inconsistent interpretations of the test which *Roth* and *Memoirs v. Massachusetts*[125] pronounced, the newly constituted Burger Court enunciated a more definitive interpretation

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121. *Id.* at 908. *See* Walsh, *Are Local Zoning Bodies Required By the Court To Consider Regional Needs?* 3 CONN. L. REV. 224 (1971). For a discussion of the district court's opinion see Mallach, *Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation*, 6 RUTGERS-CAMDEN L.J. 653, 672 (1975). Mallach discusses the opinion vis-a-vis Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

The requirement of a developer, under the Petaluma Plan, to build a certain percentage of low and moderate income housing has been held unconstitutional in another state. *See* Board of Supervisors v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973). In *Board of Supervisors* such a requirement was held to be socio-economic zoning and violative of the just compensation clause. *Id.* at 237-38, 198 S.E.2d at 602.

122. In other areas of first amendment rights the Ninth Circuit held an excise tax on telephone service to be nondiscriminatory under the reasoning of Grosjean v. American Press Co., 297 U.S. 233 (1936), and therefore valid. *See* Saltzman v. United States, 516 F.2d 891 (9th Cir. May, 1975) (per curiam). Also, a statute banning movable political signs from sidewalks and other areas adjacent to highways was held unconstitutional. *See* Aiona v. Pai, 516 F.2d 892 (9th Cir. May, 1975) (per curiam), *citing* Police Dep't v. Mosley, 408 U.S. 92 (1972).

123. *See, e.g., Ex parte* Jackson, 96 U.S. 727, 736-37 (1877). In considering the conviction of a person for using the mails to operate an illegal lottery, the *Jackson* Court referred to the federal obscene mail statute of 1873 as an example of the constitutionality of punishing those who use the mail to corrupt the public morals. *Id.* For two interesting discussions of obscenity and constitutional law prior to the 1960s see Henkin, *Morals and the Constitution: The Sin of Obscenify*, 63 COLUM. L. REV. 391 (1963); Klaven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV..1.

124. 354 U.S. 476 (1957). Obscenity was defined as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489.

125. 383 U.S. 413 (1966). In an opinion written by Justice Brennan, in which Chief Justice Warren and Justice Fortas joined, the Court elaborated on the *Roth* definition of obscenity and held that three elements must coalesce to establish something as obscene.

> a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; b) the material is patently offensive because it affronts contemporary community standards . . .; and c) the material is utterly without redeeming social value.

of *Roth* in *Miller v. California*[126] and its companion cases.[127]

Chief Justice Burger, writing for the majority in *Miller*, reaffirmed *Roth* and at the same time found the *Memoirs* interpretation of *Roth* inaccurate. *Miller*'s interpretation of *Roth* requires that the following guidelines be used to judge whether material is obscene;

> (a) [If an] "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to prurient interest; [and if]
>
> (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and [if]
>
> (c) . . . the work, taken as a whole, lacks serious literary, artistic, political or scientific value, [it is obscene].[128]

The *Miller* Court expressly rejected the *Memoirs* view that a work is not obscene unless it is "utterly without redeeming social value." *Miller* also found that national standards were "hypothetical and unascertainable," and therefore that triers of fact are to be given broad discretion in defining the relevant community and in defining and applying that community's standards regarding obscenity.[129]

Id. at 418. Justices Clark and White did not consider element (c) sufficiently stringent. *Id.* at 441, 461. The difficulty in applying the test is reflected in the more than fifty separate opinions written for the thirteen obscenity cases before the Court since *Roth*. *See* Shugrue & Zeig, *An Atlas For Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157 (1974).

126. 413 U.S. 15 (1973).

127. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. 12,200 Ft. Reels of Super 8 MM Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973).

128. 413 U.S. at 24, *quoting* Kois v. Wisconsin, 408 U.S. 229, 230 (1972) *and* Roth v. United States, 354 U.S. 476, 489 (1957). For a discussion of the *Miller* standards see Berbysse, *Conflicts in the Courts: Obscenity Control & First Amendment Freedoms*, 20 CATH. LAW. 1 (1974); Fahringer & Brown, *The Rise and Fall of Roth–A Critique of the Recent Supreme Court Obscenity Decisions*, 62 KY. L.J. 731 (1973) [hereinafter cited as Fahringer & Brown I]. For an updated version of this article which considers the Court's decision in *Hamling v. United States* see Fahringer & Brown, *The Rise and Fall of Roth–A Critique of the Recent Supreme Court Obscenity Decisions*, 10 CRIM. L. BULL. 785 (1974) [hereinafter cited as Fahringer & Brown II]. *See also* Note, *Community Standards, Class Actions, and Obscenity under Miller v. California*, 88 HARV. L. REV. 1838 (1975); Note, *The Scienter Element in California's Obscenity Laws: Is There A Way To Know?*, 24 HASTINGS L.J. 1303 (1973) [hereinafter cited as *Scienter* Note].

129. 413 U.S. at 30-34.

One year later, in *Hamling v. United States*,[130] the Supreme Court considered the retroactive application of *Miller* and the community standard to be applied for violations of the federal statute[131] proscribing the mailing of obscene material. Specifically, *Hamling*, in upholding the validity of the federal obscene mail statute, held that judgments of conviction rendered before the decision in *Miller* would be examined in light of *Miller*, and if the judgment was not yet final, the defendant would only be entitled to the benefits of *Miller*.[132] Furthermore, the *Hamling* Court held that violations of a federal obscenity statute require the application of a contemporary community standard and not the application of a national standard.[133] If a pre-*Miller* case used the standard of a geographical area which is larger than that which would have been used under *Miller*, a decision would be reversed only if use of the larger area's standard materially affected the jury's deliberations. *Hamling* also reaffirmed[134] *Ginzburg v. United States*,[135] which held that evidence of pandering is relevant in close cases.

In *United States v. Jacobs*,[136] the Ninth Circuit dealt with the problem of applying *Miller* retroactively to a situation where *Hamling*'s guidance is not complete. *Jacobs* involved a defendant who committed a crime under the obscenity laws before *Miller*, but who was tried after *Miller*. The *Jacobs* court held that the application of the *Miller* guidelines in Jacobs' case amounted to the imposition of an ex post facto law, thereby depriving the defendant of due process.[137] The court also adapted to *Jacobs'* facts

130. 418 U.S. 87 (1974).

131. 18 U.S.C. § 1461 (1970) provides:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable . . . [commits a crime].

132. 418 U.S. at 101-02.

133. *Id.* at 105.

134. *Id.* at 130. Chief Justice Warren defined pandering as "the business of purveying textural or graphic matter openly advertised to appeal to the erotic interest of the customers." Roth v. United States, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring).

135. 383 U.S. 463 (1966).

136. 513 F.2d 564 (9th Cir. Sept., 1975) (per Koelsch, J.).

137. *Id.* at 566. For a similar conclusion see Fahringer & Brown I, *supra* note 128, at 754, *citing* Rabe v. Washington, 405 U.S. 313 (1972); Bouie v. City of Columbia, 378 U.S. 347 (1964).

the *Hamling* rule that, if retried, defendant must be judged under the law as it existed before *Miller*, subject only to the exception that the *Miller* guidelines must be applied to the extent that they would be more beneficial to the defendant than the pre-*Miller* standard.[138] It should be noted that the Sixth Circuit does not share the *Jacobs* court's view regarding the ex post facto issue,[139] although the other circuits which have considered the issue have adopted the Ninth Circuit's preferable position.[140]

Appeals in both *United States v. Henson*[141] and *United States v. Dachsteiner*[142] were concerned with the prejudicial effects of applying the obscenity standard of a geographical area which is larger than warranted by *Miller*. Specifically, the court examined how juries are affected by: (1) the government's presentation of evidence relating to a national standard; and (2) jury instructions to apply a national standard. The Ninth Circuit held that it was error to apply a national standard, but that a conviction would not be reversed unless the error was prejudicial to the deliberations of the jury.[143] In *United States v. Henson*, Judge Ely found the jury deliberations to have been prejudiced by the references to a na-

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Jacobs also held that appellant's attack on the constitutionality of 18 U.S.C. section 1462 was foreclosed by the decision in *Hamling*, which held that section 1462 is constitutional. 513 F.2d at 567. For a different view see United States v. Orito, 413 U.S. 139, 147 (1973) (Brennan, J., dissenting). Justice Brennan believed the statute to be "clearly overbroad and unconstitutional on its face." 413 U.S. at 147-48.

138. 513 F.2d at 564. However if the judgment was final and conviction was had under the *Roth-Memoirs* test, a reconsideration of the case, after *Miller*, would necessitate a conviction under the broader definition of obscenity set forth in *Miller*. *See* United States v. Miller, 505 F.2d 1247 (9th Cir. Nov., 1974) (per curiam), *cert. denied*, 422 U.S. 1024 (1975). *See also* Miller v. United States, 507 F.2d 1100 (9th Cir. Nov., 1974) (per curiam), *cert. denied*, 422 U.S. 1025 (1975); United States v. Harding, 491 F.2d 697 (10th Cir. 1974). For a further discussion of this issue see Richards, *Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 71 (1974).

139. A Sixth Circuit court believed that *Miller* merely clarified the meaning of 18 U.S.C. section 1461, and that claims of a lack of fair notice regarding what is illegal under the statute must fail. United States v. Marks, 520 F.2d 913, 921-22 (6th Cir. 1975).

140. Both the D.C. Circuit and Fifth Circuit are in agreement with *Jacobs*. *See* United States v. Sherpix, 512 F.2d 1361 (D.C. Cir. 1975); United States v. Wasserman, 504 F.2d 1014 (5th Cir. 1974).

141. 513 F.2d 156 (9th Cir. March, 1975) (per Ely, J.).

142. 518 F.2d 20 (9th Cir. Jan., 1975) (per Wallace, J.), *cert. denied*, 421 U.S. 954 (1975). Justices Brennan, Stewart and Marshall dissented. Justice Douglas did not participate.

143. United States v. Henson, 513 F.2d 156, 157-58 (9th Cir. March, 1975); United States v. Dachsteiner, 518 F.2d 20, 22 (9th Cir. Jan., 1975). In *Henson*, the court held that this would constitute reversible error where there was testimony that the "national standard" would tolerate less sexual candor than the attitudes prevailing in the community. 513 F.2d at 157-58. However, at least three justices of the Supreme Court believe that a national standard should be applied to violations of a federal obscenity sta-

tional standard. He vacated the judgment against the defendant, and ordered a retrial that would apply only the benefits of *Miller*. In *Henson*, the government convinced the jury that the population of the country as a whole is less permissive than the population of California, thereby enhancing the effect of the erroneous instruction to apply a national standard. A similar erroneous instruction did not precipitate a reversal in *Dachsteiner*. The *Dachsteiner* court did not believe that evidence of a national standard materially affected the jury's deliberations. The court also held that the jurors, in their consideration of which community standard to apply, should not be limited to the particular city where the alleged obscene expression occurred.[144] Rather, the court felt the jury could consider the standard of the area from which the jury panel was obtained.

The community standard applied in *Dachsteiner* vividly illustrates two criticisms of *Miller*.[145] First, the area from which the jurors are selected may be different from the area in which the alleged obscene material is displayed, thus possibly denying some people access to material which is deemed acceptable in their community. Second, different local standards give federal prosecutors an opportunity to shop for an advantageous forum, thereby producing a chilling effect on the exercise of first amendment rights.

Evidence of pandering, relevant to an obscenity case only when that case is a close one,[146] was also considered in *Dachsteiner*, even though the case does not appear at all close. The "close case" requirement was not discussed by the *Dachsteiner* court, even though the evidence was found relevant. The prejudice to the defendant by the introduction of the pandering evi-

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tute. *See* United States v. Orito, 338 F. Supp. 308 (E.D. Wis. 1971), *rev'd*, 413 U.S. 139, 147 (1973) (Brennan, J., dissenting). This seemed to be the Supreme Court's belief before *Miller*. *See* Jacobellis v. Ohio, 378 U.S. 184 (1964).

144. 518 F.2d at 22. Justice Brennan, in his dissent to the denial of certiorari, felt it did "not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards." 421 U.S. at 955.

145. *See, e.g., Comments, Community Standards and the Regulation of Obscenity*, 24 DE PAUL L. REV. 185, 190 (1974).

146. *See* Ginzburg v. United States, 383 U.S. 463 (1966). *See also* Hamling v. United States, 418 U.S. 49, 82 (1973) (Brennan, J., dissenting); United States v. Young, 465 F.2d 1096 (9th Cir. 1972) (if not a close case then merely cumulative, so no effect on decision); United States v. 35 MM Motion Picture Film, 432 F.2d 705, 714 (2d Cir. 1970); United States v. Pinkus, 333 F. Supp. 928 (C.D. Cal. 1971); Fahringer & Brown II, *supra* note 128, at 788; *Scienter* Note, *supra* note 128, at 1324.

dence was probably non-existent when one considers the trial court's finding that the appellant was guilty of the sixteen other counts on which he was tried. However, even if the court's admission of pandering evidence was not prejudicial, *Dachsteiner* illustrates a misuse of a rule that is already widely criticized.[147]

B. Freedom of the Press

In *Branzburg v. Hayes*,[148] the Supreme Court held that newspersons have an obligation, similar to that of members of the public, to appear before a grand jury and answer questions about: (1) the identity of their news sources; or (2) information which they have received in confidence.[149] Recognizing a significant governmental interest in grand jury proceedings involving criminal prosecutions, *Branzburg* ruled that newspersons are not entitled to special access to information which is not made available to the public. However, the Supreme Court recognized that a grand jury investigation must be held in good faith; the Court does not sanction "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources . . . ."[150] Some courts have limited *Branzburg* to its facts,[151] while other courts have not hesitated to

147. *See, e.g.*, Fahringer & Brown I, *supra* note 128, at 734.

148. 408 U.S. 665 (1972).

149. *Id.* at 685. For a discussion of a newsperson's privilege and cases dealing with that issue see Annot., 7 A.L.R.3d 591 (1966).

150. 408 U.S. at 707-08. This view has been accepted by the Department of Justice with respect to its policy regarding the issuance of subpoenas to the news media. *See* 28 C.F.R. § 50.10 (1974), which provides at subsection (e):

> (e) In requesting the Attorney General's authorization for a subpoena, the following principles will apply:
> (1) There should be reasonable ground . . . that a crime has occurred.
> (2) There should be reasonable ground to believe that the information sought is essential to a successful investigation . . . . The subpoena should not be used to obtain peripheral, nonessential or speculative information.
> (3) The government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources.
> . . .
> (5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.

151. *See, e.g.*, Baker v. F.F. Inv., 470 F.2d 778 (2d Cir. 1972) (to criminal cases); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973) and State v. St. Peter, 315 A.2d 254 (Vt. 1974) (no alternatives exist to obtain information); *In re* Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973) (instances in which statutes exist); Bursey v. U.S., 466 F.2d 1059 (9th Cir. 1972) (government established legitimate and compel-

expand the decision to deal with analogous situations.[152]

The Ninth Circuit, in *Farr v. Pitchess*,[153] had occasion to examine a contempt order against a reporter who had refused to identify those attorneys who had given him information in violation of a gag order. Farr, a reporter for the *Los Angeles Herald Examiner*, published prejudicial evidence not admitted into a murder trial. Subsequent to the trial and the termination of his employment as a reporter, Farr was ordered to disclose the identify of the attorneys who had violated the gag order; this Farr refused to do, and his contempt citation and incarceration followed. After balancing the state trial court's interest in enforcing its rules and orders and the defendant's interests in having a fair trial against any first amendment protection Farr may have, the *Farr* court upheld the contempt order of the California trial court.[154]

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ling reasons for disclosure); United States v. Dionisio, 410 U.S. 1 (1973), Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), and Beverley v. United States, 468 F.2d 732 (5th Cir. 1972) (grand jury). For a general critique of *Branzburg* see Cades, *The Power of the Courts to . Protect Journalists Confidential Sources of Information: An Examination of Proposed Shield Legislation*, 11 HAWAII B.J. 35 (1974); Goodale, *Branzburg and the Protection of Reporter's Sources*, 29 U. MIAMI L. REV. 456 (1975); Murasky, *The Journalists Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829 (1974); Comment, *Newsman's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy*, 49 TUL. L. REV. 417 (1975) [hereinafter cited as *Newsman's Privilege*]; Note, *Newsman-Source Privilege: A Foundation in Policy For Recognition at Common Law*, 26 U. FLA. L. REV. 453 (1973) [hereinafter cited as *Newsman* Note]; 9 U. RICHMOND L. REV. 171 (1974).

152. *See* Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974) (civil cases); Smilow v. United States, 465 F.2d 802 (2d Cir. 1972) (persons other than reporters); United States v. Liddy, 354 F. Supp. 208 (D.D.C. 1972) (all judicial proceedings).

153. 522 F.2d 464 (9th Cir. Aug., 1975) (per McNichols, D.J.), *petition for cert. filed*, 44 U.S.L.W. 3162 (U.S. Sept. 22, 1975) (No. 444). The questions presented upon application for certiorari are:

> 1) Did order adjudging defendant in contempt violate first amendment?
> 2) Did retroactive application of state court's holding, that California immunity statute was unconstitutional, violate defendant's rights to due process and to be free from ex post facto law?
> 3) Was defendant denied hearing before impartial court, as demanded by fourteenth amendment's due process clause?

44 U.S.L.W. 3282 (U.S. Nov. 11, 1975).

154. 522 F.2d at 468. The court held that "under the facts . . . the paramount interest to be protected was that of the power of the court to enforce its duty and obligation relative to the guarantee of due process to the defendants . . . ." *Id.* at 469. In *Farr* the newsman was between jobs when called before the grand jury. A California appellate court held that the California Newsman Privilege Statute did not protect him since he was not a newsman when called before the grand jury; this would be true even though Farr *was* a newsman when he received the information. Farr v. Superior Court, 22 Cal. App. 3d 60, 69, 99 Cal. Rptr. 342, 347, *cert. denied*, 409 U.S. 1011 (1972). The California

The court relied on *Branzburg* and *Sheppard v. Maxwell*[155] in reaching its decision. It read the *Branzburg* holding as being sufficiently broad to reach civil as well as criminal proceedings. Furthermore, the court reasoned that since a trial court has authority, under *Sheppard*, to keep trials free from prejudicial publicity, the *Sheppard* Court impliedly authorized trial courts to discipline those who receive information from someone who is violating a gag order barring release of such information. Following this reasoning, the *Farr* court concluded that the trial court could validly compel Farr to disclose his sources. It should be noted that both of the preceding assumptions conflict with the opinion Justice Douglas wrote, in his capacity as the Circuit Justice for the Ninth Circuit,[156] before releasing Farr while his appeal was pending. Justice Douglas believed *Branzburg* should not be applied to *Farr*, which was a civil proceeding. The Justice also pointed out that, since the jury was sequestered during the trial, there was no possibility of prejudicial effect as occurred in *Sheppard*.[157] However, Justice Douglas' position appears to deprive trial courts of the means to enforce their orders—here a gag order—when the violator's identity is not known to the court.[158]

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court of appeal also held that the application of the statute in *Farr*'s fact situation would result in an unconstitutional interference by the legislative branch with the power of the court to control its own proceedings and officers. *Id.* at 69, 99 Cal. Rptr. at 348. For the California privilege statute see CAL. EVID. CODE § 1070 (West Supp. 1975), which in part provides:

> (a) A . . . reporter, or other person connected with or employed upon a newspaper, . . . cannot be adjudged in contempt by a judicial . . . body . . . for refusing to disclose . . . the source of any information procured while so connected or employed for publication in a newspaper . . . .

For further discussions of this case see *In re* Farr, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974); Murasky, *supra* note 151, at 897-99; *Newsman's Privilege supra* note 151, at 433; *Newsman* Note, *supra* note 151, at 454 n.17.

155. 384 U.S. 333 (1966). *Sheppard* involved the prejudicial effect of news-reporting during the celebrated and controversial Sam Sheppard murder case of the late 1950s. For the effect of *Sheppard* on the issuance of gag orders see Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975); Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); *Judicial Control of Pretrial and Trial Publicity: A Reexamination of the Applicable Constitutional Standards*, 6 GOLDEN GATE U.L. REV. 101 (1976).

156. Farr v. Pitchess, 409 U.S. 1243 (1973) (per Douglas, J., as Circuit Justice).

157. *Id.* at 1246. On gag orders issued against the press see Nebraska Press Ass'n v. Stuart, 46 L. Ed. 199, 203 (1975) (the gag order was dismissed after the jury was sequestered); Comment, *Gagging the Press in Criminal Trials*, 10 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 608, 649 n.197 (1975). *Nebraska Press Ass'n* was granted certiorari at 44 U.S.L.W. 3354 (U.S. Dec. 12, 1975) (No. 817).

158. "[T]he [trial] court had exhausted reasonable alternative methods of discovering who had violated the order by examining under oath the six persons Farr had named, ..." Murasky, *supra* note 151, at 898. Murasky feels that Farr should not be pro-

The Ninth Circuit also had occasion to discuss *Branzburg* in *Lewis v. United States*,[159] a case which involved a reporter's acquisition of tapes concerning the Patricia Hearst kidnapping. Appellant's action for relief from a contempt order requiring him to disclose the identity of the source of the tapes was denied. Following the approach of Justice Powell's concurring opinion in *Branzburg*,[160] the court balanced the importance of the newsperson's sources and the freedom of the press against the need for the newsperson's testimony. The court concluded that the testimony sought would be relevant and material to the investigation of the Hearst kidnapping, that it could not be obtained from other sources, and that a compelling national interest—identifying the kidnappers—was present. These facts indicated that disclosure of the tapes' source could be compelled. The *Lewis* court stressed, however, that relief from the contempt order would nonetheless be appropriate if the investigation was not in good faith.[161] The investigation in *Lewis* was found to be in good faith, and the citation order was thus upheld.

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tected from a demand that he reveal his source since he not only clouded the reputations of at least three innocent persons, but he deliberately disregarded a legitimate gag order which was instituted to preserve a criminal defendant's right to a fair trial. *Id.* In fact, Farr was sued in 1973 by two of the suspected attorneys because of injury to their professional reputations. *See Newsman* Note, *supra* note 151, at 454 n.17. It should be noted that the prosecutor at the murder trial felt Farr was correct in refusing to reveal his sources. *See* V. BUGLIOSI, HELTER SKELTER 659 (1975).

159. 517 F.2d 236 (9th Cir. May, 1975) (per curiam).

160. 408 U.S. at 709-10. Justice Powell's opinion has been followed by other courts. *See, e.g.*, United States v. Liddy, 478 F.2d 586 (D.C. Cir. 1972); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (1974); State v. St. Peter, 315 A.2d 254 (Vt. 1974). In *Lewis* this was the second time petitioner received the information and the second time he was subpoenaed.

161. 517 F.2d at 238, *citing* Branzburg v. Hayes, 408 U.S. 665, 707-08 (1972). The issuance of the subpoena had to have been in conformance with 28 C.F.R. § 50.10 (1975). For a partial text of the regulation see note 150 *supra*.

CONSTITUTIONAL LAW: PART TWO

INTRODUCTION

In recent years, there has been an explosive expansion in the application of the due process standard. The Supreme Court has carried the hearing requirement from one new area of governmental action to another.[1] This past term a number of cases which have been appealed to the Ninth Circuit concern due process questions. Two issues are typically raised in due process adjudication. First, is there a governmentally inflicted deprivation which intrudes on a liberty or property interest of the individual?[2] Second, if there is a deprivation of the type that triggers the litigant's entitlement to due process, what specific procedures are required?[3]

In considering the first issue, a court must decide if there has been state action. The Ninth Circuit has narrowly construed what will be considered state action, as three factually dissimilar cases in which the issue arose illustrate. In one case,[4] bondspersons seized the plaintiff in one state and illegally removed him to

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1. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of probation); Perry v. Sindermann, 408 U.S. 593 (1972) (dismissal of teacher with de facto tenure at public institution); Board of Regents v. Roth, 408 U.S. 564 (1972) (dismissal of untenured teacher at public institution); Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole); Fuentes v. Shevin, 407 U.S. 67 (1972) (repossession of chattels by conditional seller). A comprehensive discussion of the Court's approach to the "fair hearing" as mandated by the requirements of procedural due process in various aspects of governmental decision-making can be found in Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975), and McCormack, *The Purpose of Due Process: Fair Hearing or Vehicle for Judicial Review?*, 52 TEXAS L. REV. 1257 (1974).

2. For discussions of the state action problem see Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974); Note, *State Action: Judicial Perpetuation of the State Private Distinction*, 2 OHIO N.U.L. REV. 722 (1975); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

3. *See* Note, *Specifying the Procedures Required by Due Process: Toward Limits On the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975). The form of due process depends upon a balancing of the conflicting interests of the individual's need for procedural safeguards against the governmental interest in summary action. *See, e.g., id.* at 1510; Goldberg v. Kelly, 397 U.S. 254 (1970).

4. *See* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. Oct., 1974) (per Trask, J.) *cert. denied*, 421 U.S. 949 (1975).

another one. In a second fact situation, the plaintiff sought to show state action in the refusal to provide funeral services by a mortuary which contracted with a county to provide morgue services and facilities.[5] In yet a third situation, several section 1983 actions alleged state action by hospitals that refused to allow abortions and certain sterilizations[6] or refused to renew the staff privileges of doctors.[7] At issue was whether a combination of factors, such as receipt of Hill-Burton funds, tax-exempt status, or state regulation, would be sufficient for a finding of state action.

Once a court has found state action, it must then determine if property or liberty is at stake. Procedural due process places constraints on decision-making processes that deprive individuals of governmental benefits in which the individual has a constitutionally protected interest, *i.e.*, an "entitlement."[8]

The court heard several cases this term on this issue. Plaintiffs alleged entitlement to due process safeguards against the discontinuation of federal crop insurance,[9] the removal from nontenured teaching positions,[10] and the administrative decision of a government official recommending institution of litigation.[11]

Only two cases dealt with the type of procedure required by due process. In the first, tenants of federally financed housing projects faced with rent increases sought notice and a hearing prior to the increases;[12] in the second, a tenured professor who had been suspended as the head of a department sought reinstatement and a pre-suspension hearing.[13]

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5. *See* Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. July, 1975) (per Wallace, J.).

6. *See* Taylor v. St. Vincent's Hosp., 523 F.2d 75 (9th Cir. Aug., 1975) (per Carter, J.); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. Nov., 1974) (per Wright, J).

7. *See* Watkins v. Mercy Medical Center, 520 F.2d 894 (9th Cir. Aug., 1975) (per Wright, J.); Ascherman v. Presbyterian Hosp. of Pac. Medical Center, Inc. 507 F.2d 1103 (9th Cir. Dec., 1974) (per Ingraham, J.).

8. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). In *Roth* the Court held that an untenured teacher had no entitlement to a renewal of his contract.

9. *See* Rainbow Valley Citrus Corp. v. Federal Crop Ins. Corp., 506 F.2d 467 (9th Cir. Nov., 1974) (per Hufstedler, J.).

10. *See* Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. July, 1975) (per Murray, D. J.); Burdeau v. Trustees of Cal. State Colleges, 507 F.2d 770 (9th Cir. Nov., 1974) (per Trask, J.).

11. *See* Paskaly v. Seale, 506 F.2d 1209 (9th Cir. Nov., 1974) (per Hamley, J.).

12. *See* Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. Oct., 1974) (per Choy, J.).

13. *See* Peacock v. Board of Regents, 510 F.2d 1324 (9th Cir. Feb., 1975) (per Koelsch, J.), *cert. denied*, 422 U.S. 1049 (1975).

Only three cases in the area of equal protection came before the Ninth Circuit this term. Each was resolved on the basis of cases with similar fact situations which had previously been heard by the Ninth Circuit or the Supreme Court. Plaintiffs attacked the divorce residency requirement of one year for the state of Hawaii,[14] haircut regulations and the prohibition against wearing wigs applicable to United States Marine Corps reservists[15] and a section of the Government Code of Guam concerning the nominating petitions of independent candidates.[16]

The majority of employment discrimination cases coming before the Ninth Circuit for review arose under Title VII of the Civil Rights Act of 1964.[17] Four cases dealt with the applicable time limits for filing a Title VII action.[18] Two raised procedural problems which only arise in Title VII suits.[19] In two other cases the issue was whether a statutory remedy was available following the exhaustion of administrative remedies in suits brought by federal employees.[20] The court in three cases resolved issues unique to sex discrimination: extension of protective laws,[21] pregnancy as a temporary disability,[22] and grooming codes.[23] Finally, two cases were concerned with the award of attorneys' fees to prevailing parties under Title VII.[24]

14. *See* Mon Chi Heung Au v. T.F. Lum, 512 F.2d 430 (9th Cir. Feb., 1975) (per curiam).

15. *See* Campbell v. Beaughler, 519 F.2d 1307 (9th Cir. June, 1975) (per Wright, J.), *petition for cert. filed*, 44 U.S.L.W. 3306 (U.S. Nov. 7, 1975) (No. 680).

16. *See* Webster v. Mesa, 521 F.2d 442 (9th Cir. Aug., 1975) (per Goodwin, J.).

17. The Civil Rights Act of 1964 is codified, as amended, at 42 U.S.C. §§ 2000 *et. seq.* (Supp. II 1972).

18. *See* Davis v. Valley Distrib. Co., 522 F.2d 827 (9th Cir. July, 1975) (per Browning, J.); Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. Apr., 1975) (per Koelsch, J.); Cleveland v. Douglas Aircraft Co., 509 F.2d 1027 (9th Cir. Jan., 1975) (per curiam); Wong v. Bon Marche, 508 F.2d 1249 (9th Cir. Jan., 1975) (per curiam).

19. *See* Slack v. Havens, 522 F.2d 1091 (9th Cir. July, 1975) (per Hufstedler, J.); Western Addition Community Organization v. Alioto, 514 F.2d 542 (9th Cir. Mar., 1975) (per curiam), *cert. denied*, 44 U.S.L.W. 3344 (U.S. Dec. 8, 1975) (No. 309).

20. *See* Chandler v. Johnson, 515 F.2d 251 (9th Cir. Apr., 1975) (per Goodwin, J.), *cert. granted sub nom.* Chandler v. Roudebush, 44 U.S.L.W. 3200 (U.S. Oct. 6, 1975) (No. 1599); Bowers v. Campbell, 505 F.2d 1155 (9th Cir. Oct., 1974) (per Hufstedler, J.).

21. *See* Homemakers, Inc. v. Division of Indus. Welfare, 509 F.2d 20 (9th Cir. Dec., 1974) (per Wright, J.), *cert. denied*, 44 U.S.L.W. 3396 (U.S. Jan. 12, 1976) (No. 1213).

22. *See* Hutchinson v. Lake Oswego School Dist. No. 7, 519 F.2d 961 (9th Cir. July, 1975) (per Carter, J.), *petition for cert. filed*, 44 U.S.L.W. 3239 (U.S. Oct. 10, 1975) (No. 568).

23. *See* Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. Dec., 1974) (per Trask, J.), *cert. denied*, 422 U.S . 1046 (1975).

24. *See* Rosenfeld v. Southern Pac. Co., 519 F.2d 527 (9th Cir. June, 1975) (per curiam); Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. Sept., 1974) (per Wright, J.).

I. DUE PROCESS

A. State Action

Both section one of the fourteenth amendment and section one of the Civil Rights Act of 1871 (42 U.S.C. section 1983)[25] expressly proscribe only *governmental* activities which deprive persons of constitutional rights. The requirement of state action under the fourteenth amendment is equivalent to the requirement of action under color of state law in section 1983.[26] In *Shelley v. Kraemer*,[27] the Supreme Court found that voluntary adherence to racially restrictive covenants was private action, but that judicial enforcement of such covenants involved state action. The Court suggested that state involvement of almost any type would justify a finding of state action. The Court has not explicitly adopted this expansive reading of *Shelley*, but instead has engaged in a case-by-case analysis of the state action issue. *Burton v. Wilmington Parking Authority*[28] exemplifies this "sifting facts and weighing circumstances" technique. The *Burton* court found that the state was a joint participant in racial discrimination by a coffee shop. The restaurant was physically and financially an integral part of a public building, built and maintained with public funds, and received increased patronage due to its advantageous location.

Against the background of the *Burton* decision, the Burger Court approached the state action problem in 1970 and, for the first time since 1935, failed to find constitutional restrictions applicable.[29] In *Moose Lodge No. 107 v. Irvis*,[30] the Burger Court

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25. Civil Rights Act of 1871 § 1, 42 U.S.C. § 1983 (1970), provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

26. *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966).

27. 334 U.S. 1 (1948).

28. 365 U.S. 715 (1961).

29. *See* Evans v. Abney, 396 U.S. 435 (1970). Land was left in trust to the City of Macon, Georgia, for use as a park for whites only. In *Evans*, the Court found no state action in the Georgia Supreme Court's termination of the trust and transfer of the land to the heirs because the donor's intention had failed. Grovey v. Townsend, 295 U.S. 45 (1935), had been the last case where the Court failed to find state action. *Grovey*, which concerned primary elections, was overruled by Smith v. Allwright, 321 U.S. 649 (1944).

30. 407 U.S. 163 (1972).

narrowed the standards for a finding of state action to a significant involvement approaching a symbiotic relationship.[31] In *Moose Lodge*, the defendant refused service to the plaintiff, a lodge member's guest, at the lodge's dining room and bar solely because of his race. The Court found that regulation by the Pennsylvania state liquor board was insufficient involvement to constitute state action; it did not create the symbiotic relationship present in *Burton*.

Private Contracts

In *Ouzts v. Maryland National Insurance Co.*,[32] plaintiff entered into a bonding agreement in Nevada in connection with charges against him there and subsequently went to California in violation of the bonding agreement. The defendant bondsperson and his agents illegally removed the plaintiff from California; Ouzts sued under section 1983. The district court dismissed the action after finding no federal cause of action was established, and the Ninth Circuit affirmed.[33] On rehearing en banc during the survey term, the court again affirmed, holding that the requisite state action was not shown even accepting as true plaintiff's contention that the bondspersons represented themselves as Los Angeles County officers.[34] The court reasoned that *Ouzts* involved private conduct attempting the enforcement of a private contract in total defiance of state law, which requires a series of court proceedings by foreign bondspersons before removal of a fugitive is permitted.[35]

31. *Id.* at 173.

32. 505 F.2d 547 (9th Cir. Oct., 1974) (per Trask, J.).

33. Ouzts v. Maryland Nat'l Ins. Co., 470 F.2d 790 (9th Cir. 1972).

34. 505 F.2d at 554. The court found support for this conclusion in Warren v. Cummings, 303 F. Supp. 803, 804 (D. Colo. 1969). In *Warren*, the district court rejected a section 1983 claim against a shopowner and against his agent who had represented himself as a detective or probation officer, both of whom then detained the plaintiff until he was taken into custody by the Denver police. The court found that the Colorado statute permitting a shopowner to detain and question a suspected shoplifter merely licensed self-help protection of the shopowner's property and did not vest him or her with state authority. This distinction seems tenuous at best; the state has extended authority to private individuals to take certain actions typically undertaken by the state and beyond those allowed by common law. Even accepting *Warren*'s rationale, the kidnapping of a person, such as occurred in *Ouzts*, cannot and should not be analogized to the self-help protection of commercial property.

35. The statute involved in *Ouzts* is codified at CAL. PENAL CODE § 847.5 (West 1970). An interesting analysis of *Ouzts* in light of the leading Ninth Circuit case on state action, Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973), can be found in Culbertson v. Leland, 528 F.2d 426, 429 (9th Cir. 1975). In *Culbertson*, the defendant hotel manager seized the belongings of the plaintiffs, who had been tenants, following their eviction for nonpayment of rent. The defendant's action was taken

The court distinguished cases where the action was taken by state officials or private bondspersons in concert with state officials.[36]

Even though the majority opinion distinguished *Screws v. United States*[37] and *United States v. Classic*[38] as involving actual state officials, both cases support a broader interpretation of what constitutes state action. *Screws* refers to acting under color of state law as equivalent to acting under the pretense of law. *Classic* goes even further. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under the color of' state law."[39]

Judge Hufstedler, in a strongly worded dissent which was joined by three other judges, discussed factors which militate against the *Ouzts* majority's conclusion that the defendants were not acting under color of state law. These factors were the governmental nature of the bail system in general, and California's and Nevada's comprehensive statutory scheme for licensing and regulating bail bondspersons. Judge Hufstedler believed that, if these factors had been considered together with the fact that California grants to bail bondspersons police powers not enjoyed by private citizens generally—powers invoked by both defendants

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pursuant to an Arizona statute which authorized the keeper of a hotel or lodging house to seize, without notice or a hearing, the personal property of a lodger who fails to pay rent. The defendants in *Adams* repossessed the plaintiffs' motor vehicles without notice or a hearing under the authority of California Commercial Code sections 9503 and 9504. These sections provide that a secured party may repossess collateral by self-help upon default.

The *Culbertson* court noted that *Ouzts* and *Adams*, both written by Judge Trask, follow the same approach of focusing on common law antecedents and private contractual rights. There was a finding of a state action in *Culbertson*, although neither the *Ouzts* nor the *Adams* court made such a finding. *Adams* and *Ouzts* are distinguished in *Culbertson* on the basis that the rights the defendants exercised had existed at common law, that the rights were provided for in private contractual agreements, and that the property had a direct relation to the debt. Although these factors are important, others are necessary to a fair determination of the state action issue. The historical origin of rights has limited significance when present day practice is such that the state normally is the sole entity endowed such rights, unless it expressly delegates them. Also, in considering the relation of the subject matter of the contract to the debt, the subject matter itself bears close examination.

36. Griffin v. Maryland, 378 U.S. 130 (1964); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

37. 325 U.S. 91 (1945). *Screws* involved a sheriff who used excessive force while arresting a black person.

38. 313 U.S. 299 (1941). The defendants in *Classic*, who were Commissioners of Election, committed acts of voter fraud which the court held to be under color of state law.

39. *Id.* at 326.

when they forcibly removed the plaintiff to Nevada—a finding of state action would have resulted from an application of the *Classic* rationale. Other circuits have not yet considered the precise issue of state action within the context of action taken by bail bondspersons.[40]

In *Scott v. Eversole Mortuary*,[41] the plaintiffs sued a private mortuary in Mendocino County for its alleged refusal to provide funeral services to persons of Native American descent. They sued on the basis of section 1981 (discrimination in making contracts),[42] section 1982 (discrimination in selling personal property),[43] section 1983 (deprivation of civil rights under color of state law),[44] and intentional infliction of emotional distress. The district court dismissed all claims without leave to amend, finding that the federal claims did not allege action under color of state law, and apparently concluding that jurisdiction should not be maintained independently over the state law claim. The Ninth Circuit reversed dismissal of the 1981 and 1982 claims and the pendent

40. Although some district courts have dealt with the issue of whether seizures by bondspersons without process are state action, the exact issue has not arisen in the federal appellate courts previously. In opinions briefly considering this issue, the courts in Easley v. Blossom, 394 F. Supp. 343 (S.D. Fla. 1975), Curtis v. Peerless Ins. Co., 299 F. Supp. 429 (D. Minn. 1969), and Thomas v. Miller, 282 F. Supp. 571 (E.D. Tenn. 1968), found no state action. However, the court in United States v. Trunko, 189 F. Supp. 559 (E.D. Ark. 1960), did find state action. Although the defendant there was technically a state official, this did not seem to be the crucial factor. The defendant was a "special deputy sheriff" who received no official compensation and for whose actions the official sheriff had no responsibility under state law. The court found state action because the defendant had a badge, was armed and purported to be a state officer executing a warrant, rather than because the officer had any state authority. In fact, he had no such authority. No meaningful distinction can be drawn between the facts in *Trunko* and those in *Ouzts*. For a general discussion of the bail bond system and its abuse see Note, *Bailbondsmen and the Fugitive Accused–The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964).

41. 522 F.2d 1110 (9th Cir. July, 1975) (per Wallace, J.).

42. 42 U.S.C. § 1981 (1970) provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

43. *Id.* § 1982 provides as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

44. *Id.* § 1983. For the text of statute see note 25 *supra*.

state claim, and affirmed the dismissal of the 1983 claim.[45]

The section 1982 dismissal was reversed on the ground that the Supreme Court has construed section 1982 to prohibit both public and private discrimination in the sale of property.[46] The *Scott* court also reversed the dismissal of the 1981 action, relying on *Johnson v. Railway Express Agency, Inc.*[47] In *Johnson*, the Supreme Court did not specifically hold section 1981 applicable to all contracts, but in dictum it joined the courts of appeals in finding section 1981 applicable to private discrimination in employment contracts based on race.[48]

The dismissal of the section 1983 claim was affirmed, however, since this section only prohibits deprivation of a person's civil rights by a state or by an individual acting under color of state law. The plaintiffs in *Scott* contended that state action was present due to a contract between the defendant and California's Mendocino County for morgue services and facilities. The court rejected this contention because the failure to provide funeral services occurred after the completion of the morgue services for which the county had contracted.

The plaintiffs next argued that state regulation of mortuaries rendered the defendant's activity state action.[49] The court rejected this claim on the ground that nondiscriminatory state regulation, even in combination with an economic benefit from a restricted state franchise, is insufficient for a finding of state action.[50]

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45. 522 F.2d at 1112.

46. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Plaintiff sued under section 1982, alleging that the defendant refused to sell a home to the plaintiff because he was black. The Court held that section 1982 applies to all racial discrimination in the sale or rental of property. *Id.* at 413.

47. 421 U.S. 454 (1975). The Court held that the filing of an employment discrimination charge with the Equal Employment Opportunity Commission does not toll the statute of limitations for a section 1981 action.

48. *Id.* at 459-60.

49. In California there is extensive state regulation of mortuaries. *See* CAL. BUS. & PROF. CODE §§ 7600-742 (West 1975); CAL. HEALTH & SAFETY CODE §§ 7100-17 (West 1970); 16 CAL. ADMIN. CODE §§ 1200-74 (1975).

50. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). *Jackson* involved a defendant who had terminated plaintiff's utilities for nonpayment and who did not give prior notice of the action. The Court held that there was no state action even though the company was heavily regulated by the state, was functionally a monopoly, and served an essential public service. *Moose Lodge* involved a private club which had refused to serve black persons. The club had a state liquor license and was subject to resultant regulation, but the Court held that there was insufficient state involvement to find state action.

Hospitals

Several cases before the Ninth Circuit were concerned with whether the state action requirement could be satisfied by a combination of factors, such as the receipt of Hill-Burton funds,[51] tax-exempt status, or state regulation. The Ninth Circuit's restrictive stand on what constitutes state action is particularly evident in these cases. The court has not found state action with any combination of these factors, and seems unlikely to do so without explicit guidance from the Supreme Court.

Chrisman v. Sisters of St. Joseph of Peace[52] and *Taylor v. St. Vincent's Hospital*[53] were both section 1983 actions against the defendant hospitals for their refusal to sterilize the plaintiffs. In both cases the district court dismissed for lack of jurisdiction, and the Ninth Circuit panels affirmed. Plaintiffs claimed that state action was present on the basis of each hospital's tax-exempt status, the regulation by the state, the public function served by hospitals in general, and each hospital's receipt of Hill-Burton funds. The last factor, receipt of Hill-Burton funds, however, was seriously limited in 1973 by congressional passage of the Church Amendment,[54] which prohibits courts from using the receipt of Hill-Burton funds as the basis for compelling denominational hospitals to perform abortions or sterilizations.

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51. Hill-Burton funds are intended to provide adequate hospital services for all members of our society. *See* Comment, *Provision of Free Medical Services by Hill-Burton Hospitals*, 8 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 351 (1973). The funds are made available by The Hospital Survey & Construction Act, *codified as amended at* 42 U.S.C. §§ 291-96 (1970).

52. 506 F.2d 308 (9th Cir. Nov., 1974) (per Wright, J.).

53. 523 F.2d 75 (9th Cir. Aug., 1975) (per Carter, J.). In *Taylor*, the district court initially issued an injunction to restrain the hospital from interfering with the plaintiff's right to have a tubal ligation. However, once the Church Amendment was enacted, thus prohibiting courts from using the receipt of Hill-Burton funds as a basis for compelling denominational hospitals to perform abortions or sterilizations, the district court dissolved the injunction and denied all relief. Despite the fact that plaintiff had already received the tubal ligation, the case was not held to be moot since the section 1983 action was brought as a class action. *Accord*, Sosna v. Iowa, 419 U.S. 393 (1975).

54. 42 U.S.C. § 300a-7(a) (Supp. III, 1973) provides as follows:

> The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Service and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require—
>
> . . . .
>
> (2) such entity to—

The plaintiffs in *Chrisman* attacked the Church Amendment as a violation of the establishment clause and as an impermissible legislative limitation on judicial power. The court rejected both arguments. It found that the Church Amendment sought to preserve governmental neutrality in the face of religious differences rather than affirmatively prefer one religion over another.[55] Also, the court observed that Congress has the power to modify the jurisdiction of inferior courts,[56] and this view has been consistently upheld by the Supreme Court.[57] The involvement of the state through the remaining factors did not rise to the level of significance required for a section 1983 action.[58]

The court noted that the only difference between *Chrisman* and *Taylor* was that in *Taylor* the defendant hospital was the only hospital in the city which had a maternity department where the named plaintiff could receive a tubal ligation at the time of her cesarean delivery. The court held that difference to be irrelevant. Monopoly status of an entity alone, or in combination with state regulation and the essential nature of the public service provided, is not enough to establish state action for purposes of a section 1983 action.[59]

In two cases decided this past term, *Ascherman v. Presbyterian*

> (A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions
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> . . . .

55. 506 F.2d at 311. The *Chrisman* court analogized this case to Sherbert v. Verner, 374 U.S. 398 (1963), in which the Supreme Court invalidated the requirement that one be willing to work on Saturdays in order to receive unemployment benefits, finding that this deprived observant Seventh Day Adventists of their civil rights. However, the Church Amendment does not remove an obstruction of one religious group's civil rights. Rather, by promulgating this section, Congress had affirmatively discriminated against those whose religious, ethical or moral beliefs made elective abortions or sterilization the "right" or proper action under some circumstances.

56. 506 F.2d at 311, *citing* Cary v. Curtis, 44 U.S. (3 How.) 236 (1845).

57. *See, e.g.*, Lauf v. E.G. Skinner & Co., 303 U.S. 323 (1938).

58. In this regard *Chrisman* and *Taylor* are analogous to Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), which are discussed at note 50 *supra*.

59. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The plaintiff in *Taylor* also raised a right to privacy claim. The court found that the plaintiff's right to privacy was outweighed by the need to protect the freedom of religion of denominational hospitals. 523 F.2d at 77, *citing* Doe v. Bolton, 410 U.S. 179, 197-98 (1973); Doe v. Bellin Memorial Hosp., 479 F.2d 756, 759-60 (7th Cir. 1973); Watkins v. Mercy Medical Center, 364 F. Supp. 799 (D. Idaho 1973); Allen v. Sisters of St. Joseph, 361 F. Supp. 1212 (N.D. Tex. 1973), *appeal dismissed*, 490 F.2d 81 (5th Cir. 1974).

Hospital of Pacific Medical Center, Inc.[60] and *Watkins v. Mercy Medical Center*,[61] the plaintiff doctors sued under section 1983, alleging that their staff privileges were arbitrarily terminated by private hospitals in violation of section 1983. *Ascherman* concerned a physician whose staff privileges were terminated for unstated reasons, whereas *Watkins* involved a physician whose staff privileges were terminated because he refused to abide by certain hospital rules restricting the availability of abortions and sterilizations. In both cases the district court dismissed for lack of jurisdiction after finding no state action, and the Ninth Circuit affirmed.[62] The *Ascherman* court held that receipt by a private hospital of Hill-Burton funds, even where coupled with state and federal tax exemptions, was not sufficient for finding state action.[63] On this basis the *Watkins* court had no difficulty in finding an absence of state action when the plaintiff asserted that the state activity consisted solely of the hospital's receipt of Hill-Burton funds. The *Watkins* court also re-affirmed the Ninth Circuit's earlier position that to confer jurisdiction under section 1983 (*i.e.*, to find state involvement with a private entity), the state involvement must be with the specific activity of which a party complains and that involvement must be significant.[64] In neither case did the court find that the state had any connection with the hospitals' refusal

60. 507 F.2d 1103 (9th Cir. Dec., 1974) (per Ingraham, D.J.).

61. 520 F.2d 894 (9th Cir. Aug., 1975) (per Wright, J.).

62. The plaintiff in *Ascherman* also claimed that his staff privileges were arbitrarily and capriciously terminated in violation of his right to due process under the fourteenth amendment. Since the requirement of state action under the fourteenth amendment is equivalent to that under section 1983, *see* authority cited at note 26 *supra*, the court was able to summarily reject the constitutional claim.

The claims raised in *Watkins* were somewhat more complicated. The facts revealed that the plaintiff was refused renewal or reappointment to the staff on the recommendation of the hospital's board of directors and some subordinate committees. In his complaint Watkins alleged exclusion from staff privileges because he had refused to abide by some of the by-laws prohibiting certain sterilizations and abortion procedures in hospital facilities. The district court found that it did not have jurisdiction to grant relief under section 1983 because the hospital's refusal to renew involved no significant state action. The lower court did find, however, that the hospital had violated 42 U.S.C. § 300a-7 (Supp. III, 1973) by removing the plaintiff from the staff because of his belief that sterilization and abortions should be performed. It thus ordered restoration of the doctor's staff privileges on the condition that he perform abortions or sterilizations consistent with the hospital's rules. Since the hospital did not cross-appeal from the restoration order, this issue was not before the Ninth Circuit panel.

63. 507 F.2d at 1105.

64. 520 F.2d at 896. This position is reflected in several decisions. *See, e.g.*, Ascherman v. Presbyterian Hosp. of Pac. Medical Center, Inc., 507 F.2d 1103 (9th Cir. Dec., 1974); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. Nov., 1974); Aasum v. Good Samaritan Hosp., 395 F. Supp. 363 (D. Ore. 1975).

to grant or renew the plaintiffs' staff privileges.

The result in *Ascherman* is interesting and enigmatic when considered in conjunction with the Ninth Circuit's decision in *Geneva Towers Tenants Organization v. Federated Mortgage Investments*,[65] which did find state action.[66] The Church Amendment[67] does not permit a court to find state action due to the receipt of Hill-Burton funds, and on that basis order denominational hospitals to perform sterilizations and abortions. Thus, receipt of Hill-Burton funds could not form a basis for finding state action in *Chrisman*, *Taylor* and *Watkins*. However, the Church Amendment was not applicable to *Ascherman* since neither abortion nor sterilization procedures were involved. Despite this fact, the panel did not find state action although the court in *Geneva Towers* described receipt of Hill-Burton funds as the type of state involvement which constitutes action under color of state law.[68]

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65. 504 F.2d 483 (9th Cir. Oct., 1974) (per Choy, J.).

66. The standards used to determine whether there was federal action subject to fifth amendment limitations are the same as those used to find state action for the purposes of the fourteenth amendment. *See* United States v. Davis, 482 F.2d 893, 897 n.3 (9th Cir. 1973).

67. 42 U.S.C. § 300a-7(a) (1970). For the text of the Church Amendment see note 54 *supra*.

68. State action in the context of hospitals receiving federal and/or state aid, tax-exempt status and extensive state regulation has been the subject of frequent litigation. Presently, the circuits are in conflict on the issue. Five circuits have found no state action based on such factors. *See* Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3328 (U.S. Dec. 1, 1975) (No. 432); Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973); Ward v. St. Anthony Hosp., 476 F.2d 671 (10th Cir. 1973); Stanturf v. Sipes, 335 F.2d 224 (8th Cir. 1964); Barrett v. United Hosp., 376 F. Supp. 791 (S.D.N.Y.), *aff'd*, 506 F.2d 1395 (2d Cir. 1974).

Two circuits have found state action. *See* Christhilf v. Annapolis Emergency Hosp. Ass'n, Inc., 496 F.2d 174 (4th Cir. 1974); Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963); Bricker v. Sceva Speare Memorial Hosp., 339 F. Supp. 234 (D.N.H.), *aff'd sub nom.* Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972).

The Sixth Circuit has found both state action and a lack of state action under similar circumstances. *Compare* Jackson v. Norton-Children's Hosp., Inc., 487 F.2d 502 (6th Cir. 1973), *cert. denied*, 416 U.S. 1000 (1974) (no state action) *with* O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140 (6th Cir. 1973) (state action) *and* Meredith v. Allen County War Memorial Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968) (state action). However, of all the above cases only two involved the refusal of hospitals to permit abortions or related medical procedures; in both cases no state action was found. Greco v. Orange Memorial Hosp. Corp., *supra* at 881; Doe v. Bellin Memorial Hosp., *supra* at 761; Justice White, in his dissent to the denial of certiorari to *Greco*, in which the Chief Justice joined, gave a comprehensive history of the litigation in this area and urged the Court to resolve the many conflicts. 96 S. Ct. 433, 435-36 (1975).

In *Geneva Towers*, the tenants in two housing projects financed under section 221(d)(3) of the National Housing Act[69] sought rescission of rent increases and injunctions compelling full and fair hearings prior to any rent increase. The court analogized the 221(d)(3) housing program to the Hill-Burton Construction program. In finding state action, the court characterized the defendant lessors as engaged in a joint enterprise with the federal government. Crucial factors were the elaborate and pervasive body of government regulations and the mutually beneficial situation for the defendants and the government.[70]

B. Liberty or Property

Historically there has been a distinction between rights and privileges.[71] Government benefits were considered privileges so that no one had a right—*i.e.*, no constitutionally protected interest—in the benefit. Courts have moved away from the right-privilege distinction to a notion of entitlement.[72] As illustrated by the following discussion, the Ninth Circuit has narrowly defined what constitutes entitlement.

The Supreme Court, in *Board of Regents v. Roth*[73] and its companion case, *Perry v. Sindermann*,[74] established standards for what

69. The National Housing Act is codified at 12 U.S.C. § 1715*l*(d)(3) (1970).

70. *Accord*, McQueen v. Druker, 438 F.2d 781, 784-85 (1st Cir. 1971); *see* Langevin v. Chenango Court, Inc., 447 F.2d 296, 304 (2d Cir. 1971) (Oakes, J., dissenting); McClellan v. University Heights, Inc., 338 F. Supp. 374, 380-82 (D.R.I. 1972). *But see* Langevin v. Chenango Court, Inc., *supra* at 301. For an overview of the treatment of the legal problems involved with low-rent housing see Note, *Procedural Due Process in Government-Subsidized Housing*, 86 Harv. L. Rev. 880, 895-96 (1973) [hereinafter cited as *Procedural Due Process*].

71. The right-privilege distinction in public employment is a theory promulgated by Justice Holmes. The most succinct expression of it is his quote in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892): "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* This position has now been abandoned. "This Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.'" Graham v. Richardson, 403 U.S. 365, 374 (1971). For a discussion of the right-privilege distinction see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

72. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

73. 408 U.S. 564 (1972). *Roth* involved the nonrenewal of an untenured teacher's contract.

74. 408 U.S. 593 (1972). *Perry* involved the nonrenewal of a tenured teacher's contract at a school with a de facto tenure system.

interests would constitute liberty or property for due process considerations. The *Roth* Court cited *Meyer v. Nebraska*[75] for the proposition that a broad interpretation is to be given to the constitutional concept of liberty. Liberty

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[76]

On the specific facts of the *Roth* case (nonrenewal of untenured teacher's contract), the Court found that a nonrenewal which imposed a stigma or disability foreclosing the freedom to take advantage of other employment opportunities would be an impairment of liberty.[77]

The Court also announced a standard for determining the existence of a constitutionally protected property interest:

> [T]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of

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75. 262 U.S. 390 (1923).

76. *Id.* at 399.

77. 408 U.S. at 573. However, the Supreme Court has recently demonstrated, in Paul v. Davis, 44 U.S.L.W. 4337 (U.S. March 23, 1976), that the present Court will sharply limit the usefulness of section 1983 actions by narrowly defining what constitutes the loss of liberty or property under the fourteenth amendment. In *Paul*, the defendants, chiefs of police, distributed a flier of mug shots of persons designated "active shoplifters." Plaintiff appeared on the flier because he had been arrested over 17 months earlier for shoplifting. He was never convicted and, in fact, the charge was dismissed shortly after circulation of the flier. Plaintiff then brought a section 1983 action. Justice Rehnquist, speaking for the majority, found the interest in reputation, unconnected to a termination from employment, to be quite different from the liberty or property interests recognized in cases such as *Roth*. The Court, in *Davis*, held that a person may not maintain an action under section 1983 unless "a right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 4343. The Court thus distinguished cases dealing with employment, the right to attend school and the right to purchase liquor. Justice Brennan, writing for the dissent, bitterly criticized the opinion and felt the majority had misinterpreted *Roth*. *Id.* at 4343-45, 4349.

> property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.[78]

The *Roth* Court, relying on *Morrissey v. Brewer*,[79] emphasized that one must look to the nature of the interest at stake, not its weight, in determining whether it is a property interest.

Federal Crop Insurance

In *Rainbow Valley Citrus Corp. v. Federal Crop Insurance Corp.*,[80] the plaintiff claimed that its due process rights were violated by the discontinuation of its federal crop insurance without prior notice or an opportunity to be heard. To establish a prima facie claim of denial of due process a plaintiff must show that: (1) liberty or property interests have been invaded by the government without an opportunity to challenge; and (2) the purported justification for the invasion is at least plausibly disputable (otherwise the opportunity to challenge would be irrelevant).[81] The district court found that plaintiffs established neither element and gave summary judgment for the defendant, and the Ninth Circuit affirmed.[82]

The *Rainbow Valley* court found that the interest involved was not property or liberty within the meaning of the *Roth* standard. The Federal Crop Insurance Act did not create a system of statutory benefits to which the plaintiff was entitled. The insurance

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78. 408 U.S. at 577.

79. 408 U.S. 471 (1972). In *Morrissey*, the Court held that due process requires that parolees be given a hearing prior to revocation of parole. *Id.* at 485-88.

80. 506 F.2d 467 (9th Cir. 1974) (per Hufstedler, J.). Plaintiff also claimed a violation of the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1970).

81. 506 F.2d at 469. In *Burdeau* Judge Hufstedler alluded to her dissenting opinion in *Geneva Towers*, which states:

> The purpose of a prior evidentiary hearing in the entitlement context is to resolve those questions of fact upon which a controversy turns; if there are no material issues of fact to be resolved, a prior evidentiary hearing to determine the existence of facts is meaningless.

504 F.2d at 495, *citing* K. DAVIS, ADMINISTRATIVE LAW § 7.01 (1958, Supp. 1970); Greene v. Elroy, 360 U.S. 474, 496 (1959).

82. 506 F.2d at 468. The Ninth Circuit noted that the defendant's discontinuation might constitute administrative rule-making, but assumed for the purposes of appeal that it did not. *Id.* Generally, no due process requirements are held to attach to the rule-making function of regulatory agencies since no person or entity is deprived of property or liberty by an agency's action prior to enforcement of the rule. McCormack, *supra* note 1, at 1295-98.

contract furnished no claim of entitlement since either party could cancel at will after the first year. Additionally, the plaintiffs did not show how the defendant's factual justification for the action was plausibly disputable.[83]

Teaching Positions

In *Burdeau v. Trustees of California State Colleges*,[84] the court found that the failure of a state university to rehire a nontenured assistant professor did not deprive him of liberty or property. The crucial factor under the *Roth* test is not the presence or lack of tenure per se; rather, of primary importance is the presence or lack of entitlement to the benefit, thus making it a liberty or property interest subject to fourteenth amendment protection. The *Burdeau* court reasoned that nothing was said of a deprecatory nature in the notice to the plaintiff that he would not be rehired, and therefore his liberty was not impaired. Additionally, there was nothing in the terms of the plaintiff's employment guaranteeing his reemployment. Hence, there was no entitlement to the property interest.

The holding in *Gray v. Union County Intermediate Education District*[85] was similar to the holding in *Burdeau*. The district court in *Gray* found that the nonrenewal of the contract did not result in the loss of liberty or property, and the Ninth Circuit affirmed. The plaintiff in *Gray* was a specialized teacher employed on a yearly contract basis by the defendant. The defendant voted not to renew the plaintiff's contract after the plaintiff became involved in a dispute with a public agency which threatened to adversely affect relations between the agency and defendant.[86] A hearing was then held at plaintiff's request,[87] but the defendant voted again with the same result. The plaintiff sued under section 1983, claiming a denial of due process.[88]

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83. The defendant's factual justification was severe losses during the previous two crop years and the prediction that similar losses were likely in the future. 506 F.2d at 468.

84. 507 F.2d 770 (9th Cir. Nov., 1974) (per Trask, J.).

85. 520 F.2d 803 (9th Cir. July, 1975) (per Murray, D.J.).

86. In an effort to assist a pregnant student, the plaintiff created friction between the defendant and the Welfare Department by insisting that the girl be dealt with in a manner other than the Welfare Department thought was in her best interest.

87. The court did not reach the issue of whether this hearing satisfied due process requirements since no liberty or property interest was found.

88. There was also a first amendment issue involved. In the past, public employees were considered to be privileged to work for the government and therefore had few

According to the *Gray* court, "nearly any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual, but not every dismissal assumes a constitutional magnitude."[89] There is concern only with the type of stigma that seriously damages an individual's ability to take advantage of other employment opportunitites.[90] Thus, the court reasoned, no liberty was at stake. Similarly, no property was at stake since plaintiff was not dismissed during the contract term, while tenured, or despite an implied promise of continued employment.[91]

In both *Burdeau* and *Gray*, the court treated the effect of a nonretention in an unrealistic manner considering the saturation of the educational field with qualified personnel. The *Burdeau* court's conclusion that a nonretention will not have the derogatory effect of a firing seems questionable under these labor market conditions. The *Gray* court stated that there is concern only with the type of stigma that seriously damages a person's chances at other employment opportunitites. Certainly, in a crowded job

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rights that could be infringed upon. This doctrine of privilege gave way to a doctrine of substantial interest, and led to the Supreme Court's holding, in Pickering v. Board of Educ., 391 U.S. 563 (1968), that one must balance the interests of a public employee in speaking out against the interests of the state, as an employer, in providing public services, *Id.* at 568. For a discussion of the rise and fall of the doctrine of privilege and the Court's opinion in *Pickering* see Miller, *Teachers' Freedom of Expression Within the Classroom: A Search for Standards*, 8 GA. L. REV. 837, 884 (1974); Rosenbloom & Gille, *The Current Constitutional Approach to Public Employment*, 23 KAN. L. REV. 249, 252 (1975); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Teachers' Freedom of Expression Outside the Classroom: An Analysis of the Application of Pickering and Tinker*, 8 GA. L. REV. 900 (1974) [hereinafter cited as *Teachers'* Note].

The court, in *Gray*, held that the teacher's activities had gone beyond protected speech by disrupting the internal functioning of the Intermediate Education District (IED) and by disrupting the working relationship between the Welfare Department and the IED. 520 F.2d at 807. Usually, protected speech tends to be nondisruptive and concerned with matters of general political interest. Speech which has not been protected is that which jeopardizes a necessary close working relationship or affects the performance of one's duties. *See* Pickering v. Board of Educ., 391 U.S. 563, 569-74 (1968). *See also* Clark v. Holmes, 474 F.2d 928 (7th Cir.) (matters not of public concern), *cert. denied*, 411 U.S. 972 (1972); Duke v. North Tex. State Univ., 469 F.2d 829 (5th Cir. 1972) (extremely disrespectful and grossly offensive remarks), *cert. denied*, 412 U.S. 932 (1973); Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972) (bickering and running disputes with superiors); Rozman v. Elliot, 467 F.2d 1145 (8th Cir. 1972) (intermeddling and disruptive speech). However, for a court to hold speech unprotected it must find specific harm and not merely a potential effect. *See* Jones v. Battles, 315 F. Supp. 601 (D. Conn. 1970); *In re* Chalk, 441 Pa. 376, 272 A.2d 459 (1971); *Teachers'* Note, *supra*, at 903-07.

89. 520 F.2d at 806 (citation omitted).

90. For this assertion the court relied on *Roth*.

91. 520 F.2d at 805.

market an accusation of moral depravity is not necessary for the foreclosure of many job opportunities. Contentions that a person's personality is agressively difficult or hostile will in all likelihood be as effective in limiting job opportunities.

Administrative Hearings

In *Paskaly v. Seale*,[92] the plaintiff, an employer who was the subject of a wage claim investigation by the defendant, a deputy labor commissioner, brought a section 1983 action and fourteenth amendment claim of denial of due process. The labor commissioner had investigated the wage claim and had conducted a hearing during which the plaintiff allegedly received "insulting and arrogant treatment," and at the end of which the commissioner decided against the plaintiff even though he allegedly knew the wage claim was false. When the plaintiff refused to comply with the order to pay the claim, the defendant referred the case to his division's legal section, whereupon a civil action was instituted against the plaintiff. The district court gave summary judgment for the defendant, and the Ninth Circuit afffirmed.[93]

Under *Roth*, liberty includes not only freedom from bodily restraint, but also freedom from serious damage to an individual's standing and associations in the community.[94] The *Paskaly* court found that the civil suit vindicated any temporary liberty grievance that might have stemmed from an abusive administrative hearing. The court also found that the plaintiff had no property at stake in the administrative hearings since no binding order could be entered against him. A civil suit was necessary to enforce compliance with the issued order. Although the plaintiff may have incurred expense in defending himself in the administrative proceeding, the due process clause does not recognize this kind of expenditure as a property interest.[95] Since the plaintiff prevailed in the civil suit, there was also no deprivation of property or liberty resulting from the suit. The *Paskaly* court found that the expense of defending himself in the civil suit possibly constituted a property interest for the plaintiff. However, since the defend-

92. 506 F.2d 1209 (9th Cir. Nov. 1974) (per Hamley, J.).

93. *Id.* at 1212.

94. 408 U.S. 571, 573. This interpretation of *Roth* may no longer be tenable in light of Paul v. Davis, 44 U.S.L.W. 4339 (U.S. March 23, 1976).

95. For this assertion the *Paskaly* court relied on the fact that the administrative hearing could lead to no binding order. The court indicated that *Roth* supports its position by analogy. 506 F.2d at 1212.

ant's role in bringing the suit was recommendatory only, the court could not say that he deprived plaintiff of the property interest. The court concluded that administrative officers who make non-binding recommendations should "not do so at the risk of incurring damage liability if the suit turns out to be unfounded."[96]

Federally Subsidized Housing

In *Geneva Towers Tenants Organization v. Federated Mortgage Investments*,[97] the Ninth Circuit found that the plaintiffs met the *Roth* test of a legitimate claim to government benefits. The plaintiffs, as tenants of a section 221(d)(3) housing project, had such a claim due to the statutorily created expectation that they would continue to receive the benefits of low-cost housing.[98]

C. Procedure Required by Due Process

Once the court decides that liberty or property is at issue, it must decide what procedure is required by due process to protect this interest. *Goldberg v. Kelly*[99] establishes a balancing test for determining what procedure is required for the termination of a government benefit. A court must balance the interest of the state in summary adjudication against the interest of the individual in avoiding the loss. For instance, in *Goldberg* there was a legitimate state interest in summary proceedings, *i.e.*, administrative economy and efficiency. However, this interest was found to be outweighed by the interests of the plaintiff in avoiding the loss of the governmental benefit. The specific loss threatened, welfare benefits, could make the difference in the welfare recipient's day-to-day struggle for survival.

Federally Subsidized Housing

In *Geneva Towers Tenants Organization v. Federated Mortgage Investments*,[100] the court considered three factors in applying the

96. *Id.* The plaintiff likened the proceedings to malicious prosecution, but the court noted that this concept is available only in criminal proceedings and alone does not constitute a civil rights violation. *Id.* at 1212-13.

97. 504 F.2d 483 (9th Cir. Oct., 1974). For the facts of the case see text accompanying notes 65-69 *supra*.

98. *Accord*, Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165, 1167-68 (2d Cir. 1973); *Procedural Due Process, supra* note 69, at 896; *see* Marshall v. Lynn, 497 F.2d 643 (D.C. Cir. 1973); Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973).

99. 397 U.S. 254 (1970).

100. 504 F.2d 483 (9th Cir. Oct., 1974). For the facts of the case see text accompanying notes 65-69 *supra*.

Goldberg balancing test to a potential rent increase: (1) the importance of the tenants' interest; (2) the input the tenants could make in the adjudicatory process; and (3) the governmental interest at stake. The court found that the interest of the tenants in retention of decent low-cost housing was substantial. However, the tenants could contribute little input since a rent determination is largely based on technical factors.[101] Also, the government's interest in the preservation of the flexibility of the program under section 221(d)(3) of the Housing Act of 1961 is substantial.[102] If the program becomes encumbered with bureaucratic obstacles, private investment may be significantly deterred. The *Geneva Towers* court found that the government's interests were not sufficient to entirely outweigh the need for permitting the tenants a limited right of intervention. Since the formality and procedure required by due process can vary,[103] a hearing was found not to be required. The court held that notice of the increase, a concise statement of the FHA's reasons for the increase, and the opportunity to make written objections before FHA approval of the request would be sufficient.[104]

In her dissent Judge Hufstedler took the position that the tenants' interests did not meet the entitlement standards of *Roth*. To have an entitlement to low rents, the tenants must assert a legal requirement rendering a rent increase to be a factual rather than a discretionary decision, which is improper under disputable and disputed facts. Section 221(d)(3) leaves the regulation of rents to the discretion of the Secretary. Because the statute does not fix nor require the Secretary to fix specific factual standards under which rents are to be regulated, there is no entitlement to rent at at a particular rate.[105]

Judge Hufstedler thought that if the tenants had an entitlement, they would be due more procedural safeguards than the majority prescribed. She felt the kind of participation the majority described should be accorded by administrative policy. At minimum, due process requires not only adequate prior notice,

101. For a summary of the technical factors which are considered see UNITED STATES DEP'T OF HOUSING AND URBAN DEVELOPMENT, MANAGEMENT OF HUD-INSURED MULTIFAMILY PROJECTS UNDER SECTION 221(d)(3) AND SECTION 236, A HUD GUIDE, No. HM G 4351.1, at 209 (1971).

102. Section 221(d)(3) of the Housing Act of 1961 is codified at 12 U.S.C. § 1715*l*(d)(3) (1970).

103. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

104. 504 F.2d at 492.

105. *Id.* at 496.

but also a meaningful evidentiary hearing with the right to a personal appearance and the right to call and examine witnesses as well as present documentary evidence. She noted that the court gave fewer due process protections to the tenants than did the Supreme Court to prisoners "under the extremely difficult conditions attending prison disciplinary proceedings."[106]

There is a conflict among the circuits on the issue of what due process requires for rent increases in federally financed housing. The problem has been approached in two ways. First, tenants have contended that a right to hearings on the subject is implied in the relevant statute. Second, tenants have made claims under the due process clause. There have been a variety of results and rationales in response to these claims.[107]

Post-Suspension Hearings

In *Peacock v. Board of Regents*,[108] the plaintiff, who was tenured and under contract, was suspended as the head of the department of surgery. He sued, alleging a denial of due process by the absence of a pre-suspension hearing. The court held that this interest was protected by due process, but that a prompt post-suspension hearing would be sufficient. The court applied the *Goldberg* balancing test and in this process rejected plaintiff's argument that the balancing should be presumptively weighted in favor of a prior hearing.[109]

106. *Id.* at 498.

107. Two Circuits have rejected both claims, finding no implied statutory right to a hearing and no due process violation. However, the two cases holding this were decided before *Roth* and so did not use the analysis put forth there. *See* Langevin v. Chemango Court, Inc., 447 F.2d 296 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970). The Third Circuit found no implied right and did not reach the due process question since they found no jurisdiction. However, the court did doubt that the tenants' interests would be considered a property interest under *Roth*. *See* People's Rights Organization v. Bethlehem Associates, 356 F. Supp. 407 (E.D. Pa.), *summarily aff'd*, 487 F.2d 1395 (3d Cir. 1973). The Seventh Circuit held there was no implied statutory right and no right to due process since entitlement was lacking. *See* Harlib v. Lynn, 511 F.2d 51 (7th Cir. 1975). The District of Columbia Circuit resolved the issue by implying a statutory right to notice and an opportunity to respond in writing before the increase took effect; thus, the court did not reach the due process question. *See* Marshall v. Lynn, 497 F.2d 643 (D.C. Cir. 1973). The Sixth Circuit followed the D.C. Circuit and implied a statutory right, but went even further by expressly rejecting the due process claim without comment. *See* Paulsen v. Coachlight Apartments Co., 507 F.2d 401 (6th Cir. 1974).

108. 510 F.2d 1324 (9th Cir. Feb., 1975) (per Koelsch, J.), *cert. denied*, 422 U.S. 1049 (1975).

109. 510 F.2d at 1328. The *Peacock* court relied on Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), and Arnett v. Kennedy, 416 U.S. 134 (1974), as authority for rejecting plaintiff's argument.

The court struck a balance between the school's interest in efficient administration and the professor's interests in his reputation. The Ninth Circuit found that it was significant that the professor would lose no salary by the suspension and that the proposed termination would not stigmatize him in the way that a charge of dishonesty or immorality might.[110] The court concluded that whatever damage was suffered would be minimized by a prompt post-suspension hearing.

II. EQUAL PROTECTION

Traditionally, two standards of review have been applied in equal protection cases. The rational relationship standard is usually used. This requires merely that the classification be rationally related to a legitimate governmental objective.[111] When a classification is suspect or impinges upon a fundamental constitutional right, however, a court will apply strict scrutiny and require that a compelling state interest be demonstrated to sustain the classification.[112]

A. Residency Requirements

In *Sosna v. Iowa*,[113] the Supreme Court, using the rational relationship test,[114] held that residency requirements for divorce were "reasonably" justifiable on two grounds. The first is a state's interest in granting divorces only to those persons who are

110. 510 F.2d at 1328.

111. *See, e.g.*, Powell v. Pennsylvania, 127 U.S. 678, 687 (1888). A law regulating the making of oleomargerine which did not involve a fundamental right or suspect classification was upheld in *Powell*. The classification had a rational relationship to a legitimate state interest.

112. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969). In *Shapiro*, the Court struck down a one year residency requirement for welfare applicants. The classification divided citizens into two groups: those who had recently exercised the fundamental right to travel and those who had not. The discrimination was unconstitutional since there was no compelling state interest requiring the classification.

113. 419 U.S. 393 (1975). One month after moving to Iowa the plaintiff petitioned for a dissolution. The petition was dismissed for lack of jurisdiction because, under Iowa law, one must reside within the state for one year before a divorce can be obtained from an Iowa court. *Id.* at 395.

114. The Court distinguished cases where there were residency requirements for welfare payments, *e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969), voting, *e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972), and medical care, *e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). In those cases, the Court scrutinized more strictly the discrimination against the class exercising its first amendment right to travel. The plaintiffs in each case risked an irretrievable foreclosure from some benefit or possibly some irreparable harm. In *Sosna*, the plaintiff was not faced with this irretrievable foreclosure; she could still be divorced, only at a slightly later date.

genuinely attached to the state; this prevents a state from becoming a "divorce mill" for unhappy spouses. The second ground lies in the state's desire to insulate its divorce decrees from the likelihood of successful collateral attack.[115]

In *Mon Chi Heung Au v. T. F. Lum*,[116] the plaintiff, a Hawaii resident, challenged the divorce residency requirements of one year within the state and three months within a judicial circuit in the state as violative of equal protection. The district court held for the plaintiff, but the Ninth Circuit reversed in an opinion relying solely on *Sosna v. Iowa*.

B. Sex Discrimination

The Ninth Circuit has held that hair length regulations are a rational exercise of regulatory power[117] and that an individual reservist has no constitutional right to choose his own hair style in violation of military regulations.[118] Despite these cases, the plaintiffs in *Campbell v. Beaughler*,[119] Marine Corps reservists, claimed that haircut regulations coupled with the prohibition against wearing wigs denied to them their constitutional rights to privacy, freedom of expression, and equal protection (women in the Marine Corps are allowed to wear wigs). They urged the court to

115. Judicial power to grant divorces is founded on domicile. Williams v. North Carolina, 325 U.S. 226, 229 (1945). A finding of domicile by one state in an ex parte proceeding is not binding on another state in the face of contrary evidence. *Id.* at 236. Thus, where the majority of states have one year residency requirements, one can reasonably assume Iowa's one year residency requirement makes its decrees less susceptible to successful collateral attack.

116. 512 F.2d 430 (9th Cir. Feb., 1975) (per curiam).

117. *See* King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971). In *King*, the court held that provisions in school dress codes concerning the length of male students' hair were not violative of due process. For this finding, the court relied on statutes which authorize the establishment of regulations for day-to-day operations of the schools and impose a duty upon students to comply, and the uncontradicted affidavits of teachers and school administrators that extreme hair length on male students interfered with the education process. For a discussion of federal court litigation concerning hair length restrictions, including challenges to military regulations, see Dilloff, *Federal Court Litigation Over the Regulation of Adult Grooming*, 38 Albany L. Rev. 387 (1974).

118. *See* Agrati v. Laird, 440 F.2d 683 (9th Cir. 1971). The *Agrati* court held that the enforcement of an army regulation concerning hair length against a reservist who claimed that the regulation seriously interfered with his professional career as an actor did not constitute a denial of due process. *Accord*, Martin v. Schlesinger, 371 F. Supp. 637 (N.D. Ala. 1974). *Contra*, Brown v. Schlesinger, 365 F. Supp. 1204 (E.D. Va. 1973); Garmon v. Warner, 358 F. Supp. 206 (W.D.N.C. 1973); Harris v. Kaine, 352 F. Supp. 769 (S.D.N.Y. 1972).

119. 519 F.2d 1307 (9th Cir. June, 1975) (per Wright, J.).

view sex as an inherently suspect category,[120] and to thus evaluate the regulation in light of the compelling state interest standard. The *Campbell* court found the plaintiffs put too much reliance on *Frontiero v. Richardson*,[121] since only a plurality and not a majority of the Court viewed sex as inherently suspect. Accordingly, the summary judgment which had been entered in defendants' favor was affirmed. Recent Supreme Court decisions support the Ninth Circuit's finding that only a rational relationship is necessary to justify sex-based discrimination.[122]

C. Election Regulations

The plaintiff in *Webster v. Mesa*[123] was barred from the 1974 legislative primary ballot by the defendant, the Director of Elections of Guam, since some of the signatures on his nominating petition also appeared on the petitions of one or more partisan candidates in violation of a section of the Government Code of Guam. The plaintiff then sued under the Guam Elective Governor Act,[124] an act of Congress making available to residents of Guam the equal protection clause of the fourteenth amendment. He sought injunctive and declaratory relief, challenging the constitutionality of section 2916 of the Government Code of Guam.[125]

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120. Plaintiffs relied on Frontiero v. Richardson, 411 U.S. 677 (1973), to support their view that sex is an inherently suspect category.

121. 411 U.S. 677 (1973).

122. *See* Stanton v. Stanton, 421 U.S. 1 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975).

123. 521 F.2d 442 (9th Cir. 1975) (per Goodwin, J.).

124. 48 U.S.C. § 1421b(u) (1970).

125. Gov't Code of Guam § 2916 (1970) provides:

> Nomination papers may be filed on behalf of independent candidates. The papers shall be similar in form and signed in the manner as in the case of party candidates, and no nominator shall sign any petition who has previously signed a petition for the same primary for a partisan candidate.

Added by Pub. L. No. 10-151, effective June 24, 1970.

The court found that injunctive relief was moot due to the completion of the election, but that declaratory relief was available. Otherwise the question would have been "capable of repetition yet evading review." Roe v. Wade, 410 U.S. 113, 124-25 (1973), also discusses this aspect of the mootness doctrine.

The plaintiff also complained of section 2933(b) of the Government Code of Guam, which provides that "the winner in [a primary] shall be the candidate receiving the greatest number of votes," unless such winner is an independent candidate; independent candidates must receive at least ten percent of the total votes cast for the office. The district court and the Ninth Circuit both declined to consider the question since there was no case or controversy involving that section.

Section 2916 states that names will be stricken from the nominating petitions of independent candidates if the same voters have previously signed nominating petitions for any of the partisan candidates seeking one of the 21 seats in the Guam Legislature. The 21 senators are elected at large. The plaintiff's timely nominating petition was disqualified because the names of some of the voters who signed the petition were stricken. The district court held that the discrimination between partisan and independent candidates served an important state interest, was not invidious, and that section 2916 was therefore constitutional. The *Webster* court strictly scrutinized the statute since voting is among our most precious freedoms and considered to be a fundamental right.[126] Here, section 2916 was not shown to have any reasonable purpose. Rather, the court found its purpose was to make it more difficult for an independent candidate to obtain valid signatures. By limiting possible signatories to those qualified voters who relinquished their right to nominate one or more partisan candidates for one or more of the 21 vacant seats, the section unreasonably foreclosed participation in the political process.[127]

III. EMPLOYMENT DISCRIMINATION

Equal opportunity in employment is the mandate of the law. The most prominent of the relevant laws is Title VII of the Civil Rights Act of 1964.[128] Under Title VII, a separate agency, the Equal Employment Opportunity Commission (EEOC), was created solely to deal with employment discrimination grievances. A claimant has 180 days from the date of the alleged discriminatory incident to file a complaint with the EEOC. The EEOC then investigates the incident, and if it finds probable cause to believe the claimant was discriminated against, it attempts to negotiate with the employer to effect voluntary compliance with non-discriminatory policies. If voluntary compliance fails or the EEOC does not find probable cause to believe the incident was discriminatory, the EEOC notifies the claimant by a "right-to-sue" letter that she or he can file a civil suit on her or his own behalf within 90 days of receipt of the letter. One can also seek

126. *See* Williams v. Rhodes, 393 U.S. 23, 30 (1968). *Williams* invalidated Ohio laws which favored the Republican and Democratic parties and frustrated new political parties seeking positions on the Ohio ballot.

127. 521 F.2d at 444.

128. 42 U.S.C. §§ 2000e *et seq.* (1970), *as amended* 42 U.S.C. §§ 2000e *et seq.* (Supp. III, 1973).

relief from a discriminatory employment situation under the Civil Rights Act of 1871.[129]

A. Procedural Issues

Timeliness of Charges

Of the Title VII procedural problems that came before the Ninth Circuit during this past term, most concerned the timeliness of charges filed with EEOC or of the initiation of suit under Title VII. In *Collins v. United Air Lines, Inc.*,[130] the plaintiff was a former stewardess who had been compelled to resign by the defendant's once-held policy of requiring stewardesses to resign or be terminated upon marriage. The plaintiff resigned May 20, 1967; November 7, 1968, the defendant discontinued its policy. On October 19, 1971, the plaintiff requested reinstatement. The district court dismissed for failure to file timely charges with the EEOC. The court of appeals held that the present unemployment was merely the effect, rather than the alleged unlawful act or practice itself, so that the discriminatory firing could not be considered a continuing act. The *Collins* court also rejected plaintiff's argument that the denial of her request for reinstatement was a new and separate discriminatory act or somehow rendered the initial violation a presently continuing one.[131] The court analogized the instant case to a Third Circuit labor law case which held that a discharged employee litigating a denial of reinstatement is litigating the unfairness of the original discharge, rather than the denial of reinstatement, because only if the original discharge was discriminatory is the employee entitled to reinstatement as though the employee never ceased working.[132]

Davis v. Valley Distributing Co.[133] turned on the interpretation of the 1972 amendment[134] to Title VII which lengthened the times

129. *See* 42 U.S.C. § 1983 (1970). For the text of this statute see note 25 *supra*.

130. 514 F.2d 594 (9th Cir. Apr., 1975) (per Koelsch, J.).

131. *Id.* at 596.

132. *See* NLRB v. Textile Mach. Works, 214 F.2d 929, 932 (3d Cir. 1954). The *Collins* court also relied on NLRB v. McCready & Sons, Inc., 482 F.2d 872, 874-75 (6th Cir. 1973), as supporting this proposition.

133. 522 F.2d 827 (9th Cir. July, 1975) (per Browning, J.). In *Davis*, the plaintiff was discharged in October, 1971. He filed a complaint with the Arizona Civil Rights Commission in February, 1972, but the complaint was dismissed as barred by Arizona's 60-day statute of limitations. Plaintiff filed his complaint with the EEOC in March, 1972, 135 days after his dismissal.

134. 42 U.S.C. § 2000e-5(d) (1970). Title VII was amended on March 24, 1972, by enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86

allowed for filing with EEOC. When the plaintiff went to EEOC, section 706(d) required that the complaint be filed within 90 days of the alleged discriminatory conduct (unless an individual first went to a state agency). Section 4 of the Equal Opportunity Act of 1972 extended this requirement to 180 days.

The general rule is that subsequent extensions of a statutory limitation period will not revive a claim previously barred.[135] However, the Supreme Court has held that evidence of legislative intent may rebut the general rule.[136] After alluding to these rules, the *Davis* court found that Congress intended the extended time limit to apply to all violations occuring 180 days before the enactment of the 1972 amendment, including those otherwise barred. For this finding, the court relied on section 14 of the 1972 Act, changes in language and the exceedingly short limits under the statute. These factors become even stronger when considered in light of the fact that filings under Title VII are lay-initiated proceedings. Also, the Equal Employment Opportunity Act is considered to be a remedial statute which should be liberally construed in favor of victims of discrimination.[137] The *Davis* court also noted that the courts, when confronted with procedural ambiguities, have "with virtual unanimity" resolved them in favor of the complaining party.[138] The court expressly reserved decision on whether the longer federal limitations period, applicable when a claimant first files with a state agency, would be available to a complainant whose filing with the state agency is untimely.[139]

The time for filing a complaint in court under section 706 (90 days presently, but prior to the 1972 amendment, 30 days), does not begin to run until the charging party receives the notice required by statute—the right-to-sue letter. There is a conflict

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Stat. 103, *amending* 42 U.S.C. § 2000e (1970). Section 706(b) of the 1964 Act was relettered 706(c); section 706(d) was relettered 706(e). The limitation periods were extended from 90 to 180 days for the initial filing with EEOC, and from 210 to 300 days where the complainant first submits a claim to the state agency. 42 U.S.C. § 2000e-5(e) (Supp. III, 1973).

135. *See, e.g.*, James v. Continental Ins. Co., 424 F. 2d 1064 (3d Cir. 1970).

136. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945).

137. *See* EEOC v. Wah Chang Albany Corp., 499 F.2d 187 (9th Cir. 1974).

138. For this proposition the *Davis* court cited Sanchez v. Standard Brands, Inc., 431 F.2d 455, 461 (5th Cir. 1970), which cited Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355 (6th Cir. 1969); Georgia Power Co. v. EEOC, 412 F.2d 462 (5th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968); and Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

139. *Cf.* Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975).

among the circuits on whether the time limit is a procedural or a jurisdictional requirement.[140] The Ninth Circuit in *Wong v. Bon Marche*[141] and *Cleveland v. Douglas Aircraft Co.*[142] held the time limit was a jurisdictional requirement. The *Wong* court did note, however, that in an earlier case[143] the filing requirement was tolled on the basis of the particular facts and general equitable principles.[144]

In *Cleveland*, the plaintiff had filed suit after receipt of a first right-to-sue letter in 1968 but dismissed the suit in 1969 at the EEOC's recommendation. The plaintiff filed suit again in 1971 after receipt of a second right-to-sue letter, and the district court dismissed for not suing within 30 days of the first right-to-sue letter.[145]

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140. The Fourth and Eighth Circuits have held the time limit to be a procedural requirement. *See* Huston v. General Motors Corp., 477 F.2d 1003 (8th Cir. 1973); Stebbins v. Nationwide Mut. Ins. Co., 469 F.2d 268 (4th Cir. 1972), *cert. denied*, 410 U.S. 939 (1973). The Fifth, Sixth and Tenth Circuits view it as a jurisdictional requirement. *See* Genovese v. Shell Oil Co., 488 F.2d 84 (5th Cir. 1973); Archuleta v. Duffy's, Inc., 471 F.2d 33 (10th Cir. 1973); Goodman v. City Prods. Corp., Ben Franklin Div., 425 F.2d 702 (6th Cir. 1970).

141. 508 F.2d 1249 (9th Cir. Jan., 1975) (per curiam). Wong filed a claim with the EEOC alleging a racially motivated discharge, but the EEOC found no probable cause to believe defendant had engaged in unlawful employment practices. The plaintiff filed a civil action on the 91st day after the receipt of his right-to-sue letter. The plaintiff had engaged an attorney to draft a formal complaint for him which was prepared and delivered prior to the deadline. However, the plaintiff took his right-to-sue letter to the district court in a timely but unsuccessful effort to commence the suit. The plaintiff also sought but was denied the services of a court-appointed attorney. The plaintiff related in his *pro se* appeal that he did not discover he could file his formal complaint himself until too late.

142. 509 F.2d 1027 (9th Cir. Jan., 1975) (per curiam).

143. Gates v. Georgia Pac. Corp., 492 F.2d 292 (9th Cir. 1974). EEOC notified the grievant it was closing her case for lack of jurisdiction but did not tell her that she could file a civil action within 30 days. When she filed suit after receiving the proper notification, the court found that such action was timely filed.

144. Other examples of cases where equitable principles were held to toll the filing requirements are Stebbins v. Nationwide Mut. Ins. Co., 469 F.2d 268 (4th Cir. 1972), *cert. denied*, 410 U.S. 939 (1973), and McQueen v. E.M.C. Plastic Co., 302 F. Supp. 881 (E.D. Tex. 1969).

145. Cleveland filed suit after receipt of his first right-to-sue letter. After filing, a district court held that EEOC was limited to 180 days for the processing of claims and a suit was barred if it was not filed within 180 days of the alleged act of discrimination. *See* 509 F.2d at 1028, *citing* Cunningham v. Litton Industries, 1 F.E.P. Cases 252 (C.D. Cal. 1967). Cleveland's suit was held in abeyance pending review of *Cunningham*. The Ninth Circuit reversed *Cunningham*, holding that the limitation period begins to run when one receives notice of failure to effect voluntary compliance regardless of the time EEOC takes to process the claim. *See* Cunningham v. Litton Industries, 413 F.2d 887 9th Cir. (1969). EEOC then told Cleveland that he could dismiss his suit without prejudice while EEOC pursued the administrative remedy of voluntary compliance. When the conciliation attempt failed, EEOC sent plaintiff a second right-to-sue letter.

The plaintiff in *Cleveland* argued that: (1) the time limit is procedural, and individual substantive rights should not be defeated on a technical procedural mistake resulting in no prejudice to the defendant; (2) the policy consideration is voluntary compliance, and the withdrawal was focused on accomplishing this at EEOC's suggestion; and (3) the plaintiff should not be barred because of reliance on the advice of EEOC. The court rejected the first argument on the basis of the *Wong* decision. The *Cleveland* court held that EEOC had no statutory authority to issue a second letter, and therefore the letter was a nullity.[146] Also, there was some evidence of prejudice to the defendant.[147] As to the second argument, the *Cleveland* court found that EEOC did not condition its offer to continue attempts at voluntary compliance on dismissal. EEOC made it clear the plaintiff could maintain his suit if he wished. The error in dismissing was the plaintiff's.[148]

With respect to the last argument, the court held that one could not rely on the mistake of a government agency's attorney to save a time-barred suit.[149] The court relied on *Pittman v. United States*,[150] a suit under the Federal Tort Claims Act, in which a claim was filed too late because of erroneous advice from a government attorney. In *Pittman*, the government was held to have profited by the erroneous advice from a government attorney. The *Cleveland* court reasoned that the *Pittman* holding applied even more strongly here where the government agency was not even a party and therefore stood to gain nothing by its advice.

This conclusion is a questionable application of *Pittman*. The *Pittman* case can be distinguished from *Cleveland* since the proceedings were neither lay-initiated nor the result of a remedial statute. Both of these factors demand a more generous treatment of the plaintiff. Furthermore, the plaintiff in *Pittman* was seeking

146. 509 F.2d at 1030, *citing* Harris v. Sherwood Medical Indus., Inc., 386 F. Supp. 1149 (E.D. Mo. 1974).

147. The *Cleveland* court cited, as examples of prejudice, that over seven years had elapsed since the alleged act of discrimination had occurred, and one of appellee's witnesses had died subsequent to the filing of the claim.

148. The court relied on Goodman v. City Prods. Corp., Ben Franklin Div., 425 F.2d 702 (6th Cir. 1970), for this proposition. *Goodman*, in turn, relied on Kavanagh v. Noble, 332 U.S. 535 (1947). *Kavanagh* involved a limitation provision on refunds of federal taxes. The *Cleveland* court's indirect reliance on *Kavanagh* seems misplaced since the limitation involved was significantly longer, two years, and not a provision of a remedial statute.

149. 509 F.2d at 1030.

150. 341 F.2d 739 (9th Cir. 1965).

advice from an adverse party whereas in *Cleveland* the plaintiff was relying on a governmental agency created by statute to assist him in seeking redress.

Right to Jury Trial

In *Slack v. Havens*,[151] the plaintiffs alleged discriminatory discharges. They prevailed in the district court, and the Ninth Circuit affirmed except on the matter of damages. Two issues were presented on appeal.[152] First, defendants contended that their request for a jury trial was improperly denied. Second, they claimed the successor corporation should not be held liable. The court rejected defendants' contention that their request for a jury trial was improperly denied.[153] The Ninth Circuit joined several other circuits in holding that back pay is an integral part of the equitable remedy of reinstatement, rather than an action at law, and therefore a jury trial need not be provided for the defendants in Title VII suits.[154]

Successor Corporation Problem

The defendant in *Slack* also raised the issue of whether a party's successor in business will be held liable if it is not named in the charge originally filed with EEOC, but has notice of the proceeding. Agreeing with the Sixth Circuit that the appropriate standards under Title VII are the same as those used in a labor law context,[155] the court found that the defendant successor corpora-

151. 522 F.2d 1091 (9th Cir. July, 1975) (per Hufstedler, J.).

152. Havens also argued that he was not an "employer" within the meaning of the Act because the period of employment of plaintiffs and the number of his employees did not bring him within its purview. He also urged an averaging argument for the determination of the number of employees, but the court rejected this. Additionally, Havens argued there was insufficient evidence to support the findings, but the court held that the district court's findings were not clearly erroneous. *Id.* at 1095.

153. *Id.* at 1094.

154. *Id.* at 1094. The *Slack* court discussed Curtis v. Loether, 415 U.S. 189 (1974), which held that under Title VIII of the Civil Rights Act of 1968 damages could not be recovered absent the protections of the seventh amendment. *Curtis*, which contrasted Title VIII's language of "damages" with that of "equitable relief" in Title VII of the Civil Rights Act of 1964, was viewed as authority for the proposition that "not all awards of monetary relief should necessarily be characterized as legal relief for purposes of the jury trial requirement." 522 F.2d at 1094. Accordingly, it was held that awards under Title VII need not be attended by jury trial, and this conforms with the position other circuits have adopted. *Id.*

155. The appropriate standards as set out in EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974), are whether: (1) the successor company had notice of the charge; (2) the predecessor has the ability to provide relief; (3) there has been sub-

tion (International) substantially met all of these standards.[156] The absence of technical notice of EEOC proceedings before the suit was filed did not prevent liability because International had a full and fair opportunity to present all of its defenses in the district court, and therefore it was not prejudiced in any way by the failure of antecedent notice of EEOC proceedings.

Mootness

Western Addition Community Organization (W.A.C.O.) v. Alioto[157] concludes a series of cases which illustrate a "hands off" attitude by the courts toward desegregation of the San Francisco Fire Department. Plaintiffs filed a civil rights class action under sections 1981 and 1983 to obtain relief from discriminatory testing for jobs with the San Francisco Fire Department. In its original opinion the distirct court found that the discrimination was not invidious or intentional, and thus denied injunctive relief while reserving the power to issue additional orders.[158] Plaintiffs brought suit three additional times to compel modification of the test to eliminate its alleged discriminatory effects.[159] In the last opinion, the district court entered a temporary order requiring that the existing vacancies be filled by qualified minority and non-minority applicants on an alternating basis.[160] However, a Ninth Circuit panel, citing no authority, construed "filled" to mean no more than bona fide offers of employment, not acceptances. Based on this construction of the order, the *W.A.C.O.* court held that the issue was moot since the defendants had complied with the order and all the vacancies had been filled.[161] The

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stantial continuity of business operations; (4) the new employer uses the same plant; (5) the new employer uses the same or substantially the same work force; (6) the new employer uses the same or substantially the same supervisory personnel; (7) the same jobs exist under substantially the same working conditions; (8) the new employer uses the same machinery, equipment and methods of production; and (9) the new employer produces the same product. *Id.* at 1094.

156. 522 F.2d at 1095.

157. 514 F.2d 542 (9th Cir. Mar., 1975) (per curiam).

158. Western Addition Community Organization (W.A.C.O.) v. Alioto, 330 F. Supp. 536 (N.D. Cal. 1971).

159. For judicial discussions engendered by these three suits see W.A.C.O. v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972); W.A.C.O. v. Alioto, 360 F. Supp. 733 (N.D. Cal. 1973); W.A.C.O. v. Alioto, 369 F. Supp. 77 (N.D. Cal. 1973).

160. 369 F. Supp. 77, 81 (N.D. Cal. 1973). Defendants appealed the order, and plaintiffs cross-appealed from the subsequent refusal to make the order permanent.

161. 514 F.2d at 544. The majority cited no authority for finding the appeal moot. Judge Barnes reluctantly concurred in a separate opinion. *Id.* at 545. He expressed grave doubts that the action was moot under United States v. W. T. Grant Co., 345 U.S. 629,

fact that ten of the 118 minority applicants refused job offers did not keep the issue alive.

Suits by Federal Employees

In suits by federal employees there are often unique procedural problems. Two such problems are whether section 1981 exists as an independent action for federal employees and, if it does, what standard of review is to be used in adjudications subsequent to the administrative review of grievances. *Bowers v. Campbell*[162] involved a federal civilian employee who claimed that her removal from a trainee position, the denial of later promotions, harassment and reprimands were based on race discrimination. After unsuccessfully exhausting departmental and Civil Service Commission remedies, she sued under section 1981[163] and the Administrative Procedure Act (APA).[164]

The *Bowers* court examined whether the plaintiff, after losing in the administrative proceedings, was entitled to a trial de novo or the more restrictive form of judicial review available under the APA. Under the review procedures of the APA, the district court would be limited to a review of the administrative proceeding to determine whether the governmental action was arbitrary and capricious or procedural errors had been committed. On the other hand, in suits brought under section 1981, courts usually conduct a full de novo trial. Rather than accepting either alternative, the Ninth Circuit took a middle ground. The *Bowers* court analogized the situation to *Alexander v. Gardner Denver Co.*,[165] where the claimant sought relief under Title VII after exhausting his remedies under a collective bargaining agreement. In *Alexander*, the court concluded that, despite an adverse arbitration ruling, a Title VII complainant was entitled to a de novo trial in the district court, and at such trial the arbitration record was to be accorded great weight. The *Bowers* court, following this reasoning, ruled that the district court had the "ultimate responsibility for determining the facts underlying the dispute"[166] (as in a de novo pro-

633 (1953) ("no reasonable expectation that the wrong will be repeated"), and Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911) (a short term order "capable of repetition, yet evading review").

162. 505 F.3d 1155 (9th Cir. Oct., 1974) (per Hufstedler, J.).

163. For the text of this statute see note 42 *supra*.

164. The Administrative Procedure Act is codified as amended at 5 U.S.C. §§ 500-03, 551-59, 571-76 (1970). The plaintiff invoked jurisdiction under *id.* §§ 701-06.

165. 415 U.S. 36 (1974).

166. 505 F.2d at 1160.

ceeding), but that the administrative record and determination should be introduced into evidence and accorded great weight, and supplemented if necessary to permit the employee a full and fair hearing.[167]

In a dissent, Judge Barnes distinguished *Alexander* as involving separate contractual and statutory rights.[168] He stated that in the instant case there is one right but two overlapping statutory remedies. He felt that the policy considerations of diminished judicial respect for agency decisions and decreased judicial and administrative efficiency militate against a requirement of de novo review.

Chandler v. Johnson[169] examined the standard of review for a Title VII suit subsequent to the exhaustion of statutorily prescribed administrative procedures. The plaintiff claimed that her employer, the Veterans Administration, denied her a promotion on the basis of race and/or sex. After an administrative hearing,[170] an examiner found that the plaintiff had been discriminated against on the basis of sex and recommended retroactive promotion. Pursuant to Civil Service regulations, the recommendation and the record were sent to the head of the Veterans Administration for a final agency decision. The acting assistant general counsel rejected the recommendation, stating that the finding was not substantiated by the evidence. The plaintiff appealed to the Civil Service Board of Appeal and Review; it affirmed the agency decision. The plaintiff then sued.

On appeal before the Ninth Circuit the plaintiff contended that she was entitled to a trial de novo, while the defendant argued that the administrative hearing should receive the more limited review provided for in the APA. Relying on *Bowers v. Campbell*, the court rejected the polar positions of the plaintiff and the defendant and took an intermediate position. The court found that Congress intended to assure federal and private employees equivalent but not identical judicial remedies under Title VII. Private employees, unlike federal employees, are entitled to de novo hearings.[171] The remedies differ because Congress created diffe-

167. *Id.*
168. *Id.* at 1161.
169. 515 F.2d 251 (9th Cir. Apr., 1975) (per Goodwin, J.).
170. The hearing was held pursuant to 5 C.F.R. § 713.217 (1975).
171. *See* McDonnell Douglas v. Green, 411 U.S. 792, 798-99 (1973).

rent administrative processes for the two classes of employees.[172] The district court judge faced with the demand for a trial de novo is entitled to determine at a pre-trial conference or otherwise why the plaintiff feels the necessity for a new trial. The *Chandler* court found that there was no abuse of discretion in the trial court's decision not to have a trial de novo and not to reopen the administrative record.

B. Substantive Issues

Sex Discrimination

California's protective laws concerned with maximum hours and overtime pay for women were at issue in *Homemakers, Inc. of Los Angeles v. Division of Industrial Welfare*.[173] The district court found that sections 1350 and 1350.5 of the California Labor Code[174] were in conflict with Title VII. The Ninth Circuit affirmed. Guidelines issued by the Equal Employment Opportunity Commission[175] called for the extension of such protective laws to men rather than their invalidation. The *Homemakers* court rejected this position, reasoning that EEOC did not have the power to issue regulations which would modify substantive state law to the degree of extending such statutory protection, for such is the legislature's function. The court held that the district court correctly found that it would be beyond its own power to interpret the challenged sections in a way that significantly expanded the statutorily designated class of beneficiaries.[176] Finally, the court noted that the California Legislature had recently enacted legislation to authorize overtime pay for men also.

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172. The court referred to *Bowers* for this assertion.

173. 509 F.2d 20 (9th Cir. Dec., 1974) (per Wright, J.), *cert. denied*, 44 U.S.L.W. 3396 (U.S. Jan. 12, 1976) (No. 1213). Justice White, in a dissent to the denial of certiorari, joined by Justice Blackmun, cogently pointed out the direct conflict between the Eighth and Ninth Circuits and the need for resolution of this conflict. 96 S. Ct. 803 (1976). For a discussion of this conflict see note 176 *infra* and accompanying text.

174. Cal. Labor Code § 1350 (West 1971). This section provides: "No female shall be employed in any [of the designated industries], more than eight hours during any one day of 24 hours or more than 48 hours in one week, except as provided in Section 1350.5."

175. These guidelines are codified at 29 C.F.R. § 1604.2(b)(3) (1974).

176. *Contra*, Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972). The *Hays* court reasoned that EEOC guidelines were due great deference. *Accord*, Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1227 (9th Cir. 1971). Additionally, the *Hays* court found there was ample support for curing any discrimination resulting from the Arkansas protective statute involved by extending the benefits to men rather than invalidating the statute. Such a position is in accord with the express policies of the analogous Equal Pay Act, 29 U.S.C. § 206(d)(1)

In *Hutchison v. Lake Oswego School District No.7*,[177] the plaintiff sought coverage for her normal childbirth under the school district's plan for its employees relating to sick leave benefits. The defendants refused this coverage on the basis that sick leave was for "illness or injury," and that pregnancy was merely a temporary disability. The plaintiff exhausted her administrative remedies and then sued for: (1) a declaratory judgment that the defendant's maternity leave policy constituted sex discrimination under the fourteenth amendment and the Civil Rights Act of 1964; (2) damages;[178] and (3) attorney's fees. The district court dismissed the claims against the school district on the basis of sovereign immunity, but allowed the plaintiff to recover from the school district board and individual board members.

The Ninth Circuit affirmed the finding of a Title VII violation, but reversed the lower court's finding of a violation of the fourteenth amendment, relying on the Supreme Court decision in *Geduldig v. Aiello*,[179] which had been rendered while the appeal was pending. The *Geduldig* Court held that to only exclude from a state disability insurance plan disabilities resulting from a normal pregnancy was neither arbitrary nor sex-based discrimination, and therefore was not a violation of the fourteenth amendment.

In affirming the finding of a Title VII violation, the *Hutchison* court relied on section 703(a) of Title VII which states that classifications are unlawful which "in any way would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect a claimant's status . . . ."[180] The court also found support in *Sprogis v. United Air Lines*[181] which held that:

> [T]he effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . .

(1970). *See* Shultz v. American Can Co.—Dixie Prods., 424 F.2d 356, 359 (8th Cir. 1970); Murphy v. Miller Brewing Co., 307 F. Supp. 829, 836-37 (E.D. Wis. 1969); 29 C.F.R. §§ 800.60-.61 (1972); L. KANOWITZ, WOMAN AND THE LAW, 121, 147 (1969); Annot., 7 A.L.R. FED. 707, 713, 751-53 (1971).

177. 519 F.2d 961 (9th Cir. July, 1975) (per Carter, J.), *petition for cert. filed*, 44 U.S.L.W. 3239 (U.S. Oct. 10, 1975) (No. 568).

178. Damages were sought under 42 U.S.C. § 2000e-5(g) (1970).

179. 417 U.S. 484 (1974).

180. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1970).

181. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

> or through the unequal application of a seemingly neutral company policy.[182]

The court noted that the EEOC guidelines, which are due great deference, unequivocally provide that exclusion of pregnancy or childbirth related disabilities from sick leave is a violation of Title VII.[183] This view is supported by other circuits and some district courts.[184]

In *Baker v. California Land Title Co.*,[185] the plaintiff was discharged for wearing long hair and sued under section 706, alleging sex discrimination in violation of section 703(a).[186] The trial court dismissed, and the Ninth Circuit affirmed. Since the court held that different grooming codes for male and female employees do not constitute sex discrimination within the meaning of Title VII, it did not reach the question of whether the grooming standards constituted a bona fide occupational qualification.[187]

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182. 444 F.2d at 1198.

183. *See* 29 C.F.R. § 1604.10(b) (1975), which provides:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

184. *See, e.g.*, Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir.), *cert. granted*, 421 U.S. 987 (1975); Communications Workers of America v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975). *See also* Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975); Farkas v. South Western City School Dist., 506 F.2d 1400 (6th Cir. 1974), *aff'g* 8 F.E.P. Cases 288 (S.D. Ohio 1974); Sale v. Waverly-Shellrock Bd. of Educ., 390 F. Supp. 784 (N.D. Iowa 1975); Vineyard v. Hollister Elementary School Dist., 64 F.R.D. 580 (N.D. Cal. 1974).

185. 507 F.2d 895 (9th Cir. Dec., 1974) (per Trask, J.), *cert. denied*, 422 U.S. 1046 (1975).

186. 42 U.S.C. § 2000e-2(a) (1970).

187. If this issue had been dealt with, the court would have considered *id.* § 2000e-2(e)(1), which provides:

> (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to clas-

There is presently a conflict on this issue among the federal courts.[188]

Attorney's Fees

Title VII contains statutory authorization, at the court's discretion, for an award of attorney's fees to the prevailing party.[189] *Rosenfeld v. Southern Pacific Co.*[190] established the standards for determining the award of attorney's fees. These factors are: (1) the competence of plaintiff's attorney; (2) the significance and complexity of the case; (3) the attorney's manner of handling the issues; (4) the hours devoted to the case; and (5) the fees customarily charged by comparable attorneys in the community.

The defendant in *Rosenfeld* claimed that under section 713(b), it should not be liable for plaintiff's attorneys fees. Section 713(b)[191] states that parties will not be subject to liability or punishment for an unlawful employment practice if they plead and

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> sify or refer to employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ and individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

188. The Fifth Circuit, the District of Columbia Circuit and several district courts take the position that hair length restrictions for men do not constitute sex discrimination. *See* Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973); Morris v. Texas & Pac. Ry. Co., 387 F. Supp. 1232 (M.D. La. 1975); Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141 (E.D. Mich. 1974); Boyce v. Safeway Stores, Inc., 351 F. Supp. 402 (D.D.C. 1972); Rafford v. Randle Eastern Ambulance Service, Inc., 348 F. Supp. 316 (S.D. Fla. 1972).

The EEOC and a district court have taken the position that dress and appearance distinctions based on sex are considered to be within the purview of Title VII, and that the bona fide occupational qualification exception is afforded a narrow scope. *See* Roberts v. General Mills, Inc., 337 F. Supp. 1055 (N.D. Ohio 1971); 29 C.F.R. § 1604.2a (1974). For a discussion of the question of hair length restrictions as a condition of employment see Dilloff, *supra* note 117, at 390.

189. 42 U.S.C. § 2000e-5(k) (1970).

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

190. 519 F.2d 527 (9th Cir. June, 1975) (per curiam).

191. Section 713(b) of the Act is codified at 42 U.S.C. § 2000e-12(b) (1970).

prove a good faith reliance on an EEOC opinion.[192] The *Rosenfeld* court held that good faith reliance is relevant only to the liability for back pay or other damages; therefore, declaratory or injunctive relief and the award of attorney's fees are not barred.

In *Van Hoomissen v. Xerox Corp.*,[193] a case of first impression, the Ninth Circuit held that attorney's fees may be awarded to prevailing defendants against the EEOC under section 706(k). The plaintiff alleged discriminatory hiring and retaliatory firing by the defendant. EEOC sought to intervene. Intervention was granted as to the retaliatory firing issue only. EEOC appealed the denial of intervention on the discriminatory hiring issue and lost. The Ninth Circuit construed section 706(k) to mean that the EEOC and the United States Government can be liable for costs including attorney's fees.[194] The hearing in which the interlocutory decree was issued was held to be a sufficiently discrete proceeding so that the defendant could be considered a "prevailing party."

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192. The defendant asserted good faith reliance on EEOC guidelines that state protective laws regarding lifting weights would not be deemed to conflict with Title VII. However, the court stated that reading section 713(b) to bar attorney's fees whenever good faith reliance was shown would discourage private suits challenging suspect EEOC interpretations of Title VII. Since there are already burdens on those who pursue such litigation, such as the complex issues involved and the small likelihood of success (due to the deference accorded an agency's interpretation of its governing statute), and since such litigation is important to policy development, it should not be further discourgaged by the barring of attorney's fees.

193. 503 F.2d 1131 (9th Cir. Sept., 1974) (per Wiright, J.) (supplemental opinion). Judge Wright's principal opinion in *Van Hoomissen* is reported at 497 F.2d 180 (9th Cir. 1974), *dismissing appeal from* 368 F. Supp. 829 (N.D. Cal. 1973).

194. *Id.* at 1132-33. *Accord*, United States v. Jacksonville Terminal Co., 316 F. Supp. 567, 623 (M.D. Fla. 1970), *rev'd on other grounds*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).