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Developments in Civil Liberties: 1984-85 Term

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I. Litigation Involving the First Amendment

The Seventh Circuit tackled various first amendment issues this past term, dealing with freedom of speech, freedom of association, freedom of press as well as the free exercise rights of men in the military. In general, the Seventh Circuit's position in these cases reflects recent Supreme Court decisions which will also be highlighted.

A. Freedom of Speech and Association: The Right Not to Associate

The Supreme Court has clearly established that the first amendment protects both the right to associate as well as a freedom not to associate. Similarly, the Court has held that citizens have a right not to contribute to a government-endorsed political message. For example, in *Abood v. Detroit Bd. of Education* it was held that public school teachers could not be forced to join a labor union as a condition of employment. Applying this doctrine, the plaintiffs in *Libertarian Party of Indiana v. Packard*, challenged Indiana's statutory scheme of raising revenues through the sale of personalized license plates and distributing a portion of that revenue to qualifying political parties. The Seventh Circuit rejected this claim by relying on *American Party of Texas v. White* and *Buckley v. Valeo*, which both hold that government may use public funds to finance political parties. Although the Indiana scheme allowed the distribution of funds only to qualifying parties, and the formula meant that only the two major political parties would receive any revenue, the Seventh Circuit noted that the two Supreme Court cases similarly upheld distribu-

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2. Abood v. Detroit Bd. of Education, 431 U.S. at 234 (1977). See also Rutgers v. Galda, 772 F.2d 1060 (3d Cir. 1985) (invalidated state university's exaction of a refundable fee to support student-run "public interest research group" that advances positions on political and ideological issues, contrary to the beliefs of some students).

3. 741 F.2d 981 (7th Cir. 1984).


6. 741 F.2d at 983.
tion schemes which favored parties in power based on the important
government interest served by limiting public assistance to those candi-
dates with significant public support.\textsuperscript{7}

The Supreme Court in \textit{Buckley} stressed that use of funds to finance political parties is justifiable because the government’s interest is unrela-
ted to the advancement of any specific political message, but rather is advancing the important public interest in encouraging public discussion
and participation in the electoral process.\textsuperscript{8} This is in contrast to the fees at issue in \textit{Abood} which were being used to support the particular parti-
san viewpoint of one private organization—namely a labor union.\textsuperscript{9} Since public financing of qualifying political parties does not offend the first amendment, the state may constitutionally utilize part of the sales tax on personalized license plates for this purpose.\textsuperscript{10}

Based on this analysis, the court specifically rejected plaintiff’s argu-
ment that Indiana motorists were being forced to forego owning a per-
sonalized license plate in order to avoid contributing money to political parties with whom they may not agree in violation of the well-established constitutional principle that government cannot condition benefits on re-
linquishing first amendment rights.\textsuperscript{11} Since the Supreme Court has explicitly upheld the use of public tax dollars to finance qualifying political parties, and since the money is not being used to support a particular viewpoint, such as in \textit{Abood}, the court reasoned that Indiana’s Personal-
ized License Plate Act did not, as a matter of law, condition the availabil-
ity of the government benefit on the surrender of first amendment rights.\textsuperscript{12} The Supreme Court has held that government may in general use tax dollars to help support the major political parties in this country; thus plaintiffs have no first amendment claim that the use of certain tax dollars derived from the sale of personalized license plates cannot constitutionally be used in this manner. Even in \textit{Abood} the Court held that government could constitutionally condition public employment on re-

\textsuperscript{7} \textit{Id.} at 987.
\textsuperscript{8} Buckley v. Valeo, 424 U.S. at 92-93.
\textsuperscript{9} In \textit{Abood} the Court held that a local school board and the union representing the school’s teachers could not require a teacher to pay to the union fees that would be used to finance the advancement of ideological and political causes, at least to the extent the causes were unrelated to the union’s duties as collective bargaining representative. \textit{Abood}, 431 U.S. at 234 (1977).
\textsuperscript{10} \textit{Libertarian Party of Ind.}, 741 F.2d at 990. Note that plaintiff Libertarian Party also raised an equal protection challenge. The case, however, went up on a preliminary injunction and the court ruled that the Libertarian Party must be given an opportunity on remand to make a factual showing that it was being discriminated against in that the system operated to disadvantage non-major parties by reducing their strength. \textit{Id.} at 991-92.
\textsuperscript{12} \textit{Libertarian Party of Ind.}, 741 F.2d at 990.
quiring employees to pay a fee to be used for collective bargaining because of the "overriding interests" being served in the prevention of labor strife. 13 Buckley holds that utilization of public funds to finance political parties similarly advances goals "vital to a self-governing people,"—the facilitation of public discussion and participation in the electoral process. 14 Thus the overriding standard set forth in Abood is arguably met by the state.

The meaning of the Abood decision also came into play in the case of Hudson v. Chicago Teacher's Union Local No. 1, 15 which is presently pending before the United States Supreme Court. As stated earlier, in Abood the Supreme Court established that employees cannot be forced to join a union or to contribute fees to the union, other than fees used to support the collective bargaining function of the union. 16 Plaintiffs in Hudson are challenging the procedure established to determine the proportionate share that nonunion employees should be required to contribute to support of the union as the collective bargaining agent. Plaintiffs argue that the procedures lack reasonable protections and thus make it likely that money collected may be used to support objectives not germane to the union's function in the collective bargaining process. 17

The Seventh Circuit held that the procedure violated both the first amendment rights described in Abood, and also constituted a violation of liberty within the meaning of the fourteenth amendment. 18 Whereas the first amendment requires a procedure to assure that wages not be used to support the union's political and ideological activities not germane to collective bargaining, the due process clause mandates more broadly that wages not be used to support any union activities, whether or not the activities are political or ideological. Since the process established in the collective bargaining agreement gave the union the right to pay the arbitrator and did not provide for judicial review of the decision of the arbitrator, the court reasoned that minimum constitutional requirements of fair notice, a prompt administrative hearing, and judicial review of the agency's decision were not provided and thus the procedure was unconstitutional. In addition, the court held that a proper escrow arrangement must be created in order to make sure that the union does not obtain

15. 743 F.2d 1187 (7th Cir. 1984), aff'd, 106 S. Ct. 1066 (1986).
16. See supra note 9 and accompanying text.
17. Hudson, 743 F.2d at 1194-95. Under the procedure, the union sets the "service" fee and although nonunion members may challenge the amount, the decision rests with an arbitrator chosen by the union.
18. Id. at 1193.
even temporarily the use of employee dollars for impermissible purposes. The latter conclusion rests on the Supreme Court holding in Ellis v. Brotherhood of Railway Clerks,\textsuperscript{19} that a rebate procedure is inadequate even if the union pays interest on the amount deducted, because the union in a sense is obtaining an involuntary loan contrary to the Railway Labor Act. The same analysis, the Seventh Circuit reasoned, applies to a due process challenge under the fourteenth amendment.

Although the court's ruling in Hudson appears to flow from previous Supreme Court precedent, the one innovative portion of the decision deals with the conclusion that an employee cannot be compelled to contribute to any union activities not germane to collective bargaining, regardless of whether the activities are political or ideological. Unlike the Abood decision which is based only on first amendment doctrine, the Seventh Circuit goes one step further and finds on the basis of a liberty interest "not to associate" a further requirement that fees not go to support any activities of the union not germane to collective bargaining. The court reasoned that freedom of association is violated where an individual is forced to support even the non-ideological activities of the union. Thus, procedures which reasonably assure that the deprivation will go no further than is necessary to prevent the individual from taking a free ride on an entity providing services as a collective bargaining representative are constitutionally mandated.\textsuperscript{20}

\section*{B. Freedom of the Press}

The Supreme Court has frequently rejected the concept of a special press privilege, holding that members of the press may be required to testify before grand juries, may be subject to search warrants, and have no greater right of access to government-held information than the public.\textsuperscript{21} On the other hand, the Court has held that once the press gets the information, even if that information has been obtained through the illegal activity of third parties, government cannot prohibit or punish the publication of such information absent a compelling interest and no less

\textsuperscript{19} 104 S. Ct. 1883, 1890 (1984), discussed in Hudson at 1196.

\textsuperscript{20} Hudson, 743 F.2d at 1193. The Supreme Court's affirmance was based solely on first amendment doctrine.

\textsuperscript{21} Branzburg v. Hayes, 408 U.S. 665 (1972) (holding that reporters are not privileged from appearing before a grand jury or refusing to answer relevant questions); Zurcher v. Stanford Daily, 436 U.S. 547, reh'g denied, 439 U.S. 885 (1978) (holding that newspaper offices can be subject to valid search warrants); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (the media has no right of special access to government information different from or greater than that accorded the public generally).
In *Worrell Newspapers of Indiana, Inc. v. Westhafer* the press challenged an Indiana statute which punishes by contempt anyone who discloses the name contained in a sealed information prior to the arrest of the suspect. Although recognizing that the state clearly has an interest in apprehension of criminals, the flaw found in the Indiana statute was that it reached beyond the punishment of individuals who by virtue of their positions in the judiciary are privy to the information contained in a sealed document. Rule 6(e)(4) of the Federal Rules of Criminal Procedure sets forth a similar contempt provisions which, however, is limited to punishing those who hold positions in the criminal justice system. Thus, although conceding the importance of the state's interest, the means were held to be overbroad. The state failed to provide any evidence that sanctioning the press was necessary to further its goal of apprehending criminals, and the court ruled that the danger was insufficient to warrant the infringement on the first amendment. This conclusion was summarily affirmed by the Supreme Court last term.

**C. Access to Government-Owned Property**

The Supreme Court in recent years has focused on the place wherein first amendment rights are being exercised in deciding the extent to which government regulation of speech will be tolerated. Speech in traditional and limited public forums, i.e., government-owned property which traditionally has been open for use by the public as a place for expressive activity, is highly protected and any regulation must be content neutral and narrowly tailored to accomplish significant government interests. On the other hand, the Supreme Court has held that speech on public property which is not by tradition a forum for public communication may be regulated provided the regulation meets the lesser standard of reasonableness and viewpoint neutrality. The trend in recent years has been for the Supreme Court to identify most government-owned property as a "nonpublic" forum, and therefore to allow greater regula-

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22. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (invalidating on first amendment grounds a state law which punished individuals for divulging or publishing truthful information regarding confidential proceedings of a State Judicial Review Commission prior to filing formal complaints about a judge's misconduct).

23. 739 F.2d 1219 (7th Cir. 1984), aff'd, 105 S. Ct. 1155 (1985).

24. *Id.* at 1225.


tion of speech in such locations. Last term, for example, the Supreme Court upheld denial of access to a federal fundraising campaign. Although the government had allowed various groups to reach government employees through a unified official campaign, it had not thereby created a federal forum, and therefore the government could selectively grant and deny access to that forum provided that its regulation was reasonable and viewpoint neutral. In another case the Court held that a military base, previously recognized as a nonpublic forum, does not become a public forum simply because the base holds an open house.

Two Seventh Circuit decisions this term reflect these principles. In a case almost identical to the Supreme Court decision involving the army base, the Seventh Circuit in United States v. Quilty rejected the first amendment claims of a defendant arrested on the premises of the Rock Island Arsenal while participating in a peaceful prayer meeting. The court held that even where the military base is open to certain groups, this does not transform a military base into a public forum. The defendants had previously received a "bar letter," prohibiting them from ever entering the base, based on their earlier participation in an antinuclear demonstration on the Arsenal premises. Under federal law they could be fined and imprisoned for reentering the base. Relying on the nonpublic nature of the forum, the court held that the convictions could be sustained.

The nonpublic forum analysis also figured significantly in the Court's review of the claims presented in Piarowski v. Illinois Community College. In this case the chairman of the art department alleged that his first amendment rights were violated when the college demanded that he relocate certain of his art works to an alternative site on campus due to the sexual explicitness and potential racial offensiveness of the material. Although recognizing that purely artistic expression is protected by the first amendment, the court reasoned that the gallery was not a public forum. Even though artists from outside the college had in the past been invited to exhibit their work in the gallery, that was not enough to transform a college art gallery into a public forum. Further, plaintiff's position as a public employee was stressed, because Supreme Court pre-

29. 741 F.2d 1031 (7th Cir. 1984).
30. See 18 U.S.C. § 1382 (1982). Note that this very same provision was being contested in the Supreme Court case last term in U.S. v. Albertini, supra note 28.
31. 759 F.2d 625 (7th Cir.), cert. denied, 106 S. Ct. 528 (1985).
32. Id. at 629.
33. See discussion supra note 28 and accompanying text.
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cedent dictates that government may place greater restrictions on its employees than it may on the public in general.34

Although much of its analysis is persuasive, the court then proceeds to espouse the troublesome theory that sexually explicit though non-pornographic art can be subjected to greater regulation than political speech.35 Although a plurality opinion in an earlier Supreme Court decision had espoused this view, the majority of the Court has refused to give this type of material a less protected constitutional status.36 The Piarowski opinion emphasizes further that this is a case of relocating, not suppressing sexually explicit material in that the plaintiff was offered an alternative, though less conspicuous site for his display. The Supreme Court, however, has specifically held that the availability of alternative sites does not mitigate a first amendment violation.37 Although the university argued that the display in a place of great prominence and visibility might imply college approval of the art, certainly this concern could have been met by the posting of some type of disclaimer. The court also expressed concern with federalizing "every trivial alteration of the site of an art exhibit."38 Although some of these comments in isolation are troublesome, the Seventh Circuit does conclude by stressing the compilation of factors, i.e. the nature of the expression, the fact that the plaintiff was a faculty member and administrator, that the college sought relocation not removal, and that the material sought to be exhibited was both sexually explicit and racially offensive art work. Together perhaps they

34. 759 F.2d at 629. Another Seventh Circuit decision dealing with the free speech rights of government employees is Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985), cert. denied, 106 S. Ct. 36 (1985). Applying the analysis set forth in the Supreme Court decision of Connick v. Meyers (discussed in Bodensteiner and Levinson, Current Developments in Civil Liberties, 60 CHI.-KENT L. REV. at 456-60 (1984), the court held that the teacher had viable claims for impermissible retaliation, in that her speech both (1) involved some matters of public concern and (2) was a motivating factor in the defendant's conduct. Perhaps most significant about the decision is the court's analysis of what types of speech meet the "matters of public concern" standard, which due to Connick has become a critical inquiry in retaliation suits. See, e.g., McCabe, Free Speech of Government Employees, 60 IND. L.J. 339 (1985). The court held here that although complaints about classroom assignment and evaluation content were not matters of public concern, speech regarding inequitable mileage allowance for coaches, the extent of liability insurance and grievance procedures did qualify.

35. Id. at 630.

36. Young v. American Mini-Theatres, 427 U.S. 50, 70, reh'g denied, 429 U.S. 873 (1976). In City of Renton v. Playtime Theatres, 106 S. Ct. 925 (1986), the Court upheld a zoning law aimed at adult theatres by finding that the city's primary concerns were the effects of such theatres on the surrounding community and not the content of the films. The reasoning in the case would support the holding in Piarowski.


38. Piarowski, 759 F.2d at 632.
justify the conclusion that no first amendment rights were violated in this case.

D. Free Exercise Rights of Men in the Military

In Ogden v. United States the Seventh Circuit dealt with the question of whether the commander of the Great Lakes Naval Training Center would constitutionally place "off limits" facilities operated by certain churches. After concluding based upon Supreme Court precedent that the plaintiffs were precluded from seeking monetary but not injunctive relief, the court proceeded to discuss a recent decision of the United States Court of Appeals for the District of Columbia. In Goldman v. Weinberger the appellate court upheld strict enforcement of Air Force uniform dress requirements, refusing to allow a "religious garb" exemption to an Orthodox Jewish officer required by his faith to wear a yarmulke (skullcap). The court in that case stressed the less protected status of free exercise rights of men in the military and upheld the regulation as necessary to avoid serious disruption to the military's interest in uniformity.

Here the Seventh Circuit reasoned that the off-limits order was based upon evidence that a religious group was encouraging unauthorized absences and that there had been some incidents of sexual assault and intimidation by members of the religious group. The relevant inquiry, as stated by the Goldman court, is whether these legitimate military ends are "being achieved by means designed to accommodate the individual right to an appropriate degree." In examining the question of appropriate accommodation, the Seventh Circuit reasoned that both the degree of interference or intrusiveness of the military action and the nature of the religious activity had to be scrutinized. Thus, an order which completely barred participation in religious service would merit closer scrutiny than an order which merely restricted the time or location of participating in a less intensely religious practice. Since, however, the district court failed to determine the precise religious practices that

39. 758 F.2d 1168 (7th Cir. 1985).
40. As to the procedural question, the court held that although the Supreme Court decision in Chappell v. Wallace, 462 U.S. 296 (1983), foreclosed a Bivens-type remedy for damages, the Supreme Court had left open the availability of an equitable remedy. 758 F.2d at 1174-78.
41. 734 F.2d 1531, 1536 (D.C. Cir. 1984), aff'd, 106 S. Ct. 1310 (1986), discussed in Ogden, 758 F.2d at 1179-80.
42. 734 F.2d at 1539, 1541.
43. Ogden, 758 F.2d at 1171-73.
44. Id. at 1183 (citing Goldman, 734 F.2d at 1536).
45. Id.
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took place in at least one of the "off-limit" sites, and failed to elucidate the degree of intrusiveness of the off-limits declaration, the case was remanded for further proceedings.\textsuperscript{46}

While stating its reliance on the standard enunciated in \textit{Goldman}, the Seventh Circuit's analysis exhibits a greater sensitivity to religious freedom than did the D.C. Court of Appeals. The Seventh Circuit opinion specifically cautions that if indeed religious worship was displaced by the off-site declaration, and no readily available alternative site existed, the defendants would carry a greater burden of showing why an exception to the off-limits order should not exist.\textsuperscript{47} In defining this burden, the Seventh Circuit stated that the defendant would have to prove that attendance at organized worship services "would necessarily entail the type of individual encounters or specific harms that the military legitimately desires to avoid."\textsuperscript{48} This is in contrast to the much more deferential approach taken by the Court of Appeals for the District of Columbia in the \textit{Goldman} case, wherein the military's general assertion of a need for uniformity in dress code was held to outweigh the free exercise rights of an individual who merely wanted to wear a skullcap in observance of his faith.

The Supreme Court affirmed the holding in \textit{Goldman}.\textsuperscript{49} Without articulating a specific standard, it stressed that great deference must be given to the professional judgment of military authorities and that the first amendment "does not require the military to accommodate such practices in face of its view that they would detract from the uniformity sought by the dress regulations."\textsuperscript{50}

\section*{II. DUE PROCESS CHALLENGES TO GOVERNMENT ACTION}

The Seventh Circuit decided several interesting cases involving the due process clause of the constitution. In general the cases reflect well-
established Supreme Court doctrine, but a few raise highly controversial questions regarding the Parratt limitation on due process claims as well as the broader meaning of substantive due process as a guarantee against arbitrary government decision-making.

A. Protecting Property and Liberty Interests Under the Due Process Clause

The Seventh Circuit analyzed procedural due process challenges to government action under the now well-established standard set forth in the Supreme Court decision of Mathews v. Eldridge. The first part of the Mathews analysis requires identification of a property or liberty interest necessary to trigger procedural safeguards. An interesting challenge to the existence of a property right was made in the case of Sowers v. City of Fort Wayne, Ind. Plaintiffs had been promoted in rank by the fire chief, but were then demoted when the city, in compliance with a state court order, reinstated the previous employees. Defendants argued that plaintiffs had no legitimate claim of entitlement since their promotions were invalid in the first instance. The court summarily rejected this argument, looking to state law which clearly established property interests on behalf of the plaintiffs that could be taken only in accordance with due process of law. In short, in complying with the court order in a previous case, the defendants had infringed on the plaintiff’s due process rights.

In addition to property interests, the Supreme Court has also recognized that deprivations of “liberty” may trigger procedural safeguards. Last year in Lawson v. Sheriff of Tippecanoe County, Inc., the Seventh Circuit reasoned, based upon Supreme Court precedent, that the term liberty includes the right to follow a trade, profession or calling. Thus

52. Id. at 333-35.
53. 737 F.2d 622 (7th Cir. 1984).
54. Id. at 623.
55. Id. at 624. Indiana law clearly sets forth the conditions under which and the terms for which demotion would be possible, specifically requiring predeprivation written notice ten day prior to a hearing date. On the question of the existence of a property interest rooted in state law, see also Malcak v. Westchester Park Dist., 754 F.2d 239 (7th Cir. 1985) (reversing a jury verdict, based on the court’s finding that as a matter of state law plaintiff did not establish a protected property interest—the key holding was that a court may as a matter of law decide the existence of the property interest if the state law from which the interest derives would allow the determination to be made as a matter of law); Schultz v. Baumgart, 738 F.2d 231, 234-35 (7th Cir. 1984) (holding that under Wisconsin law, including statutes and cases, the plaintiff had a legitimate claim of entitlement “to be dismissed only on charges that could be sustained by the evidence”).
56. 725 F.2d 1136, 1138 (7th Cir. 1984), discussed in last year’s Survey, 61 CHI-KENT L. REV. at 236 (1985).
even if a cognizable property interest does not exist, if an individual loses
his job and simultaneously is publicly defamed, such that the statement
would preclude future employment, due process attaches. This concept
stems from *Paul v. Davis*, wherein the Supreme Court held, however, that
defamation alone is not a cognizable liberty interest.\(^{57}\) Strictly adhering
to this case precedent, the Seventh Circuit last term reversed a trial court
ruling which appeared on the record to have rested upon a defamation
action alone. In *Bone v. City of Lafayette, Ind.*,\(^{58}\) plaintiff alleged that the
city revoked her building permit and that the city engineer subsequently
told a bank that she had lied on her original application for the permit.
The district court judge focused solely on the defamatory allegations,
making no findings as to any other types of injury. Since the trial court
erroneously believed that defamation alone could support a § 1983 ac-
tion, the case was remanded.\(^{59}\)

Finally in *Bigby v. City of Chicago*\(^{60}\) the court held that although
there is a liberty interest to engage in a certain occupation, this does not
include a liberty interest regarding ranks within that occupation: "... while preventing someone from advancing in his occupation can be a
 cruel deprivation, it would stretch the idea of liberty of occupation aw-
fully far . . . to treat a bar to promotion as a deprivation of that lib-
erty."\(^{61}\) Because it refused to find a constitutionally protected liberty or
property interest in promotion to rank of lieutenant, the court dismissed
the police sergeants' due process claim that their denial of promotion was
based on failure of an examination which was unrelated to a lieutenant's
duties.\(^{62}\)

**B. The Meaning of Substantive Due Process**

In addition to raising procedural due process claims, the plaintiffs in
*Bigby* also alleged that the use of a test which is not reasonably related to

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58. 763 F.2d 295 (7th Cir. 1985).
59. *Id.* at 299. Note that in its analysis the court suggests that even where there is defamation
plus a contemporaneous firing, such as in *Lawson*, this does not implicate a "liberty" entitlement
unless it can be shown that the government conduct truly affected plaintiff's employability. *Id.* at
298. See also *Greene v. Finley*, 749 F.2d 467 (7th Cir. 1984) suggesting in dictum that a termination
based on a criminal conviction does not trigger a liberty entitlement because the stigma to reputation
is not caused by the employer's conduct. 749 F.2d at 469 n.1. The court assumed the existence of a
liberty or property interest, but held that plaintiff received all the process he was "due" through the
course of the criminal proceeding. *Id.* at 469-70.
60. 766 F.2d 1053 (7th Cir. 1985), *cert. denied sub nom.* Thoele v. City of Chicago, 106 S. Ct.
793 (1986).
61. *Id.* at 1057.
62. *Id.*
the needs of the position, violates substantive due process. The Seventh Circuit cautioned that such a claim is viable only when government misconduct is "deeply repulsive to the feelings of Supreme Court Justices." A civil service exam, even if it is "a stupidly designed test hopelessly maladapted to the purpose for which it is being given," does not shock the conscience, and thus fails to violate substantive due process.

In another case this term, Rodgers v. Lincoln Towing Service, Inc., the court similarly held that in order for government misconduct to violate substantive due process it must "shock the conscience" of the court. In Rodgers, the plaintiff had been jailed for over ten hours before being allowed to post bail, following his arrest on alleged vandalism charges. In both decisions then the Seventh Circuit narrowly construed substantive due process to apply only where the misconduct is sufficiently outrageous so as to meet the "shocking to the conscience" standard derived from the Supreme Court decision of Rochin v. California. On the other hand, the Seventh Circuit in Coleman v. Frantz held that an eighteen-day detention without an appearance before a judge or magistrate is "wholly inconsistent with notions of 'fundamental fairness'" and that it meets the Rochin test.

The meaning of substantive due process—when it is triggered and what standard must be met before it is violated—has created much confusion in the lower courts and has been the subject of recent commentary. The Supreme Court last term dealt with this question in an unfortunately very weak factual context regarding a student dismissed from a combined medical/undergraduate degree program. In Regents of University of Michigan v. Ewing the plaintiff argued that his dismissal from the program after having completed four years of study was arbitrary and capricious, violating his substantive due process rights. Although Ewing was dismissed from the University of Michigan pro-

63. Id. at 1058.
64. Id.
65. 771 F.2d 194 (7th Cir. 1985).
66. 342 U.S. 165, 172 (1952). Other courts have similarly required that government misconduct be "severe," "reprehensible," or "egregious" in order to violate substantive due process. See, e.g., Davis v. Forrest, 768 F.2d 257, 258 (8th Cir. 1985); Raley v. Fraser, 747 F.2d 287, 289 (5th Cir. 1984); Teft v. Seward, 689 F.2d 637, 639 n.1 (6th Cir. 1982); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), aff'd on other grounds, 460 U.S. 719 (1983); Shillingford v. Holmes, 634 F.2d 263, 264-65 (5th Cir. 1981).
67. 754 F.2d 719, 723 (7th Cir. 1985). The court proceeded to hold, however, that the defendant was entitled to qualified immunity from liability because he was simply following procedures set forth by the circuit court and did not violate clearly established law. Id. at 731.
gram based upon his failure of a two-day written exam administered by the National Board of Medical Examiners, he argued that students had routinely been given a second opportunity to take the test. 70

Ewing was not challenging the procedural fairness of the decision-making process, because he was given an opportunity to appear both before the National Board as well as before the Executive Committee of the medical school to present his case. Rather Ewing's sole claim was that the dismissal was an arbitrary, capricious decision. The Court assumed that the plaintiff had a constitutionally protected property interest in continued enrollment, and that substantive due process assures that such enrollment be free from arbitrary state action. The Court then determined, based on the record, that the faculty's decision to expel Ewing from the program was made "conscientiously and with careful deliberation." 71 Stressing the need to defer to academic judgment, the Supreme Court reasoned that substantive due process would be violated only if the decision was "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." 72

Although the Court in Ewing stressed the importance of restrained judicial review in the realm of academic decisions, what is critical is that the suggested standard was not as high as the "shocking to the conscience" approach utilized by the Seventh Circuit. As noted earlier, the fact situation in Ewing was extremely weak in that Ewing had a long record of academic deficiencies, justifying the Court's conclusion that the dismissal was not "beyond the pale of reasoned academic decision-making when viewed against the background of [Ewing's] entire career at the University of Michigan." 73 Despite this conclusion, the Court acknowledges that substantive due process does protect against arbitrary, capricious government decisionmaking, even where procedural norms are satisfied. Although the Court's approach was highly deferential, this was due to the need for academic freedom, which is not implicated in the types of decision-making that the Seventh Circuit faced this term. Recall that in Bigby the Seventh Circuit reasoned that even if the test utilized for promotions in the police department was a "stupidly designed test hopelessly maladapted to the purposes for which it is being given," it

70. Id. at 509.
71. Id. at 513.
72. Id. Note that this language is taken from Youngberg v. Romeo, 457 U.S. 307 (1982), holding that a substantive due process violation regarding a mentally handicapped individual held involuntarily in a state hospital would not be found unless the decisions of hospital staff departed from professional judgment. 457 U.S. at 323.
73. Regents of Univ. of Mich., 106 S. Ct. at 515.
would not violate substantive due process because it did not "shock the conscience." The Seventh Circuit overruled an earlier holding that professional qualifying tests and standards must bear a rational relationship to the skills necessary for the job in order to withstand a due process challenge. Arguably the Ewing decision supports the latter approach to substantive due process claims.

On the other hand, the court in Bigby did stress that it was dealing with a test used for promotion, rather than a test which would exclude an individual from an entire occupation, which would raise a stronger liberty claim and thus perhaps justify imposition of a heavier burden on the state. Support for this approach is found in Justice Powell's concurring opinion in Ewing, in which he argues that before the protections of substantive due process should attach, the asserted interest violated must be carefully examined to determine whether it even merits due process protection. Justice Powell stated that continued enrollment in a medical degree program is not the type of fundamental interest, such as privacy, which triggers substantive due process in the first place. The problem

74. Bigby, 766 F.2d at 1058.
75. Id. at 1053. The court overrules Dilulio v. Bd. of Fire & Police Com'rs of Northlake, 682 F.2d 666 (7th Cir.), cert. denied, 459 U.S. 1038 (1982). the Dilulio approach was also followed in Schanuel v. Anderson, 708 F.2d 316 (7th Cir. 1983) and Thompson v. Schmidt, 601 F.2d 305 (7th Cir. 1979). In other contexts the Seventh Circuit has similarly stated that due process is violated by a legislative act which is arbitrary and unreasonable or by vindictive, malicious application of facially neutral laws. See, e.g., Albery v. Redding, 718 F.2d 245 (7th Cir. 1983); Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982); Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947, 958 (7th Cir. 1979), aff'd, 446 U.S. 359 (1980).
76. Bigby, 766 F.2d at 1059.
77. Regents of Univ. of Mich., 106 S. Ct. at 515 (Powell, J., concurring).
78. Id. at 516 (citing Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979) (holding that a school board's non-renewal of a teacher contract because of the teacher's failure to earn required college credits did not deprive her of substantive due process)). While the Court in Harrah did state that the interest implicated did not resemble the types of privacy interests protected in earlier substantive due process decisions, the Court proceeded to examine the question of whether any rational connection existed between the board's action and its conceded interest in providing its students with competent well trained-teachers.

The only Seventh Circuit decision this term which did involve well-recognized fundamental privacy rights was Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985), petition for cert. filed, 10-16-85 (54 U.S.L.W. 3399), in which plaintiffs challenged a twenty-four hour wait period requirement imposed on unemancipated pregnant minors. The Supreme Court has struck twenty-four hour waiting periods regarding adult women, and the Seventh Circuit reasoned that any state interest in promoting parental consultation does not outweigh the burden imposed by a waiting period. Since a fundamental privacy right is implicated, the Seventh Circuit reasoned that the state had to prove the regulation was "narrowly drawn to further a compelling interest." 763 F.2d at 1537. Although the Supreme Court has upheld the validity of parental notification requirements, i.e. in H.L. v. Matheson, 450 U.S. 398 (1981), such requirements must provide an exception to notification for mature minors and immature minors whose best interests require an abortion. The existence of notification requirements already satisfies the state's interests in promoting parental consultation, thus supporting the court's conclusion that the additional burdensome waiting period requirement is unconstitutional. 763 F.2d at 1538.
with this reasoning is that it confuses the fundamental liberty interest analysis under substantive due process, where government is required to satisfy strict scrutiny (compelling interest-no less drastic means analysis), with the more general claim that whenever liberty or property interests are implicated, government must exercise its decision-making powers in a rational fashion. Thus in *Bigby* even though the officer is not being totally excluded from an entire occupation, substantive due process should still require that government decision-making regarding promotions not be totally arbitrary and capricious. Although concededly the nature of the interest affected is critical in analyzing the rationality of the government's conduct, characterizing the interest as "non-fundamental" should not end the inquiry.

A similar unnecessarily narrow approach to substantive due process is reflected in the Seventh Circuit's decision in *Rodgers v. Lincoln Towing Service, Inc.* The court recognized that a liberty interest is at stake when the police jail an individual for over ten hours before allowing him to post bail. It ruled, however, that the delay, even though in violation of the Illinois Supreme Court rules recommending that the booking procedure take only one hour, was not so long as to "shock the conscience." Although not meeting this strict standard, the overnight detention without being informed of any constitutional rights and being specifically denied the opportunity to post bond and to call a lawyer, could perhaps support a finding that the government conduct was arbitrary and capricious.

### C. Due Process Imposes No Affirmative Duty on Government to Provide Protective Services

Another limitation on due process claims was imposed by the case of *Jackson v. City of Joliet.* There the Seventh Circuit held that the liberty clause of the fourteenth amendment is not violated when only government inaction is alleged, because the constitution is a charter of negative liberties and does not create affirmative obligations. The *Jackson* analysis was followed in two Seventh Circuit decisions this term

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79. *Rodgers*, 771 F.2d 194, 194 (7th Cir. 1985). Note that the Supreme Court in *Baker v. McCollan*, 443 U.S. 137, 143-46 (1979), held that the claimant's detention for three days did not rise to the level of a fourteenth amendment deprivation without due process, so plaintiff must argue additional factors to support the allegations of a substantive due process violation. Also note that after summarily concluding that the delay did not "shock the conscience," the court in *Rodgers* proceeded to stress the availability of adequate state tort remedies to redress the wrong. 771 F.2d at 199. This aspect of the case is discussed infra note 98 and accompanying text.


81. *Id.* at 1203. *Accord:* *Bowers v.DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).
which rejected due process claims. *Beard v. O'Neal*\(^\text{82}\) involved suit against an FBI informant who accompanied a contract murderer on the night of the killing. Reasoning that the government official had no constitutional duty to prevent the murder, the court held that his failure to take steps to protect the victim did not cause the deprivation within the meaning of the due process guarantee.\(^\text{83}\)

Similarly in *Jackson v. Byrne*\(^\text{84}\) the court rejected claims on the part of parents whose children were killed during the Chicago firefighter's strike. In response to the strike, the city had ordered several fire houses closed and guarded by Chicago policemen in an effort to effectively concentrate available manpower.\(^\text{85}\) When a fire broke out in a home located across the street from one of the unmanned fire houses, four striking fire fighters tried to gain access to the guarded fire houses, but the police barred their way.\(^\text{86}\) Thirteen minutes later a fire truck dispatched from one of the manned fire houses arrived at the scene, but it was too late to save the lives of the children in question.

Rejecting the due process claims, the Seventh Circuit reasoned that the constitution creates no positive entitlement to fire protection.\(^\text{87}\) More generally, it stated that affirmative duties do not exist unless the state creates a custodial or other special relationship with the harmed individual.\(^\text{88}\) The question here, however, was whether the city engaged in more

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83. Id. at 899, 902.
84. 738 F.2d 1443 (7th Cir. 1984).
85. Id. at 1445.
86. Id.
87. Id. at 1446.
88. Id. at 1447. The court thus distinguished cases such as White v. Rochford, 592 F.2d 381 (7th Cir. 1979), holding that the constitution creates a duty to protect minor children from immediate hazards after police officers arrest the children's guardian. Other cases involving this affirmative duty to act once a special relationship is created are discussed in last year's survey, 61 CHI-KENT L. REV. at 239 (1985). See also Baldi v. City of Philadelphia, 609 F. Supp. 162, 167 (E.D. Pa. 1985) (once police officers stopped a vehicle containing a sick individual in order to issue a traffic citation for running a red light, officers were under some obligation to provide emergency escort transportation or at least not to prevent the individual from obtaining necessary emergency medical care); Madden v. City of Meriden, 602 F. Supp. 1160, 1162 (D. Conn. 1985) (complaint stated a valid claim against the city for the death of a youth who hung himself while in pretrial custody, the court reasoning that failure to provide regulations and procedures to assure the safety of detainees with known histories of self-injury did constitute a deprivation of due process). Compare Ellsworth v. City of Racine, 592 F. Supp. 1262, 1264-65 (E.D. Wis. 1984), aff'd, 774 F.2d 182 (7th Cir. 1985) (city's failure to provide wife of narcotics dealer with twenty-four hour police protection with the result that she was beaten unconscious by unknown assailant failed to state a claim since the city's conduct did not deprive the wife of any liberty interest); Williams v. City of Boston, 599 F. Supp. 363, 366 (D. Mass. 1984) (civil rights remedy is unavailable to a victim shot during an interscholastic football game since the injury was caused by mere government inaction in the absence of any duty to act). See also Daniels v. Williams, 106 S. Ct. 662 (1986) wherein Justice Rehnquist specifically rejects the notion that the special relationship existing in the prison context creates a duty of care which protects prisoners against negligent misconduct. Instead the Court held that something more
than “mere inaction” when Chicago police officers prevented the picketing firefighters from gaining access to the municipal fire house. The court reasoned that the police did not prevent the firefighters from efforts to rescue the deceased children, but merely barred them from reaching city fire equipment. Since the constitution does not require a municipality to provide potential rescuers with even the most elementary firefighting equipment, due process has not been violated.

The court’s analysis ignores the substantive due process argument discussed in the previous section, i.e. that government officials violate due process when their conduct is arbitrary and capricious, in light of all the circumstances. Although the constitution does not require the city to provide fire equipment to rescuers, the deliberate decision of the police to preclude striking firefighters from utilizing facilities which would save lives, was sufficiently egregious so as to meet even the “shocks the conscience” standard. The fact that the police officers did not set the fire is irrelevant, because their conduct in refusing access to fire equipment right across the street from a burning home arguably contributed to the peril. Thus the plaintiffs should have been given the opportunity, foreclosed by grant of summary judgment in this case, to prove the causation requirement.

D. Parratt Limitations on Due Process Claims

In Parratt v. Taylor the Supreme Court held that the due process clause is not violated where the state provides an adequate remedy for the negligent deprivation of property rights. The Court reasoned that the state has not deprived the plaintiff of due process where there is no practical way for the state to provide a predeprivation hearing (because it cannot control random, unauthorized misconduct of its employees), and the state does afford an adequate post-deprivation remedy. In Hudson v. Palmer the Supreme Court extended this rationale to include intentional deprivations of property by random, unauthorized government official misconduct. The Court reasoned that whenever the provision of predeprivation process is impractical or impossible, the existence of an adequate state post-deprivation remedy satisfies due process. In both of

89. 738 F.2d at 1448.
90. See supra notes 68-78 and accompanying text.
91. See supra note 66 and accompanying text.
93. Id. at 543.
these cases only a deprivation of property rights was implicated, leaving unanswered the question of whether this due process analysis also applies to liberty claims. The circuit courts have divided on this issue.95

The Seventh Circuit this term continued to apply Parratt to deprivations of life and liberty, as well as property. In Guenther v. Holmgreen96 the court held that plaintiff's arrest, allegedly made without probable cause and based upon an officer's factual misrepresentations, does not constitute a deprivation of liberty without due process of law, because Wisconsin tort remedies for false arrest, false imprisonment and malicious prosecution sufficiently satisfy the demands of due process.97 Similarly in Rodgers v. Lincoln Towing Service, Inc., the court reasoned that when random, unauthorized actions by state officials deprive an individual of liberty—there an alleged impermissible detention—the availability of adequate state tort remedies to redress the wrong meets the constitutional requirement of due process.98 In short, the court reasoned that the plaintiff's access to state tort claims for false imprisonment and malicious prosecution precludes him from using section 1983 to compensate him for his injuries.

Although the fourteenth amendment does not itself prioritize liberty and property, some opinions suggest that the distinction may be a viable one.99 The Supreme Court this term had the opportunity to resolve the


96. 738 F.2d 879 (7th Cir. 1984), cert. denied, 105 S. Ct. 1182 (1985).
97. Id. at 882.
98. 771 F.2d at 199.
99. See for example Justice Blackmun's concurring opinion in Parratt in which he specifically states that he does not view the case to apply to deprivations of life or liberty. 451 U.S. 527, at 545. Similarly in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) the Court stressed that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination . . . is adequate." Id. at 611 (this passage is cited in Parratt, 451 U.S. at 540). On the other hand, the Parratt majority states that its analysis is consistent with the analysis in the earlier Ingraham decision in which the Court denied due process challenges in the context of school paddlings, which clearly implicated liberty interests.
conflict. In *Daniels v. Williams* 100 the Fourth Circuit had ruled that negligent deprivations of liberty are not actionable under the due process clause; and that even if there is a liberty interest to be free from negligent misconduct, a deprivation is not without due process of law where the state provides post-deprivation remedies. Although the appellate court could have ended its analysis after finding that negligent injuries to the person do not violate due process, the court proceeded to make it clear that *Parratt*, which reaches both intentional and negligent conduct, applies even in the context of liberty deprivations. 101 In contrast, the Third Circuit held in *Davidson v. O'Lone* 102 that *Parratt* should not be applied to deprivations of liberty. It proceeded to rule, however, that negligent deprivations of liberty do not violate due process. This analysis would support a claim for intentional deprivation of liberty, contrary to the *Daniels* holding that *Parratt* governs all claims.

In reviewing these two decisions the Supreme Court avoided the *Parratt* question by simply holding that claims of negligence are not actionable under the due process clause. 103 The Court overruled its determination in *Parratt* that neither §1983 nor the due process clause imposes any state of mind requirement. Thus even states which fail to provide a remedy for negligent deprivations of property are immune from due process claims. The Court's holding that the negligent deprivations of liberty in *Daniels* and *Davidson* did not rise to a constitutional level leaves unanswered the issue posed by the Seventh Circuit cases, i.e. the availability of a due process remedy for intentional deprivations of liberty. Although it is true that *Parratt* rests on the impossibility of providing predeprivation process where only random, unauthorized misconduct is implicated, and that this rationale arguably extends to deprivations of liberty, this simplistic analysis appears inappropriate where government misconduct affects personal liberty.

The Seventh Circuit's willingness to extend *Parratt* to liberty deprivations should be contrasted with the analysis used in *Schultz v. Baumbart*, 104 involving the discharge of a Wisconsin firefighter. The court overturned the lower court finding that the public employee waived his procedural due process rights by failing to take advantage of pretermi-

See *Parratt*, 451 U.S. at 542. At least one lower court has relied upon the latter reference to uphold the extension of *Parratt* to encompass liberty claims. See Engbloom v. Carey, 677 F.2d 957, 964-66 (2d Cir. 1982).  

100. 748 F.2d 229 (4th Cir. 1984), aff'd, 106 S. Ct. 662 (1986).  
101. Id. at 232.  
102. 752 F.2d 817 (3d Cir. 1984), aff'd, 106 S. Ct. 668 (1986).  
104. 738 F.2d 231 (7th Cir. 1984).
What is critical is that the court cautioned that on remand the district court could not rely on *Parratt* to negate the due process claim. Since the city's fire chief, rather than some low-level government official, imposed the sanctions, the court reasoned that the constitutional violation was complete at the time of the firing and could not be cured by subsequent state remedies. Since it would not have been impractical for the police chief to have provided the plaintiff predeprivation process, *Parratt* was inapplicable. The Supreme Court in *Logan v. Zimmerman Brush Co.* held that *Parratt* does not apply where plaintiff challenges a state statute which allegedly brings about the deprivation of property rights. It emphasized the distinction between unauthorized random official misuse of power for which government may not be held accountable and action taken pursuant to established state law or policy. Apparently the Seventh Circuit felt that this case, involving in effect a "policy" of the police chief, fell within the latter category.

Finally it should be noted that *Parratt* controls only procedural due process claims, and is inapposite where significant deprivations of liberty are alleged. This was stressed by the Eleventh Circuit in a recent *en banc* decision involving police officers' use of excessive force. The court stated that the historical purpose of section 1983 was to eliminate the physical violence that was being visited on citizens by those entrusted to keep the peace. In light of this history, the court concluded that substantive due process claims are outside the *Parratt* rule because the constitutional violation is complete at the moment the harm occurs. Other

105. *Id.* at 237.

106. *Id.* at 237-38 n.9. This same limitation on *Parratt* is reflected in *Patterson v. Coughlin*, 761 F.2d 886, 892 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 879 (1986), noting that the relevant question is "... whether the conduct of the state's agent that resulted in the deprivation was such as to make the injury unforeseeable when viewed from the position of one who possesses the state-delegated authority to grant a hearing when circumstances and the constitution so required." *Id.* at 892. *See also infra* note 110.


108. Although the facts in *Baumgart* involved an unwritten policy, certainly this should fit the *Logan* exception to *Parratt*. The key to *Parratt* is that the wrongdoing was "random and unauthorized." The Fifth Circuit recognized the same distinction in *Augustine v. Doe*, 740 F.2d 322, 328-29 (5th Cir. 1984), reversing a district court dismissal of a § 1983 suit where plaintiff was not given the opportunity to establish that his arrest and detention without probable cause reflected "official policy," such that the availability of post-deprivation remedies would not bar the procedural due process claim. As the court stated, "*Parratt v. Taylor* is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air." 740 F.2d at 329.


110. 744 F.2d at 1500.
members of the panel rejected the court's characterization of the claims here as substantive due process claims, and argued that whenever state policy denounces the infliction of a wrong, its institutions should satisfy due process. Based on this division of opinion, it is readily apparent that the Parratt debate implicates broader questions as to the meaning of due process discussed in the previous section. Hopefully the Supreme Court will soon provide some guidance to lower courts on these questions.

III. EQUAL PROTECTION CHALLENGES TO GOVERNMENT ACTION

A. Rational Basis Analysis "With a Bite"

The Supreme Court has generally held that in cases which do not involve either a discrete and insular minority or a fundamental right, it suffices that the legislative scheme rationally furthers a legitimate state interest. Although in the past the Court took an extremely deferential approach, generally refusing to invalidate any state laws, recent decisions reflect a more searching scrutiny and a willingness to strike statutes under the so-called traditional equal protection approach. For example, the Court ruled in Cleburne v. Cleburne Living Center that a city's refusal to grant a special permit for a group home for the mentally retarded was based on an irrational prejudice against the mentally retarded and thus violated the equal protection clause.

The Seventh Circuit this term rejected equal protection challenges to a Wisconsin statute, but only after subjecting the law to a fairly searching review. Plaintiffs in Peterson v. Lindner were court reporters who, as a result of a court reorganization, were paid disparate salaries. Prior to 1978, counties in Wisconsin awarded their court reporters a salary supplement. After the circuit and county courts were consolidated, the legislature passed a law allowing the former county court reporters who became circuit court reporters to continue at their earlier salaries. A legislative committee appointed to investigate this situa-

111. Id. at 1510-11, 1514.
112. See supra notes 63-79 and accompanying text.
114. See, e.g., Hooper v. Bernanillo County Assessor, 105 S. Ct. 2862 (1985) (invalidating as irrational a New Mexico law which limited a veteran's property tax-exemption to veterans who moved into the state by 1976); Williams v. Vermont, 105 S. Ct. 2465 (1985) (holding that a Vermont use tax which discriminated against nonresidents who purchased cars in another state and then moved to Vermont was arbitrary and unrelated to any legitimate statutory purpose).
116. 765 F.2d 698 (7th Cir. 1985).
117. Id. at 701.
tion concluded that the broad salary differentials generated by the county supplements were irrationally based on the date, county, and status of appointment, rather than on job proficiency.118 Despite this finding, the court concluded after a careful examination of the legislative history, that the freezing of the old wages was simply a temporary measure designed to maintain the status quo until a Qualifications and Compensation Committee could promulgate new regulations. This in fact was done in 1982, at which time the old system was abandoned.119

Although recognizing the Supreme Court rule that a legislature is entitled to act on one part of a problem at a time, the court stressed that any “first step” justification must be supported by a deliberate design to continue to eradicate the problem.120 Here the legislative mandate to create a new comprehensive system of qualifications and compensations supported the defendant’s claim that the challenged provision was intended to be a temporary measure only. The court ruled that the subsequent actions taken by the legislature demonstrated that the statute was rationally related to the state’s ultimate, legitimate goals.121

B. Equal Protection Challenges to Affirmative Action: The Reverse Discrimination Dilemma

The Supreme Court has failed to provide any meaningful guidance to the lower courts regarding the constitutional validity of affirmative action programs. Although the Supreme Court considered the merits of constitutional challenges to affirmative action plans in Regents of the University of California v. Bakke122 and Fullilove v. Klutznick,123 in neither case did any opinion command the assent of a majority of the Court. Although the issues are extremely complex, basically three fundamental questions need to be resolved:

1. Whether affirmative action programs are justifiable only as a remedy for past discrimination, and if not, what other state interests are permissible?
2. Assuming that remedying past discriminations is a viable justification for affirmative action, must the discrimination be specifically that

118. Id.
119. Id. at 708.
120. Id. at 706-07.
121. Id. at 708. See also Sklar v. Byrne, 727 F.2d 633, 636 (7th Cir. 1984) (holding that a Chicago ordinance allowing owners of handguns on a certain date to keep them but prohibiting others' possession was a viable "first step in a gradual approach to the problems of handgun violence." Id. at 641 n.12).
123. 448 U.S. 448 (1980).
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of the defendant or may government rely upon societal discrimination as the reason for affectuating its programs?

3. Focusing on specific remedial schemes, to what extent may preferential treatment be afforded minorities without violating the constitutional rights of non-minorities?

These key questions were raised in the context of two Seventh Circuit decisions this term, and are currently being debated before the Supreme Court in three cases.124

In Janowiak v. Corporate City of South Bend125 the Seventh Circuit tackled the first question, i.e. whether a city can adopt an affirmative action program relying solely on the statistical underrepresentation of minorities, absent findings of past discrimination. The City of South Bend adopted an affirmative action program for its Police and Fire Departments because of the disparity which existed between the percentage of minorities in the population of South Bend and the percentage of minorities in the Departments. A Minority Recruitment Task Force made specific findings that the hiring procedures were not discriminatory; but it recommended nonetheless that a two-to-one preferential hiring plan be instituted so that the departments might better reflect the minority composition of the city.126

The Seventh Circuit began its analysis by stating its understanding of Supreme Court precedent to require that affirmative action programs be based upon findings by a competent body of past discrimination.127 It reasoned that absent a finding of past discrimination, the government could not satisfy its constitutional burden of articulating a substantial or important government interest for its affirmative action program.128 Because here only evidence of statistical disparity was used to justify the affirmative action program, the court concluded that the district court had erred in granting summary judgment for the defendants.129

124. The pending cases are Local 638 v. Equal Employment Opportunity Comm'n, 753 F.2d 1172 (2d Cir. 1985), cert. granted, 106 S. Ct. 58 (1985) (raising the issue of whether general findings of discrimination against unidentified persons justify a district court-ordered race conscious affirmative action program which includes specific percentage goals); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), cert. granted sub nom. Local No. 93, Int'l Ass'n. of Firefighters v. City of Cleveland, 106 S. Ct. 59 (1985) (challenging the validity of a consent decree which, over the objection of the union, requires the promotion and maintenance of minority firefighters in higher positions); and Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984), cert. granted, 105 S. Ct. 2015 (1985) (challenging race preferences for teacher lay-offs adopted by a public employer in the absence of finding past discrimination, but based rather solely upon disparity between respective percentages of minority faculty and students).

125. 750 F.2d 557 (7th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3896 (June 10, 1985) (No. 84-1936).

126. 750 F.2d at 558.

127. Id. at 561. It stated that this same limitation was imposed by Title VII.

128. Id. at 563-64.

129. Id. at 564.
The Seventh Circuit's presumption that findings of specific past discrimination are a prerequisite to the validation of any affirmative action program should be contrasted with the approach taken in Wygant v. Jackson Board of Education, which is presently pending before the Supreme Court. In Wygant the Sixth Circuit acknowledged that the affirmative action program was voluntarily adopted by the School Board in the absence of direct findings of discrimination against minority teachers. Its purpose was to increase the percentage of minority faculty to better reflect the percentage of minorities in the study body. In determining the validity of that program, the court asked whether there was a sound basis for concluding that minority underrepresentation was substantial and chronic, and whether the handicap of past racial discrimination was impeding access and promotion of minorities. The court felt that this would be enough to justify preferential treatment within a general class of persons likely to have been the victims of discrimination. The court upheld the program because the plan's objective—to remedy past underrepresentation—was constitutional, and the means were substantially related to the objective of correcting underrepresentation.

The approach taken by the Sixth Circuit finds support in Regents of the University of California v. Bakke, wherein Justice Powell reasoned that either remedying past discrimination, or some other equally compelling government interest might justify an affirmative action program. Indeed in Bakke Justice Powell found a compelling interest in a diverse educational environment. Although he later held that the means—a strict racial quota—were constitutionally impermissible, this does not affect his conclusion that remedying past discrimination is not the only possible justification for affirmative action. Further, four concurring Justices in Bakke argued that affirmative action programs could be sustained upon a lesser governmental showing of a significant, rather than compelling, interest and means substantially related, rather than essential, to achieving that interest. The Court's review of Wygant should provide some answer to the question of whether findings of past discrimination are a prerequisite to any affirmative action program and, if not, what types of government interests are sufficient to withstand a constitutional challenge.

130. 746 F.2d 1152 (6th Cir. 1984) see ADDENDUM, infra page 465.
131. Id. at 1155. The court notes that this standard comes from Justice Brennan's four-man plurality opinion in Bakke.
132. Id. at 1156-57.
134. Id. at 311-14.
135. Id. at 359. (Brennan, J. concurring).
A second Seventh Circuit reverse discrimination case, Britton v. South Bend Community School Corp., involved a collective bargaining agreement which provided that in the event of reduction in force, lay-offs of minority teachers hired pursuant to the school board's voluntary affirmative action program were prohibited. Unlike Janowiak, there was no question here regarding past discrimination on the part of the South Bend Community School Corporation. The Office for Civil Rights (OFC) had conducted two on-site reviews of the school system, finding that the school corporation was not in compliance with federal law because of racially discriminatory teacher assignment practices. The Seventh Circuit upheld the affirmative action program against both Title VII and equal protection claims. After analyzing the Title VII challenge, the court interpreted previous Supreme Court precedent regarding the equal protection clause to require that the government action serve some interest and that the program somehow be directed towards achieving that interest. Although noting the disagreement on the part of Supreme Court Justices as to whether remedying the effects of past societal discrimination constitutes a sufficiently compelling government interest to warrant affirmative action, here there had been explicit findings of the defendant's discrimination by three competent bodies, i.e. the Office of Civil Rights, a district court, and the Attorney General's certifi-

136. 775 F.2d 794 (7th Cir. 1985) judgment vacated reh'g en banc granted, No. 84-2841 (Feb. 12, 1986).
137. Id. at 799.
138. Id. at 800-01.
139. Id. at 801.
140. Id.
141. Id. at 802-08. Basically the court's analysis under the fourteenth amendment parallels quite closely its interpretation of the Title VII standard set forth in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), i.e. that an affirmative action program be based upon some finding of past discrimination by a competent body, and that the means do not "unnecessarily trammel the interests of white employees." 443 U.S. at 208.
142. Britton, 775 F.2d at 809. The court states that this is the only clear consensus which may be garnered from the diversified Supreme Court opinions (citing Janowiak, 750 F.2d at 563.
cation underlying the consent order.\textsuperscript{143}

As to the question of remedy, the court, without specifying a particular standard, held that the means here were not only related to, but were essential and crucial to the achievement of the affirmative action objectives.\textsuperscript{144} It stressed that the provision did not stigmatize any of the white teachers who were laid off; it did not require the retention of unqualified teachers, nor the lay-off of all white teachers; and it was a temporary measure not designed to maintain a particular racial balance in the teaching staff.\textsuperscript{145}

The toughest claim made by the plaintiffs was that less burdensome lay-off procedures would have been possible, short of the "no minority lay-off" provision adopted. As to this argument, the court ruled that without the provision, the percentage of black teachers would have dropped to what it had been before the affirmative action program was adopted.\textsuperscript{146} Further, a proposal such as that adopted in the \textit{Wygant} case, i.e. that the school system simply maintain the percentages of black teachers already achieved at the time of lay-offs, would not have significantly enhanced the protection for non-minorities and would have undercut the goal of increasing the percentages of minority teachers in the school system.\textsuperscript{147}

Questions as to the viability of affirmative action programs are being raised in two cases pending in the Supreme Court. In one, a court-ordered affirmative action program establishing a 29.23\% nonwhite membership "goal" for the sheet metal workers' union and other special preferences in training programs for minorities are being challenged.\textsuperscript{148} The court order came as a result of judicial findings that the union and its joint Apprenticeship Committee had purposefully discriminated against nonwhites in violation of Title VII.\textsuperscript{149} The second case involves a labor union's challenge to a consent decree which required the promotion of minority firefighters to higher positions in the Department.\textsuperscript{150}

\begin{itemize}
\item \textsuperscript{143} \textit{Id.} at 809-11.
\item \textsuperscript{144} \textit{Id.} at 812. \textit{See id.} at 811-12 for a discussion of the standards adopted by various circuits on this question.
\item \textsuperscript{145} \textit{Id.} at 812-13.
\item \textsuperscript{146} \textit{Id.} at 813.
\item \textsuperscript{147} "Lay-offs pursuant to such a provision would have kept the percentage of black teachers at 13.0\%, while the actual lay-offs pursuant to the no minority plan increased the percentage to 13.8\%." \textit{Id.}
\item \textsuperscript{148} \textit{Local 28 v. EEOC}, 753 F.2d 1172 (2d Cir.) \textit{see ADDENDUM, infra page 465.}
\item \textsuperscript{149} \textit{Id.} at 1175. The case arose in the context of contempt proceedings for violations of the court order, and also raises legal issues as to the use of this contempt power.
\item \textsuperscript{150} \textit{Vanguards of Cleveland v. City of Cleveland}, 753 F.2d 479 (6th Cir.), \textit{cert. granted sub nom. Local No. 93 v. City of Cleveland see ADDENDUM, infra page 465.}
\end{itemize}
Again here the district court made specific findings of race discrimination in promotions in the defendant's Fire Department. The union's contention that the affirmative action plan was unreasonable because "it penalizes innocent non-minority firefighters" was rejected by the Sixth Circuit.

The most significant issue raised by both of these cases is whether affirmative action programs may include those who are not actual victims of past racial discrimination. The Justice Department has adopted a new policy which would limit affirmative action programs to those who are actual victims of discrimination, while opposing any other types of preferential treatment. Although thus far the Administration has failed to convince any federal appellate courts of its arguments, certainly Supreme Court guidance is needed both regarding the validity of the Administration's "victim-specificity" requirement, and more generally as to the standard of review which should be utilized when challenges are made to affirmative action programs on grounds that they impermissibly violate the equal protection rights of non-minorities.

IV. EMPLOYMENT DISCRIMINATION

A. Age Discrimination

The cases brought under the Age Discrimination in Employment Act (ADEA) and considered by the court this term generally fit into two categories: those addressing the requirements of a prima facie case of age discrimination and those dealing with the timeliness of the charges. It is generally accepted that the method of proof established

151. Id. at 483.
152. Id. at 484-85. The court stressed that the plan did not require hiring unqualified minority firefighters, it did not create an absolute bar to the advancement of non-minority employees, and it was both flexible and temporary.
153. This is the position advocated in briefs submitted by the Justice Department in the pending cases.
155. A significant number of the ADEA cases were disposed of in the trial courts by summary judgment. An order granting summary judgment in favor of the defendant was reversed in Stumpf v. Thomas & Skinner, Inc., 770 F.2d 93 (7th Cir. 1985), with an indication that summary judgment is inappropriate in a discrimination case "where a material issue involves any weighing of conflicting indications of motive and intent." Id. at 97. The court also indicated that a plaintiff opposing summary judgment "should be required to do no more than offer proof which casts doubt upon the veracity of the employer's stated reason for its action." Id. at 98. See also Herman v. Nat'l Broadcasting Co., 744 F.2d 604, 609-10 (7th Cir. 1984), cert. denied, 105 S. Ct. 1393 (1985) (affidavit of defendant's official indicating he had selected the "best applicants" without considering the ages of any of the applicants was insufficient to warrant summary judgment for the defendant on a claim of willful discrimination where those making the selection had requested the applicants' dates of birth, there was evidence of past age discrimination by the employer and statistical evidence indicating that the twenty persons hired pursuant to job postings for particular years were all under 50 years of age).
Where a plaintiff is replaced by a younger person, the court stated in *Stumph v. Thomas & Skinner, Inc.* that he could establish a prima facie case of age discrimination by showing that:

1. he was a member of the protected class (persons aged 40 to 70);
2. he was qualified for his position;
3. he was terminated; and
4. he was replaced in his position by a younger person.

A problem arises with the fourth factor in a case where an employer is reducing the work force. In such a case, *Tice v. Lampert Yards, Inc.*, the court indicated that "replacement of the plaintiff by a younger person may not be required in order to establish a prima facie case." Subsequently, in *Matthews v. Allis Chalmers*, the majority adopted the Fifth Circuit's version of the fourth factor and required the plaintiff to produce "circumstantial or direct evidence from which a factfinder might reasonably conclude that the employer intended to discriminate in making the employment decision at issue." Judge Flaum, in a concurring opinion, discusses the different approaches taken in the circuits and argues that the *Williams* approach "upsets the delicate balance in burdens of proof that was struck by the Supreme Court in *McDonnell Douglas*." He correctly argues that the test adopted by the majority, based on *Williams*, is too strict for plaintiffs and "threatens to undermine the function of *McDonnell Douglas* in providing plaintiffs with a meaningful opportunity to litigate their discrimination claims." Instead, Judge Flaum would allow a plaintiff in a reduction-in-force case to establish a prima facie case of age discrimination "by showing that he

Summary judgment for the defendant was upheld in *Matthews v. Allis-Chalmers*, 769 F.2d 1215 (7th Cir. 1985) (plaintiff did not produce any indication of discriminatory motive and intent), and *Trembath v. St. Regis Paper Co.*, 753 F.2d 603 (7th Cir. 1985) (no genuine issue of fact as to one item of plaintiffs' prima facie case, i.e. whether there was an available job open when the plaintiffs were discharged).

157. *See e.g.*, *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1212 (7th Cir. 1985); *Trembath v. St. Regis Paper Co.*, 753 F.2d 603, 604 (7th Cir. 1985); *LaMontagne v. American Convenience Prod., Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984).
158. 770 F.2d 93 (7th Cir. 1985).
159. *Id.* at 96 (citations omitted).
160. 761 F.2d 1210 (7th Cir. 1985).
161. *Id.* at 1215 n.5. *See also Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93 (7th Cir. 1985) (error for the district court to hold that plaintiff failed to make a prima facie showing of age discrimination because he failed to show replacement by a younger employee).
162. 769 F.2d 1215 (7th Cir. 1985).
163. *Id.* at 1217. *See Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982).
164. 769 F.2d at 1217.
165. *Id.* at 1222 (Flaum, J., concurring).
166. *Id.*
was in the protected age group, that he was performing according to his employer's legitimate expectations, and that he was discharged while younger employees either were retained to perform the plaintiff's job or permitted to transfer into some other job for which the plaintiff was qualified. Judge Flaum's approach seems much better suited to accomplish the purposes of *McDonnell Douglas* in light of the special circumstances surrounding a reduction in force.

The court dealt with both of the limitation periods which govern ADEA cases. In *Stearns v. Consolidated Management, Inc.* the court confirmed that the administrative filing requirements under the ADEA are not jurisdictional, and it reversed the lower court's dismissal for lack of subject matter jurisdiction. Since filing with the EEOC is not jurisdictional, questions frequently arise as to whether the 180 day period has been equitably tolled. More specifically, the question relates to the date the EEOC filing deadline begins to run. For example, in *Vaught v. R.R. Donnelley & Sons Co.* the plaintiff was demoted in October 1979 and knew he was being replaced by a younger employee. In December 1980 the plaintiff learned for the first time that the defendant had removed most middle-level managers over age fifty. He filed his EEOC charge within 180 days of December 1980, but more than 180 days from October 1979. The court adopted the test from *Reeb v. Economic Opportunity Atlanta, Inc.* which held that the EEOC filing deadline is tolled.

167. *Id.* at 1224. Utilizing his standard, Judge Flaum indicated the plaintiff had established a prima facie case of age discrimination, but he concurred in the result because the defendant provided a nondiscriminatory justification for the discharge and the plaintiff offered no evidence to show that the justification was a pretext. *Id.*

168. 747 F.2d 1105 (7th Cir. 1984).

169. The lower court dismissed for lack of subject matter jurisdiction because the charge had been forwarded to the EEOC by the state agency, rather than by the plaintiff. Noting that the ADEA is "humanitarian legislation that should not be construed in a hypertechnical manner," 747 F.2d at 1112, the Seventh Circuit held that the purpose of filing with the EEOC had been served, regardless of who forwarded the charge to the EEOC.

170. Under the ADEA, charges must be filed with the EEOC within 180 days, unless the state has an agency authorized to remedy age discrimination. 29 U.S.C. § 626(d). In *Anderson v. Ill. Tool Works, Inc.*, 753 F.2d 622 (7th Cir. 1985), the court held that in a deferral state, such as Illinois, the charging party does not have to file with the state agency, rather than by the plaintiff. Noting that the ADEA is "humanitarian legislation that should not be construed in a hypertechnical manner," 747 F.2d at 1112, the Seventh Circuit held that the purpose of filing with the EEOC had been served, regardless of who forwarded the charge to the EEOC.

171. 745 F.2d 407 (7th Cir. 1984).

172. 516 F.2d 924 (5th Cir. 1975).
until the time when "facts that would support a charge of discrimination were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff." Because the plaintiff was aware of facts in October 1979 which would support an age discrimination charge, his charge was untimely. It is not necessary that he be aware of facts sufficient to make out a prima facie case.

The ADEA also requires that suits be brought "within two years after the cause of action has accrued" unless there is a willful violation of the Act, in which case the limitations period is three years. The defendant in *Heiar v. Crawford County, Wisconsin* was precluded from arguing the statute of limitations defense in the court of appeals because, even though the county had raised it as an affirmative defense in the district court, the defense was subsequently abandoned and not preserved in the pre-trial order. The court also held that the district courts have discretion to award prejudgment interest in cases finding nonwillful violations of the ADEA to compensate plaintiffs for the delay in receipt of wages.

The underlying issue in *Heiar* was whether the county's mandatory retirement age of 55 for deputy sheriffs constitutes a bona fide occupational qualification within the meaning of a statutory exception provided in the ADEA. The defense was rejected because the employer did not present persuasive evidence that it needed a mandatory retirement age, as required by *Orzel v. City of Wauwatosa Fire Department*.

The county failed in this case to persuade the district judge that there was "a factual basis" for believing that "substantially all employees" aged 55 or older would be unable to perform their duties safely and efficiently because of the "particularly arduous" nature of the employment, and that medical or other objective tests to determine the capacity of older workers on an individual basis were infeasible. Also, the court rejected the defendant's argument based on the federal statute which generally requires federal law enforcement officers to retire at age fifty-five.

173. Id. at 931.
174. 29 U.S.C. § 255(a) (incorporated by 29 U.S.C. § 626(e)(1)).
175. 746 F.2d 1190 (7th Cir. 1984), cert. denied, 105 S. Ct. 3500 (1985).
176. Id. at 1201.
179. 746 F.2d at 1200.
180. 5 U.S.C. § 8335(b).
181. This is consistent with Johnson v. Mayor & City Council of Baltimore, 105 S. Ct. 2717 (1985), in which the Court held that the federal statute generally requiring federal firefighters to
The holding in *Heiar* is consistent with the recent decision in *Western Airlines v. Criswell* in which the Supreme Court rejected the airline’s bona fide occupational qualification defense for its requirement that flight engineers retire at age sixty. The Court held that the BFOQ exception was meant to be extremely narrow and when the BFOQ defense is based on safety interests, the relevant considerations are whether the job qualification is reasonably necessary to the overriding interest in public safety and whether the employer is compelled to rely on age as a proxy for the safety-related job qualification. As to the latter, the employer must establish either that it had reasonable cause to believe that all or substantially all persons over the age qualification would be unable to perform safely the duties of the job or that it is highly impractical to deal with the older employees on an individualized basis. Consistent with this, the Court held that the trial court properly rejected Western’s proposed jury instruction which would have allowed it to succeed on the BFOQ defense by proving “that in 1978, when these plaintiffs were retired, there existed a rational basis in fact for defendant to believe that the use of [flight engineers] over age sixty on its DC-10 airliners would increase the likelihood of risk to its passengers.”

### B. Title VII—Sex Discrimination

Two cases of sex discrimination, one challenging a denial of a promotion and the other claiming sexual harassment, will be discussed here. The plaintiff in *Caviale v. State of Wisconsin Department of Health & Social Services* claimed she had been denied a promotion because of the department’s decision to limit application eligibility for the new regional director position to current members of a career executive program, all of whom were men. The lower court ruled that she retire at age 55 does not establish, as a matter of law, that age 55 is a bona fide occupational qualification for nonfederal firefighters under the ADEA.

183. *Id.* at 2751-53.
184. *Id.* at 2753 (emphasis in original).
185. Other cases claiming sex discrimination in violation of Title VII include *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2023 (1985) (discharging the plaintiff because she was a transsexual does not constitute “sex” discrimination within the meaning of Title VII); *St. Louis v. Alverno College*, 744 F.2d 1314 (7th Cir. 1984) (plaintiff who moved but failed to advise the EEOC of the move does not have 90 days from actual receipt of the right to sue letter to initiate judicial proceedings); *Epstein v. Secretary, U.S. Dept. of the Treasury*, 739 F.2d 274 (7th Cir. 1984) (defendants articulated a legitimate, nondiscriminatory reason for not upgrading the plaintiff’s position, even though the position of a similarly situated male was upgraded, which was not a pretext for discrimination). In the latter case, the plaintiff’s Equal Pay Act, 29 U.S.C. § 206(d)(1), claim was also rejected because the lower court’s finding that the jobs did not involve equal work was not clearly erroneous.
186. 744 F.2d 1289 (7th Cir. 1984).
failed to establish a prima facie case and, even if she established such a case, the defendant met its burden of proving that its selection method was a business necessity. To establish a prima facie case, the court held that the plaintiff had to show (1) that she was qualified for the position of regional director,\(^{187}\) (2) that she is a member of a group protected under Title VII, and (3) that the challenged selection criterion imposed a disproportionate burden upon women qualified for the position.\(^ {188}\) Because the lower court found that the challenged selection criterion "substantially limited" the number of otherwise qualified women available to apply, more than it limited the number of qualified men, the court of appeals found that the plaintiff necessarily satisfied the third requirement.

As to the business necessity defense, the court found no evidence in the record showing membership in the career executive program was a job-related selection criterion. The record "fails to reveal a close match between the skills that the career executives possessed and the skills required in the position"\(^ {189}\) sought by the plaintiff. Even though the court found that the plaintiff had established liability for discrimination in violation of Title VII, it remanded the remedy question because the plaintiff is not entitled to lost wages if it turns out the male selected was better qualified for the position and would have been appointed even if the plaintiff had been allowed to compete. On this causation issue, the court held that the defendant must "bear the burden of proving [the plaintiff's] inevitable rejection."\(^ {190}\) The burden was allocated to the defendant because the facts relating to this issue are peculiarly within its knowledge.\(^ {191}\)

In *Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.*\(^ {192}\) the plaintiff claimed she was discharged by the defendant, because of her refusal to respond to the sexual advances of the plant superintendent, in violation of Title VII. On appeal the defendant challenged the liability determination on the basis of a lower court finding that the supervisory hierarchy above the plant superintendent neither knew nor approved of the superintendent's sexual misconduct. In rejecting the defendant's ar-

\(^{187}\) *Id.* at 1293. This requires only that she meet the "objective" qualifications, not the "subjective" qualities that the employer might find desirable. *Id.* at 1294.

\(^{188}\) *Id.* at 1293.

\(^{189}\) *Id.* at 1295.

\(^{190}\) *Id.* at 1296.

\(^{191}\) *Id.* See also *McDonald v. United Airlines, Inc.*, 745 F.2d 1081 (7th Cir. 1984), cert. denied, 105 S. Ct. 2139 (1985) (after liability has been established, International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), rather than Texas Dept of Community Affairs v. Burdine, 450 U.S. 248 (1981), controls the proof scheme for remedy issues).

\(^{192}\) 755 F.2d 599 (7th Cir. 1985).
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argument, the Seventh Circuit adopted the EEOC regulation which imposes strict liability on employers for the acts of sexual harassment committed by their supervisory employees. The court referred to several policy justifications for the EEOC regulation: (1) a company acts only through its supervisory personnel and when they have authority to hire and fire they are the company; (2) the doctrine of respondeat superior imposes liability on principals for the intentional torts of their agents; and (3) in passing Title VII Congress determined that employers, rather than the victims of discrimination, should bear the cost of remedying and eradicating employment discrimination. The court went on to reverse the district judge’s denial of back-pay, holding there were no “special factors” to justify the denial.

C. Racial Discrimination

Only two cases involving racial discrimination in employment will be discussed here. In Aguilera v. Cook County Police & Merit Board the court considered whether a county requirement that correction officers have a high school diploma or high school equivalency certificate satisfies the requirement that there be “a reasonably tight fit between the challenged criterion and the actual demands of the job.” Even though this requirement had not been “validated” and the record did not contain sworn evidence that the requirement of a high school

193. 29 CFR § 1604.11(c) (1985). The court expressly indicated it was not addressing the question whether actual or constructive knowledge is required to hold an employer liable for sexual harassment by a co-employee. 755 F.2d at 603 n.2. See Vinson, ADDENDUM, infra page 465.
194. 755 F.2d at 604-06.
195. This aspect of the case was remanded for further fact-finding. Because the plaintiff presented sufficient evidence to permit a reasonable estimate at lost wages, the burden shifted to the employer to rebut that evidence or show the plaintiff failed to take reasonable efforts to mitigate her loss. Id. at 606-08.
196. Two other cases involving racial discrimination, Mozee v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984), and Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985), involved the trial court’s weighing of the evidence and findings of fact. In the former, the judgment for the defendant was vacated and remanded for a new trial because the findings of fact were insufficient to permit meaningful appellate review. In a third case, Jones v. Madison Serv. Corp. & American Transit Corp., 744 F.2d 1309 (7th Cir. 1984), summary judgment for the defendant was upheld because the plaintiffs did not initiate the lawsuit within 90 days of receipt of the notice of right to sue letters by their attorney. The court held that the 90-day limitation period begins to run “on the date that the EEOC right to sue notice is actually received either by the claimant or by the attorney representing him in the Title VII action.” 744 F.2d at 1314. Finally, in Trigg v. Fort Wayne Community Schools, 766 F.2d 299 (7th Cir. 1985), the court held that a plaintiff claiming race and sex discrimination by her state government employer can sue under § 1983 claiming violations of the fourteenth amendment and thereby escape the comprehensive remedial scheme under Title VII, even if the same facts would give rise to a Title VII claim.
197. 760 F.2d 844 (7th Cir. 1985).
198. Id. at 847 (citing Caviale v. Wisconsin Dep’t of Health & Human Serv., 744 F.2d 1289, 1294 (7th Cir. 1984)). See supra notes 186-91 and accompanying text.
education is “job related,” the court upheld a grant of summary judgment in favor of the defendant. This was based on a

[p]resumption which we derived from the previous cases that requiring law enforcement officers to have a high school education is appropriate, here reinforced by the literature we have reviewed concerning the needs and practices in the selection of corrections officers around the nation, by the documents of record concerning the training and responsibilities of Cook County jail guards and by the requirement—not challenged as unreasonable—that such guards undergo college-level training, . . . .

In essence, the court decided there had been enough judicial and professional experience with educational requirements in law enforcement to establish a presumption in favor of such requirements and “to excuse civil rights defendants from having to prove, over and over again, that such requirements really are necessary for such jobs.”

This decision certainly makes it much less burdensome for defendants, particularly after extensive litigation regarding a requirement of employment, to show that a requirement is job related and necessary.

An issue of first impression was presented in Musikiwamba v. Essi, Inc., i.e., whether the successor doctrine applies to claims of employment discrimination brought under the Civil Rights Act of 1866. In holding that the doctrine can be applied to section 1981 claims for employment discrimination, the court focused on two critical factors. First, because the successor doctrine is derived from equitable principles, it is important to determine whether the successor company had notice of the charge or pending lawsuit prior to acquiring the business or assets of the predecessor. Second, it is important to determine whether the predecessor could have provided any or all relief to the plaintiff prior to the transfer of assets. Several other factors should be considered, but they “merely provide a foundation for analyzing the larger question of whether there is a continuity in operations and the work force of the successor and the predecessor employers.” The case was remanded to give the plaintiff an opportunity to amend the complaint to properly state a claim under the successor doctrine.

199. 760 F.2d at 847.
200. Id. at 848.
201. 760 F.2d 740 (7th Cir. 1985).
204. 760 F.2d at 751.
D. Title VII—Retaliation for Initiating Charges

Section 704(a) of the Civil Rights Act of 1964\(^{205}\) prohibits retaliation by an employer against employees for opposing unlawful employment practices. The plaintiffs in *Mozee v. Jeffboat, Inc.*\(^{206}\) alleged their employer retaliated against them for participating in protests against its treatment of black workers; the protests were held on workdays and required that participants be absent from work. The district court finding in favor of the employer was reversed. To prevail on the retaliation claim, the court indicated the plaintiffs "had to show, as a threshold matter, that they reasonably believed that Jeffboat practiced unlawful discrimination and that their opposition to the discrimination caused the employer to take the adverse action alleged."\(^{207}\) Concerning the possibility of disruption caused by the plaintiffs' absences, the court held that this should be balanced against the employees' interest in lawful opposition to employment discrimination. Therefore, an employee's refusal to report to work may be protected by the Title VII prohibition on retaliation so long as it is neither excessively disruptive nor unlawful.

E. Title VII—Application of Preclusion Principles

Discrimination charges filed under Title VII of the Civil Rights Act of 1964 frequently present preclusion issues because of the statutory requirement that charges be deferred to state agencies. In *Kremer v. Chemical Construction Corp.*\(^{208}\) the plaintiff pursued his discrimination charge through the New York administration agency and then appealed an adverse decision to the Appellate Division of the Supreme Court of New York. The state court unanimously "confirmed" the decision of the Agency Appeals Board holding that there had been no discrimination. Based on the federal statute which requires federal courts to give the same preclusive effect to state court judgments that they would be given

\(^{206}\) 746 F.2d 365 (7th Cir. 1984).
\(^{207}\) 766 F.2d 275 (7th Cir. 1985), the court held that a plaintiff, to make a prima facie case of retaliatory discharge, must show: "(1) He opposed an employment practice that was unlawful within the meaning of Title VII or he participated in a proceeding under Title VII; (2) he suffered an adverse action by his employer; (3) because of his opposition or participation." 766 F.2d at 280. The court upheld a grant of summary judgment for the defendant even though the plaintiff established a prima facie case because the defendants presented a legitimate, nondiscriminatory reason for its employment decision and the plaintiff failed to present evidence sufficiently substantial to raise a material issue of fact as to whether the defendant's proffered reason for its employment decision was pretextual. See also *Hearn v. R.R. Donnelley & Sons Co.* 735 F.2d 304 (7th Cir. 1984), cert. denied, 105 S. Ct. 1219 (1985) (lower court finding of retaliation reversed as clearly erroneous because the plaintiff failed to establish that the legitimate reason stated by the defendant for not hiring the plaintiff was merely pretextual).
\(^{208}\) 456 U.S. 461 (1982).
in the courts of the state, the Court concluded that the state court decision upholding the agency's rejection of the discrimination claim as meritless was entitled to preclusive effect in the federal court action under Title VII. In a footnote, the court in Kremer stated:

[s]ince it is settled that decisions by the EEOC do not preclude a trial de novo in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own court.

The Seventh Circuit, in Buckhalter v. Pepsi Cola General Bottlers, Inc., held that footnote 7 in Kremer refers only to a state administrative agency acting in its investigatory capacity, as opposed to its adjudicatory capacity. Therefore, because the plaintiff had a full and fair opportunity to litigate his claim of race discrimination before the Illinois Human Rights Commission, with thorough procedural and evidentiary safeguards, the court applied administrative res judicata and held that the Title VII action in federal court was precluded. The court indicated that its application of administrative res judicata should be narrowly construed and "used only in those situations where the state administrative agency, while acting in a judicial capacity, has reviewed the merits of the complainant's employment discrimination claim and has ruled that the evidence does not support such a claim."

A related issue arose in a Title VII action brought by a black police officer who was discharged following a hearing before the Civil Service Commission. During his hearing before the Commission he attempted to introduce evidence tending to show that white officers involved in activities as bad as or worse than his had not been recommended for discharge. The discharge was upheld in the plaintiff's appeals to the state courts. Because the plaintiff tried to raise his defense of racial discrimination, but neither the commission nor the state courts would consider it, the court

210. 456 U.S. at 470 n.7.
212. Id. at 854. Relying on McDonald v. City of West Branch, Mich., 466 U.S. 284 (1984), holding that arbitration is not a "judicial proceeding" within the meaning of § 1738, the court stated that § 1738 does not apply to this case. Instead it relied upon the judge-made doctrine of administrative res judicata. The court distinguished Patzer v. Board of Regents of Univ. of Wis. Sys., 763 F.2d 851 (7th Cir. 1985), where the plaintiff prevailed on his claim of discrimination before the Wisconsin Administrative Agency but did not receive back-pay because it was not authorized under Wisconsin law. This was affirmed by a state court, and the plaintiff then filed a state court complaint seeking damages and lost wages. The case was dismissed for lack of personal jurisdiction. He then filed an action in federal court under Title VII, seeking back-pay and the restoration of benefits. The court held that under Wisconsin law the second suit would not be barred by res judicata because the relief sought in federal court was not available in the state proceedings.
in *Jones v. City of Alton, Ill.* held he was not barred from litigating the racial discrimination claim in federal court.

V. ENFORCEMENT OF CIVIL RIGHTS

Only a few cases decided this term address significant enforcement issues. One of the cases, *Toledo, Peoria, & Western Railroad v. State of Illinois, Department of Transportation,* involved two issues which arise in § 1983 actions against state agencies and officials. The plaintiff sued the Illinois Department of Transportation, its secretary and two of its employees seeking damages and injunctive relief. First, the court held that state agencies are not "persons" for purposes of actions under section 1983. Based on this determination, it dismissed the section 1983 action against the state agency "for lack of federal court jurisdiction." The dismissal for lack of subject matter jurisdiction seems inappropriate. In determining whether a state agency is a "person" under section 1983, the court is interpreting a federal statute. This presents a federal question and the court has jurisdiction under section 1331 to determine whether the plaintiff states a claim. The more appropriate ruling would have been a dismissal for failure to state a claim under Rule 12(b)(6).

In the other aspect of the case, the court held that state officials are persons under section 1983, but applying *Pennhurst State School & Hospital v. Halderman,* it ruled that the eleventh amendment bars even injunctive relief against state officials based on state law.

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213. 757 F.2d 878 (7th Cir. 1985). The court distinguished *Lee v. City of Peoria,* 685 F.2d 196 (7th Cir. 1982), because there the discharged police officer made no attempt to raise his race discrimination claim before the Administrative Board which ruled on his discharge. *Cf. Vandenplas v. City of Muskego,* 753 F.2d 555 (7th Cir.), cert. denied, 105 S. Ct. 3481 (1985) (federal constitutional claims barred because they could have been raised as an affirmative defense to the reasonableness of a "raze order" issued by a state court).

214. 744 F.2d 1296 (7th Cir. 1984), cert. denied, 105 S. Ct. 1751 (1985).

215. Id. at 1299.


217. Fed. R. Civ. P. 12(b)(6). This approach is consistent with *Bell v. Hood,* 327 U.S. 678 (1946) (federal court has jurisdiction to determine whether the plaintiff states a cause of action under the constitution). The difference in the two approaches is that a dismissal under Rule 12(b)(6) represents a ruling on the merits of the claim as stated and would preclude relitigation of the same claim.


219. 744 F.2d at 1299. While the court is correct in holding that *Pennhurst* prohibits injunctive relief against state officials sued in federal court on state claims, it did not point out that the federal courts can award damages against such officials, in their individual capacity, based on violations of state law. This suggests the importance of indicating in the complaint the capacity in which government officials are sued — official, individual or both. In *Kolar v. County of Sangamon of the State of Ill.,* 756 F.2d 564 (7th Cir. 1985), the court noted that attorney fees under 42 U.S.C. § 1988 can be awarded only where officials are sued in their official capacity. Relying on *Hutto v. Finney,* 437 U.S. 678, 700 (1978), it held that fee awards against an official sued in his individual capacity are not governed by § 1988, but can be awarded under the traditional bad faith standard and paid by the individual official rather than the government employer. Addressing the problem created by unclear
In a lengthy opinion the court dealt with several enforcement issues raised by claims under 42 U.S.C. §§ 1981, 1983, 1985 and 1986. Daniel Bell was killed in 1958 while being chased by several Milwaukee police officers and this suit was filed by his sister and brothers on behalf of themselves, the estate of Daniel Bell and the estate of the now deceased father of Daniel Bell. Although the killing took place in 1958 and this action was not commenced until 1979, it was not barred by the statute of limitations because of the Wisconsin doctrine of estoppel by fraudulent concealment. The jury awarded $100,000 in compensatory damages and $25,000 in punitive damages to the estate of Daniel Bell for the loss of his life and enjoyment thereof; $75,000 in compensatory damages to the estate of Daniel’s father for loss of society and companionship; $100,000 to the siblings for loss of society and companionship; as a result of a conspiracy to cover up the facts of the shooting and killing, the estate of Daniel’s father was awarded $75,000 for deprivation of due process and $150,000 for deprivation of racial equality; as a result of the same conspiracy the siblings were awarded $540,000; finally, the jury awarded substantial punitive damages as a result of the conspiracy.

The primary issue in the case involved the relationship between Wisconsin wrongful death and survivor statutes and the federal civil rights statutes. In considering the appropriateness of the damage awards the court, as required by 42 U.S.C. § 1988, first looked to state law. Based on Robertson v. Wegmann the court outlined the process for selection of the appropriate substantive law in civil rights cases. First, it must be determined whether the civil rights acts are deficient in providing a particular rule. If yes, state law is examined to fill in the gaps in the federal provisions. Finally, state law must be disregarded in favor of federal law if the state law is inconsistent with the meaning and purpose of federal statutory and constitutional law.

Looking to Wisconsin law, the court found that its statutory scheme creates a survival action in favor of the estate for pre-death injuries and a wrongful death action in favor of the victim’s survivors, but neither action allows recovery of damages for loss of life itself. The court held the Wisconsin law is inconsistent with the deterrent policy of § 1983 and the fourteenth amendment’s protection of life, and therefore concluded that the Wisconsin law would not be applied to preclude the $100,000 damage

pleadings, the court indicated it will assume governmental officials sued under § 1983 are sued only in their official capacity unless the complaint expressly refers to their individual capacity as well. 756 F.2d at 568.

220. Bell v. City of Milwaukee, 746 F.2d 1205, 1231 (7th Cir. 1984).
award to Daniel Bell's estate for loss of life.\textsuperscript{222} For the same reason, an award of $25,000 in punitive damages to Daniel Bell's estate was upheld, even though Wisconsin law would not allow the victim's estate to recover such damages.\textsuperscript{223}

Regarding the jury award for loss of society and companionship, the court determined that Wisconsin law would preclude the siblings' recovery and allow the father's estate $25,000 at best. Before determining whether the limitations of Wisconsin law control, the court considered whether either the father or the siblings have a constitutional liberty interest in their association with Daniel Bell, such that application of Wisconsin law would be contrary to federal law. Indicating the Supreme Court has not addressed this question, the court reviewed decisions dealing with the family relationship and concluded that a father does have a liberty interest in the association with his son and therefore can recover under section 1983 for the unlawful breach of the parent-child relationship by virtue of the child's death.\textsuperscript{224} However, based on its review of these same decisions, the court concluded that siblings do not have a constitutional liberty interest in association with their brother.

The determination that the due process clause protects a parent's relationship with his child from unlawful interference for which section 1983 would appear to provide a remedy did not, however, end the inquiry. The court indicated it had to consider whether there is implicit in section 1983 a common law limitation on the remedy.\textsuperscript{225} After reviewing the history of section 1983, it concluded that there was no controlling common law operative at the time it was enacted which would bar the father's estate from recovering damages for loss of society and companionship.\textsuperscript{226}

Because several police officers had conspired to cover up the actions

\textsuperscript{222} 746 F.2d at 1234-41.
\textsuperscript{223} Id. at 1241.
\textsuperscript{224} Id. at 1242-45.
\textsuperscript{225} Id. at 1248-50. This is required, the court stated because § 1983 must be read against the "background" of common law tort remedies. See Smith v. Wade, 461 U.S. 30 (1983) (look to common law for standard of conduct regarding imposition of punitive damages); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (common law ruling shielding municipalities from punitive damages incorporated into § 1983).
\textsuperscript{226} 746 F.2d 1250. The court also considered the effect of the Wisconsin wrongful death statute which creates a hierarchy of beneficiaries; parents can recover only if the victim leaves no children or spouse; the victim's siblings are next in the order of recovery, eligible if the victim leaves no parents. The statute also limits recovery for loss of society and companionship to $25,000. The court found that under Wisconsin law the siblings could not recover for loss of society and companionship, a result consistent with its ruling under § 1983. After again considering the purpose of damage awards under § 1983, the court also concluded that the father's estate would not be bound by the state limitation on damages for loss of society and companionship and therefore affirmed the jury award of $75,000.
surrounding the death of Daniel Bell, the court held that the surviving siblings could recover under section 1985(3) for violation of their fourteenth amendment right to due process.\textsuperscript{227} The jury's award of compensatory damages for the conspiracy was affirmed and punitive damages were also awarded against several of the defendants, raising the question whether the city could be held liable for punitive damages assessed against individual police officers. The court first ruled that the Supreme Court decision in \textit{City of Newport v. Fact Concerts, Inc.},\textsuperscript{228} holding municipalities immune from punitive damages in a section 1983 action, applies to sections 1981 and 1985 as well. However, the court proceeded to rule that a Wisconsin statute, which provides indemnification by the political subdivision for a defendant public employee against whom a damage judgment is entered for activities within the scope of employment, waived the city's immunity under \textit{City of Newport}. Therefore, the City of Milwaukee is liable for the punitive damages assessed against two of the police officers.\textsuperscript{229}

Finally, the court held that Milwaukee County could not be held liable for the activity of the district attorney because the evidence did not indicate that his conduct constituted a custom, policy, or practice of the county under \textit{Monell v. Department of Social Services}.\textsuperscript{230} The district attorney's participation in the conspiracy was simply conduct in a single case, and the court held that a custom, policy or practice could normally not be inferred from a single incident of unconstitutional behavior.\textsuperscript{231}

The court considered attorney fee issues under 42 U.S.C. § 1988 in several cases, but did not decide any important questions. In \textit{Lynch v. City of Milwaukee}\textsuperscript{232} the court indicated that the decision in \textit{Hensley v. Eckerhart}\textsuperscript{233} requires two modifications to the Seventh Circuit's previous

\textsuperscript{227} \textit{Id.} at 1260-65. The court held that the conspiracy deprived the siblings of property without due process of law and obstructed their right of access to the courts in that the conspiracy prevented the prosecution of a valid claim.

\textsuperscript{228} 453 U.S. 247 (1981).

\textsuperscript{229} 746 F.2d at 1268-72. \textit{See also} Kolar v. County of Sangamon of the State of Ill., 756 F.2d 564, 567 (7th Cir. 1985).

\textsuperscript{230} 436 U.S. 658 (1978).

\textsuperscript{231} 746 F.2d at 1272. Several other cases dealt with the related question of whether a supervisor, employed by a municipality, could be held liable for the actions of one of the employees supervised. In McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984), the court recognized that § 1983 does not impose strict liability on the supervisor, but the supervisor is liable if "he was negligent, whether in selecting or supervising or failing to discharge his subordinates, and that his negligence was causally related to their more direct wrongdoing." 750 F.2d at 1391. \textit{See also} Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985) (sufficient evidence to link the Director of the Illinois Department of Corrections to the continued punitive segregation of the plaintiff); Harris v. Greer, 750 F.2d 671 (7th Cir. 1984). \textit{See Pembaur, ADDENDUM, infra} page 465.

\textsuperscript{232} 747 F.2d 423 (7th Cir. 1984).

\textsuperscript{233} 461 U.S. 424 (1983).
approach. First, Hensley implicitly rejected the position that fees should be awarded only for those specific claims on which the plaintiff prevailed, and second it emphasized that considerable attention must be given to the relationship between the extent of success and the amount of the award.234 In another case, McKinnen v. City of Berwyn,235 the court recognized that the Supreme Court in Blum v. Stenson236 left open the question whether the risk of losing is a permissible factor in considering a prevailing plaintiff’s request for use of a multiplier or a bonus in assessing fees, but affirmed its earlier holding that the risk of losing alone does not justify the use of a multiplier.237 Finally, in Lampher v. Zagel238 the court, relying on New York Gas Club, Inc. v. Carey,239 held that a federal court plaintiff could recover fees under section 1988 for time spent in a related state court proceeding, initiated by the federal court defendants, because the efforts in the state court contributed to the favorable outcome.

ADDENDUM

The three affirmative action cases, discussed at pp. 447-451 were decided as follows: in Wygant v. Jackson Board of Education,240 the Court without reaching a consensus as to the standard of review, reversed the Sixth Circuit and invalidated the no-minority layoff provision; in Local 28 of Sheet Metal Workers v. EEOC,241 it upheld the minority hiring goal, rejecting the victim specificity requirement discussed in the text; and in Local No. 93 v. City of Cleveland,242 it held that consent decrees are to be treated as voluntary affirmative action plans, not limited by the constraints imposed on a court's remedial power.

The following three Supreme Court decisions are also relevant to issues discussed above at pp. 456-57, Meritor Savings Bank, FSB v. Vinson,243 (sexual harassment creating a hostile environment violates Title

235. 750 F.2d 1383 (7th Cir. 1984).
237. 750 F.2d at 1392. See Bonner v. Coughlin, 657 F.2d 931, 936 (7th Cir. 1981); In re Ill. Congressional District’s Reapportionment Cases, 704 F.2d 380, 382 (7th Cir. 1983).
238. 755 F.2d 99, 103 (7th Cir. 1985).
VII and the liability of employers is governed by agency principles); at pp. 459-60, *University of Tennessee v. Elliott*, 244 (unreviewed decision of state administrative agency acting in a judicial capacity does not have preclusive effect on Title VII claims); and at p. 464, *Pembaur v. City of Cincinnati*, 245 (single act of policymaking official sufficient to give rise to municipal liability).

244. 106 S. Ct. 3220 (1986).
245. 106 S. Ct. 1292 (1986).