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# Constitutional Law

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# CONSTITUTIONAL LAW

## I. THE LIMITS OF CONSTITUTIONAL PRIVACY IN THE PSYCHOTHERAPIST—PATIENT EVIDENTIARY PRIVILEGE

### A. INTRODUCTION

The California Evidence Code protects against compelled disclosure during discovery or at trial of confidential communications that occur in the course of a psychotherapeutic relationship.[1] In *Caesar v. Mountanos*,[2] a Ninth Circuit panel upheld the constitutionality of section 1016 of the Evidence Code, commonly known as the patient-litigant exception to the psychotherapist-patient evidentiary privilege. Section 1016 creates a statutory waiver by providing that there is no privilege "as to a communication relevant to an issue concerning the mental or emotional condition of the patient" if the patient tenders such a condition as an element of a claim or defense in a cause of action.[3] Although a California statute was reviewed, the decision will affect proceedings throughout the circuit because the *Caesar* panel extended a constitutional foundation to the evidentiary privilege.

### B. THE CAESAR DECISION

Petitioner Caesar, a practicing psychiatrist, was denied a writ of habeas corpus in the federal district court where he sought to vacate a finding of civil contempt by a California trial court. The contempt conviction followed Caesar's refusal to cooperate in court-ordered discovery in a personal injury action brought by a former patient who had consulted him for treatment after an alleged tort. The patient-litigant and her counsel had conceded that the treatment given by petitioner "may be involved" in the lawsuit.[4]

In an initial deposition, Caesar refused to answer any questions relating to treatment because he claimed it would be psy-

1. CAL. EVID. CODE § 1014 (West Supp. 1977) provides, in relevant part, "the patient . . . has a privilege . . . to prevent another from disclosing . . . a confidential communication between patient and psychotherapist. . . ."

2. 542 F.2d 1064 (9th Cir., Sept. 1976) (per Jameson, D.J.; the other panel members were Koelsch and Hufstedler, JJ.) *cert. denied*, 430 U.S. 954 (1977).

3. CAL. EVID. CODE § 1016 (West 1966).

4. 542 F.2d at 1064.

chologically harmful to his former patient. In a second court-ordered deposition, Caesar acknowledged that treatment had been given and disclosed his diagnosis that the patient was mentally depressed, but he would not answer eleven questions concerning the relationship between the alleged tort and the patient's emotional condition.[5]

Caesar contended that the right of privacy implicit in the fourteenth amendment affords absolute protection for confidential communications between patients and their psychotherapists. The panel disagreed, but it did acknowledge that a conditional right of privacy generally guards such communications. According to current standards of due process, disclosure is required only if properly justified by a compelling state interest.[6] The panel determined that the patient-litigant exception is supported by a compelling interest, that of insuring the ascertainment of truth in legal proceedings. By compelling disclosure of only "relevant" psychotherapeutic communications, section 1016 is sufficiently narrow to obviate constitutional infirmities under due process.[7] The panel also concluded that the statutory privilege scheme, alleged to discriminate unlawfully between people who consult psychotherapists and those who seek out clergymen for counseling, does not violate the equal protection clause of the United States Constitution.[8] Finally, the panel reviewed the facts of the case and held that, because the litigant alleged mental injury in her cause of action, her psychiatrist must answer questions relevant to the claim.[9]

Judge Hufstedler disagreed with the majority on the due process question. She contended that the majority had oversimplified the factors in balancing the state interests against those of the patient; and the relevance test as interpreted by the majority was not the narrowest feasible method of implementing the complex, compelling interests of the state.[10]

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5. The questions are detailed in the dissenting opinion. *Id.* at 1071 n.1.

6. *Id.* at 1067-68.

7. *Id.* at 1069.

8. *Id.* at 1068-69.

9. *Id.* at 1070.

10. *Id.* at 1071-75. For a discussion of the dissenting opinion in *Caesar*, *see* Note, *Constitutional Law . . . The Patient-Litigant Exception to the Psychotherapist-Patient Privilege - Caesar v. Mountanos*, 10 LOY. L.A.L. REV. 695, 700-01, 706 (1977) [hereinafter cited as *Note, Caesar*].

### C. Analysis

In support of its conclusions the *Caesar* majority adopted the California Supreme Court's analysis of similar issues in *In re Lifschutz.*[11] In this decision, the court held that "under a properly limited interpretation, the litigant-patient exception . . . does not unconstitutionally infringe the constitutional rights of privacy of either psychotherapists or psychotherapeutic patients."[12] The *Lifschutz* court also found that the existence of a legislatively created absolute clergyman-penitent privilege held by the cleric did not deny equal protection to psychotherapists, whose statutory privilege is conditional rather than absolute.[13] The *Caesar* panel's wholesale reliance on the methodology and conclusions in *Lifschutz* rendered its analysis of both the due process and equal protection issues unsound. In several cases decided after *Lifschutz,*[14] the United States Supreme Court refined substantive due process review, but the *Caesar* majority failed to consider these developments in several important respects. These decisions substantially expanded the right of privacy,[15] but the *Caesar* panel did not explore the particular aspect of the privacy concept which inheres in the psychotherapist-patient relationship. Next, these decisions established the requirement of a compelling state interest to justify state regulation of a fundamental right.[16] Nevertheless, the *Caesar* court simply redenominated the state interest of insuring the ascertainment of truth in legal proceedings, termed "historically important" in *Lifschutz,* as "compelling" without further analysis. Finally, the *Caesar* majority incorrectly assumed that the *Lifschutz* interpretation of section 1016 was an attempt to narrow the statute under modern due process standards which were non-existent at the time of the *Lifschutz* decision. With respect to its assessment of the equal protection claim which was asserted on behalf of patients, the panel in Caesar erred in adopting the *Lifschutz* analysis which applied to a claim asserted on behalf of therapists.

#### 1. Substantive Due Process

The controlling United States Supreme Court opinion in-

11. 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

12. *Id.* at 423, 467 P.2d at 561, 85 Cal. Rptr. at 833.

13. *Id.* at 427, 467 P.2d at 564, 85 Cal. Rptr. at 836.

14. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

15. *See* notes 21-27 *infra* and accompanying text.

16. *See* notes 17-20 *infra* and accompanying text.

volving the review of state action under substantive due process is *Roe v. Wade,*[17] decided two years after *Lifschutz.* In *Roe,* the Court held that state regulations involving fundamental rights such as privacy "may be justified only by a 'compelling state interest'" and "must be narrowly drawn to express only the legitimate state interests at stake."[18] Caesar urged an independent review of the validity of section 1016 in light of *Roe* and its companion case *Doe v. Bolton,*[19] but the majority chose to reexamine the issues superficially, relying on the *Lifschutz* analysis. However, while the court in *Lifschutz* employed a due process balancing test, it did not achieve the elevated standard of review mandated in *Roe.*[20] This shortcoming is best demonstrated in a breakdown of the individual steps in due process analysis.

*Constitutional Privacy*

Due process review balances the individual's interests against the competing interests of the state. Thus, it is important to assess the nature of the privacy right involved in *Caesar.* A substantial privacy right may only be limited by a compelling state interest. The *Lifschutz* court found a conditional right of privacy encompassing psychotherapeutic communications in the penumbras of the Bill of Rights.[21] This aspect of privacy is, in the words of one commentator, the right of "individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others."[22] In reviewing the constitutional validity of section 1016, the *Lifschutz* court was

17. 410 U.S. 113 (1973).

18. *Id.* at 155.

19. 410 U.S. 179 (1973).

20. When *Lifschutz* was decided, the "compelling state interest" test was an equal protection doctrine "of relatively recent vintage." Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting). The *Lifschutz* opinion is conspicuously devoid of any reference to cases such as *Shapiro,* thus indicating that *Lifschutz* was decided under a lower standard of review.

21. The California Supreme Court relied on an interpretation of the United States Constitution in Griswold v. Connecticut, 381 U.S. 479 (1965), in which Justice Douglas listed the first, third, fourth, fifth, and ninth amendments as the sources of various "zones of privacy." *Id.* at 484. Although *Griswold* only involved the right of privacy as it protects the use of contraceptives in the marital relationship, the *Lifschutz* opinion extended constitutional privacy to protect psychotherapeutic communications. The court reasoned that the intimate nature of communications made in the course of treatment gives rise to a reasonable expectation that there will be minimal public intrusion into the relationship. The emphasis is on preserving the anonymity of the patient. 2 Cal. 3d at 431-32, 467 P.2d at 567-68, 85 Cal. Rptr. at 839-40.

22. A. WESTIN, PRIVACY AND FREEDOM 7 (1967).

"mindful of the justifiable expectations of confidentiality that most individuals seeking psychotherapeutic treatment harbor."[23]

The Supreme Court, in *Roe* and *Doe*, held that a conditional right of privacy protects a woman's decision to terminate her pregnancy. The source of this right is the personal liberties safeguarded by the fourteenth amendment.[24] Implicit in this right is the principle of autonomy which expanded the scope of privacy as a constitutionally protected right.[25]

The *Caesar* court assimilated the concept of privacy adopted in *Lifschutz* without seriously considering the autonomy principle developed in *Roe* and *Doe*. The majority failed to further explore the nature of the right of privacy with respect to psychotherapeutic communications.[26] The court should have addressed the possibility that psychotherapy may be hampered or even fail for an individual patient as a result of the compelled disclosure of confidential communications made in therapy.[27] The more lim-

23. 2 Cal. 3d at 431, 467 P.2d at 567, 85 Cal. Rptr. at 839.

24. 410 U.S. at 153, 189. The Supreme Court did not explicitly hold that the doctor-patient relationship *per se* is cloaked in the constitutional right of privacy. Justice Douglas did, however, recognize such a zone of privacy in his concurrence in *Doe*. 410 U.S. at 219. And the Second Circuit Court of Appeals, relying on the decisions in *Roe* and *Doe*, held that medical prescription records, a product of such a relationship, are protected by constitutional privacy. Roe v. Ingraham, 480 F.2d 102 (2nd Cir. 1973), *rev'd on other grounds sub nom.* Whalen v. Roe, 429 U.S. 589 (1977).

25. The Supreme Court in later cases explained the autonomy principle established in *Roe*. It stated that the concept of liberty in the fourteenth amendment includes "the interest in independence in making certain kinds of important decisions." Carey v. Population Services International, 431 U.S. 678, 684 (1977) (quoting Whalen v. Roe, 429 U.S. at 599-600). *See* Baker, *Roe and Paris: Does Privacy Have a Principle?* 26 STAN. L. REV. 1161 (1973-74) [hereinafter cited as *Baker*], in which both the anonymity and autonomy principles of constitutional privacy are discussed. Baker contends that "it is more difficult to justify broad protection of autonomy on the basis of the specific guarantees mentioned by Justice Douglas in *Griswold* than on the basis of the 14th amendment." *Id.* at 1166.

26. *See* 542 F.2d at 1067 n.9 and accompanying text.

27. Although it is true, as the *Lifschutz* court observed, that § 1016 does not proscribe the association of psychotherapists and patients, 2 Cal. 3d at 432, 467 P.2d at 568, 85 Cal. Rptr. at 840, it does operate as a burden on the psychotherapeutic process. *See* Carey v. Population Services International, discussed note 25 *supra*, in which the Court, in commenting on the *Roe* and *Doe* cases, held that the same test "must be applied to state regulations that burden an individual's *right to decide* . . . as is applied to state statutes that prohibit the decision entirely." 431 U.S. at 688 (emphasis added). After observing at the outset that "psychotherapy is perhaps more dependent on absolute confidentiality than other medical disciplines," 542 F.2d at 1067, the *Caesar* majority might have concluded that strict confidentiality is essential to effectuating at least some decisions that are generated in the context of a psychotherapeutic relationship. *But cf.* Whalen v. Roe, 429 U.S. 589, 600-02 (1977) (rejected claims that a New York program which records the names and addresses of users of certain prescription drugs threatens patient interests in

ited concept of privacy contemplated by the panel in *Caesar* permitted a less compelling state interest to overcome the patient's privacy interests.

*Compelling State Interest*

The *Caesar* majority held that the state has a compelling interest "to insure that truth is ascertained in legal proceedings in its courts of law."[28] The *Lifschutz* court had characterized the same interest as "historically important" and found it "substantial enough to compel the disclosure of a great variety of confidential material."[29] However, in both *Caesar* and *Lifschutz* the state interest was evaluated in terms of cases which involved the power of the government to compel testimony before criminal grand juries and courts in criminal actions.[30] The *Caesar* court failed to adequately support its leap from an historically important to a compelling state interest in the context of civil litigation.[31]

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both the non-disclosure of private, sensitive information and in making important medical decisions independently).

28. 542 F.2d at 1069.

29. 2 Cal. 3d at 432-33, 467 P.2d at 568, 85 Cal. Rptr. at 840.

30. United States v. Calandra, 414 U.S. 338 (1974) (witnesses must testify before grand juries concerning an offense even if evidence was illegally obtained); Branzburg v. Hayes, 408 U.S. 665 (1972) (a newsman must testify before grand juries concerning privileged information); Kastigar v. United States, 406 U.S. 441 (1972) (once immunity has been given, a witness may not invoke the fifth amendment against self-incrimination); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (a state witness granted immunity from prosecution under state law must give testimony which may incriminate him under federal law, but the testimony and its fruits may not then be employed in a federal prosecution against him); Blair v. United States, 250 U.S. 273 (1919) (a witness summoned to testify before a grand jury may not refuse to answer on the basis that the jury is without jurisdiction over the offense under investigation).

31. The state interest in facilitating the discovery of facts in civil litigation is distinguishable from the interest supporting inquisitorial and prosecutorial functions of the government. For example, in Branzburg v. Hayes, 408 U.S. 665 (1972), a case cited by the *Caesar* majority, the Court stated that the investigatory role of the grand jury was justified because "'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege . . . ." *Id.* at 688. A compelling state interest was identified in "extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders. . . ." *Id.* at 701. The state interst defined in *Caesar* pales in comparison. The Court of Appeals for the Second Circuit refused to apply the rule in *Branzburg* in reviewing a motion to compel a journalist to testify during discovery in a civil case. In Baker v. F & F Investment, 470 F.2d 778 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), the court found a qualified privilege for confidentiality in the first amendment, reasoning that the Supreme Court's concern "with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes Branzburg from the case presently before us." *Id.* at 784-85. The court suggested that the public interest, clearly present in a criminal prosecution, is more attenuated in civil cases and

A compelling interest may be identified in due process obligations of the state to conduct fair trials for both parties in civil disputes, as the dissent in *Caesar* suggested.[32] However, the parameters of the state role in facilitating an adverse party's access to evidence are not fixed. An absolute psychotherapist-patient privilege may in some cases deprive a defendant of information necessary to a proper defense. However, there are other rules of evidence which, by their nature, are always exercised in derogation of truth.[33] Further, it could be argued that a defendant's right to a fair trial would not be impaired if the information protected by the psychotherapist-patient privilege were either cumulative or obtainable from another source.[34] Therefore, the existence of a compelling state interest should be determined on a case-by-case basis.

*Narrowly Drawn*

Perhaps in theory, the word relevant[35] sufficiently narrows the statute so that it is not a violation of substantive due process. However, the *Caesar* majority did not consider its procedural aspect: the potential invasion of privacy which could occur when

held that the proponent of discovery would have to demonstrate that the evidence sought was necessary to maintain the action. *Id.* at 784.

32. 542 F.2d at 1073.

33. Consider, for example, the application of the exclusionary rule in criminal actions. In Weeks v. United States, 232 U.S. 383 (1914) and Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court held that it was reversible error for a trial court to admit evidence obtained in violation of an accused's fourth amendment right to privacy. For a summary of California evidentiary privileges, *see* Pickering & Story, *Limitations on California Professional Privileges: Waiver Principles and Policies They Promote*, 9 U.C.D. L. REV. 477 (1976).

34. The majority would only prevent discovery of irrelevant psychotherapeutic communications.

35. It is not completely clear what is meant by "relevant." One possibility is the standard used to determine admissibility at trial, which requires that the evidence tend "to prove or disprove any disputed fact that is of consequence to the determination of the action." CAL. EVID. CODE § 210. (West 1966). This is not as broad as the relevancy test that governs discovery generally, which permits inquiry into all information related to the subject matter of the action whether or not admissible at trial. CAL. CIV. PROC. CODE § 2016(b) (West Supp. 1978). Judge Hufstedler, dissenting in *Caesar*, charged that the relevance test was impossible to apply as demonstrated by the *Lifschutz* court's inability to decide whether ten-year-old psychotherapeutic communications were directly related to the mental condition of the patient. 542 F.2d at 1073. However, that particular question was not at issue in the appeal. Nevertheless, the *Lifschutz* court retreated from its limitation on § 1016 by leaving open the possibility that a ten-year-old communication might be relevant. The deliberation by the California Supreme Court on the whole question of applying the relevance standard indicates the dilemma a patient must face in order to seek legal redress for an injury involuntarily suffered. 2 Cal. 3d at 435-37, 467 P.2d at 570-71, 85 Cal. Rptr. at 842-43.

the statute is implemented. By following *Lifschutz*, the majority implicitly adopted its reasoning that, since the patient knows the nature of the alleged mental injury and the content of the communications, the patient has the burden of proving that a given communication is not relevant.[36] Presumably this would arise in a hearing on a defense motion to compel discovery and would require that the communication at issue be divulged.[37] This revelation may be inoffensive if the communication is ultimately discoverable under section 1016, but if a communication is adjudged irrelevant and therefore not discoverable, invasion of privacy has already occurred.[38]

*Lifschutz* was more sensitive to the privacy interests of the patient than the *Caesar* panel. At least *Lifschutz* cautioned that trial judges should carefully control compelled disclosures in implementing section 1016 and suggested that the determination of relevancy might be made *ex parte* in chambers.[39] The *Caesar* majority made no such attempt to minimize intrusion into the privacy of the patient-litigant.[40] While the court did note two

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36. Judge Hufstedler attacked this procedure because

> [t]he layman-patient simply cannot be expected to diagnose his own illness, to determine for himself what mental conditions are in issue in the lawsuit, or to decide what evidence is or is not "directly" related to the issue. Even a medically trained patient turned personal injury lawyer would be hard pressed in territory less slippery than mental health to prove the negative Lifschutz imposes upon him.

542 F.2d at 1073. Indeed, most judges and psychotherapists are not equipped to fully assess the nature, including the causes, of mental and emotional conditions. *See generally*, Bartholomew & Milte, *The Reliability and Validity of Psychiatric Diagnoses in Courts of Law*, 50 AUST. L. J. 450 (1976). The author of *Note, Caesar, supra* note 10, challenges both the reliability and the relevance of psychotherapeutic communications. *Id.* at 701-07.

37. *Cf.* CAL. EVID. CODE § 915 (West 1966) which forbids a judge from requiring the disclosure of a communication claimed to be privileged in order to determine that the privilege applies. Noting this provision, the *Lifschutz* court dismissed the inconsistency between § 915 and its ruling "because the privileged status of psychotherapeutic communications depends upon the content." 2 Cal. 3d at 437 n.3, 467 P.2d at 571 n.3, 85 Cal. Rptr. at 843 n.23.

38. Thus, this procedure may well be overbroad under the *Roe* test because it may permit disclosure of constitutionally protected material.

39. 2 Cal. 3d at 437 n.3, 467 P.2d at 571 n.3, 85 Cal. Rptr. at 843 n.23. *See Note, Caesar, supra* note 10, at 705.

40. One commentator has observed that § 915(b) of the California Evidence Code (West 1966) "already provides for such in camera hearings in those cases where the identity of an informer and the nature of a trade secret are sought. Psychotherapeutic communications deserve no less protection." *Note, Caesar, supra* note 10, at 706. *But see* Judge Hufstedler's formula for reducing the impact of § 1016 on the privacy rights of patient-litigants: "No confidential communication between a psychotherapeutic patient and his treating doctor shall be deemed relevant for the purpose of Section 1016, except

other discretionary procedural safeguards discussed in *Lifschutz*, protective and exclusionary orders, it did not adopt a mandatory set of procedures for trial courts.[41]

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the fact of treatment, the time and length of treatment, the cost of treatment, and the ultimate diagnosis, unless the party seeking disclosure of the communication establishes in the trial court a compelling need for its production." 542 F.2d at 1075. Hufstedler would limit this restriction to treating doctors, since an examination by a psychotherapist when a patient is contemplating litigation is intended to be an evidentiary source. This procedure implicitly recognizes that the balancing of both plaintiff's and defendant's due process rights can only be done on a case-by-case basis. It is narrower in scope than the majority's resolution because the ambit of relevant communications is strictly limited to a list of easily identifiable elements; in order to acquire access to additional information, the defendant must demonstrate the need for it. But compare a recent Alaska Supreme Court decision with Judge Hufstedler's proposal on allowing disclosure of even the fact of treatment: "In particular situations . . . disclosure of the mere fact that an individual has visited a certain physician may have the effect of making public certain confidential or sensitive information." Falcon v. Alaska Public Offices Comm'n, 570 P.2d 469, 479 (1977). Because of a specialized practice, such disclosure also reveals the nature of the treatment, which, in the opinion of the court, "patients would normally seek to keep private." *Id.* at 480. Such treatment, for example, may include the services of "a psychiatrist, psychologist or of a physician who specializes in treating sexual problems or venereal disease." *Id.* By following the approach of the Alaska Supreme Court, a patient might, by asserting the constitutional privilege, legitimately refuse to disclose some information that is not protected by statute. *See* CAL. EVID. CODE § 1012 (West Supp. 1978) which provides that confidential communications only include oral communications between the patient and the therapist, information obtained by an examination of the patient, and the diagnoses and advice given by the psychotherapist in the course of treatment. The Law Revision Commission Comment notes that the 1967 amendment added "diagnosis" to insure the operation of the privilege whether the diagnosis is communicated to the patient or not.

41. 542 F.2d 1070 *quoting* Lifschutz, 2 Cal. 3d at 437-38, 467 P.2d at 572, 85 Cal. Rptr. at 844. Protective orders are granted if the moving party shows "good cause" why discovery should not be permitted. CAL. CIV. PROC. CODE § 2019(b)(1) (West Supp. 1978). In this case, a protective order could only follow the determination of relevancy and could not reverse the disclosure. Exclusionary orders prevent the introduction at trial of evidence if its probative value is substantially outweighted by the probability that it will be prejudicial to the objecting party. CAL. EVID. CODE § 352 (West 1966). An order to exclude prejudicial or inflamatory evidence at trial has no value during the discovery phase of litigation.

*But cf.* United States v. Nixon, 418 U.S. 683 (1974). Although the *Nixon* opinion was limited to the "conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence in criminal trials," *Id.* at 712 n.19, it provides a cohesive model for pretrial judicial supervision of constitutionally protected evidence. In order to meet the burden required by Rule 17(C) of the Federal Rules of Criminal Procedure, the Special Prosecutor had to show relevancy, admissibility and specificity with respect to the evidence sought. In addition, since the Court recognized a constitutionally based presidential privilege the Special Prosecutor had to show that the material was "essential to the justice of the [pending criminal] case." *Id.* at 713, *quoting* United States v. Burr, 25 Fed. Cas. 187, 192 (1807). The trial court was ordered to conduct an *in camera* inspection of the materials under subpoena for admissibility. The Supreme Court also instructed the district court to protect the excised, privileged conversation by returning them under seal to the custodian of White House records.

The *Nixon* case mandated the kind of procedural safeguards mentioned in *Lifschutz* and *Caesar*. Moreover, it viewed the evidence as presumptively privileged, which made it

### 2. EQUAL PROTECTION

In *Caesar,* a two-fold equal protection claim was made on behalf of the patient. First, Caesar alleged that section 1016 deprives psychotherapeutic patients of rights afforded other litigants by placing a precondition on their access to the courts.[42] Although it noted the deterrent effect of section 1016 on potential causes of action, the panel relied on *Boddie v. Connecticut*[43] to rule that state procedural requisites for litigants are permissible if they are grounded in a "proper consideration" of the interests involved. The panel found that the section 1016 waiver is consonant with the general litigation requirement of disclosure of facts upon which a claim is based.[44] Consequently, the court reasoned that it operates to place psychotherapeutic patient-litigants in the same position as all other persons who bring suit.[45]

Second, Caesar contended that the statutory scheme, which grants an absolute privilege for communications between a clergyman and a penitent,[46] discriminates unlawfully against those who consult psychotherapists, rather than clerics, for counseling.[47] The panel rejected this claim, again in reliance on *Lifschutz.*[48] However, the *Lifschutz* court had only considered the assertion that the statutory absolute clergyman-pentitent privilege, which may be independently claimed by the cleric,[49] denied *therapists* equal protection of the laws. Since the patient and not the therapist is the holder of the psychotherapist privilege,[50] it

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unnecessary for the party asserting the privilege to file motions for *in camera* review and protective measures in the trial court.

42. 542 F.2d at 1068.

43. 401 U.S. 371 (1971). The Supreme Court in *Boddie* held that a state may not deny access to the courts for indigent parties seeking a dissolution of marriage because of their inability to pay the standard filing fees. Relying on due process rather than equal protection grounds, Justice Harlan's majority opinion stated two reasons for finding the financial barriers to the courts unconstitutional. The claim involved the "adjustment of a fundamental human relationship" and, in order to make this adjustment, "resort to the judicial process" was necessary. *Id.* at 383.

44. The panel distinguished *Boddie* by noting that access to a meaningful hearing was not the issue in *Caesar.* 542 F.2d at 1068 n.12. However, the difference between the deterrent effect of § 1016 and the access principle is one of degree. A patient contemplating a personal injury lawsuit involving allegations of mental or emotional distress is forced to choose between privacy and damages for an injury involuntarily suffered. Judge Hufstedler labeled this "Hobson's choice." *Id.* at 1074.

45. *Id.* at 1068.

46. CAL. EVID. CODE § 1033 (West 1976).

47. 542 F.2d at 1068.

48. *Id.*

49. CAL. EVID. CODE § 1034 (West 1966).

50. CAL. EVID. CODE § 1013 (West 1966).

was incumbent on the *Caesar* panel to inquire into the differences between the privacy rights of the patient and those of the therapist before blindly adopting a rule formulated in response to a therapist's claim of privilege.

### D. Conclusion

Because it recognized a qualified right of privacy in psychotherapist-patient relationships, the *Caesar* decision elevated the confidentiality privilege for psychotherapeutic communications to the status of a constitutionally based rule of evidence. This determination obviously has implications beyond the scope of the issues decided in *Caesar*. Since the majority merely adopted the *Lifschutz* analysis, the impact of the case in California state proceedings will be minimal. However, the *Caesar* opinion has laid some groundwork for later development of issues relating to the psychotherapist-patient privilege. In particular, it adopted a standard, albeit vague, by which other statutory or common law exceptions to the privilege may be constitutionally reviewed.[51]

It is difficult to assess the impact of *Caesar* in Ninth Circuit states individually because there is little uniformity among state codes. All states within the circuit have some form of a psychotherapist-patient privilege, except Hawaii which protects only communications made to medical doctors practicing psychiatry.[52]

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51. For example, Cal. Evid. Code § 1028 (West Supp. 1978) provides: "Unless the psychotherapist is a person described in subdivision (a) or (b) of Section 1010, there is no privilege under this article in a criminal proceeding." This effectively denies the privilege to patients of clinical social workers, school psychologists, and family counselors, while allowing one to patients of psychiatrists or licensed psychologists. Cal. Evid. Code § 1010 (West Supp. 1978). Under the *Caesar* standard this discrepancy may be attacked as a violation of equal protection. In fact, the Law Revision Commission has recommended to the legislature that § 1028 be repealed. "A patient consulting a psychotherapist expects to receive the benefit of the privilege regardless of the type of psychotherapist consulted; Section 1028 frustrates this expectation [and] may also discourage potential patients from seeking treatment . . . ." *Recommendation Relating to Psychotherapist-Patient Privilege*, 14 Cal. L. Revision Reports 7 (1977).

The Commission's suggestion is embodied in Assembly Bill No. 2517, introduced in the Assembly on February 13, 1978. AB 2517 was passed by the Assembly on April 13, 1978 and sent to the Senate where it was referred to the Committee on the Judiciary on April 19, 1978. Assembly Weekly History 504 (May 18, 1978).

52. Haw. Rev. Stat. § 621.20.5(a) (1976). The provision states, in relevant part, "No physician shall, without the consent of his patient, divulge in any civil action or proceeding . . . any information which he may have acquired in attending the patient, and which was necessary to enable him to prescribe or act for the patient." *Id.* The statutory exception provides, "consent shall be deemed to have been given . . . (1) in every civil action which has been brought by any person for damages on account of personal injuries."

The application of *Caesar* in both Nevada and Oregon will be relatively simple because these two states, like California, have psychotherapist-patient privileges codified as rules of evidence.[53] There are statutory exceptions to the privileges in both states that resemble California's section 1016, and the *Caesar* test for constitutionality may be directly applied.[54]

In the business and professions codes of Alaska,[55] Arizona,[56] Idaho,[57] Montana,[58] and Washington,[59] there are protective provisions for confidential communications made to "psychologists".[60] The Alaska provision was construed solely as a rule of professional conduct by the Alaska Supreme Court which held, nevertheless, that a common-law privilege for psychotherapeutic communications would apply on a case-by-case basis.[61] In the remain-

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*Id.* This statutory waiver is not as narrow as the patient-litigant exception reviewed in *Caesar*. It is an automatic, complete waiver without regard to what physical, mental, or emotional condition has been tendered in issue by the patient and is not limited to relevant communications. It is therefore vulnerable to constitutional challenge under the *Caesar* rule insofar as the statute permits the discovery of irrelevant psychotherapeutic communications. The *Caesar* opinion implies that constitutional privacy protects certain psychotherapeutic communications whether or not a particular jurisdiction recognizes a psychotherapist privilege per se.

53. NEV. REV. STAT. § 49.215 (2) (1977) includes practitioners of psychology in the physician-patient privilege. OR. REV. STAT. § 44.040(1)(h) (1977) prevents "licensed psychologists" from being examined as witnesses in the course of professional employment but the privilege may only be invoked in civil proceedings. State v. Betts, 384 P.2d 198 (1963).

54. NEV. REV. STAT. § 49.245 (3) (1977) creates an exception for communications relevant to the condition of the patient in proceedings in which the condition is an element of a claim or defense. OR. REV. STAT. § 44.040 (2) (1977) provides for a waiver of the privilege if parties to an action offer themselves as witnesses.

55. ALASKA STAT. § 08.86.200 (1977).

56. ARIZ. REV. STAT. § 32-2085 (West 1976).

57. IDAHO CODE § 54-2314 (Supp. 1978).

58. MONT. REV. CODES ANN. § 66-3212 (Supp. 1977).

59. WASH. REV. CODE ANN. § 18.83.110 (1978).

60. CAL. BUS. & PROF. CODE § 2918 (West 1974), on the other hand, directly refers to CAL. EVID. CODE § 1014 for the protection of psychotherapeutic communications.

61. Allred v. State, 554 P.2d 411 (1976). In *Allred*, decided one month before *Caesar*, the Alaska Supreme Court considered whether communications made by a criminal defendant to a psychiatric social worker were admissible at trial to prove his guilt. The majority denied the existence of "any state action that would trigger . . . privacy guarantees," *id.* at 416, and dismissed the confidentiality provision in ALASKA STAT. § 08.86.200 as "anti-gossip" legislation. *Id.* at 415. It recognized, however, a common law psychotherapist-patient privilege and adopted a strict constitutional standard of review. *Id.* at 421. The test was derived from *Ravin v. State*, 537 P.2d 494 (1975), in which the court extended the right of privacy [in Art. I, § 22 of the Alaska Constitution] to permit the use of marijuana in a person's home.

Dicta in *Allred* analogized the psychotherapist privilege to the physician-patient and stated that it "may be waived." 554 P.2d at 418 n.18. In Alaska, the physician-patient

ing four states it is unclear whether the business code provisions relating to confidentiality function as evidentiary privileges or merely as codes of professional conduct.[62] Judicial recognition of these codes as evidentiary rules could create multiple standards of statutory protection for psychotherapeutic communications.[63] A distinction could be drawn between those patients who consult psychologists and those who consult psychiatrists. When the communication is made to a psychiatrist, an additional privacy protection arises because of the physician-patient privilege. Application of *Caesar* in these states will require that any discrepancies be carefully scrutinized.

*Bonnie Maly*

## II. DUE PROCESS AND CONFINEMENT FOR CIVIL CONTEMPT

### A. INTRODUCTION

In *Lambert v. Montana,*[1] the court was presented with a

privilege is waived by the commencement of a personal injury action. Mathis v. Hilderbrand, 416 P.2d 8 (1966). And the waiver extends to the discovery of "all matters pertinent" to the plaintiff's claim. Trans-World Investments v. Drobny, 554 P.2d 1148, 1151 (1976). If Alaska courts adopt these waiver principles for the psychotherapist-patient privilege, they would be limited by the *Caesar* rule in the same manner as the Hawaii statutory exception. In other words, federal constitutional standards require that the patient be allowed to show that a given communication sought in discovery is not relevant to his or her claim. The result may be different under the Alaska Constitution, which mandates a balancing test analogous to the one in *Roe.* Falcon v. Alaska, 570 P.2d 469, 476 (1977).

62. *But cf.* ALASKA STAT. § 08.86.200 (provision silent as to application in legal proceedings) with IDAHO CODE § 54-2314 (provision expressly forbids examination of psychologist in civil or criminal proceedings). The Idaho Code lends itself more to interpretation as a rule of evidence than the Alaska statute, which was rejected as such in *Allred.* ARIZ. REV. STAT. § 32.2085 resembles the Alaska provision, while MONT. REV. CODES ANN. § 66-3212 resembles the Idaho Code. WASH. REV. CODE ANN. § 18.83.110 (provision forbids unspecified "compulsory disclosure"), is somewhere in between. To date, there are no reported cases in Arizona, Idaho, Montana or Washington that have construed these codes as evidentiary privileges.

63. *See* business and professional codes, notes 56, to 59, *supra* (communications made to "psychologists" exist "on the same basis" or "to the same extent" as confidential communications between attorney and client). This analogy was effective in California until 1965, when CAL. EVID. CODE § 1014, note 1 *supra,* superseded CAL. BUS. & PROF. CODE § 2904. For an historical summary, see *Lifschutz,* 2 Cal. 3d at 422 n.3, 467 P.2d at 560-61 n.3, 85 Cal. Rptr. at 832-83 n.3. The court observed that § 1014 was enacted to eliminate the double standard between the privilege afforded patients of psychologists under the business code and that given patients of psychiatrists under the physician-patient privilege.

1. 545 F.2d 87 (9th Cir. Oct., 1976) (per Lay, J., United States Circuit Judge for the Eighth Circuit, sitting by designation; the other panel judges were Kilkenny and Wright, JJ.).

"novel question"[2]: Is the length of confinement following a state court's declaration of contempt influenced by the individual's constitutional right to due process?[3] The court held that where imprisonment is of such duration that it may have ceased to be coercive, the contemnor should be allowed an opportunity to demonstrate that there is no substantial likelihood that further confinement would accomplish the purposes for which he or she was originally committed.[4] The position adopted by the *Lambert* court is without precedent[5] and may undermine the effectiveness of the contempt power.

## B. Background

The power of courts to punish for contempt has long been recognized as a necessary and integral part of the independence of the judiciary and as essential to the performance of the duties imposed on courts.[6] Contempt may be either civil or criminal.[7] The line that distinguishes civil contempt from its criminal counterpart is unclear, and courts have had difficulty in determining which label is appropriate.[8] But the distinction is important, particularly in terms of the sanctions that can be applied, and a general guideline has been developed. Since civil contempt is coercive in nature while criminal contempt is punitive, courts attempt to determine the category by looking to the nature and purpose of the sanctions imposed.[9]

Criminal contempt is similar to an ordinary conviction, even when the contemptuous act does not violate provisions of the

2. *Id.* at 88.

3. *Id.*

4. *Id.* at 91.

5. *See, e.g.*, Uphaus v. Wyman, 360 U.S. 72 (1959); Penfield Co. of Cal. v. Securities & Exchange Comm'n, 330 U.S. 585 (1947); United States ex rel. Goodman v. Kehl, 456 F.2d 863 (2d Cir. 1972); *cf.* Maggio v. Zietz, 333 U.S. 56 (1948).

6. *See* R. Goldfarb, The Contempt Power 1-45 (1963), which contains an extensive analysis of the history of the contempt power.

7. R. Goldfarb, *supra* note 6, at 47. *See also* United States v. Rizzo, 539 F.2d 458, 462-63 (5th Cir. 1976); United States v. Yanagita, 418 F. Supp. 214, 217 (E.D.N.Y. 1976).

8. Bessette v. W.B. Conkey Co., 194 U.S. 324, 329 (1904); R. Goldfarb, *supra* note 6, at 46-67.

9. *See* Shillitani v. United States, 384 U.S. 364, 368-70 (1966); United States v. Spectro Foods Corp., 544 F.2d 1175, 1182 (3d Cir. 1976); Skinner v. White, 505 F.2d 685, 689 (5th Cir. 1974); Cromaglass Corp. v. Ferm, 500 F.2d 601, 604 (3d Cir. 1974); Southern Ry. Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968); Donato v. United States, 48 F.2d 142, 143 (3d Cir. 1931); 4 Barron, Federal Practice and Procedure 2422 (1951).

criminal law.[10] A person accused of criminal contempt has the right to a full and impartial hearing with notice and an opportunity to defend, as well as the right to counsel and to call witnesses.[11] Since criminal contempt is often defined by statute,[12] an element of willfulness or wrongful state of mind may be required. The contempt must be shown by proof beyond a reasonable doubt,[13] the conviction is appealable,[14] and the offense is pardonable.[15] The sanction that can be imposed is generally unconditional.[16]

A civil contempt proceeding is subject to fourteenth amendment safeguards applicable to all judicial proceedings.[17] A person charged with civil contempt is entitled to have counsel present, to be given adequate notice, and to have an opportunity to be heard.[18] Civil contempt requires only that there be clear and convincing evidence of a lawful order and a violation thereof; there is no requirement of willful violation.[19] However, the sanction is conditional since the contemnor can comply with the order of the court and thus avoid any imprisonment.[20] The conditional nature of the imprisonment, based as it is on a contemnor's continued defiance, justifies holding civil contempt proceedings without the safeguards of an indictment and a jury trial.[21] The validity of

10. Bloom v. Illinois, 391 U.S. 194, 201 (1968); Michaelson v. United States *ex rel.* Chicago, St., P., M. & O. Ry. Co., 266 U.S. 42, 66 (1924).

11. *See* Harris v. United States, 382 U.S. 162 (1965); Cooke v. United States, 267 U.S. 517 (1925); United States v. Anderson, 553 F.2d 1154 (8th Cir. 1977).

12. *See* Note, *Constitutional Law: The Supreme Court Constructs a Limited Right to Trial by Jury for Federal Criminal Contemnors,* 1967 DUKE L.J. 632, 654 n.84, which contains a partial listing of state contempt statutes.

13. United States v. U.M.W., 330 U.S. 258, 303 (1947); United States v. Greyhound Corp., 508 F.2d 529, 531-32 (7th Cir. 1974); *In re* Brown, 454 F.2d 999, 1006-07 (D.C. Cir. 1971); United States v. Jackson, 426 F.2d 305, 308-09 (5th Cir. 1970).

14. Union Tool Co. v. Wilson, 259 U.S. 107, 110-11 (1922); Pabst Brewing Co. v. Brewery Workers Local No. 77, 555 F.2d 146, 149 (7th Cir. 1977). In contrast, a civil contempt order is ordinarily not appealable. Fox v. Capital Co., 299 U.S. 105, 107 (1936).

15. *See Ex parte* Grossman, 267 U.S. 87 (1925).

16. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-43 (1911); Skinner v. White, 505 F.2d 685, 688-89 (5th Cir. 1974).

17. Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostook R.R. Co., 380 F.2d 570, 578 (D.C. Cir. 1967), *cert. denied,* 389 U.S. 970 (1967).

18. United States v. Anderson, 553 F.2d 1154, 1155 (8th Cir. 1977).

19. Landman v. Royster, 354 F. Supp. 1292, 1300 (E.D. Va. 1973).

20. United States v. Spectro Foods Corp., 544 F.2d 1175, 1182 (3rd Cir. 1976); Carbon Fuel Co. v. U.M.W., 517 F.2d 1348, 1349 (4th Cir. 1975); De Parcq v. United States Court for So. Dist. of Iowa, 235 F.2d 692, 699 (8th cir. 1956).

21. Shillitani v. United States, 384 U.S. 364, 370-71 (1966). The Court recognized, however, a contemnor's inability to comply as one exception. It released Shillitani at the end of grand jury's term because he no longer had the opportunity to comply and thus purge himself. *See* Maggio v. Zeitz, 333 U.S. 56 (1948). While federal courts have been

indefinite sentences was established by the Supreme Court in *Uphaus v. Wyman.*[22] The Court reasoned that

> where the defendant carries the keys to freedom in his willingness to comply with the court's directive, [such coercion] is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees . . . . If appellant chooses to . . . obey the [court's] order . . . , he need not face jail. If, however, he continues to disobey, we find . . . no constitutional objection to the exercise of the traditional remedy of contempt to secure compliance.[23]

## C. THE *Lambert* DECISION

Lambert was charged with aggravated assault for discharging a weapon in the direction of two people. The state later concluded that he was not the one who had fired the gun. However, the state was convinced that Lambert knew who did, so it had the court dismiss the assault charge, grant him immunity from prosecution, and order him to divulge the identity of the responsible person. Lambert admitted that he knew who had fired the gun, but refused to cooperate. The state trial court found him in contempt and ordered him committed until he cooperated.[24]

The Montana Supreme Court denied relief.[25] Lambert then

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responsive to cases of inability to comply, they have not otherwise been willing to authorize release short of compliance. *See, e.g.,* McCrone v. United States, 307 U.S. 61 (1939); Scott v. Scott, 382 F.2d 461 (D.C. Cir. 1967); Giancana v. United States, 352 F.2d 921 (7th Cir. 1965), *cert. denied,* 382 U.S. 959 (1965); Doe v. Norton, 365 F. Supp. 65 (D.C. Conn. 1973), *prob. juris. noted,* Doe v. Norton, 415 U.S. 912 (1974), *vacated and remanded,* 422 U.S. 392 (1975) (mother could be confined under Connecticut statute for failure to disclose identity of father of her child even though the incarceration might work to the disadvantage of her child).

22. 360 U.S. 72 (1959). The case concerned a man confined for his persistent refusal to comply with two subpoenas *duces tecum* which called for the production of certain corporate records. The Court noted that Uphaus "admitted . . . that although [the documents] were at hand, not only had he failed to bring them with him to court, but that, further, he had no intention of producing them. In view of appellant's unjustified refusal we think the order a proper one . . . ." *Id.* at 81.

23. *Id.* at 82, *quoting in part* Green v. United States, 356 U.S. 165, 197 (1958) (dissenting opinion). *See also In re* Nevitt, 117 F. 448 (8th Cir. 1902), which coined the phrase which pervades the law of civil contempt: The contemnor "carries the keys of his prison in his own pocket." 360 U.S. at 86.

24. 545 F.2d at 88.

25. State v. Lambert, 167 Mont. 406, 538 P.2d 1351 (1975). The court held that the trial court had correctly construed the state immunity statute. MONT. REV. CODES ANN.

sought a writ of habeas corpus in federal district court, alleging "(1) that he had been denied due process of law by being imprisoned beyond the term of the court without a hearing; and (2) that the action of the district judge amounted to an invasion of the province of the grand jury and violated the Fifth and Fourteenth Admendments of the Constitution of the United States."[26] The federal district court denied relief, holding that no substantial federal constitutional issues were presented.[27]

The court of appeals affirmed the denial of the writ of habeas corpus agreeing with the district court that there was no federal jurisdiction to review the ruling of the Montana Supreme Court.[28] Further, the court explained that Lambert's reliance on *Shillitani v. United States*[29] was misplaced. That case involved a contempt order which arose in the context of a grand jury investigation. The *Shillitani* court held that after the grand jury was disbanded "a contemnor lost the power to purge himself and could no longer be civilly committed."[30] Since state court judges are always available, Lambert could comply with the contempt order at any time.[31]

However, the panel remanded the case for further consideration because it concluded that further confinement might amount to a denial of due process.[32] The district court was instructed either to grant a hearing immediately or to allow the state of Montana thirty days to do so in order to determine whether Lambert's confinement had become punitive and whether there was a substantial likelihood that extending commitment would induce him to testify.[33] In reaching this result, the panel referred to two United States Supreme Court decisions, *Jackson v. Indiana*[34] and *McNeil v. Director, Patuxent Institution.*[35] In

95-1807 (1947) provides for immunity from prosecution or forfeiture, except for perjury or contempt, for any transaction which the witness is compelled to testify about during any judicial proceeding. Further, the court held that the proceeding involving Lambert was a judicial proceeding within the meaning of the statute. 545 F.2d at 88.

26. 545 F.2d at 88.

27. *Id.*

28. *Id.* at 88-89.

29. 384 U.S. 364 (1966).

30. 545 F.2d at 89.

31. *Id.*

32. *Id.* at 91.

33. *Id.* at 91-92. Judge Kilkenny, dissenting in part, believed that Lambert should have been required to seek a writ of certiorari from the United States Supreme Court. *Id.*

34. 406 U.S. 715 (1972).

35. 407 U.S. 245 (1972).

*Jackson,* the Court stated "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[36] In *McNeil,* the Court implied that due process requires that confinement cease when it is clear that the original purpose will probably not be achieved.[37] In order to comply with the high court, the *Lambert* panel adopted the approach of the state courts in *In re Farr*[38] and *Catena v. Seidl.*[39] Both courts employ a "substantial likelihood"

36. 406 U.S. at 738. In *Jackson,* a man charged with robbery was ordered committed by a state court to the Indiana Department of Mental Health until he could be certified as sane. Jackson was committed because two doctors testified that he would not understand the nature of the charges against him or be able to participate in his own defense. One doctor testified that it was unlikely that Jackson would ever attain the requisite competency to stand trial. Under these circumstances, Jackson's counsel urged that such a commitment amounted to a life sentence without conviction. *Id.* at 719. The Supreme Court agreed, concluding that the state could not "constitutionally commit the petitioner for an indefinite period simply on account of his incompetency to stand trial on the charges filed against him." *Id.* at 720.

37. 407 U.S. at 250. In *McNeil,* the petitioner was convicted on two counts of assault and sentenced to five years imprisonment. He was then referred, by *ex parte* order, to Patuxent Institution for an examination to decide whether he was subject to indeterminate commitment under a Maryland statute concerning "defective delinquents." *Id.* at 246. The confinement was intended to be temporary in nature, and the hearing required for commitment as a defective delinquent required counsel and a trial by jury. However, McNeil refused to cooperate with the examining psychiatrists and was confined beyond the term of his sentence, and apparently would have been confined indefinitely. *Id.* at 246-47. The Supreme Court, citing *Jackson,* held that

> the petitioner has been confined for six years, and there is no basis for anticipating that he will ever be easier to examine than he is today. In these circumstances, it is a denial of due process to continue to hold him on the basis of an *ex parte* order committing him for observation.

*Id.* at 250.

38. 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974). *Farr,* for the first time, raised a narrow limitation to a court's contempt power. A newspaper reporter covering the murder trial of Charles Manson caused to be published a highly inflammatory statement of a prospective witness. The trial court had previously prohibited any persons connected with the pre-trial proceedings from releasing information to the public concerning testimony or evidence to be presented. At a hearing conducted after the trial's conclusion, the reporter was ordered to reveal the identity of his informant. The reporter stated that three persons were responsible, two of whom were among the six attorneys of record in the case, but he refused to disclose any specific identities. He claimed that the California Evidence Code and the first amendment guarantee of freedom of the press conferred a privilege which entitled him to protect his sources. The trial court disagreed and ordered him to complete his identification. The reporter remained defiant and was incarcerated until he agreed to comply. Although released forty-five days later by Mr. Justice Douglas pending appeal before the Ninth Circuit, *id.* at 581, 111 Cal. Rptr. at 651, Farr nevertheless pressed his claims in the California Court of Appeal. He challenged his incarceration on the ground that it constituted an indeterminate sentence in violation of the constitutional prohibition against cruel and unusual punishment. *Id.* at 583-85, 111 Cal. Rptr. at 653-54.

39. 65 N.J. 257, 321 A.2d 225 (1974). For the subsequent appeal, see 68 N.J. 224, 343

test: a contemnor should be released if he or she is able to meet the heavy burden of showing that there is no substantial likelihood that continued commitment would accomplish the purpose of the order on which the commitment was based.[40] Since Lambert had been confined for over sixteen months without testifying, the Ninth Circuit panel believed that there was a substantial likelihood that continued confinement would not serve its original coercive purpose.[41] The *Lambert* court found further support for its ruling in the fact that Lambert had been incarcerated far beyond the six-month maximum term of imprisonment author-

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A.2d 744 (1975). *Catena* involved a witness who had been confined for four years due to his continued refusal to answer questions regarding organized crime activities despite a grant of testimonial immunity. The New Jersey court held that once confinement for civil contempt has lost its coercive power, thereby becoming punitive, "the legal justification for it ends and further confinement cannot be tolerated." 65 N.J. 257, 262, 321 A.2d 225, 228 (1974).

40. 65 N.J. at 265, 321 A.2d at 228, *cited with approval* in *Lambert,* 545 F.2d at 90. The *Farr* court, citing *Jackson* and *McNeil* as supporting authority, held that civil commitment for contempt, at least in certain instances, is sufficiently analogous to commitment for lack of capacity to stand trial to incorporate an implied "substantial likelihood" limitation on such confinement. 36 Cal. App. 3d at 584, 111 Cal. Rptr. at 653. *Farr* relied on the California Supreme Court case of In re Davis, 8 Cal. 3d 798, 106 Cal. Rptr. 178, 505 P.2d 1018 (1973), that under *Jackson*

> no person charged with a criminal offense and committed to a state hospital solely on account of his incapacity to proceed to trial may be so confined more than a reasonable period of time necessary to determine whether there is a substantial likelihood that he will recover that capacity in the foreseeable future. Unless such a showing of probable recovery is made within this period, defendant must either be released or recommitted under alternative commitment procedures.

*Id.* at 801, 106 Cal. Rptr. at 181, 505 P.2d at 1021. The *Farr* court noted that confinement presented a

> special problem where disobedience of the order is based upon an established articulated moral principle. . . . In such a situation, it is necessary to determine the point at which the commitment ceases to serve its coercive purpose and become [sic] punitive in character. When that point is reached so that the incarceration . . . becomes penal, its duration is limited by the five day maximum sentence provided in [California's contempt statute].

36 Cal. App. 3d at 585, 111 Cal. Rptr. at 653, *quoted with approval* in *Lambert,* 545 F.2d at 91. *See* R. GOLDFARB, *supra* note 6, at 60.

The *Catena* court adopted the "no substantial likelihood" test of *Farr* without *Farr*'s qualification that continuous silence must based on "an established articulated moral principle." 68 N.J. at 228, n.1, 343 A.2d at 747, n.1 (1975). The court discarded this limitation "as incapable of practical application." *Id.* Nevertheless, the *Catena* court did warn that "[a] person's insistence that he will never talk, or confinement for a particular length of time, does not automatically satisfy the requirement of showing no substantial likelihood." *Id.* at 228, 343 A.2d at 747.

41. 545 F.2d at 90.

ized under Montana's criminal contempt statute.[42] Thus, while acknowledging the propriety of the original contempt order, the court found Lambert's continued confinement constitutionally suspect.[43]

### D. Conclusion

For two reasons, it may be unwarranted to place reliance on *Jackson* and *McNeil.* First, neither case involved the coercion inherent in a civil contempt order. Jackson was confined to a mental health institution until he was competent to stand trial.[44] McNeil was confined until he cooperated with doctors conducting a psychological examination.[45] This criticism was raised by the dissent in *Catena.*[46] The dissenting justices argued that the purpose of civil contempt would be frustrated if a right to remain silent in the face of a lawful order to testify could be "purchased for a price."[47] Second, indeterminate confinement for civil contempt is procedurally distinguishable from the commitments ruled unconstitutional in *Jackson* and *McNeil;* civil contempt orders must be preceded by a judicial hearing that comports with due process. It is unfortunate that the errant analysis of the two state courts has now been extended to the entire Ninth Circuit.

*Brian Kerss*

## III. DUE PROCESS AND FIRST AMENDMENT CONSIDERATIONS IN THE SUSPENSION, TERMINATION, AND TRANSFER OF PUBLIC EMPLOYEES

### A. Introduction

In this term Ninth Circuit panels reported seven cases in

42. *Id.* The Montana code provides that a person convicted of criminal contempt can be confined not more than six months or fined a maximum of $500, or both. Mont. Rev. Codes Ann. 94-7-309 (Supp. 1975).

43. 545 F.2d at 91.

44. 406 U.S. 715 (1972).

45. 407 U.S. 245 (1972).

46. 68 N.J. 224, 230, 343 A.2d 744, 748 (1975) (Schreiber, J.).

47. *Id.* at 233, 343 A.2d at 749. The dissenters also took issue with the inherent subjectivity of the standard by which the majority purportedly determined that Catena's confinement no longer would accomplish the purpose of the contempt order. That is, imprisonment in cases like Catena's has a dual aspect—"[i]t is *both* coercive and punitive." *Id.* (emphasis added). The longer the contemnor remains confined, the greater are the effects of both. Moreover, considerations of the age and health of a contemnor do not diminish his or her capacity to comply and may actually increase the coercive impact of incarceration. *Id.* at 234, 343 A.2d at 750.

1. 545 F.2d 97 (9th Cir. Nov., 1976) (*per curiam;* the panel members were Browning and Choy, JJ. and Gray, D.J.).

which public employees challenged the constitutionality of the personnel decisions made by government employers. This note summarizes the rulings on the more important issues presented on appeal. They involve questions of both substantive and procedural due process under the fourteenth amendment. They also include claims arising under the first amendment freedom of expression.

## B. Due Process

### *Government Action*

In *Mathis v. Opportunities Industrial Centers,*[1] a panel considered whether the relationships between the federal government and Opportunities Industrialization Centers, Inc. (O.I.C.), a nonprofit corporation, was of such a nature as to make O.I.C.'s actions in firing an employee reviewable under the due process clause of the fifth amendment. The trial court dismissed the action brought by the aggrieved employee because it did not recognize the defendant as a public corporation or an agency of the federal government.[2] Relying on *Ginn v. Mathews,*[3] the panel reversed the ruling of the district court and remanded the case for trial because "substantial controls by the Federal Government were imposed upon O.I.C."[4] Also, the court noted that O.I.C.'s basic purpose is to train people who are only marginally employable. This is done under contract with the federal government and generates ninety-five percent of O.I.C.'s income.[5] Thus, the

2. *Id.*

3. 533 F.2d 477 (9th Cir. 1976). In *Ginn* a Ninth Circuit panel found government action in the relationship between a private corporation and the federal government. The panel adopted the standard established by the First Circuit, which stated:

> Mere receipt of financial subsidy and subjection to some regulation are the conditions of much of our societal life. Neither factor—or both together—is dispositive of "state action." But, while we disavow any effort to be definitive, we conclude that at least when a specific governmental function is carried out by heavily subsidized private firms or individuals whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches.

McQueen v. Druker, 438 F.2d 781, 7784-85 (1st Cir. 1971).

4. 545 F.2d at 98. Substantial controls included the following: (1) monthly reports to be submitted to the Department of Labor by O.I.C., (2) quarterly reports to H.E.W. by O.I.C., (3) ceilings on salaries which may only be exceeded with government approval, (4) audits by the Department of Labor, and (5) government prescribed billing procedures and forms. *Id.*

5. *Id.* at 97-98.

court concluded that there was sufficient government involvement to warrant consideration of the due process claims.[6]

*Procedural Due Process*

In *Jacobs v. Kunes*[7] four employees were fired from the Maricopa County Tax Assessor's Office for disobeying a regulation restricting the hair length of male workers. The aggrieved employees brought an action in the federal district court alleging violations of the first, ninth, and fourteenth amendments. The district court dismissed the action.[8] On appeal, a Ninth Circuit panel rejected the employees' contentions that the regulation violated their substantive constitutional rights.[9] However, as the county procedures did not provide a hearing until after dismissal,[10] the panel had to consider whether procedural due process requirements were met. In order to decide if the termination procedures comply with the due process clause, a court must determine whether a particular employee has an entitlement, either a liberty or property interest, that warrants review.[11] The panel reversed the judgment as to the "permanent" employees. The panel determined that they had a property interest in their respective jobs since they were subject to dismissal only "for cause." The "temporary" employees had no such guarantee.[12]

6. *Id.* at 98.

7. 541 F.2d 222 (9th Cir. Aug., 1976) (per Choy, J.; the other panel members were Wright and Goodwin, JJ.), *cert. denied,* 429 U.S. 1094 (1977).

8. *Id.* at 223.

9. *Id.* at 224. Specifically, plaintiffs argued the regulation impinged on the following substantive constitutional rights: first amendment freedom of expression, ninth amendment right to privacy and fourteenth amendment substantive due process and equal protection. *Id.* Without discussing the nature of these rights the *Jacobs* panel disposed of the claims by applying the analysis in Kelley v. Johnson, 425 U.S. 238 (1976), which upheld regulations on hair length and facial hair for local policemen. *Id.* at 249. The level of review employed by the Supreme Court in *Kelley* required only that there be a rational relationship between the hair length regulations and the state interest in uniformity among the forces. *Id.* at 248. The *Jacobs* panel applied the *Kelley* deferential standard of review to evaluate the regulation before it and concluded it was reasonable, citing customer complaints and the fact that the "[a]ssessor's office is carrying out tasks within the police power" as sufficient justification. 541 F.2d at 224.

10. *Id.* at 225.

11. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). For recent commentary on entitlement in public employment *see* Michelman, *Formal and Associational Aims in Procedural Due Process,* DUE PROCESS 126 (J. Pennock & J. Chapman, eds. 1977); Note, *Statutory Entitlement and the Concept of Property,* 86 YALE L.J. 695 (1977).

12. This reasoning was followed in a later Ninth Circuit decision which rejected a probationary employee's claim of entitlement. Sherman v. Yakahi, 549 F.2d 1287, 1291 (9th Cir. Feb., 1977) (per Wright, J.; the other panel members were Kilkenny and Choy, JJ.).

The panel relied on two Supreme Court cases[13] which recognized that a "for cause" standard established a property interest in continued employment. However, the panel noted that the Justices disagreed on the method to be used in determining whether the interest had been infringed.[14] According to the *Jacobs* court, three Justices hold the view that the property interest in public employment "is limited by the procedures set out for terminating it and that due process requires only that those procedures be complied with."[15] The termination procedures were followed faithfully in this case so the panel reasoned that at least these Justices would deny plaintiffs' claim.[16] But other Justices believe that, once a property interest has been found, "the Constitution is an independent source of procedural requirements . . . ."[17] Within this latter group, the panel concluded that two Justices would hold that these procedures satisfied due process as long as back pay could be awarded if the employee prevailed at the time of the hearing.[18] Since it was not clear whether back pay could be awarded under the procedures here, the Jacobs panel remanded for a determination of this question.[19]

In *Ong v. Tovey*,[20] plaintiff, a member of the Commissioned Corps, was assigned as a surgical resident at a Public Health Service (PHS) hospital.[21] Ong's privilege to perform surgical operations was terminated "on public safety grounds"[22] and he was eventually dismissed from both the PHS program and the Commissioned Corps because he was found to be AWOL.[23] The district court reinstated Ong with back pay and the PHS appealed.[24] Although it could be argued that Ong's status was merely "temporary," the Ninth Circuit panel found a property interest

13. Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974). For a critical analysis of the *Bishop* opinion *see* Rabin, *Job Security and Due Process*, 44 U. CHI. L. REV. 60 (1976).

14. 541 F.2d at 225.

15. *Id. citing* Arnett v. Kennedy, 416 U.S. 134 (1974). These three are Chief Justice Burger, Justice Stewart and Justice Rehnquist.

16. *Id.*

17. *Id.* These five are Justices Brennan, White, Marshall, Blackmun and Powell.

18. *Id.* These two are Blackmun and Powell.

19. *Id.*

20. 552 F.2d 305 (9th Cir. Apr., 1977) (per Anderson, J.; the other panel members were Kennedy J. and Burns, D.J.).

21. *Id.* at 306.

22. *Id.* at 307.

23. *Id.* at 306.

24. *Id.*

sufficient to trigger procedural due process requirements.[25] The court relied on a recent Ninth Circuit panel decision, *Stretten v. Wadsworth Veterans Hospital*[26] which held that a resident surgeon employed by the Veterans Administration had a property interest in his position.[27] However, the *Ong* court reversed because it found the dismissals complied with due process.[28] The panel considered the due process aspects of plaintiff's termination from his surgical residency and his discharge from the Commissioned Corps separately. This was necessary because the plaintiff retained his PHS commission independently of his status as a resident.

First, with regard to Ong's dismissal from the residency program, the panel applied the analysis of *Mathews v. Eldridge,*[29] and rejected plaintiff's contentions that due process requires written notice and a full evidentiary hearing.[30] The *Ong* panel reasoned that plaintiff had sufficient notice because there had been a series of meetings where he was informed of his many shortcomings and asked to resign from the residency program.[31] Further, the panel noted that plaintiff and his attorney met with supervising doctors and, even though the conference was not a formal adversary hearing, it nonetheless satisfied the due process requirement of an opportunity to be heard.[32] The panel explained that when, as here, doctors are in close contact with each other and the doctors' opinions of incompetency are based on personal

25. *Id.* at 308.

26. 537 F.2d 361 (9th Cir. 1976).

27. *Id.* at 367. In *Ong,* the panel also invoked the *Stratten* decision to find that the liberty interest protected by the due process clause of the fifth amendment "is not infringed by a label of incompetence." 552 F.2d at 307.

28. 552 F.2d at 308.

29. 424 U.S. 319 (1976). The Court outlined three distinct factors which must be considered in deciding the requirements of due process:

> First, *the private interest* that will be affected by the official action; second, *the risk of an erroneous deprivation* of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, *the Government's interest,* including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [emphasis added]

*Id.* at 335. For commentary *see* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28 (1976).

30. 552 F.2d at 307-08.

31. *Id.* at 308.

32. *Id.*

observation, "those opinions are unlikely to be shaken at a more formal hearing with trial-type cross-examination."[33]

Second, the panel rejected plaintiff's argument that he was denied due process in his discharge from the Commissioned Corps.[34] Since the termination of his residency was proper, he was not justified in refusing to work. The panel noted that he had adequate notice that he was considered AWOL and therefore his discharge was proper.[35]

*Bignall v. North Idaho College*[36] involved the termination of an instructor who had been with the college for eleven years.[37] In January, she was informed by letter that she would not be rehired for the following school year, but the letter did not state the reasons for termination. When she demanded a hearing, the administration refused, claiming that plaintiff was a probationary employee and therefore not entitled to a hearing.[38] She brought suit in federal court alleging that the manner in which she was terminated violated due process. She also alleged that her termination was discriminatory retaliation for her husband's legal activities on behalf of minority students.[39] The district court ordered the Board of Trustees of the College to conduct a hearing. Hearings were held but the plaintiff withdrew because the Board would not allow her access to the personnel files of other instructors considered for termination.[40] The plaintiff then returned to the district court. It found that she was "*de facto* tenured"[41] and therefore had a property interest[42] but held that she had waived her right to further hearings.[43] The district court then reviewed the merits of the case and found that plaintiff was discharged for valid reasons based on financial exigencies and not in retaliation

33. *Id.* at 307-08.

34. *Id.* at 308.

35. *Id.*

36. 538 F.2d 243 (9th Cir. June, 1976) (per Hufstedler, J.; the other panel members were Kennedy, J. and Sweigert, D.J.).

37. *Id.* at 245.

38. *Id.*

39. *Id.* Mrs. Bignall's husband joined in the federal action. However, only Mrs. Bignall's claims will be discussed.

40. *Id.*

41. *Id.*

42. *Id.* A non-tenured instructor employed by virtue of a renewable contract may in some circumstances have a property interest in continued employment, termed *de facto* tenure. *See* Perry v. Sinderman, 408 U.S. 593, 599-603 (1972).

43. 538 F.2d at 245.

for her husband's constitutionally protected activities.[44] On appeal, plaintiff contended that she should have received notice and hearing before the decision to terminate her was made. She also claimed that the Board of Trustees was inherently biased.[45]

First, the panel ruled that the requirements of due process are satisfied so long as proper notice and hearing are given prior to the effective date of the termination.[46] The *Bignall* court, adopting the reasoning of the Third and Fourth Circuits,[47] explained that an "instructor has not been denied due process while still employed at the same job and while adequate procedures remain to challenge and forestall the nonretention."[48] The panel found that here the hearing requirement was met because the college conducted hearings prior to her termination date.[49] However, the notice requirement was not met because, although timely notice was given, the panel held it inadequate in that it did not inform plaintiff of the reasons for nonretention.[50] Nevertheless, it denied relief to the plaintiffs because it viewed the trial on the merits granted by the district court after plaintiff withdrew from the Board hearings, as compensation for the deficiency in the administrative procedure.[51]

Second, the panel, relying on decisions in other circuits which allow college boards of trustees to conduct termination hearings,[52] rejected the claim of bias.[53] It also relied on a Supreme Court decision[54] which held that a disciplinary board comprised

44. *Id.*

45. *Id.*

46. *Id.* at 246.

47. *Id.* Chung v. Park, 514 F.2d 382 (3rd Cir. 1975); Vance v. Chester County Bd. of School Trustees, 504 F.2d 820 (4th Cir. 1974).

48. 538 F.2d at 246.

49. *Id.*

50. *Id.* at 247. In fact, the College did not give reason for termination ("financial exigency") until the hearings conducted just prior to the termination date. The court ruled that Mrs. Bignall did not have enough time to prepare an adequate response. The panel noted that "[t]he purpose of notice is to allow a complainant to marshall a case against the firing body." *Id.*

51. *Id.* at 248. The *Bignall* panel did not question the propriety of this trial and plaintiff did not raise this issue on appeal.

52. Vance v. Chester County Bd. of School Trustees, 504 F.2d 820 (4th Cir. 1974); Brubaker v. Bd. of Educ., 502 F.2d 973 (7th Cir. 1974); Swab v. Cedar Rapids Community School Dist., 494 F.2d 353 (8th Cir. 1974); Simard v. Bd. of Educ., 473 F.2d 988 (2nd Cir. 1973); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

53. 538 F.2d at 247.

54. Wolff v. McDonnell, 418 U.S. 539 (1974).

of prison adminstrators satisfied the due process requirement of impartiality in reviewing decisions that affect an inmate's right to liberty protected by the fourteenth amendment.[55] The panel concluded that the Board of Trustees was no more biased than prison administrators.[56]

*Decker v. North Idaho College*[57] also involved an instructor who alleged denial of due process because he was discharged without a hearing.[58] The district court conducted a trial on the merits and found that the plaintiff had been denied due process.[59] It ordered the defendants, both individually and as members of the Board of Trustees, to reimburse the plaintiff for one year's back pay.[60]

On appeal, the Ninth Circuit had to consider three issues. First, the court determined that it was not error for the district court to decide the merits of the case rather than ordering the Board of Trustees to hold a hearing.[61] The panel stated that such action was not appropriate in all circumstances but held that, by implication, the parties "consented to allow the district court to act as a substitute for the Board . . . ."[62] Second, the *Decker* panel rejected plaintiff's contention that he should have received reinstatement in addition to back pay.[63] The panel noted that "the controversy between the parties has been raging for approximately five years. In these circumstances it would be stretching the limits of equity to order the extraordinary remedy of reinstatement . . . ."[64] Third, the panel affirmed the award against

55. *Id.* at 571.

56. 538 F.2d at 247.

57. 552 F.2d 872 (9th Cir. Apr., 1977) (per Kilkenny, J.; the other panel members were Browning, J. and Van Pelt, D.J.).

58. *Id.* at 873. The panel noted that there were three reasons for not renewing Decker's contract:

> (1) he was teaching outside of his major field of study; (2) he did not have a Master's Degree in the fields in which he was teaching (although he was paid as if he had such a degree); and (3) he had a communication problem with his students in his lecturing.

*Id.* at 873 n.1.

59. *Id.* 873.

60. *Id.* at 875.

61. *Id.* at 874. The panel relied on Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. June, 1976). *See* text accompanying note 51 *supra.*

62. 552 F.2d at 874.

63. *Id.* at 874-75.

64. *Id.* at 875. The panel stated that reinstatement is usually imposed only in cases

the College.[65] However, the panel, *sua sponte*, reversed the district court order holding the defendants individually liable.[66] It reasoned that, since there was no bad faith on the part of the individuals, a compensatory award against them was "erroneous."[67]

## C. First Amendment

In *Kannisto v. City and County of San Francisco*,[68] a police lieutenant was suspended for fifteen days because he "made disrespectful and disparaging remarks about a superior officer while addressing his subordinates during a morning inspection."[69] He alleged that the conduct regulation under which he was suspended was overbroad, vague, and unconstitutionally applied, and therefore his first amendment rights were violated.[70] The district court dismissed the claim for failure to show a constitutional violation.[71]

On appeal, the court determined the extent to which first amendment protections applied in this case. The panel noted that the Supreme Court has stated that the difficulty "is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the

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in which it is proved that the basis for dismissal was racial discrimination or retaliation for the exercise of first amendment rights. *Id.* at 874 *citing* Burton v. Cascade School Dist. Union High School, No. 5, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975). For a critical analysis of the *Burton* decision *see* Comment, *Burton v. Cascade School District: Failure to Recognize the Need for a Right to Reinstatement Following an Unconstitutional Teacher Dismissal*, 17 Wm. & Mary L. Rev. 781 (1976).

Chief Judge Browning dissented. He argued that the only appropriate remedy was reinstatement plus back pay. 552 F.2d at 875.

65. 552 F.2d at 875.

66. *Id.*

67. *Id.*

68. 541 F.2d 841 (9th Cir. Aug., 1976) (per Wright, J.; the other members of the panel were Sneed, J. and Wess, D.J.), *cert. denied*, 430 U.S. 931 (1977).

69. *Id.* at 842. He referred to his superior as an "unreasonable, contrary, vindictive individual." Further, he stated his superior's behavior was "belligerent, arrogant, contrary and unpleasant." *Id.*

70. *Id.* The regulation in question provided, in pertinent part:

> Any . . . misconduct or any conduct on the part of any member . . . which tends to subvert the good order, efficiency or discipline of this Department or which reflects discredit upon the Department or any member thereof, or that is prejudicial to the efficiency of the Department, . . . shall be considered unofficerlike conduct triable and punishable by the Board.

*Id. citing* former Department Regulation 2.13.

71. *Id.*

interest of the state, as an employer, in promoting the efficiency of the public service it performs through its employees."[72] The panel concluded that the police department's interest in maintaining discipline and harmony among its employees outweighed the right of the plaintiff to discuss the deficiencies of a superior officer in the presence of co-workers.[73] It explained that "Kannisto's diatribe, delivered as it was before his men while in formation for inspection, can be presumed to have had a substantial disruptive influence on the regular operations of the department."[74] The panel observed that under the circumstances his remarks did not contribute to the "public's interest in being informed."[75] Further, the panel stated that Kannisto was speaking in his capacity as a public employee and not as a private citizen.[76] In balancing all of the interests involved therefore, the court ruled that the state's interest prevailed.[77]

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72. *Id.* at 843 *quoting* Philips v. Adult Probation Dep't, 491 F.2d 951, 954-55 (9th Cir. 1974) *quoting* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). In *Pickering,* the Supreme Court upheld the right of a public school teacher to criticize the budgetary policies of the school board in a letter published in a local newspaper. For commentary regarding the *Pickering* decision, *see* Note, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle,* 42 U. CHI. L. REV. 530 (1975); Note, *Judicial Protection of Teachers' Speech: The Aftermath of Pickering,* 59 IA. L. REV. 1256 (1974); Moskowitz, *Teachers and the First Amendment: Academic Freedom and Exhaustion of Administrative Remedies Under 42 U.S.C. Section 1983,* 39 ALBANY L. REV. 661 (1975). The *Kannisto* panel distinguished the facts in *Pickering* reasoning that the teacher's comments did not threaten the personnel relationships necessary to the daily function of the school system, whereas in *Kannisto,* plaintiff's statements, made during the regular performance of his duties, more directly affected the inner harmony of the police force and were therefore unprotected by the first amendment. 541 F.2d 843-44.

In a later Ninth Circuit case, Byrd v. Gain, 558 F.2d 553 (9th Cir. Aug., 1977), Judge Goodwin stated:

> The reasoning developed in Kannisto . . . establishes in this circuit the proposition that, while First Amendment rights of employees are deserving of protection against unreasonable and arbitrary restriction in the name of institutional policy, the employee does not have an unqualified right to abuse his employer in public while remaining on the payroll.

*Id.* at 554.

73. 541 F.2d at 843-44.

74. *Id.* at 844.

75. *Id.*

76. *Id.*

77. *Id.* Judge Sneed wrote a short concurring opinion expressing his displeasure over the fact that a federal court had to decide this issue. According to Judge Sneed, the balancing should not have required the intervention of a federal court. He stated, "A society which accepts no accommodation save that mandated by a federal court is neither strong nor happy. Moreover, such reliance on the federal courts slowly saps their strength. Inevitably they become but another suspect mediative institution indistinguishable from those they supplanted." *Id.* at 845.

The plaintiff in *Bernasconi v. Tempe Elementary School District*,[78] was a Mexican-American School teacher with special training for counseling children of the same ancestry. In particular, she was skilled in intelligence testing and interpretation. She worked as a counselor in a school that had large numbers of Mexican-American and Yaqui Indian children. The plaintiff became concerned that children were being classified as mentally retarded because, instead of being tested in their native tongues, they were tested in English.[79] She contacted both the school principal and the special services division of the school district in order to rectify this problem. The school officials were not responsive so she told some parents to contact the local legal aid society.[80] The relationship between plaintiff and the school principal deteriorated to the point that she was transferred to a predominantly "well-to-do Anglo" school.[81] The School District Board of Trustees held a hearing and upheld the transfer.[82] Plaintiff brought suit in district court. It found that the transfer was in retaliation for her exercise of first amendment rights; however, it denied relief because it ruled that the transfer did not deprive her of a "valuable governmental benefit."[83] Plaintiff appealed.[84]

The question of whether this transfer deprived plaintiff of a valuable governmental benefit was an issue of first impression in the Ninth Circuit.[85] Since the transfer did not result in less pay or decreased status, there was no infringement of a property interest.[86] Nevertheless, the panel held that plaintiff's counseling posi-

78. 548 F.2d 857 (9th Cir. Feb., 1977; amended April, 1977) (per Ely, J.; the other panel members were Wallace, J. and Soloman, D.J.), *cert. denied*, 434 U.S. 825 (1977).

79. *Id.* at 859.

80. *Id.*

81. *Id.* The panel noted that after Bernasconi approached the parents, her relationship with the school authorities became "significantly strained," *id.*, and she was no longer able to see the files of those children placed in "special education classes." *Id.*

82. The Board stated several reasons for the transfer including lack of federal funds, less teaching positions available at this school than at others, and the fact that the guidelines developed by the teachers organization provided that the principal should make final transfer decisions. *Id.*

83. *Id.* at 859-60. The term "valuable governmental benefit" as applied in first amendment analysis is separate and distinct from the "property interest" which must be demonstrated by a plaintiff in order to sustain a fourteenth amendment claim. *See* Perry v. Sinderman, 408 U.S. 593, 597 (1972) (dismissed teacher lacked tenure and the right to a hearing under procedural due process, but, *held:* plaintiff denied a governmental benefit worthy of protection under the first amendment freedom of expression).

84. 548 F.2d at 858.

85. *Id.* at 860.

86. *Id.*

tion, "uniquely suited to her talents and desires,"[87] was a governmental benefit of the kind identified by the Supreme Court in *Perry v. Sindermann*,[88] and protected by the first amendment.[89] The panel adopted a modified view of the California Supreme Court which held first amendment protection applicable to all administrative sanctions.[90] The panel also relied on a Fourth Circuit opinion which held unconstitutional the transfer of a school teacher to administrative work because of his first amendment activities.[91]

The finding that the transfer in the *Bernasconi* case denied the plaintiff a governmental benefit, however, was not dispositive. The panel reviewed the evidence and concluded that the district court's finding, that Bernasconi's transfer was partially motivated by her complaints, was not erroneous.[92] But this finding alone was not sufficient to grant relief to the plaintiff. The panel applied a new standard of proof developed in *Mt. Healthy City School Dist. v. Doyle*.[93] Under this rule the school district, on remand, must be permitted to show by a preponderance of the evidence that it would have transferred Bernasconi even if she had not engaged in constitutionally protected conduct.[94]

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87. *Id.*

88. 408 U.S. 593 (1972).

89. In Perry the Court reasoned, "if the government could deny a benefit to a person because of his constitutionally protected speech of associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* at 597.

90. 548 F.2d at 860. *See* Adcock v. Bd. of Educ., 10 Cal. 3d 60, 109 Cal. Rptr. 676, 513 P.2d 900 (1973).

91. *Id. See* Acanfora v. Bd. of Educ., 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974).

92. *Id.* at 861.

93. 429 U.S. 274 (1977). In *Doyle* the Supreme Court held that once a plaintiff introduces evidence showing retaliatory governmental action, the defendant must be permitted to show "by a preponderance of the evidence, that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287.

94. 548 F.2d at 862.