Civil Rights and Civil Liberties

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The United States Court of Appeals for the Seventh Circuit has long maintained a laudable reputation for its receptiveness to civil rights and civil liberties claims. Over the years, the court has been a leader in the protection and promotion of constitutional entitlements. It is interesting to note, however, that the circuit's generally "liberal" propensities do not extend into all matters of constitutional concern. During its recent term, the court was particularly vigorous in its vindication of expression, welfare, and housing rights, but was decidedly reluctant to project itself into the controversial areas of prisoner and employment rights. Understandably, many

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2. Some significant Seventh Circuit decisions on civil rights include: Haines v. Kerner, 427 F.2d 71 (7th Cir. 1970); Clark v. Universal Builders, 501 F.2d 324 (7th Cir. 1974); United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973); Slate v. McFetridge, 484 F.2d 1169 (7th Cir. 1973); Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973).

3. With the United States Supreme Court's landmark decision in Wolff v. McDonnell, 418 U.S. 539 (1974), prisoner rights has temporarily subsided as a topic of major controversy on the appellate level. Limiting its decision to prospective applicability, the Wolff Court held that due process in prison disciplinary proceedings requires that adequate written notice of the alleged offenses be given to the accused inmate, that the fact finders prepare and submit a written statement as to the evidence relied on and their reasons for any disciplinary action, and that, absent unusual circumstances, the prisoner be allowed to call witnesses and present evidence. The Supreme Court noted that due process does not demand the assistance of counsel or confrontation and cross-examination procedures. 418 U.S. at 567-70.

In a very real sense, Wolff conclusively resolved serious constitutional questions that have inundated district and appellate courts for years. The debate over due process in the administration of internal prison discipline created much confusion. Its resolution in Wolff is most welcome and hopefully foreshadows an era of increased penal responsibility and decreased prisoner litigation.

As a result of Wolff, the Seventh Circuit's prisoner decisions offer no interpretation worthy of comment. Seven opinions deal with Wolff issues and are distinctly undistinguished. E.g., LaBatt v. Twomey, 513 F.2d 641 (7th Cir. 1975) (due process not required prior to imposing restrictive status institutional deadlock in emergency situation); Carroll v. Sielaff, 514 F.2d 415 (7th Cir. 1975) (loss of good time may be "grievous loss" requiring due process hearing); Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975) (due process required in transferring inmate from reformatory to prison segregation unit); Edwards v. Illinois Dept. of Corrections, 514 F.2d 477 (7th Cir. 1975) (pre-Woff loss of good time does not require full due process hearing); Black v. Brown, 513 F.2d 652 (7th Cir. 1975) (pre-Woff isolation requires opportunity to explain actions
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ambiguities were created in the circuit's treatment of civil rights. However, as developed herein, these disparities are often attributable to the court's composition and its limited responses to the specific issues that it confronted, and not due to a general trend of constitutional interpretation on particular issues.

This article examines and reviews the circuit's civil rights-civil liberties rulings of the past term and draws conclusions concerning the court's current posture and attitudes. Among the topics discussed are decisions on first amendment freedoms, privacy rights, fourteenth amendment protections in employment, welfare, and housing, and public official immunity.

One important generalization must be made at the outset. Reviewing the circuit's fifty-plus civil rights decisions, it is eminently clear that any genuinely aggrieved individual will receive a "day in court." In sixteen of the twenty-six cases where the trial court dismissed for failure to state an actionable claim or entered summary judgment and the case was subsequent-

subject to discipline); Thomas v. Pate, 516 F.2d 889 (7th Cir. 1975); United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1975) (not retroactive, but pre-Wolff still requires some due process in prison disciplinary action); and Burbank v. Twomey, 520 F.2d 744 (7th Cir. 1975) (Wolff requires statement of reasons prior to imposition of discipline).

The remaining prisoner cases merely reaffirm established theories of the extent of constitutional rights in prison. E.g., Chapman v. Kleindienst, 507 F.2d 1246 (7th Cir. 1974) (disciplinary action taken because of prisoner's refusal to handle pork on religious grounds may be a violation of free exercise of religion); Bickham v. Cannon, 516 F.2d 885 (7th Cir. 1975) ("customary" procedure of removing prisoner from honor farm to administrative isolation pending hearing on possession of unauthorized property not a violation of due process); Bach v. Coughlin, 508 F.2d 303 (7th Cir. 1974) (prison postal regulation restriction prohibiting unlimited free postage not unreasonable); and Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975) (prison regulation authorizing "shakedown search" not a violation of fourth amendment rights against unreasonable search and seizure).

In its 1974-1975 term, the Seventh Circuit was confronted with a number of "employment" cases. The import of several of these opinions is significant and has been reserved for textual discussion. In the area of equal employment opportunity, however, the court's decisions were procedural in nature, uniformly uninteresting, and may be summarized as follows: Caro v. Schultz, 521 F.2d 1084 (7th Cir. 1975) (federal employees are entitled to a full district court evidentiary hearing of Title VII claims even if, prior to filing suit, the employees have exhausted all administrative remedies with adverse results); Gibson v. Kroger Co., 506 F.2d 647 (7th Cir. 1974) (as a jurisdictional prerequisite to filing a civil action by a private plaintiff under Title VII of the 1964 Civil Rights Act, the plaintiff must receive a right-to-sue notice from the Equal Employment Opportunity Commission and that notice must be attached to and pleaded in the civil complaint); Adams v. Brinegar, 521 F.2d 129 (7th Cir. 1975) (section 717 (c) of the 1972 EEOA, which allows federal employees to bring civil suits for employment discrimination, applies to any claim pending before the EEOC as of March 24, 1972, the date of the enabling statute's enactment); Flowers v. Crouch-Walker Corp., 507 F.2d 1378 (7th Cir. 1974) (direct assignment to federal magistrates of Title VII civil actions is impermissible under the applicable law, absent a deliberate finding by the district court that a specific case cannot be brought to trial within 4 months after issue is joined).
ly appealed, the court found error and reversed and remanded for a full hearing on the merits.\(^5\) It would be too much, however, to assert that the

5. The sixteen cases remanded include: Keenon v. Conlisk, 507 F.2d 1259 (7th Cir. 1974) (class action alleging sex discrimination in Chicago Police Department practice of transporting all female arrestees to Central Headquarters for processing rather than processing at district stations as is done with male arrestees); Black v. Brown, 513 F.2d 652 (7th Cir. 1975) (prisoner action alleging denial of due process in not being allowed to explain actions during prison disciplinary hearing); Thomas v. Pate, 516 F.2d 889 (7th Cir. 1975) (prisoner action alleging denial of due process during a 1963-64 prison disciplinary hearing); Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975) (prisoner action alleging violation of property rights and interference with free access to courts when “shakedown search” resulted in loss of trial transcript); LaBatt v. Twomey, 513 F.2d 641 (7th Cir. 1975) (prisoner actions alleging denial of various constitutional rights as a result of restricted status during nine day institutional deadlock); Chapman v. Kleinindeinst, 507 F.2d 1246 (7th Cir. 1974) (prisoner action alleging punitive segregation for refusal to handle pork in violation of prisoner’s right to free exercise of religion as a Black Muslim); Carroll v. Sielaff, 514 F.2d 415 (7th Cir. 1975) (prisoner action alleging denial of due process because of failure to provide hearing prior to prison transfer which resulted in loss of compensatory “good time”); Spence v. Staras, 507 F.2d 554 (7th Cir. 1974) (civil rights action to recover damages occasioned by death of state mental hospital inmate as a result of beatings incurred from other inmates); Drexler v. Southwest Dubois School Corp., 504 F.2d 836 (7th Cir. 1974) (action alleging denial of first and fourteenth amendment rights as a result of failure to renew contract of non-tenured teacher); Nickerson v. Thompson, 504 F.2d 813 (7th Cir. 1974) (action alleging denial of equal protection by school officials in failing to institute and properly administer program for “special education” as required by state statute); Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975) (action brought by medical clinic challenging constitutionality of abortion services regulations); Morris v. Cizek, 503 F.2d 1303 (7th Cir. 1974) (civil rights action brought by black couple alleging race discrimination in denial of apartment lease); Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975) (action alleging violation of first and fourteenth amendment rights resulting from dismissal as Deputy Sheriff because of political party affiliation); Calvin v. Conlisk, 520 F.2d 1 (7th Cir. 1975) (action alleging inadequacy of internal police disciplinary procedures and investigations of police brutality violated civil rights); Lavin v. Illinois High School Ass’n, No. 74-1829 (7th Cir., Aug. 29, 1975) (action alleging sex discrimination in denying women right to compete in high school varsity athletics); and Kimbrough v. O’Neil, 523 F.2d 1057 (7th Cir. 1975) (action alleging cruel and unusual punishment and violation of civil rights in conditions of and commission to solitary confinement at federal prison in Atlanta, Georgia). See also Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975); Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391 (7th Cir. 1975).

The ten cases in which the appellate court affirmed the dismissal of a suit include: Paulos v. Breier, 507 F.2d 1383 (7th Cir. 1974) (challenging constitutionality and application of police regulation prohibiting use of office for political purposes); Gibson v. Kroger Co., 506 F.2d 647 (7th Cir. 1974), cert. denied, 421 U.S. 914 (1975) (dismissal of employment discrimination suit due to failure to properly allege and file EEOC letter giving plaintiff right to sue); Blankner v. City of Chicago, 504 F.2d 1037 (7th Cir. 1974) (dismissal of suit alleging conspiracy to condemn land for private purposes on grounds of collateral estoppel and res judicata); Rhodes v. City of Chicago, 516 F.2d 1373 (7th Cir. 1975) (no federal jurisdiction over suit alleging inadequate compensation for land taken by eminent domain); See also Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975); Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391 (7th Cir. 1975).

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federal district courts are required to hear every properly docketed lawsuit. Acutely aware of the bludgeoning caseloads of its district courts, the circuit is often as practical as it is "liberal." Recognizing that every claimant is entitled to a threshold opportunity to be heard, the court has been increasingly aware of the existence and availability of conflict-resolution forums other than the federal courts and has utilized these devices, where appropriate, to check federal intervention in matters of state or local concern.  

1975) (alleging due process violation as result of alleged conspiracy between state court judge and plaintiff's ex-wife's attorney); Bach v. Coughlin, 508 F.2d 303 (7th Cir. 1974); Edwards v. Illinois Dept. of Corrections, 514 F.2d 477 (7th Cir. 1975); and Bickham v. Cannon, 516 F.2d 885 (7th Cir. 1975) (noted at note 3 supra). To a great extent this apparent receptive approach to constitutional allegations accounts for the Seventh Circuit's "liberal" reputation.

6. "The state courts are as firmly bound by the constitution . . . as is this [federal] court and [the proper] forum for the enforcement of any constitutional rights that may have been violated is in the . . . state courts with the right of ultimate determination by the Supreme Court of the United States." Blankner v. City of Chicago, 504 F.2d 1037, 1042 (7th Cir. 1974), quoting Green Street Ass'n v. Daley, 373 F.2d 1, 6-7 (7th Cir.), cert. denied, 387 U.S. 932 (1967). For other examples where the Seventh Circuit recommends the availability of another forum, see Rhodes v. City of Chicago, 516 F.2d 1373 (7th Cir. 1975) (state courts); Gibson v. Kroger Co., 506 F.2d 647 (7th Cir. 1974), cert. denied, 421 U.S. 914 (1975) (EEOC). See also Carroll v. Sielaff, 514 F.2d 415 (7th Cir. 1975). Compare Drexler v. Southwest Dubois School Corp., 504 F.2d 836 (7th Cir. 1974); Nickerson v. Thompson, 504 F.2d 813 (7th Cir. 1974).

7. Judge Stevens was the court's most vocal and articulate advocate of restrictive federal authority in local controversies. In Schreiber v. Lugar, 518 F.2d 1099 (7th Cir. 1975), a suit seeking to enjoin the construction of an Indianapolis, Indiana sports arena, Judge Stevens firmly rejected the theory, well established since Yick Wo v. Hopkins, 118 U.S. 356 (1886), that an arbitrary and capricious violation of state law by state officials deprives aggrieved parties of their rights to the equal protection under the law: "If this expansive theory is adequate to create federal jurisdiction over this dispute, federal judges surely have bootstraps that will enable them to stand on their own shoulders. The civil rights claim is frivolous." Schreiber v. Lugar, 518 F.2d at 1105. Likewise, in Bonner v. Coughlin, 517 F.2d at 1105. For example, in Drexler v. Southwest Dubois School Corp., 504 F.2d 836 (7th Cir. 1974); Nickerson v. Thompson, 504 F.2d 813 (7th Cir. 1974).

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It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against "State" deprivations of property; in the latter situation, however, even though there is action "under color of" state law sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.

This is not to suggest that the plaintiff in a § 1983 action must exhaust his state remedies before seeking federal relief. Rather, it seems to us that the availability of an adequate state remedy for a simple property damage claim avoids any constitutional violation. This result is entirely consistent with the basic statutory purposes as explained in Monroe v. Pape. There is simply no need to provide a federal tort remedy for property damage caused by the negli-
Conversely, where special protection of particular rights is believed to be warranted, the Seventh Circuit will not only assume jurisdiction over the case, but will often act and comment beyond the controversy directly confronting it.8

**FIRST AMENDMENT**

Of all the various civil rights and liberties, the Seventh Circuit has been most zealous in its protection of the first amendment freedom of speech. Often interpolating far beyond the issues presented for decision, the court is well known as a vigorous defender of free expression.

Particularly significant last term was its decision in *Chicago Council of Lawyers v. Bauer.*9 There, an association of Chicago attorneys challenged the constitutionality of the "no-comment" or "gag" rules of the United States District Court for the Northern District of Illinois.10

The rules prohibited lawyers from making public comment on pending civil and criminal litigation where such statements were "reasonably likely to interfere with a fair trial or otherwise prejudice the administration of justice." In this declaratory judgment action, plaintiffs argued that this form of speech regulation was vague, overbroad, and unduly restrictive of their first amendment freedoms.11 Fundamentally, then, *Chicago Council of Lawyers* raised basic inquiries concerning the relationship between an attorney's free speech rights and a party's entitlement to a fair trial.

Evaluating and balancing the rights and interests involved, the district court held that the constitutional inquiry was limited to the special circumstances of this case. This analysis is consistent with the fact that the federal remedy provided by § 1983 is supplementary to whatever state remedy may exist for constitutional violations. The comment to that effect in *Monroe v. Pape* rested on the premise that a constitutional violation had occurred; in that situation the availability of a state remedy could not foreclose the supplementary federal remedy. In this case, however, we are persuaded that the availability of traditional and adequate state procedures for the redress of ordinary property damage tort claims forestalls the conclusion that there has been any deprivation of plaintiff's property without due process of law within the meaning of the Fourteenth Amendment. In short, no federal right was violated by defendants' alleged negligence.

*Id.* at 1319-20.


9. 522 F.2d 242 (7th Cir. 1975).


court, by its Executive Committee, found that its "reasonable likelihood" test was the proper standard for reviewing comments by counsel and dismissed the case for failure to state a claim upon which relief could be granted. The Seventh Circuit reversed, holding that the rules were overbroad and an unjustifiable invasion of first amendment rights.

Recognizing that trial courts are obliged "to take all reasonable means to ensure a fair trial to every litigant" and that "there is a place and need for specific [disciplinary] provision in properly drawn rules," the Seventh Circuit began its analysis by observing that, where restraints are placed upon speech, "the limitation . . . must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Without hesitation, the court concluded that the "per se proscription" of comments "reasonably likely" to interfere with or prejudice a civil or criminal trial was overbroad and constitutionally infirm.

In lieu of the impermissible standard, the court fashioned its own test, stating that "[o]nly those comments that pose a 'serious and imminent threat'
of interference with the fair administration of justice can be constitutionally proscribed. This formula is rooted in Chase v. Robson and In re Oliver, two recent Seventh Circuit decisions which discussed the constitutionality of judicial discipline of attorneys for extrajudicial comments on pending lawsuits and which held:

[B]efore a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is "a serious and imminent threat" to the administration of justice.

Since Dennis v. United States and its implied rejection of the "clear and present danger" test as a yardstick for determining the extent of first amendment protections, courts and commentators have struggled to achieve an acceptable understanding of the free speech guarantee. Dennis

16. Id. at 249.
17. 435 F.2d 1059 (7th Cir. 1970), involving a blanket order prohibiting counsel from making any case-related extra-judicial statement during the pendency of a criminal trial.
18. 452 F.2d 111 (7th Cir. 1971), concerning an order prohibiting any comment during the pendency of a civil trial.
19. 435 F.2d at 1061. Both Chase and Oliver held the court-imposed orders overbroad because, as blanket restrictions, they failed to distinguish between speech that would not have a prejudicial effect on the fair administration of justice and speech that would have such prejudicial effect. But in Chase, the court specifically refused to rule whether a reasonable likelihood standard could be used to measure the limiting scope of free speech. And in Oliver, the majority opinion noted that there was support for the "reasonable likelihood" standard when dealing with criminal jury trials.
21. First enunciated in Schenck v. United States, 249 U.S. 47 (1919) and finally adopted in Herndon v. Lowry, 301 U.S. 242 (1937), the "clear and present danger test" was the standard by which courts measured the extent to which speech and other forms of expression could be suppressed for the sake of a greater common good. In Dennis, where the Smith Act conviction of Communist Party leaders in New York was affirmed, the Court asserted that use of the Schenck (danger) test would bar effective government action until it was too late:

[Preventing] overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value for a society, for if any society cannot protect its very structure from armed internal attack it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the phrase 'clear and present danger' of the utterance bringing about the evil within the power of Congress to punish.

. . . Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been weighed and the signal is awaited.

laid the ground rules and facilitated the emergence of a balancing approach by stating that "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."\textsuperscript{23} The results of this struggle have been frustrating and inconclusive.\textsuperscript{24}

\textit{Chicago Council of Lawyers} does much to increase and little to clarify the post-\textit{Dennis} confusion. The opinion devotes only three paragraphs to the issue of what standard should apply. The circuit chose not to refute or even review the district court's logic and citation of cases. Rather, it merely concluded that the right to a fair trial is "the most fundamental of all freedoms" and that where conflicts arise between that right and counsel's freedom of speech, "the right to a fair trial ... must take precedence," if the lawyer's statements "are apt to seriously threaten the integrity of the judicial process."\textsuperscript{25}

\textit{Amendment}, 1964 Sup. Ct. Rev. 191; \textit{Freunzl, The Supreme Court of the United States} (1961); \textit{Krislov, The Supreme Court and Political Freedom} (1968). Between 1951 and 1971, the clear and present danger standard was found specifically unsuitable in dealing with free speech and libel (Beauharnais v. Illinois, 343 U.S. 250 (1952); see New York Times v. Sullivan, 376 U.S. 254 (1964)) or obscenity, Roth v. United States, 354 U.S. 476 (1957), and was in fact used in only one majority opinion, Wood v. Georgia, 370 U.S. 375 (1962), where a contempt conviction for statements allegedly made to interfere with the due administration of justice was reversed.

23. 341 U.S. at 510.

24. Determining the point at which freedom of expression ceases to be constitutionally protected through the probability or improbability of the occurrence of certain conduct is not the same as determining at what point that conduct threatens the existence of organized society. Once the gravity of the evil is discounted by its probability, it must be ascertained whether the invasion is justified. This decision is made by balancing the respective interests involved and the balancing technique emasculates any test as a means of delineating the scope of free speech. See Dennis v. United States, 341 U.S. 494, 581-92 (1951) (Douglas, J., dissenting).

But balancing is the logical extension of the modified "danger" test urged in \textit{Dennis}. Whether it be "ad hoc balancing," where the interest in prohibiting the conduct is weighed against the interest of the person in pursuing such conduct (see Morris & Powe, \textit{Constitutional and Statutory Rights to Open Housing}, 44 Wash. L. Rev. 1, 28-46 (1968); Kauper, \textit{Political Freedom}, 58 Mich. L. Rev. 619 (1960); Karst, \textit{Legislative Facts in Constitutional Litigation}, 1960 Sup. Ct. Rev. 75); Karst, \textit{The First Amendment and Harry Kalven}, 13 U.C.L.A. L. Rev. 1 (1965)), or "definitional balancing," where the court defines such concepts as "speech," "abridge," and "freedom" in light of the facts presented in each case and then weighs the respective interests and burdens involved (see Emerson, \textit{Toward a General Theory of the First Amendment}, 72 Yale L.J. 877, 912-16 (1963); Frantz, \textit{The First Amendment in Balance}, 71 Yale L.J. 1424, 1433-45 (1962); Nimmer, \textit{The Right to Speak from 'Times' to 'Time': First Amendment Theory Applied to Libel and Misapplied to Privacy}, 56 Calif. L. Rev. 935, 935-67 (1968)), courts have used some form of these techniques to decide whether limits on pure speech, speech-plus and speech related conduct are justified. Balancing allows greater latitude of decision at the expense of engendering uncertainty concerning the extent of first amendment guarantees.

25. 522 F.2d at 247-48. The plaintiff-lawyers had maintained that balancing the first amendment rights of attorneys against litigants' sixth amendment rights to fair trials was not necessary since these two rights do not compete. Neither the first nor sixth
Unfortunately, the court's conclusionary acceptance of the serious and imminent threat standard offers little aid in either understanding the complexities of a first amendment—sixth amendment conflict or in the search for a consistent standard in measuring the scope of freedom of speech. While the out-of-hand assertion that "only those comments which pose a serious and imminent threat . . . can be conditionally proscribed" may reinforce the Seventh Circuit's strict and aggressive posture toward protecting first amendment freedoms, it is simply not helpful in comprehending the theoretical underpinnings which presumably support it and may as easily be negated by a blanket conclusion to the contrary. It seems that some historical analysis was in order here, particularly since the issue will undoubtedly be appealed to the Supreme Court.

Even the inclusion of the serious threat standard was "not constitutionally sufficient by itself" because the gag rules were also attacked on vagueness grounds. The court proceeded to examine each rule to "determine what may constitute a 'serious and imminent threat' of interference with the fair administration of justice."26

The analysis first considered the rules governing criminal proceedings. In situations where criminal charges have not yet been lodged, but public interest in the investigation is at a peak, the circuit perceived that a per se limitation on public discussion concerning the government's prosecutorial authority would be an affront to traditional concepts of free speech and expression.27 Government attorneys, however, are in a substantially different position during this stage.

They have the ability to influence and ensure proper governmental procedure without resort to public opinion. Moreover, they know what charges may be brought and are a prime source of damaging statements. Admittedly, our formulation may place prosecutors in a difficult position since they may be criticized for a particular investigation but may not publicly respond. This is a situation that competing interests necessitate. Ultimately the prosecutor's response will come in the form of an indictment or information or else the investigation will have ended and his speech will be unrestricted.28

amendment guarantees can effectively exist without the complimentary mandate and result of the other. A fair trial assures that the freedom to speak will not be arbitrarily taken away and, conversely, freedom of speech assures that a trial will be open and fair. Chief Justice Burger recently commented in a Bicentennial Address to the Mormon Tabernacle: "Through recognition of the dependence of one freedom on another and through exercise of each, all can be preserved." Chicago Sun-Times, Sept. 7, 1975, at 94, col. 2. From an ideal or abstract view the Seventh Circuit agreed that the two rights can and should co-exist without disharmony. In everyday situations, however, the court recognized that conflicts are inevitable. 522 F.2d at 248.

26. 522 F.2d at 250.
27. The court said: "Those in the best position to inform the public . . . should be free to do so." Id. at 253.
28. Id.
Accordingly, appropriate disciplinary rules could be fashioned and enforced during a criminal investigation only in relation to attorneys associated with the investigation on behalf of the government.

The court next considered speech limitation from the time of indictment or arrest to commencement of trial or the entering of a guilty plea. There are many reasons why an attorney may desire to comment during this time. A lawyer may wish to publicly assert that a statute is unjust or unconstitutional or that the prosecutor's office has abused its discretion in bringing charges. Counsel may also seek to solicit defense funds. According to the Seventh Circuit, however, none of these reasons were sufficient to overcome the potential damage which comment by the defense or government attorneys may create. At this stage in the criminal judicial process, "formal controversy that should be settled by the courts is in existence. The balance swings more toward the necessity of prohibiting certain speech. . . ."29 Statements by either counsel concerning reputation, prior criminal records, results of tests, confessions of guilt, plea bargaining offers, and opinions as to guilt, evidence, or the merits of the case may be proscribed and may give rise to a rebuttable presumption of posing a serious threat to the administration of justice.

The time frame from jury selection to the end of trial was found to be "a special one."

[This] period of time . . . is relatively limited even in the case of a lengthy trial. More important, it is the stage in which there is likely to be the most intense news coverage and which therefore creates the most need to ensure that inadmissible opinions or statements do not encroach upon the laboratory conditions of the trial.30

Attorney comments relating to the trial, the parties, or the issues in trial were found capable of raising a presumption of serious and imminent harm. In arriving at this conclusion, the court rejected the argument that in bench trials and in jury trials where the jury is sequestered, the serious and imminent danger test should not apply because the fact-finder could not be influenced by any comment. And, although life-tenured federal judges may be "men of fortitude, able to thrive in a hardy climate,"31 they are also "human . . . [and may be] consciously or unconsciously influenced by demonstration in or near their courtrooms both prior to and at the time of the trial."32 On these grounds, the court decided that there should be no distinction between bench trials and jury trials.

On the other hand, strict judicial isolation from exterior influences, particularly comments by counsel of record, was found to be unnecessary between the time of completion of trial and sentencing.

29. Id. at 254.
30. Id. at 255.
31. Id. at 256, citing Craig v. Harney, 331 U.S. 367, 376 (1947).
Unlike the prohibition on comment during a bench trial, there is very little possibility that any factual matter that could not be presented in court would be communicated to the judge by way of extra-judicial comment of attorneys. This is because a judge is entitled to consider almost any factor in exercising his sentencing discretion. He may conduct an inquiry "largely unlimited either as to the kind of information he may consider, or the sources from which it may come."83

Finally, the court evaluated the applicability of gag rules to attorneys engaged in civil lawsuits, noting that there are particular distinctions between civil and criminal litigation, the most important of which is the greater insularity against the possibility of interference with fairness in criminal cases.

The point to be made is that the mere invocation of the phrase "fair trial" does not as readily justify a restriction on speech when we are referring to civil trials. [Other distinguishing factors are that civil suits usually take longer to resolve than criminal matters and often concern important social issues.]

. . . [C]ertain civil suits may be instigated for the very purpose of gaining information for the public. Often actions are brought on behalf of the public interest on a private attorney general theory. Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public. Yet it is normally only the attorney who will have this knowledge or realize its significance. Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi-private institutions or governmental entities. Often non-lawyers can adequately comment publicly on behalf of these institutions or governmental entities. The lawyer representing the class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.34

The inordinate time span of the rules prohibiting attorney comment on civil matters and the public's interest in knowing about important social cases prompted the circuit to hold that the gag rules could never be constitutionally applied to civil suits.

*Chicago Council of Lawyers* demonstrates the conflicting policies which surround the free speech-fair trial controversy and the problems inherent in any attempt to limit attorneys' first amendment rights. It is unfortunate that the court felt compelled to examine the rules for vagueness after they had already held them unconstitutionally overbroad. No concrete controversy was present. Unlike *Oliver* and *Chase*, no attorney had been disciplined under the rules. While the court obviously sought to avoid the very involved and time-consuming litigation of the same issues now tying up other courts, it would have been better advised to await an actual situation in order to

33. *Id.* at 257 (citations omitted).
34. *Id.* at 258.
properly evaluate and balance the interests involved. As noted, however, the Seventh Circuit often takes a pragmatic approach in the civil rights-civil liberties area and thereby attempts to achieve a harmony between its desire to vindicate and safeguard constitutional rights and its awareness of the burdens of an ever-increasing caseload.

While *Chicago Council of Lawyers* questioned restrictions of "pure speech," the court also resolved first amendment claims for protection of expressive conduct. The cases dramatically illustrate that the circuit's solicitous attitude toward first amendment freedom decreases markedly as the challenged expression becomes more "conduct" and less "speech."

In *Herzbrun v. Milwaukee County*, the court rejected an overbreadth attack on a county civil service regulation which authorized the suspension, demotion, or discharge of any covered employee who is guilty of acts or omissions unbecoming an incumbent of the particular office or position held, which render . . . suspension, demotion or discharge necessary or desirable for the economical or efficient conduct of the business of the county or for the best interest of the county government.

Plaintiff Herzbrun was a tenured civil service employee of the Milwaukee County Department of Public Welfare and the president of her local union. When a dispute arose over the placement of bulletin boards announcing union activities, Herzbrun and other employees expressed their displeasure by disrupting the Department's telephone system, causing a major backup of incoming calls and destroying internal telecommunications. After a hearing, Herzbrun was discharged from service and the others were suspended for violations of the cited rule. Plaintiffs claimed that their actions were protected by the first amendment's freedom of speech.

The district court reviewed the rule, found it vague and overbroad, and ordered plaintiffs to be reinstated with back pay. The Seventh Circuit reversed, concluding:

Although the action taken was a concerted response in a dispute with management . . . we think the physical interference with communication and the conduct of public business was too deliberate, substantially disruptive, and prolonged to be classified as symbolic speech and protected expression.38

35. 504 F.2d 1189 (7th Cir. 1974).
36. *Id.* at 1192, citing Milwaukee County Civil Serv. Rules R. VII, § 4(1)(k).
37. Herzbrun v. Milwaukee County, 338 F. Supp. 736 (E.D. Wis. 1972). See also Zekas v. Baldwin, 334 F. Supp. 1158 (E.D. Wis. 1971), decided after the events and before the decision in Herzbrun, which held the paragraph unconstitutionally vague and overbroad.
38. 504 F.2d at 1193 n.2. It is interesting to note that in his concurring opinion Judge Stevens did not consider the conduct to be expressive in nature and urged that standing to raise any first amendment issue be denied in its entirety. *Id.* at 1197.
First, the court asserted that, because of the nature and extent of their actions, plaintiffs lacked standing to challenge the rule on vagueness grounds. On the basis of *Broadrick v. Oklahoma*, the court stated, now permit, attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

But before this type of claim is sustainable, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." To this, the Seventh Circuit added:

As we understand this test of substantial overbreadth, when evaluating statutes covering both speech and unprotected conduct once a court determines that there is an area of possible impermissible applications, the court is to compare that area with the "plainly legitimate sweep" of the statute in order to determine that the former is substantial.

The *Herzbrun* court applied these considerations in light of the Supreme Court's decision in *Arnett v. Kennedy*. *Arnett* concerned the constitutionality of a federal statutory and regulatory scheme which authorized the removal or suspension of nonprobationary federal civil service employees who "engage in criminal, infamous, dishonest, immoral or notoriously dis-

   It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and when "such summary action" is inappropriate. But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

*Id.* at 615 (citations omitted).
41. 413 U.S. at 615.
graceful or other conduct prejudicial to the Government" or who perform acts "which might result in, or create the appearance of . . . [a]ffecting adversely the confidence of the public in the integrity of the Government." The Supreme Court flatly rejected a bid for facial overbreadth, reasoning that the system was "not directed at speech as such but at employee behavior, including speech, which is detrimental to the efficiency of [the Government]." 44

Comparing the language of the Milwaukee County rule with that upheld in Arnett, the court was unable to "conclude that the county rule is significantly more broad in terms of arguable applicability to constitutionally protected speech." 45 Accordingly, the regulation was not susceptible to a first amendment assault.

A similar issue arose in Paulos v. Breier, 46 a civil rights suit brought by a Milwaukee police detective who was suspended from duty for sending a letter to fifty-four subordinates urging them to support a particular candidate for political office. The mailing allegedly violated a Milwaukee Police Department regulation prohibiting police personnel from using "the influence of their office for political reasons." 47

Plaintiff Paulos argued that, in violation of the first and fourteenth amendments, his right to freely express his opinions was abridged by this overbroad and vague rule. The district court disagreed, declared the rule constitutional, and dismissed the case. 48

Affirming, the Seventh Circuit was most careful in stating its holding: "On [these] facts . . . we conclude that the interests of the municipality in preserving a nonpartisan police force and the appearance thereof . . . outweighs the interests of plaintiff in conveying his endorsement to subordinate officers." 49 The overbreadth and vagueness challenges were rejected because Paulos lacked the requisite legal interest to raise these questions. Employing the Broadrick test of "real and substantial overbreadth," the court decided that the regulation "is constitutionally applicable to a myriad of situations" and "has a substantially legitimate sweep" within which

44. Id. at 162.
45. 504 F.2d at 1194.
46. 507 F.2d 1383 (7th Cir. 1974).
47. Id. at 1384, citing Milwaukee County Police Dept. Rules and Regulations R. 29, § 31.
49. 507 F.2d at 1386, citing Pickering v. Board of Education, 391 U.S. 563, 568 (1974) and CSC v. Letter Carriers, 413 U.S. 548, 564 (1973). The court noted that "a balance must be struck between the First Amendment interest of a state employee and the interests of the state in promoting the efficiency of the public services that it performs through its employees." Relying on the government interests detailed in Letter Carriers, the court believed the county rule to be justified. Id. at 1385. See Broadrick v. Oklahoma, 413 U.S. 601, 616-17 (1973).
plaintiff's conduct fell. Concerned for "persons on the edge of the regulation's applicability whose rights [may be] constitutionally infringed," the court suggested that "it will be for them to make the challenge in the context of a concrete dispute, so that a court need not base its decision on mere hypothetical infringements which this plaintiff asserts."

Likewise, Paulos' vagueness argument could not be considered as presenting a viable case or controversy since "[a] reasonable man would have had fair notice that as a police detective he was prohibited by the regulation from sending a political endorsement to the patrolmen in his voting district."

Another decision, Sheehan v. Scott, raised overbreadth and vagueness questions concerning the words "habitually truant" as used in the compulsory school attendance sections of the Illinois School Code and the Illinois Juvenile Court Act. Turning aside Sheehan's claim for failure to state a substantial constitutional issue, the court held that his absence from school for 11 of 19 days in a calendar month constituted "habitual truancy," however defined, and was not entitled to first amendment protection because "plaintiff was [not] attempting to express anything of a protected nature . . . ." Since Sheehan had no first amendment claim, he lacked standing to challenge the statutory scheme on overbreadth concepts.

As for vagueness, the court, citing United States v. Harriss, perceived the appropriate standard for application as follows:

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally

50. 507 F.2d at 1386-87.
51. 507 F.2d at 1387. It is unfortunate that the Chicago Council of Lawyers panel did not adopt this judicious attitude.
52. Id. See 413 U.S. at 578-79; 417 U.S. at 757; United States v. Harriss, 347 U.S. 612, 618 (1954). In refusing to hold the rule vague as related to Paulos, Judge Cummings distinguished the Seventh Circuit's earlier and apparently contrary decision in Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974), cert. denied, 419 U.S. 1121 (1975). There a Milwaukee Police Department rule prohibiting "conduct unbecoming a member and detrimental to the service" was held unconstitutionally vague. Bence had been disciplined for sending a letter to the city's labor negotiator outlining and explaining a proposed bargaining demand. The Seventh Circuit held the regulation vague both as applied and on its face. The court relied in part upon the "as applied" holding to avoid standing problems. 501 F.2d at 1193. Paulos and Bence were distinguished as involving different regulations and different conduct. Also, Bence was the more compelling case, because Paulos, unlike Bence, had ample notice that his conduct was proscribed by the rule prohibiting the use of the office to influence political matters. 507 F.2d at 1388.
53. 520 F.2d 825 (7th Cir. 1975).
54. ILL. REV. STAT. ch. 122, § 26-1 et seq. (1973); ILL. REV. STAT. ch. 37, § 702-3(b) (1973).
55. 520 F.2d at 828.
responsible for conduct which he could not reasonably understand to be proscribed.

On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction.67

Upon examination, the court determined that plaintiff's claim of vagueness was meritless since his conduct was so unmistakably covered by the law.

These decisions manifest the court's reluctance to protect expression by conduct as opposed to expression by speech alone. As a plaintiff's first amendment activity moves toward the "hard-core" conduct end of the speech-conduct continuum, the court of appeals limits overbreadth and vagueness challenges to a consideration of the precise case or controversy under examination. And this is so despite its explicit recognition that a particular rule or statute may potentially or immediately interfere with the first amendment rights of non-litigants, thereby "chilling" their freedom of speech.68

Two additional first amendment cases—*Chicago Area Military Project v. City of Chicago*59 and *Illinois Migrant Council v. Campbell Soup Co.*60—merit comment because both involve attempted limitations of free speech in specific locales.

The Chicago Area Military Project (CAMP) publishes a "GI Movement" newsletter which is distributed free to interested servicemen and members of the public. Chicago's O'Hare Field, a center of national air travel, is one of CAMP's primary distribution points. Enforcing an unwritten regulation against leafletting, Chicago police officers threatened CAMP members with arrest if they persisted with their activity at the airport. Alleging first amendment violations, CAMP sued for injunctive and monetary relief.

The district court conducted a hearing at which city officials at-

57. 520 F.2d at 828 (citations omitted).
58. Civil rights advocates should take note of the increasing use of the "hard-core" concept. In *Smith v. Goguen*, 415 U.S. 566 (1974), invalidating for vagueness a Massachusetts flag misuse statute, Justice Powell maintained that, if Goguen's behavior had rendered him a "hard-core" violator, the statute might not be impermissibly vague, whatever its implications for those engaged in different conduct. He said: "To be sure there [will be] statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain. The hard-core violator concept makes some sense with regard to such statutes." Id. at 577-78. As discussed in the text, this hard-core concept was a factor in all the speech-plus decisions rendered by the Seventh Circuit this term.
59. 508 F.2d 921 (7th Cir. 1975).
60. 519 F.2d 391 (7th Cir. 1975).
tempted in vain to recreate and explain the oral rule. The court found for the plaintiffs and entered an order enjoining the city from interfering with this protected expression and assembly in the public places of the airport. The airplane arrival and departure areas were expressly excluded from the effect of the order.

Defendants appealed and the Seventh Circuit affirmed. Preliminarily, the court recited:

The First Amendment to the Constitution proscribes federal action which abridges an individual's right to freedom of speech, press and assembly and it has long been settled that the Fourteenth Amendment extends these First Amendment proscriptions to state action. One of the primary reasons for the adoption of the First Amendment was to ensure the right to distribute copies of one's own publication in public places.61

Rejecting defendants' argument that O'Hare's terminal buildings are not public places and only serve the public for the limited purpose of air travel, the court observed:

There is no question but that the terminal buildings at O'Hare Airport, city-owned and operated, are freely available to the general public and that their wide-open public areas which perhaps 90,000 transients visit daily can accommodate seven persons peacefully distributing, in groups of twos and threes, free copies of their publication to interested persons. Indeed, although airport and airline officials testified that unrestricted leafletting and solicitation could conceivably interfere with important airport operations, the City does not contend that the activities of the plaintiffs do in fact obstruct airport traffic.62

In this context, then, the Seventh Circuit agreed with the district court that plaintiffs were entitled to equitable protection against the unconstitutional activity of the defendants. Affirming the acceptability, however, of narrow regulations drawn to protect substantial interests of the state, the court also approved the exclusion of the "working" areas of O'Hare Field from the injunction order.

A "company town" issue confronted the court in Illinois Migrant Council. There the council (IMC) was denied access to consult with and advise Campbell Soup Company farm workers residing in the company's residential community at Prince Crossing, Illinois. Maintaining that Prince

61. 508 F.2d at 924 (citation omitted). See Near v. Minnesota, 283 U.S. 697 (1931); Lovell v. City of Griffin, 303 U.S. 444 (1938); Schneider v. State, 308 U.S. 147 (1939).
62. 508 F.2d at 925. See Hague v. CIO, 307 U.S. 496, 515-16 (1939) (city owned common areas recognized as particularly appropriate places for exercise of right to communicate ideas and information); Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968) (publicly owned bus terminal); Kuszynski v. City of Oakland, 479 F.2d 1130 (9th Cir. 1973) (city airport).
Crossing is a "company town" within the meaning of *Marsh v. Alabama*, plaintiffs IMC and its regional director brought suit against Campbell for injunctive and monetary relief. Although the complaint stated that the company maintained a residential community complete with basic services for the residents, and that access to the town was by private road protected by the state trespass laws, the district court found that plaintiff's failure to allege that the company maintained ordinary municipal services constituted an admission that it did not maintain such services. On this basis, the court held that the community did not possess the requisite public characteristics that would constitute state action, for purposes of federal jurisdiction.

The Seventh Circuit reversed, chiding the district court for its myopic view of plaintiffs' claim:

The court reiterated the firmly established rule of pleading that a complaint may be dismissed for failure to state a claim only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Liberally construing the allegations of plaintiffs' complaint, the court concluded that sufficient facts were asserted to support the claim that Prince Crossing was a "company town" and that, if Campbell Soup refused plaintiffs access to the community, it did so under color of state law. In summary, where a private entity assumes and exercises the attributes of a state-created municipality, it stands "in the shoes of the state" and its actions must be deemed to constitute those of the state. Thus, the court found Campbell's refusal to permit IMC to enter Prince Crossing to be constitutionally infirm:

63. 326 U.S. 501 (1946). A "company town" is a community operated by a private company which "possesses the characteristics of any other American town" and which serves as a functional equivalent of a municipality for its residents. *Id.* at 502. Such a designation warrants a finding of "state action" sufficient to bring actions of the otherwise private entity within the proscriptions of the Civil Rights Act, 519 F.2d at 395. See Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). Compare Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

64. 519 F.2d, at 394. The district court's decision was based on the plaintiff's failure to allege that the company maintained police, sewage, postal and shopping facilities as part of the "municipal" services provided.

65. *Id.* at 394-95.


Municipal regulations affecting constitutional rights must be drawn with "precision," and must be "tailored," to accomplish their legitimate objectives. A city may not choose the most restrictive method of regulation if other, "less drastic means," are available. Clearly, the defendant's [action] fails to comply with these stringent requirements.68

*CAMP* and *Illinois Migrant Council* bring no new law to their respective areas, but merely reaffirm, in no uncertain terms, the Seventh Circuit's strong prejudice against activity, sanctioned by state law, which infringes upon protected rights. This term's abortion decisions are further testimony to this attitude.

**ABORTION**

The continuing action and reaction arising from the Supreme Court's landmark decisions in *Roe v. Wade*69 and *Doe v. Bolton*70 brought two interesting abortion cases before the Seventh Circuit. The court has long exhibited considerable sympathy for the constitutional protection of privacy which gives support to the so-called "right to abort."

*Friendship Medical Center, Ltd. v. Chicago Board of Health*71 represents one of the most far-reaching circuit court decisions this year. The issue was whether the Board of Health could promulgate and enforce a medical regulatory system which dictated—without reference to the trimester of pregnancy involved—the conditions, equipment, and procedures of abortion facilities. The court thought not.

In May 1973, shortly after *Roe* and *Doe* were rendered, the Board of Health adopted certain Regulations for Abortion Services in the City of Chicago, requiring that abortions be performed by a licensed obstetrician or surgeon in a hospital or clinic complying with the rules. Each medical facility was subject to extensive record-keeping and reporting requirements and had to maintain normal surgical equipment as well as an affiliation agreement with a licensed Chicago hospital, for purposes of lab tests and emergencies. Before aborting, each patient was obliged to undergo a


71. 505 F.2d 1141 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975).
complete physical examination and to delay the operation until twenty-four hours after the check-up. At the abortion itself, the rules required that the physician be attended by a registered nurse with obstetric or gynecological experience of at least one year and that a social service unit be available to the patient.

The Medical Center and its director, Dr. T. R. M. Howard, offered abortion services to the public at the time the Board of Health regulatory scheme became effective. Although no action was taken against them, these parties filed suit claiming that the Board's regulations were undue restrictions on the patient's right to privacy and on plaintiffs' "rights to treat medical matters relating to abortion." Arguing that the rules had no legitimate relation to any recognizable governmental interest in maternal health, the clinic and Howard contended that they were overbroad and invalid.

The district court disagreed. Rejecting the privacy challenge on standing grounds, the court ruled that reasonable state efforts to impose safety requirements on those seeking and performing abortions were not prohibited by the Constitution, *Roe,* or *Doe.* On appeal, the Seventh Circuit reversed, limiting its review to a consideration of the standing of plaintiffs and the privacy rights of the patient.

Relying on *Griswold v. Connecticut,* *Eisenstadt v. Baird,* and *Doe,* the court granted privacy standing to the Medical Center and Howard.

[IN] our view the fact that the challenged regulations are aimed and operate directly on the plaintiffs, and are of a continuing nature, with potentially very real criminal consequences is sufficient to allow plaintiffs to assert the rights of their patients.

. . . This is not, therefore, a case where one party seeks to raise the rights of another with whom he has only marginal involvement. Rather as the Court recognized in *Griswold* the rights being asserted were "likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to [the one whose rights are raised]. . . ."

Quoting from *Barrows v. Jackson,* the court concluded:


73. 381 U.S. 479 (1965), where a physician was granted standing to assert the constitutional rights of married persons in challenging a Connecticut statute forbidding the use of contraceptives.

74. 405 U.S. 438 (1972), where a physician was allowed to champion the rights of unmarried persons denied access to contraceptives.


76. 346 U.S. 249, 257 (1953), where, in an action for damages for breach of a racially restrictive covenant, the Supreme Court allowed a seller of land to defend on the grounds that the covenant violated the equal protection rights of prospective non-Caucasian purchasers.
Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.  

With standing established, the constitutionality of the Chicago regulations was measured in light of Roe and Doe. The Roe-Doe line of cases posited that, in making and executing the decision to abort, a pregnant woman's right of privacy must be balanced with the state's interest in her welfare. In effecting this balance, the Supreme Court wrote that, during the second and third trimesters of pregnancy, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." However, prior to a magical "compelling point" which occurs on the first day of the second trimester, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

By virtue of these principles, the Seventh Circuit in Friendship Medical Center held that the Board of Health regulations must fall because they unduly interfered with the woman's abortion decision.

The decision whether or not to abort a pregnancy cannot be made in a vacuum without regard to who will perform the operation, where and under what conditions it will be performed, and what procedure will be followed. All these are involved in any abortion decision and it is precisely these elements of the decision that the regulations challenged here seek to control.

In short, the regulations by their very nature restricted the abortion decision and affected whether and in what manner an abortion would take place.

An additional reason for invalidating the Board's rules lay in the fact that, contrary to the equal protection requirements of the fourteenth amendment, the Chicago Board of Health Rules on Abortion Services comprehensively regulated physicians who performed abortions, while at the same time leaving other medical procedures, often much more complex and dangerous.

77. 505 F.2d at 1148. See Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971), where a physician was allowed to assert the privacy rights of his patient in an action seeking to declare the Illinois anti-abortion statute unconstitutional. See also Pierce v. Society of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 239 U.S. 33 (1915); Crossen v. Breckenridge, 446 F.2d 833 (6th Cir. 1971).
78. 410 U.S. at 163.
79. Id.
80. 505 F.2d at 1151. According to the Seventh Circuit, Roe and Doe implied that "even after the decision to abort . . . is made, that decision must be able to be 'effectuated by an abortion free of interference by the State.'" Id., citing Roe v. Wade, 410 U.S. at 163.
in terms of the patient's health, to the good judgment of the physician. Thus, because the Board treated abortion procedures differently than similar medical operations and because this treatment adversely affected fundamental rights without a compelling justification, "the challenged regulations [could] not be allowed to remain in effect." 81

The court's opinion is a concise explanation of Roe, Doe and the permissible scope of direct and indirect state regulation of abortion. The essence of Friendship Medical Center is that, while purporting to promote maternal well-being, the Chicago Board of Health's rules unreasonably and unjustifiably infringed upon the individual's right to privacy, at least in the first trimester, to decide to abort a pregnancy. 82

Doe v. Mundy, 83 the Seventh Circuit's other abortion decision this term, concerned the validity of a rule of the Medical Staff at Milwaukee County General Hospital permitting the use of hospital facilities for an abortion only when a pregnancy is complicated by medical conditions of such nature and advanced to such degree that continuation of pregnancy threatens the life of the mother. The district court found the application of this regulation to be an unconstitutional deprivation of pregnant women's rights and preliminarily enjoined its operation. 84

On appeal, the Seventh Circuit affirmed. Although much of Mundy concerns the technical propriety of the district court's injunctive grant and is inapposite to the instant discussion, its importance lies in its unflinching resolution that a publicly owned and operated hospital may not close its doors to abortion, either by rule or by practice.

Fortunately or unfortunately, abortion on demand is here to stay, at least until the human fetus is recognized as being entitled to the constitutional freedoms accorded to "persons" by the fourteenth amendment. In its

82. 505 F.2d at 1153-54. Since the Board of Health Regulations interfered with the means necessary to effectuate an abortion, in that they unduly restricted the abortion decision, the Seventh Circuit reasoned that such regulations may only be justified by a compelling state interest. This conclusion was drawn despite the fact that both Roe and Doe permit post-first trimester abortion procedures to whatever extent reasonably related to the preservation and promotion of maternal health. 410 U.S. at 163, 189.

In a concurring opinion, Judge Fairchild argued that regulations of the safety of all medical procedures do not have to meet the compelling state interest test. Imposition of generally applicable safety regulations, even though incidentally including first trimester abortions, would "seem to be a valid exercise of the State's interest in protecting health and need only satisfy the traditional tests of judicial scrutiny [reasonable relationship]." 505 F.2d at 1155. But like the majority, he believed that the present regulations, at least as applied to the first trimester of pregnancy, imposed a "burdensome, extra layer of requirements upon a surgical process deemed indistinguishable from similar medical procedures." Id.
83. 514 F.2d 1179 (7th Cir. 1975).
84. 378 F. Supp. 731 (E.D. Wis. 1974).
interpretation of Roe and Doe, the Seventh Circuit has been an aggressive advocate of the right to abort. At least in this circuit, states bear a heavy, almost impossible, burden to justify abortion procedure regulations. During the first trimester, only limited and compelling responses will be permitted.\textsuperscript{85}

**FOURTEENTH AMENDMENT LITIGATION**

Constitutional claims arising under the due process and equal protection clauses of the fourteenth amendment invariably entail intricate evaluations of individual and social issues. Decisions in these areas, it seems, are often based upon subjective predilection rather than objective legality. This criticism is understandable. Because due process is an elusive concept with undefinable boundaries, the particular process that is due depends upon a variety of social factors. And, since the equal protection clause only bars a state from creating unreasonable and arbitrary classifications, its scope is often a matter of a court's personal opinion.

In its fourteenth amendment litigation this term, the Seventh Circuit was called upon to resolve questions ranging from the refusal to allow women to participate in high school athletics to the standard of proof required in a commitment hearing under the Illinois Sexually Dangerous Persons Act. Never simple, these cases demonstrate the broad protection offered by the federal constitution. Due to the extensiveness of this area of protection, categorization of opinions is difficult and often impossible. Indeed, the cryptic and abstract words that give rise to these protections make generalizations about trends necessarily fraught with exceptions.

**Due Process**

In the area of due process, one thing is clear: "[A]t a minimum [due process] require[s] that deprivation of life, liberty or property by adjudica-

\textsuperscript{85} In *Friendship Medical Center*, the court noted that the fundamental rights established in *Roe* and *Doe* necessarily limit the effect any general health regulation would have on first trimester abortions. "[I]n all probability nothing broader than general requirements as to the maintaining of sanitary facilities and general requirements as to meeting minimal building code standards would be permissible." 505 F.2d at 1154. Cautioning against regulations which might be overly restrictive even after the first trimester, the court said:

Even if the challenged regulations here were interpreted as applying only to the period after the first trimester, there is no basis in the record upon which this court could make a determination as to which of these regulations were reasonably related to a valid state interest.

While under a rational relationship type test a municipal ordinance pursuant to its police powers will be given great deference, it must be remembered that at the end of the first trimester a woman does not lose completely her right of privacy. . . . [A]ny regulation dealing with maternal health after [that point] must not only be reasonably related to a valid health purpose, but must have appropriate regard to the still existing right of privacy of the mother. Exactly where this balance is to be struck will have to be decided on a case by case basis.

*Id.* at 1154 n.19.
CIVIL RIGHTS AND CIVIL LIBERTIES

The need for due process prior to deprivation of vested employment rights is reflected in the case of **Muscare v. Quinn**. This case involved a firefighter named Lieutenant Frank Muscare, who was a twenty-year veteran of the Chicago Fire Department. Muscare was suspended for 29 days because of his goatee, which the department claimed violated their personal appearance regulations.

Muscare argued that the regulation violated his constitutional right to determine his personal appearance. The district court held a hearing and denied relief. The Seventh Circuit reversed, finding it unnecessary to resolve the freedom of appearance controversy. Instead, they ruled that the suspension was accomplished without proper regard for the constitutional requirement of procedural due process.

The court in **Muscare v. Quinn** surveyed a number of recent court decisions regarding hair regulations in the fire service. Some courts have upheld such regulations on the basis of “paramilitary” discipline or the need to present a well-groomed image to the public. Other courts, however, have rejected this view. More recently, fire departments across the country have begun to justify hair regulations on the basis of safety considerations, particularly the efficient use of gas masks. Though fundamentally a fact question, most courts have accepted this theory. Only a few courts have found no basis for this justification. In passing, the court noted that the challenged hair regulation, § 51.133, does not appear to be co-extensive with the need for safe and efficient use of gas masks and, if that is the sole justification, might well be more narrowly drawn.
ing the Department’s contention that plaintiff’s actual knowledge of the charges against him and his statutory right to a post suspension hearing satisfied due process, the court held:

Public employees facing temporary suspension for less than 30 days have interests qualifying for protection under the Due Process Clause, and due process requires at the minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency.

This ruling was in apparent conflict with a recent Illinois Supreme Court decision which upheld the constitutionality of the summary suspension procedures used by the Chicago Police Department, concluding that, for suspensions of more than five and less than thirty days, due process was met by post-suspension review. However, in the even more recent United States Supreme Court decision in Goss v. Lopez, a school case where several students attacked summary suspension and expulsion procedures, the high court opined that “a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process.” And, in Arnett v. Kennedy, although rejecting a due process attack, six Justices agreed that the minimal requirements of constitutional due process applied to the discharge of a federal civil servant.

Comparing these decisions to Muscare’s situation, the Seventh Circuit concluded that at least the same minimal standards should be applied to the suspension of a public employee: “Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of lost pay are at stake.” Moreover, the

90. Section 10-1-18 of the Illinois Municipal Code provides:
Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, except for cause upon written charges and after an opportunity to be heard in his own defense. ** Nothing in this Division limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. ** * * Nothing in this Division limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. ** * * Nothing in this Division limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. **

91. 520 F.2d at 1215.
94. Id. at 573.
96. Id. (Powell & Blackmun, JJ., concurring; White, Douglas, Marshall & Brennan, JJ., dissenting).
97. 520 F.2d at 1215. During the 29-day suspension, Lt. Muscare lost some $1400
requirement of pre-suspension review would neither unnecessarily burden the administration of public services nor prevent administrators from dealing with emergency disciplinary problems as they arise.\textsuperscript{98} On the merits of \textit{Muscare}, the court could "perceive no justification for avoiding the requirement of a pre-suspension hearing."\textsuperscript{99}

Another firm assertion of due process principles is found in \textit{Vargas v. Trainor},\textsuperscript{100} where the Seventh Circuit considered the adequacy of the notice required in reducing a welfare recipient's Supplemental Security Income (SSI) benefits. SSI was enacted by the 1974 amendments to Title XVI of the Social Security Act and replaced in part the program of Aid to the Aged, Blind and Disabled (AABD) established by the same act.\textsuperscript{101} SSI provides for a uniform federal minimum assistance grant, currently worth $146 per month, funded by the Social Security Administration, coupled with a mandatory supplement funded by the states. The state supplement was designed to insure individual recipients of their former AABD levels of welfare relief. Where a change with respect to some special need or circumstance occurs, the mandatory state supplement could be enlarged or reduced to reflect the change.\textsuperscript{102}

In late September 1974, the Illinois Department of Public Aid, which administers and pays the supplement to Illinois residents, mailed a written notice to some 3,780 aged, blind, or disabled recipients—approximately ten percent of all recipients—advising them that their individual assistance for October would be reduced to a subsequently specified amount. The notice stated the reduction was due to "changes in your needs or living arrangements which occurred between January 1, 1974 and the current month but which were not entered on your record so as to reflect your check." No additional explanation or statement of reasons was given. The notice informed the recipient that the reduction would not be made if wrong and that if there were questions or complaints, the assigned case worker should be consulted.

in pay, and as noted by a concurring judge in \textit{Ricucci v. United States}, 425 F.2d 1252, 1257 (Ct. Cl. 1970), "'[f]ew [government employees] earn more than enough to pay their living expenses from month to month, and when their salaries are cut off they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued.'" 520 F.2d at 1215 n.3.

98. The Seventh Circuit conceded that, in an emergency, an official body can first take summary action and later provide a hearing "'where harm to the public is threatened, and the private interest infringed is deemed to be of less importance.'" 520 F.2d at 1216, quoting \textit{R. A. Holman & Co. v. SEC}, 299 F.2d 127, 131 (D.C. Cir.), \textit{cert. denied}, 370 U.S. 911 (1962). \textit{Accord} \textit{Bickham v. Cannon}, 516 F.2d 885 (7th Cir. 1975); \textit{LaBatt v. Twomey}, 513 F.2d 641 (7th Cir. 1975).

99. 520 F.2d at 1216.

100. 508 F.2d 485 (7th Cir. 1974), \textit{cert. denied}, 42 U.S. 1008 (1975).


Elvira Vargas was one of the AABD recipients who received a notice of reduction. She promptly filed a class action attacking the notice as inadequate and untimely and asserting that every member of the class was entitled to a pre-reducing or pre-termination hearing. The district court found the notice and opportunity to be adequate. Judgment was entered for the Department of Public Aid. Plaintiff appealed and the Seventh Circuit granted temporary relief enjoining defendants from reducing grants based on the notice.

In late November, the Department issued a new “Notice of Reduction (AABD)” to members of plaintiff's class, this one advising that grants for December would be less than those for November. In all respects the November notice was identical to the September notice, except that, unlike the September notice which showed only the total amount of the new monthly grant, the November notice contained a breakdown showing the amount allowed for each item such as clothing, household supplies, rent and other items. The new notice also failed to state the reasons for the grant reduction. After receiving her November notice, Vargas filed an amended complaint, which was also denied and appealed.

Consolidating the two cases, the court reversed, holding that, when adjusting vested welfare benefits, the state must observe due process requirements and that the notices in question were infirm because they failed to sufficiently apprise recipients of the reasons for the reductions in their grants.

The Seventh Circuit examined Vargas in light of Goldberg v. Kelly, where the Supreme Court held that a state could not terminate welfare benefits without first providing recipients with a hearing. "The fundamental requisite of due process of law is the opportunity to be heard." The hearing must be "at a meaningful time and in a meaningful manner." In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Conceding that this statement was dicta, the court nevertheless felt compelled to follow its reasoning. Relying on extensive authority and citing

103. The Seventh Circuit opined: “Unless the recipients [knew] the components of their former grants, and apparently most [did] not, they [would] not even know what changes were made in the components.” 508 F.2d at 488 n.1.
104. Id.
105. 508 F.2d at 490.
107. Id. at 267-68 (citations omitted).
108. Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970) (state agency's procedure for terminating leases of public housing tenants violated due process in not advising tenants of the reasons for termination); Pregent v. New
its own prior decision in *Brooks v. Center Township*, the court concluded that a notice of proposed action could be adequate only if it explained the action taken.

It found that, even if the case authorities did not require "notice with reasons," the *Vargas* notice would still fail to meet the requirements of due process because it

is addressed to persons who are aged, blind, or disabled, many of whom, defendant could have anticipated, would be unable or disinclined, because of physical handicaps and, in the case of the aged, mental handicaps as well, to take the necessary affirmative action. Within what was left of the ten days after they received the notice, they were required either to manage to meet with their caseworkers and learn the reasons for the proposed action and then decide whether to appeal, or to appeal without knowing whether an appeal might have merit. If they failed to do either, their benefits were reduced or terminated without their being advised why. Under such a procedure only the aggressive receive their due process right to be advised of the reasons for the proposed action. The meek and submissive remain in the dark and suffer their benefits to be reduced or terminated without knowing why the Department is taking that action.\(^{110}\)

If most of the 3,780 recipients of the reduction notices had, as suggested, sought out their caseworker, the work of the Department would have been severely disrupted and the burden would have been intolerable. By comparison, written notice with explicit reasons would have caused a "mild inconvenience." Even the court noted that the deliberate choice of the summary form of notice indicated that the Department did not expect many people to seek explanations or to be informed of the reasons for the reduction.

The bureaucratic mistakes made with Robert Collier\(^{111}\) underscore the

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\(^{109}\) One member of the class, Robert Collier, appealed after receiving the first notice, and, after a hearing, the Department restored his grant to the September level. One week after receiving notice of that action, however, he received his copy of the November notice and its enclosed card, which informed him that his grant had again been reduced to the October level specified in the previous notice. Defendant stated in oral argument that apparently a mistake was made with respect to Collier. *Id.* at 488.

\(^{110}\) 485 F.2d 383, 385 (7th Cir. 1973), holding Indiana poor relief statute invalid for want of due process in failing to provide for notice of reasons for termination.

\(^{111}\) 508 F.2d at 489-90.
need for procedural due process in the reduction of welfare benefits. The court posited that, without adequate notice containing reasons for proposed action, welfare recipients could very well allow these inevitable errors to go uncorrected and thereby be deprived of the "means to obtain the necessities of life." Aware that the state has a legitimate interest in making proper welfare payments only to those who are eligible and equally aware that the state has a right to make adjustments when warranted, the Seventh Circuit held that the state must observe the requirements of due process in making these decisions.

From *Muscare* and *Vargas* it is evident that due process does not prevent the state in all instances from depriving individuals of a vested right. Due process protection merely requires that the government may do so only by a process that is "due." In *Muscare* and *Vargas*, the Seventh Circuit faced issues where notice and a hearing were required. In *United States ex rel. Stachulak v. Coughlin*, the court considered the quantum of proof necessary in a particular type of due process proceeding.

In 1969, Frank Stachulak was confined, pursuant to the Illinois Sexually Dangerous Persons Act, at the Psychiatric Division of the Menard Illinois State Penitentiary. Four years later, he brought a habeas corpus and civil rights action challenging the lawfulness of his incarceration. The district court granted relief on the grounds that the burden of proof—preponderance of the evidence—employed at the commitment hearing violated plaintiff's due process right. The court ruled that a person could not be committed under the Act unless proved sexually dangerous beyond a reasonable doubt. On appeal, the Seventh Circuit affirmed.

The Illinois Sexually Dangerous Persons Act allows the state to seek an involuntary and indeterminate institutional commitment in lieu of a criminal prosecution if a person is charged with a criminal offense and is believed to be sexually dangerous. While the Act is silent as to the burden of proof that the state must meet to establish "sexual dangerousness," proceedings under the Act are designated as "civil in nature." At Stachulak's state trial, the judge instructed the jury that they could find the defendant to be a sexually dangerous person if the state had proved its case by a preponderance of the evidence. This, the district and appellate court found, was error.

First, the Seventh Circuit stated that an indeterminate commitment under the Act is a deprivation of liberty and a "grievous loss" mandating that general principles of due process govern proceedings under the Act.

112. 520 F.2d 931 (7th Cir. 1975).
113. ILL. REV. STAT. ch. 38, § 105-1.01 et seq. (1973).
115. ILL. REV. STAT. ch. 38, § 105-3 (1973).
Because these proceedings so closely resemble criminal prosecutions, Illinois courts have accorded to individuals charged with sexual dangerousness some of the safeguards applicable in criminal trials, including the right to confront and cross-examine witnesses, the right against self incrimination and the right to a speedy trial, as well as the statutory rights to a hearing, jury trial and counsel.

After reviewing and distinguishing precedents, the court of appeals decided that the standard of proof question was governed by In re Winship, a case dealing with adjudicatory juvenile delinquency hearings and holding that the reasonable doubt standard was an "essential of due process and fair treatment." Asserting that the risk of loss of liberty and the certainty of stigmatization resulting from an alleged violation of the criminal law were integral factors in Winship, the court analogized by noting that, in Stachulak's situation,

the loss of liberty is as great, if not greater, than the loss in Winship. The violator of the criminal law—he be an adult or juvenile—is imprisoned, if at all, in almost all cases for a definite term. The person found to be sexually dangerous, in stark contrast, is committed for an indeterminate period and is unable to attain his freedom until he can prove that he is no longer sexually dangerous. Likewise with respect to stigma an involuntary commitment for sexual dangerousness presents an a fortiori case: Unlike the delinquency proceedings in Winship, these actions are not confidential, and an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency.

Illinois correctional officials sought to mitigate the gravity of plaintiff's loss by asserting that the purpose of the commitment is to treat and cure the dangerous sexual deviant. The court found this claim archaic.

123. Sprecht v. Patterson, 386 U.S. 605 (1957), discussing the fundamental protections required in proceedings under the Colorado Sex Offenders Act, but not addressing the question of burden of proof.
125. Id. at 359.
126. 520 F.2d at 935-36 n.4. The court also said:
   The instant case illustrates the potential disparity in the magnitude of the loss. Stachulak was originally charged with Indecent Solicitation of a Child in violation of Ill. Ann. Stat. That offense carried a maximum penalty of a $500 fine and less than one year imprisonment in a penal institution other than a penitentiary. Instead of prosecuting him on that charge, the state brought a proceeding, which culminated in an indeterminate commitment, under the Sexually Dangerous Persons Act. For the last five years, Stachulak has been confined at the Psychiatric Division of the Illinois State Penitentiary at Menard, a maximum-security penal institution.
   Id. at 936 n.4 (citations omitted).
All too often the "promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits." It is well settled that realities rather than benign motives or noncriminal labels determine the relevance of constitutional policies.\textsuperscript{127}

Given the uncertainty inherent in the present state of psychiatric diagnosis and prediction, the reasonable doubt standard presents many difficulties. However, proof of mental state is a commonplace in the law. Justifying its holding that the reasonable doubt standard is an essential ingredient of sexually dangerousness proceedings, the Seventh Circuit said:

Burdens of proof serve to allocate the risk of an erroneous decision between the parties in a lawsuit, and the reasonable-doubt standard reflects society's judgment "that it is far worse to convict an innocent man than to let a guilty man go free." We recognize that society has a substantial interest in the protection of its members from dangerous deviant sexual behavior. But when the stakes are so great for the individual facing commitment, proof of sexual dangerousness must be sufficient to produce the highest recognized degree of certitude.

Accordingly, we hold that due process requires that the reasonable-doubt standard be applied in proceedings under the Illinois Sexually Dangerous Persons Act.\textsuperscript{128}

In the three cases just discussed, the court regarded the nature of the plaintiffs' respective rights to be of sufficient importance to require due process safeguards. However, in two other decisions last term, the court concluded that neither the nature of the right nor the possibility of its arbitrary deprivation was strong enough to activate the procedural protections of due process. In \textit{Field v. Boyle},\textsuperscript{129} the court refused due process coverage to a state court magistrate removed from office by those who appointed him. In \textit{Whitfield v. Illinois Board of Law Examiners},\textsuperscript{130} it held that neither a full blown adversary hearing nor the right to compare one's

\textsuperscript{127} \textit{Id.} at 936 (citations omitted). To reinforce its position, the court also opined:

Commitment of the mentally ill has been conventionally justified on two bases: the state's \textit{parens patriae} authority to protect and care for the mentally ill and the state's police power to protect members of society against threat to their persons and property. While the Sexually Dangerous Persons Act specifies that the commitment is for treatment, the Act's concern with dangerousness makes it clear that it rests on both these justifications. Nevertheless, since the Act is an alternative to a criminal prosecution, it is also in a very real sense a penal measure. Although in our view this factor has no bearing on the nature of the individual's potential deprivation of liberty, it fortifies our conclusion that due process requires proof of sexual dangerousness beyond a reasonable doubt.


\textsuperscript{128} 520 F.2d at 936 (citations omitted). \textit{See} People v. Pembrock, 23 Ill. App. 3d 991, 320 N.E.2d 470 (1974), \textit{leave to appeal granted}, 58 Ill. 2d 595 (1975), where an Illinois appellate court, relying on the district court decision in \textit{Stachulak}, also held that the reasonable doubt standard was required in proceedings under the Act.

\textsuperscript{129} 503 F.2d 774 (7th Cir. 1974).

\textsuperscript{130} 504 F.2d 474 (7th Cir. 1974).
failing exam with others' passing exams was constitutionally required when failing an applicant for the State Bar.

In Field, an ex-state magistrate brought a civil rights action seeking to enjoin the judges of the Circuit Court of Cook County from removing him from office. Under the Illinois Constitution of 1870, the judges of each circuit court were authorized to appoint magistrates "at their pleasure." Local rules of the Circuit Court of Cook County provided that "the Circuit Judges . . . shall appoint magistrates to serve at their pleasure . . . for a term of one year commencing the first day of January each year and may be reappointed for like terms during good behavior." The Illinois Constitution of 1970 made no provision for the office of magistrate. On July 1, 1971, the effective date of the new constitution, persons serving as magistrates were, with the exception of Field, elevated to the position of Associate Judge for a four-year term. At a June 1971 meeting of the Cook County Circuit Court judges, a majority of the judges casting ballots followed the recommendation of a judicial committee assigned to evaluate the magistrates and voted to remove Field from his position. Field alleged that this action violated his rights under the fourteenth amendment, contending that the judges failed to grant him notice, "a fair hearing," a statement of reasons why he should not be retained, an adequate opportunity to respond to "attacks on his reputation," and an opportunity to confront his detractors.

The district court held that the termination was a deprivation of a property interest, requiring a due process hearing. However, the district court ruled that Field had waived his right to a hearing because at a May 6, 1971 meeting of the magistrate evaluation committee, Field had not taken action after being told that he had received a zero in every category in which his qualifications for associate judge were evaluated. Summary judgment was granted for defendant judges.

The Seventh Circuit accepted this determination and affirmed the district court's action on the strength of two Supreme Court decisions. In Board of Regents of State Colleges v. Roth and Perry v. Sindermann, the Court discussed the procedural rights of terminated public employees who do not have a statutory right to continued employment and concluded that the fourteenth amendment does not require notice and a hearing prior to the non-renewal of a contract of a non-tenured teacher unless the teacher shows that non-renewal deprived him either of a "liberty right" or "property interest" in continued employment, as determined by reference to state law. In Field, the Seventh Circuit found this reasoning dispositive.

131. ILL. CONST. art. 6, § 12 (1870).
132. CIR. CT. COOK COUNTY (LOCAL) R. 0.8.
133. 503 F.2d at 775-76.
134. 408 U.S. 564 (1972).
135. 408 U.S. 593 (1972).
136. 408 U.S. at 579; 408 U.S. at 599.
First, the court held that former magistrate Field had no reasonable expectancy of employment—"property interest"—which could not be divested without a due process hearing. Under the 1870 Constitution, magistrates were appointed to one-year terms "at the pleasure" of the circuit judges. The court reasoned that, by its "implicit terms," once the pleasure ceased to exist, so would the appointment. "Here the pleasure ceased to exist as of June 30, 1971." Even assuming that the annual appointment limits removal during the term of the year, the court held that there simply was no power to appoint for a year's term after the 1970 Constitution became effective. Referring to its own decision in Adams v. Walker, the court said:

We find no law or decision that mandates the conclusion that Field had a property interest in a six-month term or that the Supreme Court of Illinois and the judges of the Circuit Court of Cook County acting at its directive lacked the power to screen and dismiss magistrates prior to July 1, 1971. Neither the old constitution nor the local rule provided that magistrates could be terminated only for specified reasons after a due process hearing. Magistrates served "at [the] pleasure" of the judges.

Refusing to hold that the former magistrate had a property right in continued employment, the court assumed, arguendo, that his "liberty interest was sufficiently implicated so as to activate the due process clause." This assumption was based on the nature of the charges upon which Field's dismissal was predicated, including the low appraisal of his integrity and competence by the magistrate evaluation committee and the possible adverse effect that it might have on his reputation and ability to seek other employment. Turning to Roth, the Field court posited that a due process hearing is constitutionally mandated to protect against deprivations of liberty where the dismissal of a public employee is based on charges that might seriously damage his standing and associations in his community. As Roth explains, however, "the purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." The Seventh Circuit approved the district court's finding that Field was given the opportunity to have a full hearing regarding his qualifications for office at the May 6th meeting of the magistrate committee. His failure to take advantage of it waived any further hearing right he may have had.

137. 503 F.2d at 777.
138. 492 F.2d 1003, 1006-07 (7th Cir. 1974).
139. 503 F.2d at 777-78.
140. Id. at 778.
141. Id., quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972).
142. Id.
Similarly, in *Whitfield v. Illinois Board of Law Examiners*, the court determined that the nature of the right and the potential for abuse under the circumstances did not justify special due process procedures. Plaintiff Whitfield, a black law school graduate, brought a civil rights action against the Board of Law Examiners and its individual members after he failed the Illinois State Bar Examination for the fifth time. He argued that:

1) the bar examination is unconstitutional because it has no rational connection with an applicant's fitness or capacity to practice law; 2) he passed the examination and should be so certified; and 3) procedural due process requires that he be permitted to see his exam papers and to compare them with model answers or answers of successful applicants.

Premissing its due process analysis on the proposition that at a minimum the fourteenth amendment requires a state to employ fair practices in processing applications for admission to the bar, the Seventh Circuit did not believe that the requested procedures were constitutionally mandated. Given the availability of re-examination and assistance from the bar examiners and the administrative burdens attendant to the imposing of new procedures, the court concluded that the right to see exams and compare answers as well as the right to a full hearing were not essential to due process.

Whitfield also challenged the actions of the law examiners as violative of his equal protection rights. He claimed that the Illinois Bar Examination bore no rational connection with the applicant's fitness and capacity to practice law. This theory was based upon his assertion that, with his "fine academic and military record" and "extensive legal experience," he could not have flunked so many times if the exam had a rational relation to fitness and capacity to practice law. He relied on *Schware v. Board of Bar Examiners*, where the Supreme Court said: "A state can require high standards of qualification, such as good moral character or proficiency in its..."

143. 504 F.2d 474 (7th Cir. 1974).
144. *Id.* at 476. On appeal Whitfield argued that he also should have been afforded a full-blown adversary hearing. The court found it unnecessary to specifically consider this question, since there was no allegation in the complaint that plaintiff ever requested a hearing. *Compare Suckle v. Madison General Hospital, 499 F.2d 1364 (7th Cir. 1974).*
145. *Id.* at 478. Several state courts have determined that a failing applicant should be afforded rights to compare answers or have a hearing. *See, e.g., Application of Peterson, 459 P.2d 703 (Alas. 1969). However, the Seventh Circuit held that these determinations "were made in the exercise of the court's supervisory powers. It is axiomatic that the Fourteenth Amendment does not necessarily require those same procedural safeguards which a legislature or court may consider desirable as a matter of policy." 504 F.2d at 479.
146. Under Supreme Court Rule 711, plaintiff had been employed at various legal aid clinics where he interviewed clients, prepared legal documents, and litigated cases. In addition, he was also employed as "Legal Advisor, special policeman and Project Director" of the Gary, Indiana, Police Department.
law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."\textsuperscript{148}

Rejecting all of his contentions, the Seventh Circuit observed that even if Whitfield's background established his ability to practice law, the fact that one qualified individual failed does not mean that the exam bears no rational connection to fitness and capacity.

It is well settled that the question of whether a classification passes constitutional muster cannot be answered simply by assessing its chance effect upon a particular individual. As the Supreme Court has concluded: "[T]he fact that the Rules [concerning admission to the bar] may result in 'incidental individual inequality' [does not] make them offensive to the Fourteenth Amendment."\textsuperscript{149}

Since the authority to determine admissibility has been exclusively delegated to the Illinois Board of Law Examiners,\textsuperscript{150} the court believed that it could not interfere with the Board's determination absent proof that its action was based on a constitutionally impermissible reason.\textsuperscript{151} Although Whitfield claimed that his examination was graded arbitrarily, the Seventh Circuit readily recognized that an essay-type examination requires subjective evaluation where standards are not susceptible to precise definition.

Appellate courts in the Eighth and Ninth Circuits have affirmatively concluded that essay-type bar examinations have a rational connection with the capacity to practice law.\textsuperscript{152} Likewise, in \textit{Rasulis v. Weinberger},\textsuperscript{153} Judge Tone said: "Educational requirements and proficiency examinations are time-tested means of assuring that practitioners meet minimum standards of competence."\textsuperscript{154} Moreover, state courts have consistently approved essay exams and have refused to perform the role of "super bar examiner" by regrading or reviewing them.\textsuperscript{155} Because Whitfield's attack on the rationality of the Illinois State Bar Examination was based solely on a chance effect and because the allegation of subjective grading was unsubstantiated, the complaint was insufficient to state a claim for federal constitutional relief.\textsuperscript{156}

\begin{itemize}
  \item \textsuperscript{148} \textit{Id.} at 239.
  \item \textsuperscript{149} 504 F.2d at 476 (citations omitted). \textit{See, e.g.}, Colgate v. Harvey, 296 U.S. 404, 436 (1935); Martin v. Walton, 368 U.S. 25 (1961), where the Court said: "[T]he fact that the Rules may result in 'incidental individual inequality' [does not] make them offensive to the Fourteenth Amendment." \textit{Id.} at 26.
  \item \textsuperscript{150} Ill. S. Cr. R. 709. \textit{See Douglas v. Noble}, 261 U.S. 165 (1923).
  \item \textsuperscript{152} Feldman v. State Bd. of Law Examiners, 438 F.2d 699, 705 (8th Cir. 1971); Chaney v. State Bar of California, 386 F.2d 962, 964-65 (9th Cir. 1967), \textit{cert. denied}, 390 U.S. 1011 (1968). \textit{See also} Application of Brewer, 430 P.2d 150, 152 (Alas. 1967).
  \item \textsuperscript{153} 502 F.2d 1006 (7th Cir. 1974).
  \item \textsuperscript{154} \textit{Id.} at 1010.
  \item \textsuperscript{155} \textit{See} Annot., 39 A.L.R. 3d 719.
  \item \textsuperscript{156} 504 F.2d at 478.
\end{itemize}
CIVIL RIGHTS AND CIVIL LIBERTIES

Equal Protection

It is evident that the Constitution does not prohibit the government from treating different people differently. Only where the classification bears no reasonable relation to the legitimate end sought to be achieved will disparate treatment be reviewed for arbitrariness and possible violations of the fourteenth amendment equal protection clause. Three Seventh Circuit opinions last term illustrate the mechanics of this review.

In Stanton v. Bond,157 Indiana’s failure to aggressively implement the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) provision of the Social Security Act was found to constitute a denial of equal protection.158 EPSDT is part of a federally-funded, state-administered, comprehensive medical assistance program for the needy established by Title XIX of the Social Security Act.159 The 1967 amendment to the Act and the federal regulations implementing the amendment stipulate that each participating state furnish to eligible persons:

[S]uch early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in the regulations of the Secretary.160

These regulations seek to insure that those eligible know of their rights and are able to take advantage of them.161

Louise Bond, representing the class of persons under the age of 21 who are eligible for medical benefits under the EPSDT plan, brought suit challenging Indiana’s failure to implement the mandatory health program for needy children. Although Indiana is a participating state in the program, its compliance with the provisions of EPSDT amounted to granting the medical assistance upon request. No agency was set up to administer the plan. Nor were recipients specifically notified of the existence of the plan. The district court entered summary judgment for plaintiffs and issued a mandatory injunction to compel compliance by the state. The Seventh Circuit affirmed.

In a unanimous opinion, the court first took notice of the growing need for child health care among the poor and the urgency of preventive health measures which gave rise to enactment of the EPSDT program. Although it found that “[t]he mandatory obligation upon each participating state to

157. 504 F.2d 1246 (7th Cir. 1974).
158. Id. at 1251.
aggressively notify, seek out and screen persons under 21 in order to detect health problems and to pursue those problems with the needed treatment is made unambiguously clear by the 1967 act and by the interpretative regulations and guidelines,”162 the court noted that Indiana made little, if any, effort to implement the program. Because “Indiana's casual approach hardly conforms to the aggressive search for early detection of child health problems envisaged by Congress,” the Seventh Circuit allowed the mandatory injunction to stand, reasoning that it was unlikely that needy children or their parents would volunteer themselves for screening.163 Further, the court found injunctive relief proper where, as here, a state has not developed a plan conforming to the guidelines attached to the grant of federal money.

In an analogous case, Nickerson v. Thompson,164 the court was confronted with a state's failure to implement an assistance program which included special education facilities for children between the ages of three and twenty-one who have certain enumerated handicaps.165 The class-representative plaintiffs were five students requiring special education in Evanston High School and its primary feeder school. Plaintiffs alleged that defendant Superintendent of the Evanston school district failed to implement the special education programs established by state law and misallocated the resources of the special education programs that did exist.

The district court abstained, but the Seventh Circuit reversed and remanded. Although most of its opinion dealt with the abstention issue, the court held that “the statute clearly imposes a mandatory duty on defendants to establish and maintain needed special educational facilities” and concluded that:

On remand the district court must proceed to try plaintiffs' claim that defendant's administration of the Illinois statutes dealing with special education violates the Fourteenth Amendment. If the court finds such a violation, it should order that the distribution of the special education resources presently available be made in accordance with the Constitution.166

162. 504 F.2d at 1250.
163. Id. at 1251.
164. 504 F.2d 813 (7th Cir. 1974).
165. ILL. REV. STAT. ch. 122, § 14-4.01 (1973); Rules and Regulations of the Superintendent of Public Instruction, art. II, § 2.01-.02, art. III, § 3.01, art. IX, § 9.01-.02. Art. III, § 3.01 provides:

Each local school district shall establish and maintain special education instructional programs and supportive services which meet the educational needs of children with the following exceptional characteristics:

1. Auditory, visual, physical, or health impairment
2. Speech or language impairment
3. Deficits in the essential learning processes of perception, memory, attention, or motor control
4. Deficits in intellectual development and mental capacity
5. Educational maladjustment related to social or cultural circumstances
6. Affective disorders or adaptive behavior which restricts effective functioning...

166. 504 F.2d at 816-17.
Stanton and Nickerson illustrate that, where a statute grants benefits to individuals, the state must use all reasonable means available to implement the benefit programs. Failure to do so will subject the responsible officials to a civil rights claim.

It should be borne in mind that not every violation of statutory law is also a violation of equal protection. In Schreiber v. Lugar, several taxpayers brought an action to enjoin expenditure of $4.4 million for the construction of an indoor sports arena in Indianapolis, Indiana. Plaintiffs claimed that the stadium construction was not authorized by Indiana law and that the use of federal revenue sharing funds would violate the Local Fiscal Assistance Act of 1972. Attempting to assert federal civil rights jurisdiction on a violation of the Civil Rights Act, plaintiffs contended that their statutory right to have public funds disbursed lawfully was violated, contrary to the equal protection guarantees of the fourteenth amendment. The Seventh Circuit flatly rejected this argument by saying: "If this expansive theory is adequate to create federal jurisdiction over this dispute, federal judges surely have bootstraps that will enable them to stand on their own shoulders."

To succeed on an equal protection claim, then, it must be shown either that the classification itself is based upon an arbitrary distinction or that the application of the disparate treatment is not reasonably related to the protection of the social interest which motivated the classification. To insure rights basic to a free society when the challenged treatment infringes upon a fundamental right or when the class distinction is inherently suspect, the interest requiring protection must be shown to be compelling.

In another decision rendered last term, the Seventh Circuit demonstrated its sympathies for fundamental liberties in the context of a voting rights case. In Communist Party of Illinois v. State Board of Elections, a vote signature law was declared unconstitutional because the classification presented did not bear a reasonable relationship to the promotion of a compelling and legitimate state goal. The Illinois Election Code, section 10-2, required any political parties seeking statewide ballot recognition to submit petitions containing not less than 25,000 signatures of qualified voters, not more than 13,000 of which may be counted from any one county. Accordingly, a political party seeking to place its name on a state ballot needed support from at least one county, outside Cook County, with the total required support being 12,000 votes. The Communist Party of Illinois, several of its candidates for state office in the 1974 general elections, and a registered voter desiring to vote for these candidates filed a civil rights claim

167. 518 F.2d 1099 (7th Cir. 1975).
168. 518 F.2d at 1101 n.3.
170. 518 F.2d at 1105.
171. 518 F.2d 517 (7th Cir. 1975), cert. denied, 96 S. Ct. 394 (1975).
challenging the constitutionality of this section and seeking declaratory and injunctive relief.

The district court ruled in favor of plaintiffs, finding that section 10-2 violated equal protection and due process because “it discriminates against voters of the most populous county of the state in favor of voters in the less populous counties.” The state appealed to the Seventh Circuit, contending that the two county signature rule was a non-arbitrary attempt to assure that all Illinois residents have “equal opportunity to be involved in statewide political party activities” and that “multifarious political associations with little or no popular support do not bemuse the electoral process.” The court relied on the Supreme Court’s reasoning in Moore v. Ogilvie, which held a predecessor of section 10-2 unconstitutional, and affirmed the district court.

Moore overturned an Illinois statutory provision which required independent candidates seeking certification for the statewide ballot to obtain signatures of 200 voters from each of at least fifty counties in making up the 25,000 signatures necessary. The Supreme Court framed the equal protection problem by saying:

It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.

Under this Illinois law the electorate in 49 of the counties which contained 93.4% of the registered voters may not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties may form a new party to elect candidates to office. This law thus discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

The Seventh Circuit analogized the new provision to the one in Moore. Under new section 10-2, the 2,750,000 registered voters—45 percent of the total electorate—who live in urbanized Cook County may not, standing alone, form a new statewide political party to protect their own peculiar interests, while 25,000 voters of the remaining 55 percent of the total

173. 518 F.2d at 518.
175. 394 U.S. at 818-19.
electorate may, if from two or more counties, "create such a party to advance their distinctly different, and often competing, interests."

Noting that section 10-2 directly affects the fundamental right to vote, the Seventh Circuit rejected the state's contention that the county distribution requirement with its dilution of the vote strength of "concentrated Chicago" is necessary to prevent laundry list ballots confusing and demeaning to the statewide electoral process and demanded a showing by defendants of a compelling state interest to justify the class distinction.

Assuming that a compelling need exists in Illinois to "protect the integrity of its political processes from frivolous or fraudulent candidacies," we cannot see how this interest is tied by necessity to a discriminatory diminution of the power of the individual voter in Cook County, or any other urbanized county. Similarly, if there is a permissible and compelling state interest in limiting the total number of candidates or parties on the statewide ballot independent of the question of the seriousness or legitimacy of such candidates or parties, some method is surely available which will serve this interest without making the effectiveness of an Illinois citizen's electoral power depend on his geographical location within that state.177

Because the county distribution requirement of section 10-2 "lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment," the court held the provision violative of the Communist Party's right to equal protection under the law.178

**DISCRIMINATION IN HOUSING**

For the past decade, the Seventh Circuit has found itself immersed in race discrimination in housing suits. Much of the controversy that has reached the appellate level has been the result of the efforts of Judge Richard B. Austin in combatting entrenched patterns of segregation.179

Housing discrimination was a prominent topic in the Seventh Circuit last term. Two decisions—*Moore v. Townsend*180 and *Hairston v. R & R Apartments*181—provide revealing insights into the court’s position on racial discrimination in the sale and rental of private property.

In *Moore*, defendant Townsend listed her south side Chicago home for sale with Jean Spencer Real Estate, Inc., which employed defendant Mel-
In March 1974, plaintiffs, a black federal employee and his wife, were shown the Townsend house and made a purchase offer of $70,000. Broker Melnick informed the Moores that their offer was rejected, but that Townsend countered with an $80,000 purchase price. The Moores then offered a standard form contract for $77,000. On March 26, Melnick informed plaintiffs that Townsend had signed and accepted their proposal. On March 28, Melnick told the Moores that Townsend had decided not to sell her home and had directed her not to deliver the executed contract. Three days later, Melnick repeated that she had the signed contract, but refused to give it to the Moores or to allow them to inspect it. Subsequently, Melnick stated a community group had pressured her about showing the Townsend property to Negros. On April 2, Melnick reiterated that the $77,000 contract had been signed, but said that she had mutilated it by cutting off and destroying Townsend's signature.

The Moores, represented without fee by the Leadership Council for Metropolitan Open Communities, a fair housing organization, brought an action charging Townsend and Melnick with racial discrimination and seeking specific performance on the $77,000 contract. After an extensive hearing, the district court entered a preliminary injunction on April 16, 1974, restraining pendente lite the sale of the property to anyone other than the Moores. At a trial of the merits in June 1974, the court found that there was an executed contract for sale of the home, held that the motives in avoiding the contract were racially discriminatory, and ordered sale of the property. Despite the fact that plaintiffs' income exceeded $28,000 per year, their motion for attorneys' fees and costs was granted. The Seventh Circuit affirmed, holding that the district court's fact finding was not clearly erroneous. Considering the particular factual findings in the case, the Seventh Circuit's affirmance of the merits seems proper. However, the grant of fees and costs was questionable. The facts simply do not support the district court's conclusion that Moore, a federal employee at the GS-13 rating, was financially unable to assume attorneys' fees.

Defendants' alternative argument against the award of fees—that no grant should be made since the Leadership Council offered its services free to the Moores—was rejected in this case and indeed has been foreclosed since the Seventh Circuit's decision in Hairston v. R & R Apartments. There

182. 525 F.2d at 486.
183. 510 F.2d 1090 (7th Cir. 1975). See Jeanty v. McKey and Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); Brandenburg v. Thompson, 494 F.2d 885 (9th Cir. 1974); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Miller v. Amusement Enterprises, Inc., 426 F.2d 534 (5th Cir. 1970); Lea v. Gen-Mills Corp., 438 F.2d 86 (4th Cir. 1972); Stevens v. Dobs, Inc., 373 F. Supp. 618 (E.D.N.Y. 1974); Note, Award of Attorneys' Fees to Legal Aid Offices, 87 HARV. L. REV. 411 (1973). See also Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972).
the court joined other circuits in awarding fees to legal aid offices. Quoting from *Brandenburger v. Thompson*, the court said:

[T]he fact that the plaintiff was not obligated to pay the ACLU for its services is not a bar to an award of attorneys' fees. All that is required is the existence of an attorney-client relationship.

The policy underlying the "private attorney general" doctrine supports this conclusion. It is true that the prospect of attorney's fees does not discourage the litigant from bringing suit when legal representation is provided without charge. But the entity providing the free legal services will be so discouraged, and an award of attorneys' fees encourages it to bring public-minded suits when so requested by litigants who are unable to pay. Thus, an award of attorneys' fees to the organization providing free legal services indirectly serves the same purpose as an award directly to a fee paying litigant.

And Senior Judge Castle wrote:

Consequently, the grant of fees does accrue to the benefit of the plaintiff by assuring vigorous enforcement of the Fair Housing Act. So long as the plaintiff is unable to afford the cost of litigation, we see no reason to reduce the level of that enforcement by attaching significance to a formalized obligation to pay, and thus, in light of the purpose served by an award of fees, we find that an organization providing free legal services stands in the same position as a private attorney to whom a fee is owed. To avoid any windfall, however, the grant of fees should go directly to the organization providing the services.

In conclusion, the Seventh Circuit remanded *Hairston* for a "determination of a reasonable fee for services."

Surprisingly, the fee-granting theory has been employed with admirable circumspection. In *Sprogis v. United Air Lines*, a sex discrimination case, the court refused a fees request from a labor organization that had provided legal assistance without informing the district court of its involvement and after it had entered into a consent agreement with defendants on virtually the same issues involved.

In the low income housing sphere, the Seventh Circuit has been most aggressive and assertive. Indeed, without question, its most extraordinary civil rights decision of the term is *Metropolitan Housing Corp. v. Village of Arlington Heights*. Stretching constitutional principles to their breaking point, the court found Arlington Heights, a predominantly white suburb of Chicago, to be legally obligated to remedy a situation which it neither created nor fostered.

184. 494 F.2d 885 (9th Cir. 1974).
185. 510 F.2d at 1092-93.
186. Id. at 1093 (citation omitted).
187. 517 F.2d 387 (7th Cir. 1975).
188. Id. at 391-92.
189. 517 F.2d 409 (7th Cir. 1975), cert. granted, 46 L. Ed. 2d 404 (1975).
In 1971, the Clerics of St. Viator leased, on a long-term basis, fifteen acres of vacant property in Arlington Heights to Metropolitan Housing, a non-profit corporation organized to develop low-to-moderate income housing for the Chicago metropolitan area. Metropolitan proposed to use the land, which had always been zoned for single-family dwellings, for a multi-family townhouse development to be called “Lincoln Green.” Upon Metropolitan’s application for an appropriate zoning change, the Village conducted hearings, made and studied various traffic, tax, and school use reports, and rejected the request on the ground that the site was surrounded by single family units and that the development was not consistent with the previously-established “Comprehensive Plan” of Arlington Heights. The Comprehensive Plan, adopted in 1959 and generally followed since then, provided that an area should be zoned for multiple family dwellings only when it serves as a “buffer” or transition between single-family zoning and commercial, industrial, or other high intensity uses.

In 1972, Metropolitan Housing sued the Village and various town officials, contending that the refusal to rezone perpetuated existing patterns of racial segregation and violated plaintiff’s right to use its property in a reasonable manner. After a trial on the merits, the district court entered judgment for defendants. Upon examination of the proofs, the court found that the Village’s refusal to rezone was based solely upon its desire to preserve the integrity of its Comprehensive Plan and that this was a good-faith, non-discriminatory motivation which did not give rise to a racially-discriminatory effect.

The Seventh Circuit reversed, holding as immaterial the Village’s motives in rejecting the proposed zoning and its lack of participation in creating or perpetuating a segregated community. In essence, the court posited that, whenever a de facto condition of segregation exists, a municipality—regardless of its involvement in the condition of segregation—is constitutionally obligated to “eas[e] the problem” by affirmative action. The court said:

Lincoln Green appears to be the only contemplated proposal for Arlington Heights that would be a step in the direction of easing the problem of de facto segregated housing. Thus, the rejection of Lincoln Green has the effect of perpetuating both this residential segregation and Arlington Heights’ failure to accept any responsibility for helping to solve this problem.

... Merely because Arlington Heights did not directly create the problem does not necessarily mean that it can ignore it.

191. 517 F.2d at 414.
192. Id. See Clark v. Universal Builders, 501 F.2d 324 (7th Cir. 1974); United
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Apparently, Arlington Heights' constitutional faux pas and the basis for this conferral of liability was that it "allow[ed] itself to become an almost one hundred percent white community." In any event, the court concluded that, since the refusal to rezone had discriminatory effects that could not be justified by any compelling state interest, plaintiffs were entitled to judgment "in accordance with this opinion." 193

Criticism of this unprecedented action is simple and direct. By its action, the Seventh Circuit created a double standard of constitutional law and rendered the Constitution a "color-minded," rather than a "color-blind," document. Henceforth, entities that have engaged in no unlawful or impermissible activity and that have no material independent legal duties will have an affirmative constitutional obligation to rectify segregation wherever it is found. Under this theory of judicial legislation, the court perceived the existence of a "social problem" and unilaterally assigned the task of its solution to the unsuspecting Village of Arlington Heights.

PUBLIC OFFICIAL IMMUNITY

Public official immunity and discretion has been a recurring topic of controversy for the Seventh Circuit. 194 Last term, the court continued to define the range of activities in which government agents may engage without fear of judicial intervention or personal liability for damages in civil rights suits.

Before examining the cases, however, a prefatory comment is in order. Civil immunization of government officers for civil rights violations is premised upon the notion that public officials should not be penalized for decisions made in the ordinary course of their duties. 195 In fashioning an immunity test, the court has judiciously observed that "the proper focus [of judicial examination] is upon the character of [a] defendant's conduct rather than his motivation." 196 A contrary holding would subject office-
holders to repeated reappraisals of their subjective intentions in the conduct of their official functions. Not only would such cross-examination be unduly disruptive of the orderly process of government, it would also deter qualified individuals from entering public service and would force officeholders to continually confront the possibility of financial loss for any error of judgment that they may make. Referring to these considerations, the court has carefully enunciated its immunity rules.

In Boyd v. Adams, plaintiff was a passenger in an automobile that was stopped by Chicago policemen. The police allegedly abused Boyd and wrongfully arrested her for disorderly conduct and resisting a police officer. When she appeared in state court for trial, plaintiff and her attorney proposed and consummated a deal with defendant Assistant State's attorney Kayman, whereby all criminal charges against Boyd would be dismissed in exchange for a release of all claims against the police officers and the City of Chicago. On advice of counsel, plaintiff executed a preprinted release form, supplied by the State's attorney's Office. The charges were dropped.

Boyd filed her civil rights action against the arresting officers, the Superintendent of Police, the City of Chicago, Kayman, and the Cook County State's attorney Edward Hanrahan. The suit sought a judicial declaration that the release was void as well as money damages for the illegal search and arrest, false imprisonment, and assault and battery. Most important, at least for present purposes, Boyd requested an injunction against the State's attorney prohibiting the practice of dismissing criminal charges in return for releases of civil liability.

The district court conducted a hearing on the voluntariness of the release, found it valid, and entered judgment for the police and the city. Defendants Kayman and Hanrahan were held entitled to prosecutorial immunity and were dismissed. In a unanimous decision, the court of appeals reversed. Despite an uncontested district court finding that Boyd's waiver was made on advice of counsel, the court declared the release void as a matter of law because it "was secured in such an inherently coercive contest that plaintiff did not effectively waive her civil rights action against defendants." Plaintiff's civil rights claims against the arresting policemen were deemed actionable and were remanded to the district court for trial.

Chicago, 484 F.2d 602, 608 (7th Cir. 1973); Robichaud v. Ronan, 351 F.2d 533, 536-37 (9th Cir. 1965); Comment, Civil Rights—Section 1983—Prosecuting Attorney Held Immune From Civil Liability for Violation of Civil Rights Act, 42 N.Y.U.L. Rev. 160, 162-63 (1967).

197. 513 F.2d 83 (7th Cir. 1975).
199. 513 F.2d at 88.
While affirming the prosecutors' immunity from monetary liability under the civil rights laws, the Seventh Circuit broke new ground by ruling that official immunity does not bar injunctive relief against government agents acting beyond the scope of their authority. Relying on a concurring opinion in *Connover v. Montemuro*, a case which arrived at similar conclusions as to judicial immunity, and the absence of "any directly contrary precedent," the court reasoned that

Prospective, prohibitory injunctions, such as those sought here...will, if granted, only order defendant prosecutors to conform their conduct to the dictates of the law. No personal financial risk is involved, nor should any person be deterred from public service because of the possibility that a court may order him to conform his future conduct to the law.

This decision is both sound and welcome. To hold otherwise would create a permanent and insurmountable barrier to relief from continued unconstitutional activity. *Boyd* forewarns wrongdoing government officials that the federal courts will impose constitutional limitations upon their authority, wherever appropriate.

The difficulty with *Boyd* is its reliance upon *Connover* and its failure to recognize and resolve a possible conflict with the Supreme Court's decision in *O'Shea v. Littleton*. The suit in *Connover* was brought to enjoin certain alleged due process violations in the conduct of the Philadelphia, Pennsylvania Family Court. The district court abstained from judgment and the Third Circuit reversed, holding abstention to be improper under the circumstances. The en banc majority specifically and unequivocally refused to decide whether judicial immunity barred injunctive relief against an alleged pattern of unconstitutional activity. In a masterful concurring opinion,

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200. 477 F.2d 1073, 1096-1144 (3d Cir. 1973) (en banc) (Gibbons, J., concurring).
201. 513 F.2d at 86.
202. Id. at 86.
203. Similarly, in Calvin v. Conlisk, 367 F. Supp. 476, 483 (N.D. Ill. 1975), the court approved the use of injunctive relief against alleged widespread and continued brutality by Chicago policemen.
205. The Third Circuit said:

In determining whether or not...a federal court should on equitable principles enjoin a state court criminal prosecution, the federal equity court must take into account the available remedy at law of raising the federal constitutional claim in the pending state proceeding. That available remedy at law in the state court, when weighed with the comity due to a court of coordinate sovereignty will, in the absence of additional exceptional circumstances, always militate against the issuance of an injunction halting or interfering with the state prosecution. . . .

The purpose of Congress in enacting the Civil Rights Acts was to provide a federal forum for the enforcement of federal rights. Where an adjudication of those rights rests heavily on a factual determination, the ultimate responsibility for making this determination lies with the article III courts.

477 F.2d at 1080-81 (citation omitted).
Judge Gibbons examined the issue and concluded that the principles of immunization were not controlling in the context of equitable relief. Although Judge Gibbons' analysis is well-reasoned, it was substantially eroded by the Supreme Court's Littleton decision.

Littleton presented a factual situation similar to Connover: Illinois citizens sought to enjoin constitutional deprivations in sentencing by Illinois state judges. The district court found no jurisdiction, the Seventh Circuit disagreed, and the Supreme Court reversed on standing grounds. Although it is mere dicta and inconclusive, the Supreme Court's discussion of judicial immunity and the availability of the injunctive remedy is revealing. While not eliminating equitable relief under all circumstances, the Court exhibited an extreme reluctance to enjoin state judges when such an injunction would be "[an] unwarranted . . . interference [in the state court system] by means of continuous or piecemeal interruptions of . . . state proceedings by litigation in the federal courts" and when "there are available state and federal procedures which could provide relief from the wrongful conduct alleged."

In short, the Connover rationale has been severely limited by Littleton and provides a flimsy basis for Boyd. Support may be found in Littleton itself, however, since the injunctive relief granted in Boyd was neither an "unwarranted interference" in a comity sense nor a continued interference in the prosecutor's function or discretion. The federalism-comity problems of Connover and Littleton were simply not present there.

Two additional police cases complete the immunity picture. In Brubaker v. King, plaintiff sued local police officers and federal Treasury and Postal agents for conducting a warrantless mail intercept which produced a large quantity of hashish. Brubaker contended that the government lacked probable cause to believe that he had knowledge of the existence and illicit nature of the hashish. Defendants, for their part, filed uncontradicted affidavits attesting that they had a reasonable belief that plaintiff acted unlawfully and that the search and arrest were made with a good faith belief in their constitutional validity. Judgment was entered for defendants and the plaintiff appealed. The Seventh Circuit affirmed, holding, as it did in Tritsis v. Backer:

[T]o prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the

206. Id. at 1100-04. See also Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972); Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971); Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970).
209. 505 F.2d 534 (7th Cir. 1975).
210. 501 F.2d 1021, 1022-23 (7th Cir. 1974).
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This standard was reiterated by another appellate court panel in *Boscarino v. Nelson*.

Boscarino, an ex-convict and a known burglar, was seen "lurking about" buildings in a Milwaukee residential district. Defendant Nelson, an off-duty policeman, observed this action and stopped and searched Boscarino. Finding burglary tools, he charged Boscarino with burglary, possession of the tools, and carrying a concealed weapon. Subsequently, all charges against Boscarino were dismissed on the ground that there was no probable cause for the search or arrest. This action ensued.

After a trial on the merits, the district court found defendant guilty of a deprivation of plaintiff's fourth amendment rights. In so holding, the court relied upon the 1968 Seventh Circuit decision of *Joseph v. Rowlan*, which held that "where a police officer makes an arrest which is unlawful under the federal constitution because [it was] made without a warrant and without probable cause . . . section 1983 imposes on the officer a liability which is recoverable in federal court."

On appeal, the Seventh Circuit reversed and disavowed, in no uncertain terms, its *Rowlan* decision. Reemphasizing its adoption of the *Bivens* standard, the court stated:

In *Tritsis v. Backer* . . . this Court expressly followed the Second Circuit's holding in *Bivens* that if a police officer could show that he acted in good faith and with a reasonable belief in the validity of the arrest and search, he would have a valid defense to a suit for damages like this one.

CONCLUSION

Immunity was the last stage in this examination of the Seventh Circuit's decisions. And it seems a fitting conclusion. The court's position on immunity reminds the reader that the "liberal" Seventh Circuit is always practical. Although it vigorously supports civil rights and liberties, it is extremely reluctant to penalize wrongdoing state officials by granting money damages to even the most aggrieved party.

211. 505 F.2d at 537.
212. 518 F.2d 879 (7th Cir. 1975).
214. 402 F.2d 367 (7th Cir. 1968).
215. *Id.* at 370.
216. 518 F.2d at 887.