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Current Developments in Civil Liberties

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CURRENT DEVELOPMENTS IN CIVIL LIBERTIES

By

IVAN E. BODENSTEINER*  ROSALIE BERGER LEVINSON**

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I. SUITS UNDER THE FIRST AMENDMENT

A. Pleading and Proving Retaliatory Discharge—Less Protection for Government Employees

The Seventh Circuit, as well as the Supreme Court this past term, decided retaliatory discharge cases in which they limited the first amendment freedoms of government employees. The decisions appear to mark a trend away from previous case law which broadened the protection afforded the speech and expressive activities of government workers. In the Seventh Circuit decision of *McClure v. Cywinski* an employee claimed that he was discharged for refusing to become involved in politics. He had overheard a telephone conversation in which his employer commented that although one employee who was a senator’s friend was working out well, the plaintiff was “just a window dressing” who he would get rid of later. Further evidence in the case indicated that plaintiff was assigned a small amount of work, that a secretary kept a log of his comings and goings, that his office conditions were substandard, etc. Plaintiff then taped a telephone conversation between himself and the defendant in which the defendant told him he had to cancel a planned trip. After plaintiff tried to play the tape for the agency director, he was terminated. The jury returned a verdict in favor of the plaintiff, awarding $50,000 compensatory and $75,000 punitive damages. The court then granted defendant’s motion for judgment n.o.v.

In its analysis the Seventh Circuit began by assuming that abstention from politics constitutes protected activity. The correctness of this assumption is reflected in the recent Supreme Court decision of *Connick v. Myers* holding that “official pressure upon employees to

1. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (finding that a public school teacher could not be dismissed for writing a letter to a local newspaper criticizing the School Board’s allocation of funds); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977) (holding that once an employee shows that his conduct was a motivating factor in a termination decision, the defendant must establish by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct); *Givhan v. Western Line Consolidated School*, 439 U.S. 410 (1979) (protecting the right of a school teacher to contribute to public debate, even if such takes place in a private setting).

2. 686 F.2d 541 (7th Cir. 1982).

3. Id. at 543.

4. Id. at 544. See also *Perry v. Local Lodge 2569 of Int’l Ass’n of Mach.*, 708 F.2d 1258 (7th Cir. 1983), holding that a preliminary injunction was warranted in that plaintiff showed a reasonable likelihood of establishing that the union’s “agency shop” provision was inadequate to protect her first amendment right not to be coerced into financing the union’s political objectives.

work for political candidates... constitutes a coercion of belief in violation of fundamental constitutional rights.” The Seventh Circuit went on to find, however, that the district court properly granted judgment n.o.v. for the following reasons: first it found that plaintiff probably failed to prove that his unwillingness to work in a political atmosphere was a motivating factor in his discharge; that while a reasonable juror could have found that political considerations were important to the employer in that he hired other employees as political favors, this does not necessarily establish that politics was a motivating factor in the decision to dismiss the plaintiff. The court stated that even if plaintiff established that his apolitical activity “played some minor role in the discharge decision,” the district court judge correctly concluded that no reasonable juror could find that plaintiff satisfied the standard of proving his protected activity was a “motivating factor.” Further, even if the jury could reasonably have concluded that McClure’s dislike of politics in the workplace was a motivating factor in his dismissal, the jury could not reasonably have found that the agency would have retained the plaintiff despite the illegal tape recording incident.

In granting judgment n.o.v., the court is to view all facts in the light most favorable to the party opposing the motion and it is to allow a jury verdict to stand if it is supported by circumstantial evidence. The Seventh Circuit in a retaliatory discharge suit decided the previous term, Egger v. Phillips held that a district court erroneously granted summary judgment in favor of the defendant where the record indicated a genuine issue of fact as to motive. In that opinion the Seventh Circuit stated that it sufficed that the evidence submitted by the plaintiff raised an inference that he would not have been transferred but for his first amendment activity. It also criticized the district court for weighing the evidence regarding plaintiff’s activities where issues of motivation were involved. It would appear that the “window dressing” comment as well as some of the other evidence introduced by the plaintiff in this case clearly sufficed to support a jury verdict that plain-

6. Id. at 1691.
7. 686 F.2d at 545-46.
8. Id. at 546-47.
9. Id. at 548.
10. Konczak v. Tyrrell, 603 F.2d 13, 15 (7th Cir. 1979). See also Freeman v. Franzen, 695 F.2d 485, 489 (7th Cir. 1982), holding that a district court is not free to set aside the jury’s verdict provided plaintiff’s version of the facts is “not patently absurd.”
11. 669 F.2d 497 (7th Cir.), rev’d on other grounds (en banc), 710 F.2d 292 (1982).
12. 669 F.2d at 503.
13. Id.
tiff’s apolitical stance was a motivating factor in his discharge. The distinction the court appears to draw between “some minor role” and “a motivating factor” is unclear. Further the court’s willingness to “re-weigh” the motivation question and overturn the jury verdict in light of the record is troublesome.

In any event, the court proceeded to conclude that the jury’s verdict could not stand because the plaintiff failed to show a causal relationship between the defendant’s conduct and plaintiff’s claimed constitutional deprivation. The facts indicated that the taping incident wherein plaintiff presented an illegally taped conversation of the defendant to the agency director was the real cause for dismissal, and that it was the agency director alone and not the defendant who was responsible for the discharge. The court stated the general rule regarding uncontradicted evidence, i.e., that such testimony which stands uncontradicted and which is in no way discredited, must be taken as true and that no judgment can be permitted to stand against it. In this case, the agency director specifically testified that he decided to fire the plaintiff because of the taping incident and nothing in the record contradicted his testimony, nor was there any reason to doubt the credibility of his testimony. Of course, the court’s addition of this argument for sustaining the district court’s action—a theory never discussed below—does not mitigate the blow the court has struck to the expressive freedom of government employees.

Government workers fared no better in the Supreme Court this term. In Connick v. Myers an employee in the District Attorney’s office was discharged for an alleged act of insubordination, i.e., circulating a questionnaire concerning the office’s transfer policy, office morale, political pressure, etc. The district court found that the questionnaire involved matters of public concern and the state had not clearly demonstrated that it interfered with the operation of the employer’s office. The Supreme Court reversed, finding that the employee’s speech concerned primarily a matter of personal interest, in that the questionnaire came immediately following plaintiff’s opposition to a recommended transfer to a different division, and it was, therefore, entitled to less protection. The Court conceded that the

14. 686 F.2d at 548-50.
15. Id. at 548, citing, Chicago, Rock Island and Pacific Railroad Co. v. Howell, 401 F.2d 752, 754 (10th Cir. 1968).
16. 686 F.2d at 549.
18. Id. at 1686-87.
19. Id. at 1690-91.
questionnaire played a part in the dismissal and that the employer could not have proved a Mt. Healthy defense—that plaintiff would have been discharged based simply on her refusal to accept the transfer order. It held, nonetheless, that the termination was justified.\textsuperscript{20}

Several circuit courts have held that once a plaintiff shows that protected speech was a motivating factor in a discharge decision, the state must prove substantial interference with the operation of its office in order to justify such a dismissal.\textsuperscript{21} The Supreme Court, however, rejected such a heavy burden and instead relied on a broader balancing approach, looking to the nature of the employee’s expression as well as the context in which such expression occurs.\textsuperscript{22} Concluding that the protected status of speech is a question of law, not of fact, the Supreme Court was free to review the district court decision without adhering to the clearly erroneous standard.\textsuperscript{23}

The Court’s decision is troublesome for two reasons. First its new emphasis on whether the employee’s speech addresses a matter of public concern suggests a very dangerous precedent, one which narrows the class of subjects on which public employees may speak without fear of retaliatory discharge. The questionnaire which the plaintiff circulated concerned matters of office morale and the conduct of elected officials—matters which presumably could be viewed to be of public concern. As the dissent suggests, federal judges should be extremely sensitive in determining what is a matter of public concern and should broadly rather than narrowly construe the concept.\textsuperscript{24} The majority’s characterization of the incident as simply an extension of plaintiff’s dispute over her transfer is a troublesome conclusion in light of the lower court’s findings.

The decision also breaks with tradition in its rejection of the stricter burden that most circuit courts impose on the defendant once a finding of protected speech has been made.\textsuperscript{25} Instead of requiring the “material and substantial interference standard,” the majority resorts to its earlier Pickering decision suggesting a balancing approach which examines all factors surrounding the communication.\textsuperscript{26} In light of the

\begin{itemize}
\item \textsuperscript{20} Id. at 1694.
\item \textsuperscript{21} Kim v. Coppin State College, 662 F.2d 1055, 1065 (4th Cir. 1981); Key v. Rutherford, 645 F.2d 880, 885 (10th Cir. 1981); Van Ooteghem v. Gray, 628 F.2d 488, 492 (5th Cir. 1980), cert. denied, 455 U.S. 909 (1980); Rosada v. Santiago, 562 F.2d 114, 117 (1st Cir. 1977).
\item \textsuperscript{22} 103 S. Ct. at 1690.
\item \textsuperscript{23} Id. at 1690 n.7.
\item \textsuperscript{24} Id. at 1698-99 (Brennan, J., dissenting). The dissent contrasts the Supreme Court’s recent rejection of the task of determining what is a matter of concern in the defamation area. Id.
\item \textsuperscript{25} See supra note 20 and accompanying text.
\item \textsuperscript{26} 103 S. Ct. at 1691-92, citing, Pickering v. Board of Educ., 391 U.S. 563 (1968).
\end{itemize}
district court's findings that no concrete evidence had been presented indicating disruption of the office, impairment of plaintiff's working relationship with her superiors, nor any evidence that plaintiff's work performance was in any way hampered, the Supreme Court apparently relies on "apprehension of disruption" as sufficient to justify retaliatory dismissals. The majority argues that an employer should not have to wait for actual office disruption or the destruction of working relationships prior to taking action. This standard, however, gives employers unbridled discretion to censor speech based on speculative fears of disruption, contrary to the Supreme Court's decisions in such cases as *Tinker v. Des Moines Independent Community School District* holding that "undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression."

The *Connick* case is especially troublesome because the questionnaire sought out information which could prove to be quite valuable to the public in evaluating the performance of its elected officials. The decision obviously deters employees from engaging in such conduct. It makes it clear that a *Pickering* defense is a potentially strong weapon that can be used in addition to the *Mt. Healthy* defense in justifying government action against its employees.

**B. Access to Public Forums for the Expression of First Amendment Rights**

A second interesting case in the first amendment area concerns the validity of the Illinois Election Code and its rationing of access to the ballot by those who wish to pose questions to the electorate. The provision was being challenged by the DuPage County Citizens For Nuclear Arms Freeze who wanted a question on the ballot seeking citizen endorsement of a freeze on further testing, production and deployment of nuclear weapons. The Illinois Code permits private groups to get advisory questions placed on the ballot in a local political subdivision

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27. 103 S. Ct. at 1700-01 (Brennan, J., dissenting).
28. *Id.* at 1692.
30. *Id.* at 508.
31. Contrast the recent Fifth Circuit decision of Williams v. Board of Regents, 629 F.2d 993 (5th Cir. 1980), *cert. denied*, 452 U.S. 926 (1981), in which the Fifth Circuit upheld the trial court's refusal to even submit the issue regarding the protected status of the speech to a jury. Once it found that the speech involved a matter of public concern, the court ruled that a *Pickering* defense was unavailable as a matter of law. In *Connick* the Supreme Court conceded that at least some of the speech involved a matter of public concern, and yet it engaged in a balancing to conclude that first amendment rights were not violated.
32. Georges v. Carney, 691 F.2d 297 (7th Cir. 1982).
election, but it requires the signatures of twenty-five percent of the registered voters to do so. In addition, it limits the number of questions that can be placed on the ballot to three, the first three submitted. Furthermore, public bodies, such as the County Board, are not required to obtain any signatures in order to submit a question and thus they have a clear advantage over a private group in getting their questions before the electorate.

Last term the Seventh Circuit dealt with a similar question regarding access to so-called public forums. In *Perry Local Educators’ Association v. Hohlt*, it considered the question of access to a school district’s internal mail system by groups other than the major teachers’ union. Pursuant to a collective bargaining agreement between the union and the school board, all competing unions were denied access to the mail system. The Seventh Circuit characterized the decision as a case involving “equal access” rather than focusing on the nature of the forum, i.e., once the school system made available a forum for the expression of first amendment rights, it could not discriminate among ideas or among speakers without satisfying strict scrutiny analysis. It stated that “[d]iscriminatory treatment of speech on the basis of its content or on the basis of the identity of the speaker usually requires rigorous scrutiny because it presumptively violates the first amendment’s primary and overriding proscription against censorship.”

The Illinois Code challenged here would appear to raise similar questions of equal access and censorship, in light of the fact that public bodies need not satisfy the signature requirement and can in effect preempt a private group’s ability to get questions on the ballot. In fact a few years earlier the County Board had met one day prior to the filing deadline and had in a span of fifteen minutes added eleven questions on the ballot, thus preempting the citizen group that was proposing a ballot question on property tax reductions. Although the latter question was a binding as opposed to an advisory question and thus the signature requirement was less, the point is that the public body could preclude private citizen access because of the first-come-first-served rule. The Seventh Circuit nonetheless departed from its earlier analysis in *Perry* and found no first amendment violation due to the “nonpublic” nature of the forum.

33. 652 F.2d 1286 (7th Cir. 1981).
34. *Id.* at 1300.
35. *Id.* at 1293.
36. 691 F.2d at 303 (Cudahy, J., dissenting).
37. *Id.* at 302.
Ironically, at the same time *Georges* was decided, the Supreme Court was reversing the Seventh Circuit’s holding in *Perry*. The Court specifically rejected the Seventh Circuit’s characterization of the case as an equal access decision. Instead it held in a 5-4 opinion that the case did not involve a public forum and therefore the policy only had to be “reasonable.” Since it found no indication of discrimination on the part of the School Board, nor an intent to discourage any particular viewpoint, it upheld the differential access as reasonable and as consistent with the school district’s interest in preserving the property for the use to which it was lawfully intended, i.e., enabling the recognized union to perform its obligation as the exclusive representative of all teachers. Having rejected the first amendment argument, the Supreme Court summarily dismissed the equal protection claim, again applying simple rational basis analysis.

The Seventh Circuit’s analysis in *Georges* was quite similar. It reasoned that since there is no constitutional right to use the ballot box as a forum for advocating policies, the state was under no obligation to allow advisory questions to be placed on the ballot. The ballot is not a vehicle for communicating messages but rather a vehicle for putting questions and laws to the electorate. Conceding that the twenty-five per cent requirement made it “practically impossible” to get advisory questions on the ballot, the Seventh Circuit nonetheless reasoned that since the county could have totally prohibited such questions, the twenty-five percent rule was permissible. It did caution, as the Supreme Court had in *Perry*, that there was nothing in the record indicating public censorship of ideas, i.e., public bodies had never tried to submit advisory questions and there was no indication that this device was being used by the county to take sides on particular issues. Thus Illinois was not discriminating either directly or indirectly against the free expression of controversial ideas. It was simply “not providing a novel forum for advocating ideas.”

Again following the Supreme Court’s analysis in *Perry*, the Seventh Circuit went on to hold that in the absence of viable first amendment claims, charges of discrimination would be disposed of on a

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38. 103 S. Ct. 948 (1983).
39. *Id.* at 957.
40. *Id.* at 958.
41. *Id.* at 959-60.
42. 691 F.2d at 300-01.
43. *Id.* at 301.
44. *Id.* at 302.
It generally found that public bodies should be entitled to more liberal access to the ballot since their resolutions have a "presumptive democratic legitimacy," that is lacking with regard to private citizen groups. Since the plaintiffs were thus unlikely to prevail in a full trial on their complaint, the court affirmed the district court's denial of preliminary relief.

Although the Seventh Circuit's analysis in Georges appears to follow very closely the Supreme Court's position in the recent Perry case, the challenged provision would appear to be problematic even applying the minimal rationality standard. As the dissent persuasively argues, the majority in upholding the twenty-five percent signature rule in effect has condoned the state's right to ostensibly grant a right of access and at the same time to make that access wholly illusory. The dissent also notes the arbitrariness of the three question limit which, when combined with the first-come-first-served principle and the fact that local governing bodies do not have to comply with the twenty-five percent rule, makes it quite possible and likely that the county board may preempt the ballot spaces at its whim. The dissent points to the 1980 incident discussed previously as an indication of the censorship problems raised by the Illinois Code.

Although the state has an obviously legitimate objective in maintaining an orderly advisory question system, the means it has chosen are totally irrational in that they effectively preclude citizen sponsors' advisory questions from ever getting on the ballot. Accepting the majority's analysis, one would have to conclude that the state never really intended to give citizens any access to the advisory questions system and that the twenty-five percent rule was a rational means of affecting this denial—clearly an illogical explanation of the state legislative enactment. As the dissent notes, "... we cannot approve a statutory technique the disingenuousness of which, as described by the majority, combines an apparent opportunity to speak with a real commitment to silence. The state has furnished a 'soap box' fashioned of papier-mache."

45. Id.
46. Id.
47. Id. at 303 (Cudahy, J., dissenting). "A state cannot simultaneously provide an avenue of political expression and burden its use with conditions that, as the majority concedes, can never be met." Note that the district court struck the 25 percent rule, although it concluded that plaintiffs were not entitled to relief due to the valid three question limit, which would have in any event precluded plaintiffs' access to the ballot.
48. See supra note 35 and accompanying text.
49. 691 F.2d at 304-05 (Cudahy, J., dissenting).
Both the twenty-five percent rule, as well as the clear opportunity for government censorship posed by the three question limitation combined with the first-come-first-served principle that can be manipulated by the local governing board, pose serious first amendment questions which hopefully will be addressed more closely on remand. Unlike the facts in *Perry* where government never fully opened the forum, here Illinois has ostensibly created a public right of access to the ballot on the part of citizen groups where advisory questions can be raised, and yet at the same time its regulations render the forum illusory. The total arbitrariness and irrationality of the provision is obvious. The fact that a citizen group seeking a proposed question on property tax reductions was in fact precluded in 1980 by an eleventh hour meeting of the county board indicates the real threat of government censorship posed by the statute.

C. Freedom of Religion: Balancing Religious Freedom Against Legitimate State Concerns

In the case of *Menora v. Illinois High School Association*, plaintiffs were a group of orthodox Jews who challenged the Illinois High School Association’s (IHSA) rule forbidding basketball players from wearing hats or other head wear. As stipulated by the parties, orthodox Jewish males are required by their religion to wear a head covering at all times, i.e., a small skull cap that covers the crown of the head. Thus the Association rule requires the plaintiffs to choose between their religious observance and participating in interscholastic basketball. The district court held that the hazards posed by the skull caps (yarmulkes) were too slight to justify putting the plaintiffs to this choice. After full trial, the record failed to disclose even a single instance of a basketball player slipping on or being injured by such a head covering. It thus concluded that the unsubstantiated concern for safety did not justify the rule’s burden on religious freedom.

While conceding the impermissibility of such a choice, the Seventh Circuit characterized the issue quite differently. It argued that plaintiffs could obviate the state’s concern with safety by simply devising a method of affixing a head covering that would prevent it from falling off during the basketball game. The majority reasoned that the rule would then pose no burden at all to religious freedom. The Seventh

50. 683 F.2d 1030 (7th Cir. 1982), cert. denied, 459 U.S. 1156 (1983).
52. *Id.*
53. 683 F.2d at 1035.
Circuit rejected the district court's conclusion that lack of evidence as to safety hazard justified judgment for the plaintiffs, arguing instead that "[t]he state need not await disaster to regulate safety." 54 It noted instead that the state's concern, even if relatively slight, would be compelling in relation to what it described as a "non-burden" on the plaintiff's religious freedom. 55 In short, the plaintiffs had no constitutional right to wear yarmulkes insecurely fastened by bobby pins and thus they could not complain if the Association refused to let them do so. Rather than dismissing the case, however, it held that the district court should retain jurisdiction to give plaintiffs the opportunity to propose to the Association a form of secure head covering. 56 It cautioned the Association at the same time that its continued refusal to interpret or amend its rule to permit such a head covering would no doubt result in reinstatement of an adverse judgment against it. 57

The Seventh Circuit's rather novel approach to the balancing question, although somewhat interesting, appears to have little foundation in law. Following a full trial, the district court concluded that the state failed to justify its interference with free exercise. As the dissent notes, the greatest problem with the majority decision is that it requires the plaintiffs now to take additional affirmative steps despite the defendant's intransigence as to application of its rule. 58 Indeed, the National Federation of State High School Associations which governs the IHSA specifically responded to the yarmulkes rule by saying that the head gear is illegal regardless of the method of attachment. 59 Further, the Association's failure to substantiate its safety concern should have resulted in affirmance of the lower court ruling. In short, although the majority has perhaps devised an efficient and pragmatic resolution of competing interests, it is doubtful that this is a proper role for the court to play.

D. Religious Freedom in the Prison Context

The Seventh Circuit decided two rather interesting cases involving the free exercise rights of prisoners. 60 In the first case, Madyun v. Fran-

54. Id. at 1034.
55. Id.
56. Id. at 1035.
57. Id. at 1034.
58. Id. at 1037 (Cudahy, J., dissenting).
59. Id.
60. The Seventh Circuit decided a third case, Garza v. Miller, 688 F.2d 480 (7th Cir. 1982), cert. denied, 459 U.S. 1150 (1983), involving a challenge to various conditions in a prison, including the absence of religious services. Plaintiff, an Orthodox Jew, alleged that a rabbi never visited
zen,61 a prisoner claimed that he was punished for his refusal to submit to a “frisk search” by a woman guard even though the refusal was based on his Islamic faith forbidding physical contact with a woman other than a wife or mother.62 The Seventh Circuit noted the absence of precise guidance from the Supreme Court as to the proper standard for analysis of prisoner free exercise claims. The Supreme Court did hold in Cruz v. Beto,63 that “reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the first and fourteenth amendments without fear of penalty.” The Court, however, was simply reversing the lower court’s dismissal for failure to state a claim upon which relief could be granted and remanding the case for a hearing on the merits. The lower courts have totally divided on the question of the appropriate standard to be used in prisoner religious freedom cases.64 Some appellate courts have analyzed prisoner free exercise claims under the compelling state interest standard utilized by the Supreme Court in non-prison cases,65 while other courts have utilized a mere reasonableness test, affording extreme deference to prison officials.66 The Seventh Circuit specifically rejects both of these analyses and instead opts for the Second Circuit’s use of an intermediate approach, one requiring that prison rules be justified by an important objective and that the restraint on religious liberty be reasonably adapted to achieving that objective.67

Applying the newly articulated standard to the present fact situation, the Seventh Circuit concludes that the state does have a substan-

Marion, nor were religious services conducted or religious holidays observed. The court in a cursory response indicated that the record failed to show any requests for religious observances. Although stating the Supreme Court standard from Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972), that “reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth amendments without fear of penalty,” the record failed to establish that prison officials had denied plaintiff such a reasonable opportunity. The lack of programs was attributable to the lack of request, and not any affirmative refusals by prison officials. Compare the earlier decision of Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967), upholding prisoner’s rights to religious services.

61. 704 F.2d 954 (7th Cir. 1983).
62. Plaintiff was sentenced to 15 days in segregation for his refusal to submit to the search. Id. at 956.
63. 405 U.S. 319, 322 n.2 (1972).
66. See cases cited in n.7 of court’s opinion.
tial interest in having its women guards perform frisk searches on male inmates. It notes that if women are not allowed to perform such tasks their utility and thus their job opportunities would be significantly diminished, contrary to the state’s important interest in providing equal opportunity for women.

Although the Seventh Circuit should be commended for adopting an intermediate approach to religious freedom cases, i.e., recognizing that a prisoner doesn’t totally relinquish constitutional rights upon his incarceration, the application of its standard is questionable. The court in a rather cursory fashion asserts the state’s interest in avoiding illegal sex discrimination as a justification for the religious interference alleged here. Although the state obviously does have a substantial interest in avoiding sex discrimination in the employment of guards, and a total prohibition against women performing searches would limit their job opportunities, the prisoner seeks only to limit such functions when sincere religious objection is voiced. The facts indicated that a male guard was present who easily could and in fact in this particular case did perform the search. Thus it is questionable as to whether the prisoner indeed is asking the state to violate its goal of sexual equality by simply seeking this very narrow and limited exception. In other words, how significant is the state’s interest in having its women guards perform frisk searches over the sincere religious objection of male inmates when in fact male guards are available? Viewed in this light the substantiality of the state’s interest is clearly diminished.

In the second prisoner religious freedom case decided two weeks after Madyun, Childs v. Duckworth, the Seventh Circuit utilized a somewhat different standard for reviewing such cases. Although the prisoner’s religious claim—the right to practice Satanism—was more bizarre and the state justifications much more critical, the interesting part of the case is its discussion of the proper standard of review. Whereas the earlier Madyun decision uses an intermediate approach, the Seventh Circuit in this case states the issue as whether the restriction imposed on religious beliefs was “necessary for the operational security of the prison.” It specifically states that prison restrictions

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68. 704 F.2d at 960.
69. Id. at 956.
70. 705 F.2d 915 (7th Cir. 1983).
71. See supra note 65 and accompanying text.
72. 705 F.2d at 920. Note that the Seventh Circuit does begin its discussion by recognizing the less protected status of religious freedom in the prison context, requiring that competing interests be mutually accommodated. Id. at 920-21. Later, in justifying some of the restrictions the court finds that the authorities “reasonably” refused to accommodate the plaintiff’s requests. Id.
must be carefully scrutinized “to ascertain the extent to which they are necessary to affectuate the legitimate policies and goals of the corrections system.” The continued use of the term “necessary” following the lengthy discussion and adoption of a lesser standard two weeks previously is unfortunate. Although it is perhaps true that regardless of the semantics the judges in fact engage in a balancing of interests, the use of such terms as “necessity” vs. “intermediate scrutiny” have been given legal significance by our courts and thus should be employed cautiously. Had the challenges in the Madyun decision been tested by the standard articulated in the subsequent Childs decision, the plaintiff perhaps would have had a greater chance to succeed, i.e., it would have been difficult to show the “necessity” of interfering with the religious freedoms of the prisoner in that case.

In Childs on the other hand, the Seventh Circuit had little difficulty justifying the state’s refusal to accommodate the prisoner’s request. As to his desire to have organized religious services, the court reasoned that the plaintiff’s refusal to provide the name of a sponsor as well as information concerning the proposed activities of the group presented a potential security threat to the institution and thus was justifiable. There were further findings that Childs was the only inmate making requests for satanic meetings and that the authorities doubted the sincerity of his professed beliefs. The prison was justified in prohibiting Childs’ use of candles and incense in his cell based on the manifest fire hazard posed by such objects and the fact that incense can be used to mask the odor of illegal substances. The court proceeded to uphold other prohibitions by prison authorities as both necessary and reasonable for the security of the institution.

at 921. The ultimate conclusion, however, was that the prohibitions were “reasonable and necessary” for the security of the institution, thus suggesting a stricter analysis. Id. at 923.

73. Id. at 920.
74. Id. at 921.
75. Note that contrary to the district court, the Seventh Circuit correctly avoided the difficult question of determining whether Satanism, more specifically Child’s belief in Satanism, was a religion. The district court failed to heed Justice Burger’s cautionary note in Thomas that courts should not use their own perceptions as to belief or practice and that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714 (1981).
76. 705 F.2d at 922. The court upheld the denial of Child’s order of a crystal ball because such could be used as a weapon, as well as his desire to borrow books for group study since he was permitted to order and in fact purchase titles for his own use. Id. at 921-22. As to the latter, the Seventh Circuit found no constitutional violation for refusing his request to order books for other inmates.
II. THE DUE PROCESS CLAUSE

Several cases decided by the Seventh Circuit this term dealt with due process challenges. While some of the decisions raise the question of vague and fundamentally unfair enactments, most concern the problem of identifying property or liberty interests which would trigger procedural due process safeguards. Several cases also discuss the relevance of the existence of state remedies as affecting due process challenges, thus continuing the debate begun by the Supreme Court in *Parratt v. Taylor*.

A. Vagueness and Fundamental Fairness Challenges under the Due Process Clause

The Seventh Circuit confronted several due process challenges to drug paraphernalia laws. In the significant case of *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, the Supreme Court upheld a facial challenge to a drug paraphernalia law. The Court suggested several criteria to be used in evaluating vagueness challenges: (1) the law must provide adequate notice of what is prohibited such as to preclude arbitrary or discriminatory enforcement; (2) a scienter requirement may mitigate any vagueness as to what conduct is proscribed; (3) a court should not assume that the government would fail to clarify further the scope of the ordinance through a consistent enforcement policy or the adoption of further guidelines; (4) a law should be found facially unconstitutional for vagueness only if it is "vague in all of its applications" so that no standard of conduct is specified at all.

Applying these basic standards the Seventh Circuit upheld several drug paraphernalia laws that were patterned on the Model Act drafted by the Drug Enforcement Administration of the United States Department of Justice. The court also applied the four criteria to uphold Indiana's drug paraphernalia statute, finding the latter capable of constitutional enforcement. Again the challenge was a facial one and the Seventh Circuit found that since the law was capable of constitutional application and since it could not assume that the Indiana legislature

79. Id. at 498.
80. Id. at 499.
81. Id. at 502.
82. Id. at 497.
83. Camille Corp. v. Phares, 705 F.2d 223 (7th Cir. 1983); Levas v. Village of Antioch, 684 F.2d 446 (7th Cir. 1982).
would not clarify the scope of the law through additional guidelines or that clarification would not be provided by the pattern of enforcement, it rejected the appellant’s claims as without merit.\textsuperscript{85}

The latter decision was authored by Judge Pell who had dissented from an earlier case invalidating a somewhat similar drug paraphernalia statute. In \textit{Record Head Corp. v. Sachen},\textsuperscript{86} the majority found the West Ellis Drug Paraphernalia Ordinance unconstitutionally vague. The law was concerned primarily with the delivery of drug paraphernalia to minors and the court noted that, unlike \textit{Hoffman Estates}, individuals as well as businesses were subject to criminal liability.\textsuperscript{87} The majority found that the ordinance failed to give adequate notice of what conduct was proscribed and its ambiguity failed to protect against arbitrary enforcement.\textsuperscript{88} It read the ordinance as containing no meaningful scienter requirement, unlike the Model Act type of provision upheld in earlier rulings.\textsuperscript{89} Further, since the law was criminal legislation not restricted to economic or business activity, a more searching examination than utilized in \textit{Hoffman Estates} was required.\textsuperscript{90} The ordinance failed to meet this standard since the terminology in the provision satisfied neither the fair notice nor the consistent enforcement branches of the test for unconstitutional vagueness.\textsuperscript{91}

The assurance of fundamental fairness embodied in the due process clause also triggered much litigation in the employment context. In the case of \textit{Ciechon v. City of Chicago},\textsuperscript{92} for example, the court conceded that the procedures used by the city in discharging an employee were facially neutral. However, it recognized that even if procedures themselves are legitimate, it violates the due process clause to employ such procedures vindictively or maliciously as to a particular individual. In this case the city misused its otherwise legitimate disciplinary procedures in a single-minded effort to discharge the plaintiff, a member of a paramedic team, following the death of a patient. The record indicates that the city was responding to pressure from the media as well as a vengeance seeking family, and that adverse publicity tainted the hearing.\textsuperscript{93} The investigation of the charges against the plaintiff was

\begin{itemize}
  \item \textsuperscript{85} \textit{Id.} at 792.
  \item \textsuperscript{86} 682 F.2d 672 (7th Cir. 1982).
  \item \textsuperscript{87} \textit{Id.} at 676.
  \item \textsuperscript{88} \textit{Id.} at 677-78.
  \item \textsuperscript{89} \textit{Id.} at 677.
  \item \textsuperscript{90} \textit{Id.} at 676.
  \item \textsuperscript{91} \textit{Id.} at 678.
  \item \textsuperscript{92} 686 F.2d 511 (7th Cir. 1982).
  \item \textsuperscript{93} \textit{Id.} at 516.
\end{itemize}
incomplete and biased, indicating the city’s failure to assess the incident fairly. The record showed irregularities in the administrative procedures employed and the testimony at the hearing illustrated the improper motives with which the city conducted the proceedings. The Seventh Circuit thus adopted a broader notion that the due process clause assures not only facially complete procedures, but requires the court to look further to determine whether the procedures have been properly utilized in a particular case.

In two other cases the Seventh Circuit, while upholding the government’s position, reiterated the general principle 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. In Schanuel v. Anderson, the court upheld an Illinois statutory provision prohibiting licensed private detectives and detective agencies from employing individuals who have been convicted of felonies or crimes of moral turpitude unless ten years have elapsed since the time of prison release. Applying the rational basis standard, the court concluded that the legislative judgment embodied in the Illinois provision was not unreasonable, i.e., since detective agency employees perform potentially sensitive tasks, it was rational to suppose that the public trust might be undermined by assigning such tasks to ex-offenders. Stressing that only classifications “patently arbitrary and totally lacking in rational justification” are prohibited, the court upheld the provision.

In Diulio v. Board of Fire and Police Commissioners of the City of North Lake, the court relied upon this same principle regarding employment standards to uphold a challenged promotional examination used by a police department. The court found that the defendants sufficiently established a rational relation to job performance to justify summary judgment in their favor. Since the plaintiffs failed to raise

94. Id. at 518-22.
95. Id. at 520.
96. Note also the decision in United Church of the Medical Center v. Medical Center Commission, 689 F.2d 693 (7th Cir. 1982) in which the Seventh Circuit found that due process was violated because the trier of fact had a pecuniary interest in the outcome of the litigation. Although this case involved a facial challenge to a statute, the court stated the general principle that the due process clause guarantees a disinterested decision-maker. Id. at 699.
97. Thompson v. Schmidt, 601 F.2d 305 (7th Cir. 1979) is generally cited as authority for this principle.
98. 708 F.2d 316 (7th Cir. 1983).
99. Id. at 320.
100. Id. at 319, quoting from, Rasulis v. Weinberger, 502 F.2d 1006, 1010 (7th Cir. 1974).
101. 682 F.2d 666 (7th Cir.), cert. denied, 459 U.S. 1038 (1982).
102. Id. at 671-72. Note the court stressed the distinction between constitutional due process
any viable issue as to the rationality of the examination questions as a basis for gauging an examinee's ability to perform the function of police sergeants, summary judgment was appropriately granted to the defendants.

The deferential approach reflected in these two cases also manifests itself in the Seventh Circuit's rejection of the irrebuttable presumption component of the due process clause. The Supreme Court in *Cleveland Bd. of Educ. v. LaFleur*103 had established as a general proposition that the due process clause assurance of fundamental fairness was offended by any conclusive statutory presumption that was neither a necessary presumption or universal truth.104 Subsequent case law, however, indicated the Supreme Court's disenchantment with the concept due to its unworkability. For example, Justice Rehnquist reasoned in *Weinberger v. Saljö*105 that the irrebuttable presumption doctrine would result in the destruction of countless legislative judgments and thus was inconsistent with the proper role of the judiciary.106 Expressing the same concern, the Seventh Circuit rejected irrebuttable presumption challenges to two enactments.107

**B. Protecting Property and Liberty Interests Under the Due Process Clause**

In several decisions, mainly in the context of employment and education, the Seventh Circuit dealt with procedural due process challenges. The opinions basically follow the two step analysis set forth in the Supreme Court decision of *Mathews v. Eldridge*.108 The first part of the *Mathews* analysis is to identify a property or liberty interest which will trigger the procedural safeguards. The Supreme Court in *Board of Regents v. Roth*109 and *Perry v. Sindermann*,110 suggested that a prop-

104. *Id.* at 644-45.
105. 422 U.S. 749 (1975).
106. *Id.* at 772-73.
107. *See Schanuel v. Anderson*, 708 F.2d 316 (7th Cir. 1983); *Cozart v. Winfield*, 687 F.2d 1058 (7th Cir. 1982).
108. 424 U.S. 319 (1976). The Court looks to whether there is a protected liberty or property interest, and, if so, what procedures are required. *Id.* at 333-35.
110. 408 U.S. 593 (1972).
Property interest can be created through either (1) a statutory entitlement, (2) the operation of institutional common law, or (3) principles of contract law.

Generally courts look first to state law to determine the existence of a property interest. Thus, in *Molgaard v. Caledonia* the Seventh Circuit looked to Wisconsin law to determine whether conditional approval of a mobile home park permit created a protected property interest. The court held that plaintiffs had only a unilateral expectation that the plans might be approved because under Wisconsin law actual approval and conformance to all relevant regulations is first required.

Similarly, in *Smith v. Board of Educ. of Urbana School District No. 116 of Champaign County, Illinois* the court first examined Illinois law. Finding no tenure rights in coaching positions and thus no property rights, the court rejected the due process claims of two terminated athletic coaches. Continuing the *Roth* analysis, the court examined the employment contracts and found that they did not guarantee employment as coaches for an indefinite period of time, but rather were drafted on a one year basis. It further rejected any claim of an oral contract by the School Board to employ plaintiffs indefinitely as coaches, noting that under Illinois law an oral promise of permanent employment given in exchange for a promise to work is unenforceable. Thus neither Illinois law relating to teachers' tenure nor the more general contract law created any viable property interest.

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111. This was suggested by the Court in *Roth*, 408 U.S. at 577-78.
112. 696 F.2d 58 (7th Cir. 1982).
113. *See also* Turnquist v. Elliot, 706 F.2d 809 (7th Cir. 1983), in which plaintiff sought a higher wage rate pursuant to the Illinois University Civil Service System Act. The Act gave the University Civil Service Merit Board the power to pay the prevailing rate of wages in such classifications as it chose. The court read the statute as making the exercise of such power discretionary. Plaintiff was mistaken in his belief that the statute required payment of the prevailing rate to jobs which were comparable. Thus at best he had only a unilateral expectation of being paid the prevailing rate and no enforceable property right.

114. 708 F.2d 258 (7th Cir. 1983).
115. *Id.* at 261.
116. *Id.* at 263.
117. *Id.*

118. A similar analysis of state law appears in Lyznicki v. Board of Educ., School Dist. 167, Cook County, Ill., 707 F.2d 949 (7th Cir. 1983). The court determined that plaintiff could not base his claim for continued employment as a high school principal on either a contract, in that he had only a yearly contract, or on the Illinois School Code. The latter was rather ambiguous in that it did provide procedural protection for an administrator demoted or reduced in rank to a lower position, while not providing lateral transfers to positions of similar rank and equal salary. In this case the principal was demoted in rank, but no salary reduction was ordered. Despite the unclarity in the statutory language, the court concluded that the dominant impression conveyed by the history of the provision appeared to be the protection of salary rather than office. In any event, the court found that the procedures attached did not make the employment anything other
though recognizing a third source of property rights, i.e., "reasonable expectation of re-employment," the court found that here the plaintiffs’ misreading of the Illinois School Code, their misunderstanding of Illinois contract law, and the fact that they had simply been rehired in the past did not trigger any reasonable expectation.

Finally the court rejected plaintiffs’ claim that the Board’s statement that “a change in coaches would be good for the school’s athletic program” was so damaging to their reputations or stigmatizing as to trigger the right to a name-clearing hearing. The Seventh Circuit distinguished earlier cases in which state employees had been severely damaged through serious accusations of dishonesty, immorality, intoxication, etc. thus triggering the need for due process safeguards.

The court’s somewhat narrow focus on state law in Molgaard and Smith should be compared with the analysis in Vail v. Board of Educ. of Paris Union School Dist. No. 95. In Vail the plaintiff, induced by the School Board’s oral promise that he would be employed for a two-year period, left another job, relocated his family, and took a salary cut. His written contract was only for one year, and at the conclusion of that year he was informed that his contract would not be extended. Relying on the implied contract doctrine, suggested by the Supreme Court as another means of establishing a protected property interest, the Seventh Circuit found due process violations.

The Seventh Circuit as well as the district court rejected defendant’s claims that Illinois law failed to recognize such implied contracts or that such were unenforceable as exceeding the power of the Board or as violating the Illinois Statute of Frauds. Perhaps most significant,
the court reasoned that even assuming the contract would be unenforceable under Illinois law, the establishment of a protected property interest under federal law would not be precluded. The Seventh Circuit stressed that while a substantive property interest might have its source in state law, the Supreme Court has instructed that federal constitutional law determines whether an interest rises to the level of a legitimate claim of entitlement protected by the due process clause. Thus legitimate and reasonable reliance on a promise from the state can be the source of property rights protected under the due process clause and the civil rights statutes, even where state law fails to provide a remedy. Here the actions of the Board worked to deny plaintiff's legitimate expectations of continued employment and thus created a viable due process claim.

The same refusal to be bound by state law is reflected in the case of Reed v. Village of Shorewood in which the plaintiff claimed that defendant tried on numerous occasions to deprive him of his liquor license. While the Illinois Liquor Control Act reads that a liquor license "shall be purely a personal privilege . . . and shall not constitute property . . . ," the term "property" under Illinois law need not mean the same thing as "property" under the due process clause. Rather, the court should look behind labels to determine whether the license here was property in a functional sense, i.e., whether the "property is . . . securely and durably yours under state . . . law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." Since under Illinois law the license was held securely for a one-year period and could be revoked only for cause after notice and a hearing subject to judicial review, plaintiff indeed had a protected property interest under the fourteenth amendment.

A third case looking beyond state law to establish a property right

126. Id. at 1440, citing, Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 9 (1978). See also Winkler v. DeKalb, 648 F.2d 411, 414 (5th Cir. 1981); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 447-48 (2d Cir. 1980).

127. Note this decision will be further discussed in the section dealing with Parratt v. Taylor, infra pp. 46 through 67.

128. 704 F.2d 943 (7th Cir. 1983).

129. ILL. REV. STAT. Ch. 43, § 119 (1981).

130. 704 F.2d at 948.

131. Id.

132. The court also concluded that although the defendants were never successful in actually revoking the license, their actions in bringing baseless prosecutions, harassing customers and employees, etc. which ultimately forced the plaintiffs to give up their license, deprived plaintiffs of a property interest. Id. at 949.
The University of Wisconsin Law School was sued by an applicant after it revoked an earlier acceptance letter. While recognizing that plaintiff had no property interest under Wisconsin law, the court applied the *Roth* principle that “mutually explicit understandings” also create an enforceable property interest. The understanding based on an offer and acceptance was, however, clouded by the alleged procurement of the acceptance through the applicant’s fraud, i.e., he had lied in response to the question on the application concerning past criminal convictions. The Seventh Circuit recognized that refusal to find a property interest would permit the law school to make a determination as to whether or not an applicant had lied without granting a hearing.

The court avoided the problem by simply assuming the existence of a property interest and then concluding, after applying the factors in *Mathews v. Eldridge*, that the opportunity to submit written materials to the law school prior to its reconsideration of the applicant’s admission was all the process that was due under the circumstances. Since the case was before the Seventh Circuit on denial of preliminary injunction and since the court recognized at least colorable academic freedom questions, it found that the district court did not abuse its discretion in denying preliminary injunctive relief.

In several cases this term the Seventh Circuit dealt with the problem of defining liberty interests under the due process clause. In the case of *Johnson v. Brede* the court struck the defendants’ practice of automatically assigning criminal defendants unfit to stand trial to a highly restrictive mental health center. Since Illinois law creates a right to be provided with services “in the least restrictive environment,”

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133. 699 F.2d 387 (7th Cir. 1983).
134. Id. at 389-90.
135. 424 U.S. 319, 335 (1976): (1) the private interest affected; (2) the risk of an erroneous deprivation through the procedure used and the probable value of substitute procedures; and (3) the government’s interest.
136. 699 F.2d at 391. In another case applying the *Mathews* factors, *Lister v. Hoover*, 706 F.2d 796 (7th Cir. 1983), the court affirmed the district court’s holding that the due process clause did not require the University of Wisconsin to give written reasons for its refusal to classify a student as a state resident for tuition purposes. The court affirmed the district court’s grant of summary judgment, adopting its opinion. Note, however, the dissent of Judge Swygert applying the same three factors but concluding that the majority had under-estimated the importance of the student’s interest in paying in-state tuition, while overstating the government’s interest in avoiding the administrative burden of providing a statement of reasons. *Id.* at 798-99 (Swygert, J., dissenting).
137. 699 F.2d at 395-99 (Coffey, J., concurring). Note the concurrence would specifically find that a property interest cannot be acquired on the basis of fraudulent information and that the right of a university to make its own admissions decisions was a vital part of academic freedom that supersedes the interest of any potential student enrollee.
138. 701 F.2d 1201 (7th Cir. 1983).
plaintiff was found to have a protected liberty interest, triggering the protection of the federal due process clause.\textsuperscript{139} The court emphasized that it was not recognizing a federal right to be treated in the least restrictive environment; rather it was relying on the state-created entitlement to impose minimum procedural safeguards.\textsuperscript{140}

In addition to the procedural violations, the court also found substantive due process problems with the restrictions placed on the plaintiffs' movement in and around the facility and grounds, i.e., plaintiffs were confined indoors except for rare occasions and were locked in their rooms while the staff personnel had their meals. The court relied on the Supreme Court decision in \textit{Youngberg v. Romeo} \textsuperscript{141} as establishing freedom of bodily movement as a core liberty interest protected by the due process clause from arbitrary government action. Relying on \textit{Youngberg}, the court proceeded to balance plaintiffs' interests against the relevant state interests in securing a safe facility in which treatment could be administered.\textsuperscript{142} The court applied the \textit{Youngberg} principle that government decisions to restrict movement must be based on professional judgment.\textsuperscript{143} Since the practice at the facility of confining prisoners indoors was not in accord with the facility's own stated policy and no other justification was given by the defendants as to why they violated their own policy, there was at least some doubt that even the minimum requirement of professional judgment was satisfied.\textsuperscript{144}

Similar issues were raised in \textit{Lojuk v. Quandt},\textsuperscript{145} a suit by a voluntarily committed but incompetent patient at a Veterans Administration Medical Center who was subjected to electro-shock therapy (electro-convulsive therapy or ECT) without his consent and against the objection of his family. Having rejected plaintiff's eighth amendment claim,\textsuperscript{146} the court found that compulsory treatment implicates due

\textsuperscript{139} Id. at 1207.
\textsuperscript{140} Id. The court also found violation of plaintiff's federal constitutional right of access to the courts in that the defendant's telephone policy unreasonably restricted communication with counsel. Id. at 1207-08. The court rejected, however, plaintiff's assertion that they were entitled to a law library at the facility, finding that the right of access can be satisfied in ways other than the provision of a law library, i.e., through adequate assistance of counsel. Id. at 1208.
\textsuperscript{141} 457 U.S. 307 (1982).
\textsuperscript{142} 701 F.2d at 1208-09.
\textsuperscript{143} Id. at 1209.
\textsuperscript{144} Id. The court did, however, uphold the practice of locking the plaintiffs in their room while the staff ate, as being the result of a professional judgment based on a need to maintain internal security. Id. at 1210.
\textsuperscript{145} 706 F.2d 1456 (7th Cir. 1983).
\textsuperscript{146} The court noted that plaintiff was not asserting that ECT was administered as punishment and that it was reluctant to extend the eighth amendment to cases involving plaintiffs who "voluntarily" place themselves in the custody of the government. Id. at 1464-65.
process concerns since it is a highly intrusive and controversial form of treatment with several adverse effects.147

The district court had concluded that plaintiff's allegations did not state a claim of constitutional dimension, and thus the record was incomplete as to "what process was due." The plaintiff argued that an incompetent patient is entitled to the appointment of a guardian to consent to ECT on his behalf, while the defendants argued that at most a staff psychiatrist exercising independent professional judgment should be the one prescribing the treatment.148 Due to the limited record, the Seventh Circuit felt unable to define precisely the scope of the interest or the minimum procedures required.149 In Mills v. Rogers150 the Supreme Court assumed the right of involuntarily committed mental patients to refuse treatment with anti-psychotic drugs. However, it declined to identify the scope of the right in light of the possibility that governing state law provided broader protection. Here, neither relevant state nor federal statutes that would further define the liberty interests were presented by the parties. However, since due process requires that at minimum a staff psychiatrist should exercise independent professional judgment in prescribing the treatment and since the record failed to indicate that even this minimal protection was provided, the Seventh Circuit reversed the district court's dismissal of the case.151

In a third "liberty" case, Brookhart v. Illinois State Bd. of Educ.,152 the Seventh Circuit found that plaintiffs had a protected interest in receiving a high school diploma. The interest was rooted in state law as well as the federally recognized right to be free of stigma and damage to reputation.153 The state unconstitutionally interfered with this interest by requiring a minimum competency test as a condition for receiving a diploma without providing meaningful notice for special

147. Id. at 1465.
148. Id. at 1467.
149. Id.
151. 706 F.2d 1468 (7th Cir. 1983), citing the Supreme Court decision in Youngberg v. Romeo discussed supra note 139, in which the Court held that involuntarily committed mentally retarded individuals were entitled to minimally adequate or reasonable training in light of their liberty interests in safety and freedom. The Court defined "reasonable" to require at least that the decision of a professional not be a substantial departure from accepted professional judgment, practice or standards. Thus if plaintiff in the case could have proven that defendant's decision to administer ECT departed from accepted professional practice, a claim would be stated under even the most restrictive reading of the due process clause.
152. 697 F.2d 179 (7th Cir. 1983).
153. Id. at 185, citing, Goss v. Lopez, 419 U.S. 565 (1975) which holds that a school suspension implicated a protected liberty interest under the due process clause.
education children to enable them to prepare for the test. At least as to
special education children, imposing this prerequisite without adequate
notice was held to be fundamentally unfair in a substantive due process
sense and also violative of the procedural balancing test imposed by
Mathews.\textsuperscript{154}

In a final “liberty” case, \textit{Lossman v. Pekarske},\textsuperscript{155} the plaintiff was
denied custody of his children due to allegations of child abuse. The
hearing which was ultimately held resulted in a determination that the
children should continue at least temporarily in the custody of a foster
home.\textsuperscript{156} Plaintiff alleged that the defendants removed his children
without good cause and that they violated Wisconsin statutes which
require a social worker who takes a child into custody to “immediately
attempt to notify the parent.”\textsuperscript{157} Since the district court disposed of the
case on summary judgment, the Seventh Circuit was required to accept
as true plaintiff’s claim that there was delay in notifying him.

While conceding that the liberty clause of the fourteenth amend-
ment protects custody of one’s children,\textsuperscript{158} the court affirmed the dis-
trict court ruling that there had been no denial of such a right. First it
held that the post-deprivation hearing sufficiently protected plaintiff’s
liberty interest since there were allegations that the children’s safety
was threatened.\textsuperscript{159} The court reasoned that the defendants’ alleged fail-
ure to give notice and a pre-deprivation hearing did not “injure” plain-
tiff since the later hearing established that the removal of the children
was justified.\textsuperscript{160} The court held that any anxiety the plaintiff felt con-
cerning the whereabouts of the children due to the state’s violation of
the notice provision, did not support a constitutional claim: “peace of
mind is not liberty.”\textsuperscript{161} Applying the tort concept that a plaintiff can-
not withstand summary judgment if he has sustained no actual in-
jury,\textsuperscript{162} the court affirmed the district court ruling.

\begin{footnotes}
\item[154] 697 F.2d at 185-87.
\item[155] 707 F.2d 288 (7th Cir. 1983).
\item[156] Note that a hearing a month later resulted in the return of the children to their father for
a six month probationary period, after which legal custody was restored. \textit{Id.} at 290.
\item[157] \textit{Id.} at 289-90. WIS. STAT. \textsection 48.19(2).
\item[158] 707 F.2d at 289-90.
\item[159] Relying in part on the decision in Ellis v. Hamilton, 669 F.2d 510 (7th Cir.), \textit{cert. denied},
459 U.S. 1069 (1982), the court concluded that where the state has a procedure for a prompt,
adversary post-deprivation hearing in a child custody matter and the hearing establishes that the
state officers acted prudently in removing the children without a prior hearing, any claim that the
failure to hold a pre-deprivation hearing was a denial of due process is extinguished. 707 F.2d at
292.
\item[160] 707 F.2d at 291.
\item[161] \textit{Id.} at 292.
\item[162] \textit{Id.}
\end{footnotes}
This analysis fails to recognize the due process clause as protecting individuals against arbitrary, capricious official action.\textsuperscript{163} The court erroneously relied on \textit{Carey v. Piphus}\textsuperscript{164} for the principle that damages cannot be awarded in a suit alleging denial of due process unless the claimed hearing would have prevented the deprivation. Although \textit{Carey} held that compensatory damages for procedural due process violations were not available absent proof of injury, it did not decide that federal courts could dismiss due process claims where a subsequent hearing upholds the government's initial action. In fact, the Court in \textit{Carey} specifically established that even without proof of injury, an initial failure to provide due process gives rise to a cause of action for declaratory relief as well as nominal damages.\textsuperscript{165} Further, the finding that procedural due process was violated would support a claim for attorneys' fees.\textsuperscript{166}

Equating the question of whether compensatory damages are available in a civil rights case with the question of whether summary judgment can be granted to the defendant based on failure to allege a cause of action is clearly an unwarranted extension of the \textit{Carey} decision. The court confuses liability and remedy. \textit{Lossman} reflects the growing reluctance of many federal courts to provide a forum for litigating certain federal claims.\textsuperscript{167} This attitude is evidenced in the concluding statement in \textit{Lossman}, that the district court's intervention would have exceeded the proper limits of the federal judiciary.\textsuperscript{168}

\textbf{C. Due Process and the Existence of State Remedies}

Another example of the federal judiciary's reluctance to hear civil rights litigation is found in the Supreme Court's decision in \textit{Parratt v. Taylor}\textsuperscript{169} and its progeny. In \textit{Parratt} the Court held that a claim for negligent interference with the loss of property was not actionable in federal court where the state provides adequate post-deprivation remedies.\textsuperscript{170} At least three factors were important in that case: (1) there was no established state policy which caused the deprivation;\textsuperscript{171} (2) there

\begin{itemize}
\item \textsuperscript{163} \textit{See cases discussed, supra} notes 90-99 and accompanying text.
\item \textsuperscript{164} 435 U.S. 247 (1978).
\item \textsuperscript{165} \textit{Id.} at 266-67.
\item \textsuperscript{166} Attorneys' fees are awarded to the prevailing party in \S 1983 suits based on the Civil Rights Attorney's Fees Act, 42 U.S.C. \S 1988 (1976).
\item \textsuperscript{167} \textit{See Parratt} discussion, \textit{infra} pp. 325-37.
\item \textsuperscript{168} 707 F.2d at 292.
\item \textsuperscript{169} 451 U.S. 527 (1981).
\item \textsuperscript{170} \textit{Id.} at 538.
\item \textsuperscript{171} \textit{Id.} at 543.
\end{itemize}
was no practical way of having a pre-deprivation hearing;\textsuperscript{172} and (3) an adequate tort remedy did exist under state law whereby the prisoner could be compensated for the lost property.\textsuperscript{173} The majority opinion, however, left much ambiguity as to the precise scope of its decision. It announced at the outset that its holding would be of "assistance to courts confronting such a fact situation . . . which allege facts that are commonly thought to state a claim for a common-law tort normally dealt with by state courts . . . ."\textsuperscript{174} Nothing in this language appears to limit its analysis to negligent deprivations of property. Thus several questions have remained regarding the proper interpretation and scope of the decision. Is it limited to negligent deprivations of constitutional rights? Does it apply to claims regarding liberty deprivations? What impact, if any, does it have on substantive as opposed to procedural due process claims?

As to the first issue, it has been argued that an intentional deprivation of a constitutional right is significantly different from a negligent violation. Providing a remedy for the former deters future abuses of power by persons acting under color of state law whereas punishing the latter fails to serve such a goal.\textsuperscript{175} Justice Blackmun in his concurrence in \textit{Parratt} stressed that the impracticality rationale, i.e., the impossibility of providing pre-deprivation hearings for negligent acts, does not apply to intentional acts by state employees.\textsuperscript{176}

As to the second issue, whether a distinction can be drawn between constitutional claims of loss of property vs. claims that liberty interests are implicated, the Supreme Court in its recent interpretations of § 1983 has refused to draw distinctions between personal rights and property rights.\textsuperscript{177} However, there are other indications that the nature of the constitutional claim should be significant. For example, in the

\textsuperscript{172} Id.
\textsuperscript{173} Id. at 544.
\textsuperscript{174} 451 U.S. at 533-34. The vagueness of this statement and its destructive potential has been noted by several commentators. \textit{See}, e.g., Friedman, \textit{Parratt v. Taylor: Opening and Closing the Door on Section 1983}, 9 \textit{HASTINGS CONST. L. Q.} 545 (1982); Kirby, \textit{Demoting 14th Amendment Claims to State Torts}, 68 \textit{A.B.A.J.} 166 (1982).
\textsuperscript{175} The importance of this deterrence function was noted in the recent decision of City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981). \textit{See also} Bonner v. Coughlin, 545 F.2d 565, 568 (7th Cir. 1976), \textit{cert. denied}, 435 U.S. 932 (1978) (the court stressed that no legislative enactment can deter future inadvertance; thus providing relief for negligent as opposed to intentional actions would not serve the goals of § 1983).
\textsuperscript{177} Lynch v. Household Finance, 405 U.S. 538, \textit{rehearing denied}, 406 U.S. 910 (1972), established that claims of either property or liberty are actionable under § 1983.
Seventh Circuit decision of *Bonner v. Coughlin*, which was relied upon by the *Parratt* majority, Judge Stevens held that where the state was ready to provide a prisoner with complete compensation for his property loss, it had fulfilled its constitutional duty, leaving no federal claim to be litigated. However, Judge Stevens stressed that the question turned on the underlying constitutional claim, rather than on the remedy, since exhaustion of state remedies is not required under § 1983. Where state officials interfere with substantial liberty interests protected by the Constitution, it is difficult to see how anything the state could subsequently do would save the deprivation from being unconstitutional. Since it cannot cure the constitutional deprivation, in the sense of returning or replacing lost property, and since it is well settled that § 1983 provides a supplementary remedy, the existence of a state remedy should be irrelevant where important liberty interests are asserted.

A somewhat related question concerns the application of *Parratt* to substantive due process as opposed to procedural due process claims. Where plaintiffs are attacking an established state procedure and are urging the addition of further procedural safeguards, the *Mathews* analysis would appear to include in part a discussion of state remedies. Thus in the Supreme Court decision of *Ingraham v. White* the Court, in considering the nature of the right implicated and the risk of erroneous deprivation, pointed to the availability of state remedies to rectify abuses of corporal punishment. Its conclusion that a pre-paddling hearing was not required was based in part on the existence of state remedies that already provided some degree of protection to the challenged interest. The Court stressed in *Ingraham* that it was dealing only with procedural due process allegations and it specifically refused to reach any substantive due process claims. This distinction is re-
reflected in Justice Blackmun's concurrence in which he argued that "... there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process." Such actions should give rise to a federal court remedy.

The Seventh Circuit this term struggled with these questions in several decisions reflecting a division on the court as to the meaning of *Parratt*. It is apparent that at least some members of the panel wish to adopt an expansionist approach, while others seek to limit *Parratt* to negligent deprivations of property. Unfortunately, the decisions fail to provide a definitive position on the issues.

In *Flower Cab Co. v. Petitte*, the district court had granted a preliminary injunction compelling the Commissioner of Consumer Services in Chicago to assign taxi cab licenses to the plaintiffs. Although plaintiffs had complied with the Chicago Municipal Code, the defendant Commissioner had refused to act due to a proposed ordinance before the City Council which would prohibit assignments of licenses. The district court concluded that the plaintiffs would be able to prove at trial that the Commissioner's refusal violated the fourteenth amendment by depriving plaintiffs of a property right without due process of law, i.e., defendant had acted arbitrarily, in violation of the ordinance, and without giving the plaintiffs notice or an opportunity for a hearing. This rationale apparently encompassed both substantive due process claims—based on the arbitrariness of government action—as well as procedural due process claims—the denial of notice and the opportunity for a hearing.

The Seventh Circuit granted the defendant's motion for a stay pending appeal. It assumed without deciding that the taxicab license in Chicago was a property interest within the meaning of the due process clause and that a refusal to allow the assignment of a property right based on municipal law was a sufficient deprivation to activate the clause. It concluded, however, that the defendant's refusal—even if it was a deliberate refusal—to comply with the ministerial duty of transferring property rights did not give rise to a claim under the Constitution. Since the state provided a clear mandamus remedy, the

187. 685 F.2d 192 (7th Cir. 1982).
188. Id.
189. Id. at 193.
190. Id.
191. Id.
federal court was not a proper forum in which to litigate the claims.

The court relied on *Parratt* for the proposition that “not every act of a state officer that deprives a person of his property rights violates the due process clause, at least where there are adequate post-depriva-
tion remedies under state law.” It also stressed that as in *Parratt*, the loss here was not the result of some established state procedure but was rather an attack on one official's conduct. It reasoned that the scope of § 1983 should not encompass every deliberate failure by a state or local officer to perform ministerial duties necessary to the full enjoyment of property rights. Concerns of federalism predominated the discussion, the court noting that, “a probably baseless federal injunction interfering with the operation of municipal government is a serious affront to the theory and practice of federalism.”

The court did state, however, that it was ruling based on an incom-
plete record and that the case was being litigated only with regard to preliminary injunction. Further, here the deprivation of property was not of a serious magnitude. It was simply a delay in the assignment of some taxicab licenses pending action by the City Council on a proposal to make such licenses unassignable. Thus, there was still time to chal-
lenge the validity of the ordinance if indeed the council passed it. Nonetheless, the majority did expand *Parratt* in that it applied its anal-
ysis to deliberate, intentional conduct on the part of government offi-
cials. While it may be that the actions were not sufficiently grievous to violate the due process clause, the court here adopts the more troub-
lesome conclusion that the existence of a state remedy negates a cause of action under § 1983.

192. *Id.*
193. *Id.* at 193-94.
194. *Id.* at 194.
195. *Id.*
196. This principle was expressed in an earlier Supreme Court decision: “Section 1983 im-
197. Note earlier decisions in this circuit had clearly held that the intentional taking of prop-
erty by government officials was actionable under § 1983. Flood v. Margis, 461 F.2d 253 (7th Cir. 1972) (holding that federal courts have jurisdiction to consider a claim of denial of due process based on an arbitrary refusal to renew a license); Madyun v. Thompson, 657 F.2d 868, 873 (7th Cir. 1981), citing Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976) (en banc), (suggesting
In another case, *Scudder v. Town of Greendale, Ind.*, the court cited *Parratt* for the general principle that the federal judiciary should take care not to expand constitutional rights through § 1983 because such would both overburden federal courts, diluting their ability to defend more significant rights, while at the same time displacing state law-making authority. This reference to *Parratt*, however, was gratuitous in light of the court's actual reasoning. In *Scudder* the plaintiff challenged the Board of Trustees' denial of a permit he sought to construct houses on certain pieces of real estate. The Board of Trustees acted pursuant to a local ordinance which specifically prohibits the erection of buildings on lots which do not front a street. Further, plaintiff did not allege the invalidity of the ordinance nor did he recite any logical reasoning to support his allegations that the ordinance was applied or enforced in an unconstitutional manner. Thus the dismissal for failure to state a claim for relief under § 1983 was founded on the lack of any allegations supporting the constitutional claims—not on the existence of state remedies. While the majority stated that federal district courts should not serve as "zoning appeals boards," and that federal courts should be wary of reviewing zoning decisions, the key thrust of the opinion is that the plaintiff failed to make any allegations of arbitrary or discriminatory action which give rise to a constitutional claim. Presumably had such allegations been made, the existence of a zoning appeal body would have been irrelevant.

that an intentional taking of a state prisoner's property by a prison employee is actionable under § 1983).

It may be that applying the analysis of *Mathews*, discussed supra note 106, the court has concluded that a post-deprivation hearing sufficiently satisfies due process. Thus plaintiff has no due process claim in any court—state or federal. However, the court's analysis does not appear to rely on this theory.

201. Note that the district court had dismissed the complaint for failure to exhaust state remedies, a conclusion which could no longer support the judgment in light of the Supreme Court's opinion in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), making it clear that exhaustion of state administrative remedies is not a condition precedent to bringing suit in federal court under 42 U.S.C. § 1983.


203. This same principle is reflected in *Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982), in which plaintiffs challenged defendant's decision to grant a trucking company a permanent variance from a municipal noise ordinance in violation of their property rights. Plaintiffs claimed that the noise from the traffic disrupted their sleep, increased the danger of physical injury to all residents and had a debilitating emotional and physical effect on them personally. While the court stated that § 1983 does not provide plaintiffs a federal forum in which to contest the merits of a
The Seventh Circuit's analysis in the more troublesome *Flower Cab Co.* opinion was distinguished and somewhat limited by the holding in the subsequent case of *Evans v. City of Chicago*. In this suit plaintiffs were challenging the City's practice of paying tort judgments of $1,000 or less as soon as the judgment holders presented proper documents, while delaying the payment of larger judgments. Under an Illinois statute cities are required to pay tort judgments during the fiscal year in which the judgment becomes final, unless the city complies with two contingencies enumerated in the statute, neither of which was relied upon here. The defendants argued, however, that under the *Parratt* analysis due process was satisfied via a judicial procedure available in state court to compel compliance with the Illinois law.

The Seventh Circuit gave three reasons for rejecting this defense:

1. Whereas *Parratt* concerned a tortious loss of property resulting from a random and unauthorized act, here the city systematically deprived property owners of their state-created right to immediate payment.
2. The existence of post-deprivation remedies within a state system does not cure the unconstitutional nature of a state official's intentional, as opposed to merely negligent, act that deprives a person of property.
3. The speculative nature of the state court remedy to challenge a city's failure to pay judgments makes *Parratt* inapplicable. The court distinguished *Flower Cab Co.* as having preceded the subsequent Supreme Court decision in *Logan v. Zimmerman Brush Co.*, which held *Parratt* inapplicable to established government procedures alleged to violate due process. Further it noted the tentative nature in which the claims in *Flower Cab Co.* arose, i.e., the context of a stay pending appeal.

Of course, the difficult question raised by *Flower Cab* and *Evans* is whether *Parratt* should ever be extended to intentional acts. Several local administrative decision, it recognized that an administrative determination may be set aside if it is arbitrary and capricious. *Id.* at 480. The court did not dismiss the case based on the existence of state remedies where the administrative decision could be challenged; rather it made a finding based on the record that the decision was not arbitrary and capricious, and thus gave rise to no viable due process claim. *Id.* at 482.
cases in the Seventh Circuit and elsewhere have flatly rejected this extension. Those which have applied *Parratt* to intentional deprivations of rights have reasoned that the underlying principle in *Parratt* is that due process is not violated when no practical way exists to provide a pre-deprivation hearing. This same rationale, it is argued, applies whether the deprivation is intentional or negligent, provided meaningful prior review is impractical.

This reasoning is reflected in a recent Fourth Circuit opinion. The court concludes that procedural due process is not violated, according to *Parratt*, if the state provides a post facto remedy for an injury inflicted by an official who was not acting pursuant to an established policy and was not amenable to prior control. Thus *Parratt* would not affect the right to a § 1983 remedy where (1) the officially inflicted injury is done pursuant to an established procedure; or (2) the official act violates a substantive constitutional right such as the right to vote; or (3) the official act is sufficiently egregious to amount to a violation of the requirement of substantive due process.

Aside from these circumstances, the Fourth Circuit held “once it is assumed that a post-deprivation remedy can cure an unintentional but negligent act causing injury, inflicted by a state agent which is unamenable to prior review, then that principle applies as well to random and unauthorized intentional acts.” Since the case involved the destruction of property in a non-routine shake-down search, due process is not violated provided the state assures adequate post-deprivation relief.


217. Id. at 1222 n.2.

218. Id. (citations omitted).

219. Id. at 1223.

220. Note, however, the Fourth Circuit reversed the case on the issue of whether the defendant's conduct constitutes an unreasonable search of the plaintiff's property. The court reasoned that if defendant was unable to establish that the search was permissibly motivated and conducted in a reasonable manner, defendant might have a viable claim under the fourth amendment. It then held that *Parratt* would not affect such a right, since the right violated is now a substantive right to privacy and not simply a right to procedural due process. Thus the case would then fit into the second exception recognized by this court. Id. at 1224-25.

The Tenth Circuit has similarly held that the crucial question is whether the state provides an adequate remedy for the alleged deprivation of property, rather than whether the act was inten-
The Fourth Circuit's cautious and limited approach to the Parratt question is unfortunately not reflected in the opinions of the Seventh Circuit. While Evans appeared to mark the demise of the expansionist approach to Parratt, the Seventh Circuit's 1983 decisions indicate the continuing debate. In Wolf-Lillie v. Sonquist, the court again upheld the application of Parratt to an intentional deprivation of property interests, without trying to distinguish or even mentioning Evans. The case involved plaintiff's challenge to the untimely execution of a writ of restitution in violation of Wisconsin law. The plaintiff alleged a pervasive pattern or practice of executing stale writs of restitution on the part of the defendant, but the court held, contrary to the district court, that in light of Wisconsin's common law tort procedures, plaintiff was not deprived of her property without due process of law. This conclusion appears in clear violation of Logan's holding that Parratt is not applicable where an established procedure as opposed to a random isolated incident of abuse, is at issue. The court instead relied on Parratt for the general principle that federal courts must consider the adequacy and availability of remedies under state law before concluding that a deprivation of life, liberty, or property violates due process of law. It held that Wisconsin "has done all that the Fourteenth Amendment requires" to guarantee plaintiff due process of law.

The court does, however, recognize one clear limitation to Parratt, i.e., that plaintiff's substantive fourth amendment claims are not affected by the availability of state remedies. Parratt is limited to violations of procedural due process: "Federal and state courts in effect have concurrent jurisdiction over torts based on substantive constitutional guarantees."

A final case discussing the Parratt analysis is Vail v. Board of Educ.
of Paris Union School District No. 95226 which involves an athletic director-football coach who was terminated without a hearing despite an implied contract of employment for a two year period. Having found a viable property interest, the court affirmed the district court's award of damages for the unlawful termination.227 Judge Wood, who three months earlier authored the *Wolf-Lilie* opinion, summarily rejected any application of *Parratt*, finding that the latter was limited to cases involving a tortious loss of property where a pre-deprivation hearing would be meaningless.228 He cited the subsequent Supreme Court decision in *Logan v. Zimmerman Brush Co.*229 as indicating the Supreme Court's refusal to expand *Parratt*.230 His opinion appears to signal the Seventh Circuit's adoption of this narrow approach, but a lengthy discussion of *Parratt* found in Judge Eschbach's concurrence and Judge Posner's dissent reflects the continuing debate on the issue.

Favoring a limited reading, Judge Eschbach's concurring opinion in *Vail* argues that *Parratt* decided only the following: (1) that due process did not require a pre-deprivation hearing because such would not be meaningful in the case of negligent deprivations, and in fact would be practically impossible,231 and (2) that the post-deprivation remedy available in state court afforded due process of law, in that it would provide the plaintiff a meaningful opportunity to be heard regarding his claim.232 Here, on the other hand, a pre-deprivation hearing was feasible and in fact would have provided Vail a meaningful opportunity to guard against the risk of a wrongful or erroneous decision.233 The deprivation occurred as a result of an intentionally established state procedure of voting on continuing contracts and making decisions without providing individuals with a reason for the decision or a meaningful opportunity to be heard.234 Thus the plaintiff had a clear right to litigate his claims in federal court.

In dissent, Judge Posner begins by framing the issue as whether breaches of public employment contracts are constitutional torts which

226. 706 F.2d 1435 (7th Cir. 1983), discussed earlier regarding the question of whether a property right was created. *See supra* notes 121-125, and accompanying text.
227. 706 F.2d at 1438.
228. Judge Wood noted that this factor distinguished *Wolf-Lilie* without explaining why a pre-deprivation hearing in that case would be "meaningless" prior to execution of the writs. *Id.* at 1440-41.
230. 706 F.2d at 1441.
231. *Id.* at 1447 (Eschbach, J., concurring).
232. *Id.*
233. As Judge Eschbach explained, had Vail been discharged following a hearing and tried to bring a 1983 action, then relief would have been properly denied based on *Parratt*. *Id.* at 1448.
234. *Id.* at 1448-49.
can be litigated in federal court under 42 U.S.C. § 1983. The thrust of his entire decision rests on federalism concerns and a reluctance to constitutionalize common law torts. His reasoning proceeds as follows. First, Posner argues that a breach of contract is simply not a viable property interest. He distinguishes earlier case precedent, such as *Perry v. Sindermann*, as involving a tenure question. He then argues that even if Illinois law created some type of property interest, the interest included only a claim for damages, not a right to sue for reinstatement: "... since the right Vail was allegedly deprived of is just a right to a particular remedy—damages—he cannot complain that he has been deprived of that right unless the state fails to provide him with the remedy." Posner thus argues that there is no cause of action under § 1983 since the state of Illinois provides a remedy in its courts for breaches of contract with public school employees, and this was the only property right created on their behalf. He relies on *Parratt* to support his conclusion that the existence of a state remedy negates a cause of action under § 1983.

This argument misconstrues the scope of the due process clause. Vail is arguing that a viable property interest was created and he is therefore entitled by federal law to a hearing before such interest can be affected. The question of what remedy Illinois makes available to plaintiffs in state court in a breach of contract suit is simply irrelevant to the question of whether, having created a property interest, the state can constitutionally deprive a citizen of that interest without providing a hearing. The latter is a question of federal law and should be decided in federal court.

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235. Id. at 1450 (Posner, J., dissenting).
236. Id.
237. Id. at 1451. Posner's narrow reading of the *Sindermann* case is unwarranted because the Supreme Court did not in any way rely upon tenure as a basis for finding a protected property interest. Indeed, Sindermann was not contending that he had any express contract for continued employment but only de facto tenure. 408 U.S. 593, 600 (1972).
238. 706 F.2d at 1453 (Posner, J., dissenting). The analysis is reminiscent of Justice Rehnquist's reasoning in *Arnett v. Kennedy*, 416 U.S. 134, rehearing denied, 417 U.S. 977 (1974), that state law which creates a property interest can also circumscribe the scope or extent of that interest. A broad reading of *Arnett* would do away with due process guarantees in that the state could always create property interests and simultaneously divest those interests of any procedural safeguards. See 416 U.S. at 177-78 (White, J., concurring).
239. 706 F.2d at 1454.
240. The court in fact reached this conclusion, finding that Illinois law regarding the enforceability of plaintiff's contract would not preclude a finding of a protected property interest under federal law. See *supra*, notes 123-124 and accompanying text. Ironically Judge Posner himself argued this principle in *Reed v. Village of Shorewood*, discussed *supra*, notes 126-130 and accompanying text. There he specifically states that the term "property" under Illinois law does not mean the same thing as "property" in the due process clause.
Posner relies on *Parratt* a second time in arguing that even if a broader property interest was created by the state, due process was not violated through the state's failure to provide a pre-deprivation hearing. *Parratt*, he argues, stands for the general principle that common law remedies may in some cases provide all the process that is due.\(^{241}\) He concedes the conflict between this broad reading of *Parratt* and the earlier landmark decision in *Monroe v. Pape*\(^{242}\) in which the Supreme Court first established that a civil rights case, there a police brutality suit, was actionable under §1983 regardless of what tort remedies the victim might have against the police under state law in a state court.\(^{243}\) He argues, however, that simple breaches of contract should fall more on the *Parratt* side as opposed to the much more egregious violations complained of in *Monroe*, where more than simply the denial of due process in its original sense of proper procedure was at stake.\(^{244}\)

Although Posner may be correct that this is the direction in which the Supreme Court is moving, it is doubtful that it has yet provided a basis for the expansion that Posner suggests here. As Judge Eschbach cogently noted, "Writing, as I am, on the shores of Lake Michigan rather than the banks of the Potomac, I am not free to make that decision."\(^{245}\) In short, Posner's major concern is that it trivializes the Constitution to permit government employees, such as the football coach here, to litigate a contract claim against a school board in a federal district court. The most basic response to Posner's concern is that the Supreme Court has held that once the state creates a property interest

\(^{241}\) 706 F.2d at 1454 (Posner, J., dissenting). He cites Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982), discussed in last year's survey, Bodensteiner and Levinson, Civil Liberties: *Current Developments in the Seventh Circuit Recognizing First Amendment, Procedural Due Process, Employment Discrimination and the Enforcement of Civil Rights*, 59 CHICAGO-KENT L. REV. 403, 420-26 (1983), as well as *Flower Cab Co. and Wolf-Lillie*, discussed, supra notes 221-225 and accompanying text, to support his conclusion that *Parratt* should be read to always require federal courts to consider the adequacy and availability of remedies under state law before concluding that a deprivation of life, liberty or property violates due process. Note that this statement comports with the general requirement under the *Mathews* analysis that the court examine the risk of erroneous deprivation in determining whether a procedural due process violation has occurred. *See supra* note 182 and accompanying text. Contrary to Judge Posner, this reading of *Parratt* would not conflict with *Monroe*, because the plaintiff has obtained a federal court ruling under § 1983 on the due process question. While one might then disagree with the court as to how it has balanced the *Mathews* factors, one could not accuse the federal court of abdicating its responsibility of providing a federal forum for the adjudication of federal rights.


\(^{243}\) *Id.* at 183.

\(^{244}\) 706 F.2d at 1455 (Posner, J., dissenting). Contrast this with the recent Sixth Circuit holding that the application of *Parratt* outside the narrow prison rights context would be inconsistent with *Monroe* and the more recent Supreme Court holding in *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982), reaffirming the no-exhaustion principle under § 1983. *See* Wilkerson v. Johnson, 699 F.2d 325, 329 (6th Cir. 1983).

\(^{245}\) 706 F.2d at 1445.
either through state law, through contract or through the creation of reasonable expectations, it must provide a pre-deprivation hearing before that property interest can be taken away.\textsuperscript{246} If the state provides such a hearing, even if it then decides against the plaintiff, the case will never be litigated in a federal court but the individual would have to pursue his contract claim in state court. The Constitution thus only comes into play where the state violates clear Supreme Court precedent indicating the need to have a pre-deprivation hearing. Posner's conclusion that the \textit{Vail} opinion is "another step on the road whose terminus is the displacement of the whole of state law into the federal courts"\textsuperscript{247} is surely unwarranted once this basic principle of due process is understood.

Read together, the Seventh Circuit decisions on the \textit{Parratt} issue fail to establish any logical, coherent position. The members of the court are clearly divided on whether \textit{Parratt} should be applied to intentional deprivations of property,\textsuperscript{248} and while \textit{Wolf-Lillie} appeared to reject application of \textit{Parratt} to substantive due process claims,\textsuperscript{249} other decisions seem to ignore this distinction.\textsuperscript{250} Further the decisions conflict as to the precedential value of \textit{Logan} which rejected the application of \textit{Parratt} where established state procedures are challenged.\textsuperscript{251} The confusion in the Seventh Circuit indicates the compelling need for Supreme Court guidance on these issues.

### III. \textsc{Equal Protection: Applying The Minimal Rationality Standard}

Most of the equal protection challenges raised in the Seventh Circuit this term were rather summarily disposed of using the minimal rationality test.\textsuperscript{252} The Supreme Court has generally held that in cases

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\textsuperscript{246.} See \textit{supra} notes 107-108 and accompanying text.

\textsuperscript{247.} 706 F.2d at 1456 (Posner, J., dissenting).

\textsuperscript{248.} See \textit{supra} notes 229-242 and accompanying text.

\textsuperscript{249.} See \textit{supra} note 225 and accompanying text.

\textsuperscript{250.} See discussion of \textit{Flower Cab Co.}, \textit{supra}, pp. 485-86.

\textsuperscript{251.} While the court in \textit{Evans}, \textit{supra} note 206, and in \textit{Vail}, \textit{supra} note 226, relies on \textit{Logan} as having limited \textit{Parratt}, in \textit{Wolf-Lillie} the case is ignored despite plaintiff's allegation of a "pervasive practice" of property deprivations. See \textit{supra} notes 220-232 and accompanying text.

\textsuperscript{252.} See, e.g., \textit{Schanuel v. Anderson}, 708 F.2d 316 (7th Cir. 1983), upholding as rational an Illinois statute which makes ex-felons ineligible for employment with private detective and security guard agencies for a period of ten years following discharge from sentence; \textit{Cozart v. Winfield}, 687 F.2d 1058 (7th Cir. 1982), upholding Evanston's "Terminated Employees" regulation which allocates general assistance funds, imposing a thirty-day waiting period on employees who quit or are fired from their jobs; \textit{Georges v. Carney}, discussed, \textit{supra} notes 31-47 and accompanying text, upholding the alleged discrimination between publicly initiated and privately initiated questions with regard to ballot access in an election.
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 purpose or interest. Most of the Seventh Circuit decisions relied on the principle that legislative enactments must be sustained provided “any state of facts reasonably may be conceived to justify them.” Thus in the case of Lowrie v. Goldenhersh, the court upheld Illinois’ five-year reciprocity rule as applied to attorneys wishing to practice in the state without taking the Illinois state bar exam. The court held that the state’s concern for a bar applicant’s character and fitness meets the minimum standard of the “conceivable rational basis test,” even though the rule was not the least restrictive means and perhaps not the best way to insure character and fitness.

There were, however, two decisions in which the Seventh Circuit found that legislative classifications failed to meet even this minimal standard. The decisions are significant as perhaps beginning to mark a trend toward strengthening the anti-discrimination principle embodied in the equal protection clause. The same growing reluctance to apply a totally deferential standard is also reflected in a few recent Supreme Court decisions. In Logan v. Zimmerman Brush Company, the majority struck, on procedural due process grounds, an Illinois statute cutting off discrimination claims due to conduct outside the control of a plaintiff. Four members of the Court, however, found that the law also violated even the lowest level of permissible equal protection scrutiny. Justice Blackmun asserted that a statute must have some objective basis in order to be sustained, and that this particular law created arbitrary and invidious distinctions.

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254. 691 F.2d at 302. This principle stems from the Supreme Court’s analysis in Dandridge v. Williams, 397 U.S. 471, 485 (1970).
255. 716 F.2d 401 (7th Cir. 1983).
257. See infra notes 263-267 and accompanying text.
258. This trend was first suggested in dissenting opinions. For example, in Schweiker v. Wilson, 450 U.S. 221 (1981), a vigorous dissent argued that where there is no indication of legislative purpose, the Supreme Court should impose a “fair and substantial relationship” standard. The dissent urged that the Court be more skeptical of post-hoc justifications about legislative purpose, unsupported by legislative history. The fair and substantial relationship standard would test the plausibility of the tendered purpose and preserve equal protection review as something more than “a mere tautological recognition of the fact that Congress did what it intended to do.” Id. at 244-45 (Powell, J., dissenting).
259. 455 U.S. 1148 (1982).
260. Id. at 1160 (Blackmun, J., concurring).
261. Id. at 1161 (Blackmun, J., concurring).
In *Zobel v. Williams*, the Supreme Court struck on equal protection grounds an Alaska dividend distribution plan which created distinctions between citizens based on the duration of their residence within the state. Although the Court could have dealt with the measure as one implicating the right to travel and thus justifying stricter review, the majority instead chose to apply traditional equal protection analysis, concluding that the distinctions created by the law failed to rationally serve any valid state interest. Although the distribution plan arguably could have been justified as compensating citizens for their prior contribution to the state, the majority applied a stricter review in concluding that the requirement failed even traditional equal protection analysis.

This same stricter approach is reflected in the Seventh Circuit case of *Evans v. City of Chicago*, finding no rational basis for the city’s practice of paying smaller judgments first, leaving those with judgments in excess of $1,000 to wait inordinately long periods of time for payment. The court rejected the city’s justification for its practice as an attempt to reduce litigation and interest costs by encouraging quick settlements for $1,000 or less without interest in a large number of nuisance cases. The justification was not convincing because the city’s practice, which included the immediate payment of fully litigated claims resulting in judgments of $1,000 or less, failed to reduce interest costs since interest accumulated on the sum of the unpaid larger judgments. The court could discern no rational basis for the challenged classification.

In the second case, *Ciechon v. City of Chicago*, the court found the city’s discharge of one paramedic, while not in any way disciplining a co-paramedic involved in the same incident, as an arbitrary and irrational treatment of similarly situated persons. Finding that the city did not have even a rational basis for its disparate treatment of the

263. *Id.* at 63.
264. *See also* *Plyler v. Doe*, 457 U.S. 202 (1982), in which the majority, while failing to find either a fundamental right or a suspect classification, applied an intermediate standard, i.e., requiring the law to further some substantial goal of the state.
265. 689 F.2d 1286 (7th Cir. 1982).
266. *Id.* at 1299.
267. *Id.*
269. 686 F.2d 511 (7th Cir. 1982).
270. *Id.* The court used the equal protection clause in the same way the due process clause is sometimes used, i.e., to protect against arbitrary government conduct. *Id.* at 517. *See also supra* notes 90-94 and accompanying text.
Aside from these minimal rationality equal protection cases, the Seventh Circuit dealt with a rather interesting discrimination problem in *Madyun v. Franzen*. A prisoner challenged the Illinois Department of Corrections regulations which subject female prisoners to frisk searches by female guards only, while male prisoners are subjected to frisk searches by male and female guards. Plaintiff claimed that male prisoners should be searched by only male guards, just as female prisoners are only subjected to searches by female guards. Although first recognizing that incarceration changes to a degree the application of constitutional principles, the court concluded that applying even non-prisoner doctrine, there was no merit to plaintiff's equal protection claim.

The court applied the analysis in *Craig v. Boren* requiring that a gender-based distinction "serve important governmental objectives and . . . be substantially related to achievement of those objectives." The important objective was to eliminate what might otherwise be a substantial impediment to the utilization of women as prison guards. The differentiation was justified in that there was no similar indication that males had suffered a lack of opportunity to serve as prison guards because of their preclusion from frisk searching female inmates. Thus in order to equalize opportunities for women to serve as guards in male prisons, the gender-based distinction was drawn.

Although the court's conclusion may be correct, some of its analysis is troublesome. The court focuses on the distinction between male and female guards in arguing that the preference for women guards is permissible. If plaintiff were a male guard seeking equal job opportunities, this analysis might be more appropriate. Rather plaintiff's claim is that male prisoners should be afforded "equal dignity and respect as that afforded female inmates." While conceding that male

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271. *Id.* at 524. *See also* Kuhn v. Vergiels, 558 F. Supp. 24 (D. Nev. 1982), upholding a preliminary injunction enjoining the defendants from enforcing a durational residency requirement for eligibility in a scholarship program as wholly unreasonable and arbitrary, *citing*, *Zobel* as authority; Osterndorf v. Turner, 426 So. 2d 539 (Sup. Ct. Fla. 1982) relying heavily on *Zobel* to strike a home owner's tax exemption statute based on residence in the state, although ultimately deciding the case on state constitutional grounds; *Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981), finding no rational justification for the disparate treatment imposed on pre-trial detainees.

272. 704 F.2d 954 (7th Cir. 1983), discussed, *supra* notes 60-67 and accompanying text.

273. *Id.* at 958.

274. 429 U.S. 190, 197 (1976).

275. 704 F.2d at 960.

276. *Id.* at 962.

277. *Id.*

278. *Id.* at 961.
and female inmates must receive substantially equal facilities and conditions while in prison, the court found that a prisoner has no right to be searched only by a member of his or her own sex. Although the court’s conclusions may be correct within the prison context, the court states that this is not controlling. It reasons that if women were not allowed to perform these limited searches—or were limited to doing so only on female inmates—the utility of women prison guards would be significantly diminished and job opportunities curtailed. If this were substantiated in the record, it might indeed justify the necessity of this discrimination.

Although the Supreme Court, as noted by the Seventh Circuit, has upheld various types of benign discrimination based on attempts to ameliorate the economic plight of females, the Supreme Court’s most recent decision has urged very careful scrutiny of such legislation. In *Mississippi University for Women v. Hogan* the state’s exclusion of males from the university’s nursing school was held to violate the equal protection clause. Although the state asserted that the female-only policy was based on a desire to maximize job opportunities for women, the majority rejected this analysis and reaffirmed the following basic principles: (1) laws which discriminate against males rather than females should be subjected to the same standard of review; (2) the defendants carry the burden of showing an “exceedingly persuasive justification” for any classification; (3) care must be taken in ascertaining whether the statutory objective reflects archaic and stereotypic notions; and (4) as to the means used in achieving a statutory objective, gender should never be used as a proxy for a more germane basis of classification. Applying these principles in *Hogan*, the majority concluded that the asserted state’s interest in having an affirmative action program for females could not be justified in the realm of nursing where there is no showing that females have suffered a disadvantage.

279. *Id.* at 962 (citations omitted).
280. *Id.* Note that the court in an earlier portion of its opinion rejects plaintiff’s claim that the limited frisk searches by female guards violated first amendment privacy rights, or fourth amendment rights of male inmates. *Id.* at 956-57. The Seventh Circuit recently reached this conclusion in *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983).
281. 704 F.2d at 962.
282. 102 S. Ct. 3331 (1982).
283. *Id.* at 3336-37. Thus the Court rejected the suggestion made by Justice Rehnquist in the earlier decision of *Michael M. v. Superior Court*, 450 U.S. 464 (1981), that men do not require the “special solicitude of the courts” and thus a lesser standard of review might be permissible. *Id.* at 476.
284. 102 S. Ct. at 3336.
285. *Id.*
Further, female-only schools tend to perpetuate the stereotypic view of nursing as an exclusively woman’s job.\textsuperscript{287} Although in this case the asserted government interests are certainly stronger and are based on findings of past denial of opportunity for females, the question of means is still problematic, i.e. does the goal of equal job opportunity for women as prison guards truly require that male prisoners be subjected to frisk searches by female guards whereas female prisoners are not subjected to the same treatment.\textsuperscript{288} The real question is whether the state’s goal of providing equal job opportunity for female guards would truly be obfuscated by granting isolated, and no doubt infrequent requests by male prisoners to be frisk searched by males only. This question is never adequately dealt with by the court.

IV. STATUTORY RIGHTS

A. Title VII: Employment Discrimination

While the court decided several cases raising issues under Title VII of the Civil Rights Act of 1964,\textsuperscript{289} none of them is of great significance.\textsuperscript{290} What might have been the court’s most important decision, 287. Id. at 3339.

288. An interesting analogy can be drawn to the customer preference defense which is raised in Title VII litigation. (42 U.S.C. § 2000e-2(e)(1) (1976), permits employers to make employment decisions on the basis of “religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”) Generally customer preference has been rejected as a justification for discrimination. See, e.g., Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981); Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971). But if a female customer preference for females only were respected, the same treatment would undoubtedly have to be afforded male customers.


290. In addition to the cases discussed in the text, there are three other decisions worth noting. In E.E.O.C. v. Liberty Trucking Co., 695 F.2d 1038 (7th Cir. 1982), the court concluded that federal district courts have jurisdiction, under 42 U.S.C. § 2000e-5(f)(3), to hear actions brought by the EEOC seeking to enforce conciliatory agreements entered into by the parties after a timely charge has been filed with the EEOC. The district court had dismissed the case for lack of subject matter jurisdiction. E.E.O.C. v. Liberty Trucking Co., 528 F. Supp. 610 (W.D. Wis. 1981). \textit{Compare}, E.E.O.C. v. Safeway Stores, Inc., 714 F.2d 567 (5th Cir. 1983); Gamewell Mfg., Inc. v. HVAC Supply, Inc., 715 F.2d 112 (4th Cir. 1983) (federal law, rather than state law, governs rescission issue raised in effort to avoid a federal court settlement on the basis of unilateral mistake). In Delta Air Lines, Inc. v. Colbert, 692 F.2d 489 (7th Cir. 1982), the court held that the district court abused its discretion in denying costs under Rule 54(d), \textit{Fed. R. Civ. P.}, to a defendant who prevailed in a Title VII action. The lower court used the standard for determining whether to award attorney fees to a defendant who prevails in a Title VII action rather than the Rule 54(d) standard under which “the prevailing party is prima facie entitled to costs and the losing party must overcome that presumption.” Id. at 490. The Seventh Circuit made it clear that Rule 54(d) applies to Title VII actions and “the district court’s discretion was confined to special circumstances almost wholly related to some fault by the prevailing party (absent here), and it is insufficient that the losing plaintiff had a reasonable basis for her case.” Id. at 491. In Sanders v. General Services Admin., 707 F.2d 969 (7th Cir. 1983), the trial court, after denying the defend-
E.E.O.C. v. Joslyn Mfg. and Supply Co.,291 was effectively overruled by a subsequent Supreme Court decision in Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.292 The issue in these cases is whether Title VII, as amended by the Pregnancy Discrimination Act,293 "requires that an employer who voluntarily insures male and female employees against the cost of hospital care for their dependents when they are injured or become sick also insure male employees against the cost of hospital care for their wives when they become pregnant." 294 The Pregnancy Discrimination Act, passed in 1978, clearly overrules the decision in General Electric Co. v. Gilbert295 and requires that employers with a health insurance plan provide female employees with hospitalization benefits for pregnancy related conditions to the same extent as the plan covers other medical conditions. While female employees hospitalized because of pregnancy had the same benefits as when they or male employees were hospitalized because of illness or injury, the employers' plans in these cases did not provide the spouses of male employees with the same benefits as the spouses of female employees because of restrictions on benefits when their hospitalization was due to pregnancy.

The Seventh Circuit, with a dissent by Judge Swygert, approved the employer's plan, reasoning that "Congress intended to do [no] more than protect working women and those financially dependent upon them when it enacted the Pregnancy Discrimination Act."296 However, the Supreme Court found that the employer's plan in Newport News discriminated against male employees on the basis of sex. The Court rejected the argument that Title VII only applies to discrimination in employment.

A two-step analysis demonstrates the fallacy in this contention. The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its
face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.\textsuperscript{297} As pointed out by the Court, the decision in \textit{Newport News} does not necessarily require that an employer's medical insurance plan treat pregnancies of male employees' wives the same as it treats pregnancies of female employees.\textsuperscript{298} Rather, it requires that the pregnancy related hospitalization of an employee's spouse be treated the same as the hospitalization of spouses due to injury or illness.

Other decisions address the standard and burden of proof in Title VII cases. The proof scheme for disparate treatment cases, articulated in \textit{McDonnell Douglas Corp. v. Green},\textsuperscript{299} was interpreted and applied in a number of cases. Under this standard a Title VII plaintiff makes a prima facie claim of employment discrimination by showing:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.\textsuperscript{300}

After a plaintiff proves a prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection [or the employee's discharge]."\textsuperscript{301} If the employer articulates such a reason, the plaintiff must show that the reason is in fact a pretext. Throughout, the ultimate burden of persuading the trier of fact that the employer discriminated remains with the plaintiff.\textsuperscript{302}

In \textit{DeLessstine v. Fort Wayne State Hosp. and Training Center},\textsuperscript{303} the defendants argued that the plaintiff must "prove that his position was not filled by 'a member of the protected minority.'"\textsuperscript{304} Because the plaintiff was replaced by a female, a member of a group protected under Title VII, the defendant argued that the plaintiff was precluded from proving a prima facie case of racial discrimination. This argument was summarily rejected as defying the "logic, purpose and lan-

\textsuperscript{297} 103 S. Ct. at 2631.
\textsuperscript{298} \textit{Id.} at n.25.
\textsuperscript{299} 411 U.S. 792, 802 (1973).
\textsuperscript{300} \textit{Id.} at 802.
\textsuperscript{301} \textit{Id.}
\textsuperscript{302} Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
\textsuperscript{303} 682 F.2d 130 (7th Cir.), \textit{cert. denied sub nom.} Ackerman v. DeLessstine, 103 S. Ct. 378 (1982).
\textsuperscript{304} \textit{Id.} at 132.
guage of Title VII.”\textsuperscript{305} In affirming the lower court’s finding of discrimination, the Seventh Circuit discussed the standard of review.\textsuperscript{306} It applied the clearly erroneous standard to the lower court’s “findings of subsidiary facts encompassing the parties’ conduct,” but held that the “ultimate fact of discrimination, namely whether defendants’ conduct constitutes a violation of Title VII, involves both a finding of fact and a conclusion of law.”\textsuperscript{307} As a result, the court of appeals concluded it could make “an independent examination of the ultimate fact of discrimination.”\textsuperscript{308}

A district court finding of racial discrimination in refusing to hire the plaintiff was reversed as clearly erroneous in \textit{Lee v. National Can Corp.}\textsuperscript{309} According to the court of appeals, the “record in this case lends no credence to the district court’s finding that [the plaintiff] was qualified to work as a journeyman machinist.”\textsuperscript{310} By failing to prove his qualifications, the plaintiff thus failed to establish a prima facie case of racial discrimination. The Seventh Circuit went on to hold that even if the plaintiff had established a prima facie case, he would have failed in his ultimate burden because the reason articulated by the defendant for refusing to hire him, falsification of a job application, was not pretextual.\textsuperscript{311}

Plaintiffs failed to establish “pretext” in two other cases. In \textit{Soria v. Ozinga Bros., Inc.},\textsuperscript{312} the lower court found that the plaintiff had been discharged because of “careless and unsafe attitudes, noncooperation with management, and lack of responsibility toward his job.”\textsuperscript{313}

\begin{itemize}
  \item 305. \textit{Id.}
  \item 306. While affirming the lower court’s finding of discrimination, the court of appeals did note an error in the application of the \textit{McDonnell Douglas} standard. The lower court found that the defendants had not met their burden “of establishing sufficient non-discriminatory reasons for terminating plaintiff’s employment,” and therefore concluded that the defendants’ stated reason was a pretext. \textit{Id.} at 136-37 n.10. The court of appeals held that defendants had met their burden by articulating a legitimate reason for the plaintiff’s discharge sufficient to raise a genuine issue of fact. However, there was no reversible error because the court of appeals agreed that the plaintiff had met his burden by showing that the articulated reason was a pretext. \textit{Id.} at 137 n.10.
  \item 307. \textit{Id.} at 133.
  \item 308. \textit{Id.} The court dealt with the standard of review in another case, \textit{Wattleton v. Intern. Broth. of Boiler Makers, Etc.}, 686 F.2d 586 (7th Cir. 1982), where it upheld the lower court’s determination that a seniority system was not bona fide. Based on lower court findings, which were not clearly erroneous, that the “Blacksmiths negotiated and maintained their seniority system for the illegal purpose, and with the intent and effect, of discriminating against Negroes because of their race,” \textit{id.} at 593, the only possible conclusion is that the seniority system is not bona fide within the meaning of Title VII.
  \item 309. 699 F.2d 932 (7th Cir.), cert. denied, 104 S. Ct. 148 (1983).
  \item 310. \textit{Id.} at 936.
  \item 311. \textit{Id.} at 937.
  \item 312. 704 F.2d 990 (7th Cir. 1983).
  \item 313. \textit{Id.} at 994.
\end{itemize}
These reasons were sufficiently clear and specific and were not proved to be a pretext. The employer in *Waters v. Furnco Construction Corp.* successfully defended a discrimination in hiring charge by indicating it had not hired two of the plaintiffs because of the “need to obtain workers known from experience to be sufficiently qualified.”

Two cases involved procedural matters which arise in relation to charges to be filed with the EEOC. In *Pastrana v. Federal Mogul Corp.*, the issue was whether the plaintiff had filed with the state deferral agency in Illinois within the required 180 days, thereby triggering the 300-day period for filing with the EEOC. Here the plaintiff filed a timely charge with the state agency but did not include a claim of discrimination based on national origin. The formal charge, prepared by an intake officer, alleged only physical handicap discrimination and it was not clear who was responsible for the omission of a national origin charge. Because the plaintiff had completed a charge with the state agency within the 180 days, and subsequently filed with the EEOC within 300 days, the Seventh Circuit reversed the lower court’s dismissal and found that the equities favored the plaintiff. Relying on a Ninth Circuit decision, the court held that “failure to satisfy state filing requirements will not necessarily bar a federal Title VII

314. While the court of appeals did hold that the district court erred in ignoring the plaintiff’s statistical evidence, it found the error was insignificant because the plaintiff’s evidence was “so incomplete that it could not have assisted in the establishment of a discriminatory motive.” *Id.* at 999. The plaintiff’s expert did not properly define a “relevant labor market” for the defendant’s hiring and admitted that he was not aware of the defendant’s hiring procedures. The plaintiff’s effort in *Soria* to establish a disparate impact on the basis of statistics also failed. The usefulness of the statistics was severely impaired by the small sample size, *id.* at 995, and did not accurately reflect the company’s overall disciplinary practices because the statistics ignored the unrecorded instances of discipline which were recalled by company management during depositions. Further, the statistics failed to properly categorize the nature of the accidents, the severity of the discipline administered and the previous history of the drivers involved. *Id.* at 996.

315. 688 F.2d 39 (7th Cir. 1982).

316. *Id.* at 40. The case of the third plaintiff was remanded for further proceedings because the evidence established that he was known to the job superintendent to be experienced and highly qualified. Statistics supplied the basis for reversing the lower court’s judgment for the defendant in a disproportionate impact case. *Beavers v. International Ass’n of Bridge and Structural Iron Workers, Local Union No. 1*, 681 F.2d 821 (7th Cir. 1982). The defendant’s practice of refusing to add new members to a union shown to be predominantly non-minority while granting temporary work permits on an ad hoc basis to meet labor needs, although neutral on its face, had a discriminatory impact on skilled Hispanic ironworkers who represent 9.6% of the applicant pool. This discriminatory impact was never explained by the union.

317. 683 F.2d 236 (7th Cir. 1982).

318. Under 42 U.S.C. § 2000e-5(e) (1976) charges must be filed with the EEOC within 180 days after the alleged unlawful employment practice occurs, except in those situations where a charge is first filed with a state or local agency. In those cases, the charging party has 300 days in which to file with the EEOC.

319. Saulsbury v. Wismer and Becker, Inc., 644 F.2d 1251 (9th Cir. 1980).
suit if the equities favor the claimant.” The court also noted that actual review or consideration by the state agency is not required to trigger the longer period under Title VII.

A technical defect in the plaintiff’s charge filed with the EEOC was not grounds for dismissal of the lawsuit in Maxey v. Thompson. The plaintiff named only the Illinois Department of Revenue in his EEOC charge, but named several individuals, including the director of the department, in his complaint filed in federal court. The Seventh Circuit ruled that the plaintiff should have been allowed to amend his complaint to add the department and that such amendment would relate back to the original filing date under Rule 15(c), thus satisfying the requirement that suit be filed within 90 days after receipt of the “right to sue” letter. Relation back was appropriate because the defendant added by the amendment, the Illinois Department of Revenue, was put on notice by the EEOC charge that it might be sued.

B. Age Discrimination In Employment Act

Discrimination in employment on the basis of age is generally prohibited by the Age Discrimination in Employment Act (ADEA). A number of decisions this term involve interpretations of this Act. A plaintiff’s burden of proof in an action under the ADEA is discussed in Golomb v. Prudential Ins. Co. of America. Here the court approved the McDonnell Douglas burden of proof formula for use in cases under the ADEA. In addition, the court made it clear “that a successful claimant in an ADEA action need not prove that age was the sole determining factor for the defendant-employer’s action, but rather that

320. 683 F.2d at 240.
321. Id. at 239.
322. 680 F.2d 524 (7th Cir. 1982).
323. FED. R. CIV. P. 15(c).
324. 680 F.2d at 526. Under the same rationale the plaintiff was allowed to amend his complaint under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976), to include the Illinois Department of Revenue as a defendant.
326. Another case, Desris v. City of Kenosha, Wisconsin, 687 F.2d 1117 (7th Cir. 1982), challenged a city ordinance, which required certain firefighters to retire at age 60, on the grounds that it violated plaintiffs’ right to equal protection. City firefighters who participated in another pension plan did not face mandatory retirement until age 65. The court rejected the equal protection claim because it determined the plaintiffs were not similarly situated with firefighters belonging to the other pension plan. In a gratuitous ruling, the court also determined that a rational basis exists for the disparity in age of mandatory retirement. The court avoided the merits in a case brought under the ADEA, Locascio v. Teletype Corp., 694 F.2d 497 (7th Cir. 1982), by affirming an involuntary dismissal under Rule 41(b), FED. R. CIV. P., for failure of the plaintiffs to prosecute their action in a timely fashion.
327. 688 F.2d 547 (7th Cir. 1982).
328. 411 U.S. 792 (1973); see supra notes 299-301 and accompanying text.
age was a determining factor.\footnote{329} The court was faced with a mandatory retirement age of 55 for firefighters in \textit{Orzel v. City Of Wauwatosa Fire Dept.}\footnote{330} The primary issue in the case was the city's challenge to the magistrate's conclusion that age 55 is not a valid bona fide occupational qualification (BFOQ) for the job of firefighter.\footnote{331} The city raised several arguments in trying to establish the BFOQ exception. First it argued that because federal firefighters are generally required by statute to retire at age 55, Congress could not have intended to prohibit state and municipal employers from adopting age 55 as the mandatory retirement age for local firefighters. This was rejected because, unlike the city scheme, the federal retirement provision allows for individualized determinations of fitness in exceptional cases.\footnote{332} More importantly, the court noted that the federal retirement age for firefighters was "for a wholly different group of employees, operating under different working conditions and performing significantly different job functions."\footnote{333} Since the mandatory retirement age of 55 for federal firefighters does not automatically establish the validity of the city's BFOQ defense, the city must present objective and credible evidence establishing that its compulsory retirement rule qualifies as a BFOQ under the statute.\footnote{334} There was nothing in the record indicating that tasks performed by the local firefighters in Wauwatosa are substantially identical to those performed by federal firefighting personnel.

Next the city argued that the magistrate had failed to give sufficient deference to the judgment of the state legislature which passed the mandatory retirement age. Here the court noted that the statute does not require local municipalities to adopt age 55 as the mandatory retirement age; rather, it simply sets age 55 as a "normal retirement date."\footnote{335} The court refused to give the statute the deference urged by the city because it would have established a statutory presumption of validity. This, the court concluded, would effectively shift the burden

\footnotesize{329. 688 F.2d at 550.}

\footnotesize{330. 697 F.2d 743 (7th Cir. 1983).}

\footnotesize{331. A statute of limitations defense which questioned whether the plaintiff had filed a timely charge with the appropriate federal and state agencies was found to be waived because the city did not raise it in its answer. \textit{Id.} at 747 n.8.}

\footnotesize{332. \textit{Id.} at 749.}

\footnotesize{333. \textit{Id.} Here the court relied extensively on \textit{Tuohy v. Ford Motor Co.}, 675 F.2d 842 (6th Cir. 1982) (the mandatory retirement age for commercial airline pilots does not establish the same age as a valid BFOQ for non-commercial pilots). \textit{See also} \textit{E.E.O.C. v. Wyoming}, 460 U.S. 226, 242 n.17 (1983); \textit{E.E.O.C. v. County of Los Angeles}, 706 F.2d 1039 (9th Cir. 1983).}


\footnotesize{335. 697 F.2d at 750-51.}
of refuting an employer's BFOQ defense to the employee, contrary to "the settled law of both this and other circuits that it is the employer—not the employee—who has the burden of establishing a BFOQ defense."\cite{336} Such a shift in the burden based on a statutory presumption would have placed state and local governmental employers in a much better position than private employers under the ADEA.

Concerning the employer's burden, the court approved the magistrate's approach which required the city, in order to prevail on its BFOQ defense, "to demonstrate either that all or substantially all persons over age 55 would be unable to safely and effectively perform firefighting duties, or that at least some employees over age 55 possess a disqualifying trait that cannot practicably be ascertained by means other than automatic exclusion on the basis of age."\cite{337} While recognizing that public safety is a legitimate municipal goal, the court held that this does not relieve an employer from the burden of justifying the particular age limitation which it adopts. The city simply failed to meet its burden; its argument was substantially undercut by the fact that it had raised the mandatory retirement age from 55 to 60 while the litigation was in progress.\cite{338} Finally, the court noted that "economic factors cannot be the basis for a BFOQ, since precisely those considerations were among the targets of the ADEA."\cite{339}

The court in Orzel also faced several questions concerning the award of damages. First, the court indicated that the magistrate had not abused his discretion in deducting amounts received from unemployment compensation and retirement pension benefits.\cite{340} Second, the court rejected the employer's argument that the plaintiff had failed to mitigate damages; while noting that his efforts were "less than vigorous," the court agreed with the magistrate that the plaintiff did not violate his duty to mitigate.\cite{341} Third, the court agreed with the magistrate that the city's conditional offer to reinstate the plaintiff, which required

\begin{enumerate}
\item \textit{Id.} at 751.
\item \textit{Id.} at 754. This requirement is consistent with recent EEOC regulations, 29 C.F.R. § 1625.6(b). In addition, the court found its ruling consistent with its earlier decision in Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), \textit{cert. denied}, 419 U.S. 1122 (1975). That case upheld Greyhound's policy of refusing to consider employment applications from persons over 35 years of age and relied heavily on the importance of safety in transporting passengers and the inability of individualized testing to achieve those safety goals. \textit{See also} E.E.O.C. v. County of Los Angeles, 706 F.2d at 1042-43.
\item 697 F.2d at 755.
\item \textit{Id. See also} E.E.O.C. v. County of Los Angeles 706 F.2d at 1042.
\item 697 F.2d at 756. \textit{Contra} Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 81-82 (3d Cir. 1983) (back pay award under Title VII).
\item 697 F.2d at 756-57. The plaintiff had secured one temporary part-time job and applied for another full-time position during a two-year period.
\end{enumerate}
that he take and pass a physical exam arranged by the city, did not terminate his entitlement to back pay because rejection of the conditional offer was not unreasonable.\(^{342}\)

Finally, the court approved an award of liquidated damages based on the conclusion that the city had committed a willful violation of the ADEA.\(^{343}\) In approving this award, the court utilized its test from an earlier case, i.e., an ADEA plaintiff “must show that the defendant’s actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA.”\(^{344}\) Based on letters from both counsel for the plaintiff and the city attorney as well as the rulings in other cases, the court found that the magistrate’s conclusion that the “City knew or reasonably should have known of the requirements of the ADEA and that the City knew or reasonably should have known that its termination of Orzel was inconsistent with those requirements,” was not clearly erroneous.\(^{345}\)

In \textit{Pfeiffer v. Essex Wire Corp}.\(^{346}\) the Seventh Circuit joined five other circuits in holding that neither punitive damages nor damages for pain and suffering are available under the ADEA. The question whether the defendant had sufficient employees to qualify as an “employer” was at issue in \textit{Zimmerman v. North American Signal Co}.\(^{347}\) In upholding the lower court’s dismissal of the action, the Seventh Circuit held that persons who are no more than directors of a corporation or unpaid, inactive officers are not to be considered employees.\(^{348}\) It also held that the classification of persons as employees in the medical plan is not binding under the ADEA\(^{349}\) and rejected the plaintiff’s argument that persons who worked at some point during a week should be counted as having worked “each working day” of a week.\(^{350}\) The plaintiff in \textit{Posey v. Skyline Corp}.\(^{351}\) was dismissed for failure to file a

\(^{342}\) \textit{Id.} at 757.

\(^{343}\) Liquidated damages awarded under 29 U.S.C. § 626(b) (1976) effectively double the plaintiff’s recovery of back pay and benefits.


\(^{345}\) 697 F.2d at 759.

\(^{346}\) 682 F.2d 684 (7th Cir. 1982).

\(^{347}\) 704 F.2d 347 (7th Cir. 1983). Under the Act, an employer is defined as “a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 29 U.S.C. § 630(b) (1976). Another recent case, E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983), considered the question whether a person was an employee, and therefore covered by the ADEA, or an independent contractor not covered by the Act.

\(^{348}\) 704 F.2d at 352.

\(^{349}\) \textit{Id.}

\(^{350}\) \textit{Id.} at 352-54; see 29 U.S.C. § 630(b) (1976).

\(^{351}\) 702 F.2d 102 (7th Cir. 1983).
timely charge of age discrimination with the EEOC. While agreeing with its conclusion in an earlier decision\textsuperscript{352} that the 180-day period for filing a charge can be tolled by an employer’s failure to post a conspicuous notice of ADEA rights, the plaintiff’s affidavit indicating he had never seen such a notice was not sufficient to raise a genuine issue of fact under Rule 56.\textsuperscript{353}

The final ADEA case, \textit{E.E.O.C. v. County of Calumet},\textsuperscript{354} rejected the defendant’s argument that the extension of the ADEA to state and local employers is unconstitutional.\textsuperscript{355} The defendant also argued that the plaintiff, a deputy clerk forced to retire at age 65 by a county personnel rule, had waived her rights under the ADEA as part of a collective bargaining agreement between her union and the county. In rejecting this argument, the court held that the collective bargaining agreement did not clearly relinquish the rights of employees under the ADEA\textsuperscript{356} and, even if the agreement had represented a clear waiver of the rights, it would not be enforceable because a majority of employees in any bargaining unit cannot waive the individual rights provided by the ADEA. Here the court noted that such rights “are not to be left to the control of individual unions, institutions which have, on occasion, shown a sensitivity to the rights of the majority of the union membership and an insensitivity to the rights of the minority.”\textsuperscript{357} Because younger workers invariably outnumber those of retirement age and the interests of younger and older workers frequently conflict, the court concluded that majority rule would serve to frustrate the fundamental purpose of the Act.\textsuperscript{358}

\textbf{C. Employment Discrimination—§ 1981}

The appropriate standard and burden of proof was at issue in a

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\textsuperscript{353} \textit{FED. R. CIV. P.}

\textsuperscript{354} 686 F.2d 1249 (7th Cir. 1982).

\textsuperscript{355} \textit{Id.} at 1251-53. The court held that application of the ADEA to state and local governments constitutes a proper exercise of Congress’ power under section 5 of the fourteenth amendment. The validity of the 1974 amendment extending coverage of the ADEA to state and local governments was subsequently established in \textit{E.E.O.C. v. Wyoming}, 460 U.S. 226 (1983), where the Court held Congress acted within the scope of its power under the commerce clause and did not infringe upon states’ rights under the tenth amendment.

\textsuperscript{356} 686 F.2d at 1254-55.

\textsuperscript{357} \textit{Id.} at 1256.

\textsuperscript{358} \textit{Id.}
case brought under the Civil Rights Act of 1866\textsuperscript{359} challenging the denial of a promotion on the grounds that it was racially discriminatory. In \textit{Mason v. Continental Illinois National Bank}\textsuperscript{360} the plaintiff applied for a position as transmission supervisor of the communications section of the bank's international services division. The position was subsequently filled by a white woman who formerly worked for the bank. Although there was no indication that the plaintiff was not qualified for the position, the white woman was selected because, according to the bank, she was the best qualified candidate. The court granted summary judgment in favor of the defendant and this was affirmed.

While noting that the \textit{McDonnell Douglas}\textsuperscript{361} format is generally applicable to actions brought under section 1981, the court questioned its use "in a case involving appointment or promotion to a position for which there are several candidates."\textsuperscript{362} In contrast to the situation where an employer is attempting to fill a job opening requiring only routine mechanical skills,\textsuperscript{363} when filling a managerial position an employer "will naturally be looking for the best qualified applicant rather than a minimally qualified one."\textsuperscript{364} In such comparative evaluation cases, the court suggested that rigid application of \textit{McDonnell Douglas} is not appropriate because the presumption underlying the formula does not exist when trying to find the best qualified person to fill a position.\textsuperscript{365}

Nevertheless, after raising questions about the applicability of \textit{McDonnell Douglas}, the court went ahead and applied the test. So long as the person hired was not less qualified than the plaintiff and there was evidence indicating she was preferred for reasons having nothing to do with her race, the bank met its burden of articulating a legitimate non-discriminatory reason and the plaintiff failed to prove it was a pretext. Even though this raises questions of motive, the court found that summary judgment in favor of the defendants was appropriate. Even after extensive pre-trial discovery, the plaintiff presented no evidence indicating that racial animus played a role in the decision; instead, she re-

\begin{itemize}
\item \textsuperscript{359} 42 U.S.C. § 1981 (1976).
\item \textsuperscript{360} 704 F.2d 361 (7th Cir. 1983).
\item \textsuperscript{361} See supra notes 299-301 and accompanying text.
\item \textsuperscript{362} 704 F.2d at 364. Because disparate treatment cases require a showing of intent, the decision in \textit{General Building Contractors Ass'n v. Pennsylvania}, 458 U.S. 375 (1982), holding that proof of discriminatory intent is required under § 1981, should not affect this case.
\item \textsuperscript{363} In this situation the court suggests that the positions are normally filled on a first-come first-serve basis from a pool of qualified applicants. 704 F.2d at 365.
\item \textsuperscript{364} Id.
\item \textsuperscript{365} The court found support for this in \textit{Loeb v. Textron, Inc.}, 600 F.2d 1003 (1st Cir. 1979).
\end{itemize}
lied on conclusory assertions of discrimination. Therefore, the case demonstrates that a plaintiff is not insulated from summary judgment, even after establishing a prima facie case under *McDonnell Douglas*, if the employer articulates a legitimate nondiscriminatory reason. The determination of whether or not the articulated reason is a pretext may, in some cases, be made on a motion for summary judgment.

**D. Discrimination on the Basis of Handicap—§ 504**

Two cases raise questions under § 504 of the Rehabilitation Act of 1973. The plaintiff in *Jones v. Illinois Dept. of Rehabilitation Services* claimed that the Illinois Institute of Technology (IIT) violated his rights under § 504 by failing to provide him with the services of a sign language interpreter required for him to participate in and benefit from his class in mechanical engineering. The court quickly agreed with the district court judge's conclusion that § 504 and implementing regulations require either IIT or the Illinois Department of Rehabilitation Services to provide the plaintiff with interpreter services. The state agency had already concluded that the plaintiff was eligible for vocational rehabilitation services and provided him with financial assistance for tuition, room and board, and books. Relying primarily on federal regulations, the court placed the primary financial responsibility for supplying an interpreter on the state agency which receives federal funds specifically for vocational rehabilitation and training, rather than on the university which does not receive federal funds earmarked for that purpose. This construction of the regulations avoided what the court perceived as a difficult question if the primary burden had been placed upon the colleges and universities by federal regulations without providing funds to meet the burden.

In another case, *Brookhart v. Illinois State Bd of Educ.*, several handicapped elementary and secondary school students challenged a Peoria School District requirement that they pass a minimal competency test before receiving a high school diploma. After concluding

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367. As pointed out by Judge Cudahy in a concurring opinion, summary judgment would not have been appropriate here if the plaintiff had "presented evidence of facts which could be proved at trial to establish that the legitimate non-discriminatory reason articulated by the employer for its decision was pretextual." *Id.* at 367. The plaintiff made no assertions which, if proved, would have established that the reasons were pretextual.
369. 689 F.2d 724 (7th Cir. 1982).
370. 34 C.F.R. § 104.41-47; 34 C.F.R. § 104.51-54.
371. 689 F.2d at 729.
372. 697 F.2d 179 (7th Cir. 1983). *See also supra* notes 152-54 and accompanying text.
that the denial of diplomas to such children, who have received the special education and related services required by the Education for All Handicapped Children Act but are unable to achieve the educational level necessary to pass a minimal competency test, does not constitute a denial of a “free appropriate public education,” the court addressed the plaintiffs’ claim under § 504. Here the court noted that minimal competency testing is not discriminatory solely because handicapped students might not be capable of attaining a level of competence sufficient to pass the test. However, the court did indicate that the format or environment might have to be modified to enable handicapped students to disclose the degree of learning they actually possess. The court avoided the question whether either § 504 or the Education for All Handicapped Children Act requires that the test be validated to determine whether it is suited to the purposes for which it is being used with respect to the handicapped.

E. Housing Discrimination—Fair Housing Act and § 1982

Discrimination in housing based on race can be challenged under both the Civil Rights Act of 1866 and the Fair Housing Act. Both of these acts were utilized by the plaintiffs in *Phillips v. Hunter Trails Community Ass'n*, an action by a black couple claiming they were denied the opportunity to purchase a $675,000 home in the Hunter Trails subdivision because of the actions of the Community Association and an individual who had purchased the Association’s right of first refusal on any proposed sale. After learning of the proposed sale to the plaintiffs, the officers and directors of the Community Association held a meeting and decided to block the sale to plaintiffs by selling the right of first refusal to the individual defendant who then exercised the option by agreeing to pay the same price to the sellers. The trial court issued an immediate injunction and, after trial, awarded both compensatory and punitive damages as well as attorney fees and costs. On appeal the defendant association argued that the plaintiffs had not proved discriminatory intent as required under § 1982. Referring to

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375. 697 F.2d at 184.
376. *Id.* The court ruled in favor of the plaintiffs on procedural due process grounds. See *supra* notes 152-54 and accompanying text.
379. 685 F.2d 184 (7th Cir. 1982).
General Building Contractors Ass'n Inc. v. Pennsylvania, the court assumed that intent was also required under § 1982 but concluded that the evidence was sufficient to uphold the lower court's finding of discrimination. The lower court found direct evidence of racial animus on the part of the Association and rejected its economic defense based on a need to protect property values in the subdivision.

Although not necessary after affirming the judgment for the plaintiffs on the basis of § 1982, the court went on to consider the proof required under the Fair Housing Act. Because this was not a case where the plaintiffs argued that facially neutral policies had a disparate impact on racial minorities, the four factors discussed in Metropolitan Housing Devel. Corp. v. Arlington Heights are not relevant. In cases such as this where the plaintiffs charge discriminatory intent, rather than facially neutral actions, they can make out a prima facie case under the Fair Housing Act by showing they are black, they applied for and were qualified to buy the house, they were rejected, and the house remained on the market. The court held that the plaintiffs had clearly made the required showing and that the burden then shifted to the defendant to articulate nonracial reasons for its actions. Since the Association did not succeed in meeting its burden, the plaintiffs were entitled to judgment under the Fair Housing Act as well as § 1982.

Each plaintiff was awarded $25,000 in compensatory damages for humiliation and embarrassment, based on the testimony and demeanor of the plaintiffs. On appeal, the court found that this was not an adequate basis for "an award that is more than twice as much as any other victim of housing discrimination has received for intangible injuries, judging from the parties' submissions and our own research." The court noted that it was not appropriate to consider the value of the home, $675,000, in assessing the plaintiffs' intangible injuries nor could the egregious conduct of the Association be considered because this is reflected in the award of punitive damages. Therefore, the lower court was directed to reduce the compensatory damages for intangible inju-

381. 685 F.2d at 187-89. In a subsequent case, Clark v. Universal Builders, Inc., 706 F.2d 204, 213 (7th Cir. 1983), the court noted that it did not have to consider whether discriminatory intent is required under § 1982. It is not clear why the court did not view this matter as foreclosed by its decision in Phillips.
383. 685 F.2d at 190. See also Robinson v. 12 Lofts Realty, 610 F.2d 1032, 1038 (2d Cir. 1979).
384. 685 F.2d at 190.
ries to $10,000 for each plaintiff. The award of $50,000 in punitive damages was upheld under § 1982, even though the Fair Housing Act restricts punitive damages to $1,000. The Association’s claimed absolute immunity from punitive damages was rejected because it was not raised in the district court.\textsuperscript{385}

Another housing discrimination case based on § 1982, \textit{Clark v. Universal Builders, Inc.},\textsuperscript{386} was before the court of appeals for the third time.\textsuperscript{387} Giving substantial deference to the lower court’s findings of fact after the second trial, the court of appeals affirmed the judgment for the defendants. Under the test for both theories of liability which were established in the second appeal, the plaintiffs failed to prove a prima facie case and, therefore, it was not necessary to reach the question whether the defendants could articulate a legitimate, nondiscriminatory reason for their conduct.\textsuperscript{388} The plaintiffs in this case and the class of a thousand black home buyers had purchased newly constructed single family dwellings located on the south side of Chicago under land installment contracts between 1957 and 1969. They claimed, under the traditional theory, that the defendants violated their rights by selling to black buyers at higher prices and on less favorable terms than were available to white buyers. Under the exploitation theory, the plaintiffs claimed that a dual housing market existed in Chi-

\textsuperscript{385} The immunity argument was based on City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), holding that punitive damages cannot be awarded against municipalities under 42 U.S.C. § 1983 (1976).

\textsuperscript{386} 706 F.2d 204 (7th Cir. 1983).

\textsuperscript{387} The lower court’s denial of the defendants’ motion to dismiss and holding that the plaintiffs’ “exploitation” theory stated a claim under § 1982 was affirmed in Baker v. F & F Investment, 420 F.2d 1191 (7th Cir. 1970), \textit{cert. denied sub nom.}, Universal Builders, Inc. v. Clark, 400 U.S. 821 (1970). After a jury trial the lower court then granted the defendants’ motion for a directed verdict on the grounds that the plaintiffs could not prove liability under § 1982 without evidence of discrimination under the traditional theory. This was reversed by the court of appeals because “the admitted evidence was sufficient to establish a \textit{prima facie} case under section 1982 pursuant to the exploitation theory of liability and . . . under the so-called traditional theory of discrimination.” \textit{Clark v. Universal Builders, Inc.}, 501 F.2d 324, 334 (7th Cir.), \textit{cert. denied}, 419 U.S. 1070 (1974). A second trial was held in 1979 and the district judge eventually held that the plaintiffs had failed to meet their burden of proof under either theory of liability.

\textsuperscript{388} Under the traditional test the plaintiffs must make

\begin{quote}
 a showing of “treating, in similar circumstances, a member or members of one race different from the manner in which members of another race are treated.” That is, a black prospective buyer of a dwelling demonstrates discriminatory conduct if he proves that an owner utilizes different pricing policies with respect to blacks and whites similarly situated.
\end{quote}

\textit{Id.} at 334.
Chicago because of racially based residential segregation and the defendants exploited this by demanding prices and terms of black buyers which were unreasonably in excess of prices and terms available to white buyers for comparable housing.

The lower court found that the claim under the traditional theory failed because the homes sold to buyers in Deerfield were not in fact comparable to those sold to the black buyers; the court of appeals held this finding was not clearly erroneous. In addition to finding a lack of comparability, the lower court concluded the plaintiffs had not demonstrated discriminatory pricing policies on the part of the defendants. This finding was also upheld. Similarly, the court of appeals approved the lower court’s decision that any difference in terms of sales between the white buyers in Deerfield and the black buyers on the south side of Chicago was not sufficient evidence of discriminatory behavior.389

Concerning the exploitation theory, the lower court accepted the plaintiffs’ contention “that Chicago suffered from a high degree of racial residential discrimination and that there was a substantial demand for housing among black households,”390 but rejected the contention that this phenomenon enabled the defendants to exploit black buyers. The primary defect here was the plaintiffs’ inability to demonstrate sufficient market dominance on the part of the defendants to exploit the plaintiffs through non-competitive pricing. In other words, the court found that the defendants were not capable of maintaining prices above levels dictated by competition.391

The final housing case, Washington v. Sherwin Real Estate, Inc.,392 dealt primarily with the lower court’s order allowing the plaintiffs’ counsel to withdraw on the day of trial and directing the plaintiffs to proceed pro se without a continuance.393 On appeal it was determined that the lower court had not abused its discretion in light of the totality of the circumstances.394 On the merits, the lower court finding, that the plaintiffs were denied an apartment because of Mr. Washington’s belligerent conduct at the rental office, was not clearly erroneous. There was conflicting evidence on this point and the lower court found the

389. 706 F.2d at 207-10.
390. Id. at 211.
391. Id. at 211-12. The court also rejected the plaintiffs’ conspiracy claim under 42 U.S.C. § 1985(3) (1976). Id. at 212.
392. 694 F.2d 1081 (7th Cir. 1982).
393. Counsel withdrew because of a breakdown in communications with his clients and the plaintiffs did not object to his withdrawal. Id. at 1087-88. The court then directed the plaintiffs to proceed pro se and they did not request a continuance until halfway through the trial. Id. at 1088-89.
394. Id. at 1089.
defendants’ evidence more credible.\textsuperscript{395}

\textbf{F. Attorneys’ Fees}

Before considering the cases decided this term by the Seventh Circuit, it is important to understand the most recent decision of the Supreme Court interpreting the Civil Rights Attorney’s Fees Awards Act of 1976.\textsuperscript{396} In \textit{Hensley v. Eckerhart},\textsuperscript{397} the Court had to determine the proper standard for setting a fee award where a plaintiff has achieved only limited success in the litigation.\textsuperscript{398} Plaintiffs who “succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit” are considered prevailing parties for § 1988 purposes.\textsuperscript{399} The difficult inquiry relates to the amount of fees to be awarded. Here the Court approved, as “the most useful starting point,” multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate.\textsuperscript{400} Where a plaintiff prevails, but on less than all of the claims for relief, the Court held that two questions must be addressed: “First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award.”\textsuperscript{401} Where a plaintiff, in one lawsuit, raises different claims for relief which are based on different facts and legal theories, work on one claim is generally unrelated to work on another claim. Therefore, fees

\textsuperscript{395} It is interesting to note that even though the defendants successfully contended they denied the plaintiffs an apartment because of their belief that “they would be undesirable tenants on the basis of Mr. Washington’s rude and belligerent behavior in the real estate office,” \textit{Id.} at 1090, the defendants did rent an apartment to the plaintiffs after the litigation was filed and the lower court issued a preliminary injunction prohibiting the defendants from renting the townhouse to any one other than the plaintiffs during the pendency of the suit. Apparently the plaintiffs were not so undesirable that the defendants were willing to allow the townhouse to stand empty for a period of time.


\textsuperscript{397} 461 U.S. 424 (1983).

\textsuperscript{398} In summarizing three approaches taken to this issue by different circuits, the Court cited Muscare v. Quinn, 614 F.2d 577, 579-81 (7th Cir. 1980), as an example of cases holding that “plaintiffs should not recover fees for any work on unsuccessful claims,” and Sherkow v. Wisconsin, 630 F.2d 498, 504-05 (7th Cir. 1980), as an example of cases holding that plaintiffs “generally should receive a fee based on hours spent on all nonfrivolous claims.” 103 S. Ct. at 1938 n.5. Under the third approach, “recovery of a fee for hours spent on unsuccessful claims depends upon the relationship of those hours expended to the success achieved.” \textit{Id.} at 1938-39 n.5.

\textsuperscript{399} This formulation from Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978), was quoted with approval in \textit{Hensley}, 103 S. Ct. at 1939. A Seventh Circuit case, Busche v. Burkee, 649 F.2d 509, 521 (7th cir. 1981), \textit{cert. denied}, 454 U.S. 897 (1982), was also cited in support of this formulation. 103 S. Ct. at 1939 n.8.

\textsuperscript{400} 103 S. Ct. at 1939.

\textsuperscript{401} \textit{Id.} at 1940.
would not be awarded for services on the unsuccessful claim. A more common situation is where the plaintiff asserts claims for relief which involve a common core of facts or related legal theories. In this situation counsel’s time is devoted to the litigation as a whole, with allocation to particular claims very difficult. Here the Court directs the trial courts to “focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.” As recognized by the Court, this focus on the results achieved does not lend itself to a precise rule or formula for determining the amount of fees. In making this equitable judgment, the district court has the discretion to identify specific hours which should be eliminated or simply reduce the award to account for the limited success. The district court should, however, in exercising this discretion provide “a concise but clear explanation of its reasons for the fee award”.

The Court concluded its holding with the following summary:

We hold that the extent of a plaintiff’s success is a crucial factor in determining the proper amount of an award of attorney’s fees under 42 USC § 1988. Where the plaintiff has failed to prevail on a claim which is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

The Court remanded the case to give the district court an opportunity to apply these standards.

The determination of the proper amount of fees to be awarded was considered by the Seventh Circuit in several cases. Three cases, decided without the benefit of Hensley, involved plaintiffs who prevailed but not on all of their claims. Using the Hensley categories, two of these cases presented related claims involving a common core of facts and related legal theories. All of the plaintiff’s claims in Lenard v.

402. Id.
403. Id.
404. Id. at 1941.
405. Id. at 1943.
406. While the district court has much discretion in determining the amount of an award, the failure to articulate reasons to explain and support the determination can be grounds for reversal. Freeman v. Franzen, 695 F.2d 485, 494 (7th Cir. 1982). See also Jones v. Illinois Dept. of Rehabilitation Services, 689 F.2d 724, 731 (7th Cir. 1982) (reasons evident from the trial court’s discussion of the fact that the plaintiff prevailed on only one claim).
Argento\(^{407}\) arose out of an arrest and subsequent events at the police station and a hospital. In separate counts, the plaintiff claimed an illegal beating, a conspiracy, malicious prosecution and obstruction of justice. The jury awarded substantial damages, finding in favor of the plaintiff on the two conspiracy charges and the malicious prosecution charge. On appeal, the court affirmed the jury on only one of the conspiracy charges, reversing the findings favorable to the plaintiff on the malicious prosecution and obstruction of justice claims. After concluding that the plaintiff should be awarded fees “only for the preparation and presentation of claims on which [he] has prevailed,” the case was remanded for the trial court to carefully review the time sheets and assess the appropriate fee.\(^{408}\) The other case, \textit{Jones v. Illinois Dept. of Rehabilitation Services},\(^{409}\) involved a plaintiff who asserted claims under separate provisions of the Rehabilitation Act of 1973.\(^{410}\) Because the trial court rejected his claim under Title I on the grounds that there is no private right of action, the court of appeals held that “it was not an abuse of discretion for the trial court to take that into account in determining the amount of a reasonable fee.”\(^{411}\)

This ruling in \textit{Jones} is suspect because the Court of Appeals held it did not have to address the Title I issue since the plaintiff “obtained all the relief he sought through his section 504 claim”.\(^{412}\) If this is true, then the plaintiff was apparently seeking the same relief under both parts of the Act. Under \textit{Hensley}, this seems to be a situation where the plaintiff “won substantial relief [and] should not have his . . . fee reduced simply because the district court did not adopt each contention raised.”\(^{413}\) Contrast this with the third case raising \textit{Hensley} issues, \textit{Johnson v. Breje},\(^{414}\) where the plaintiffs failed on two of their constitutional claims—a right to a law library and the right to release from their rooms during staff meals. Disagreeing with the lower court’s determination that the attorneys’ work on successful and unsuccessful claims could not be segregated, the case was remanded for an appropriate reduction in the fee award.\(^{415}\)

Three cases address the appropriateness of using a multiplier in

\begin{enumerate}
\item 699 F.2d 874 (7th Cir.), cert. denied, 104 S. Ct. 69 (1983).
\item \textit{Id.} at 899.
\item 689 F.2d 724 (7th Cir. 1983).
\item 689 F.2d at 731.
\item \textit{Id.} at 730 n.7.
\item 103 S. Ct. at 1943.
\item 701 F.2d 1201 (7th Cir. 1983). \textit{See supra} notes 138-44 and accompanying text.
\item \textit{Id.} at 1211-12.
\end{enumerate}
determining the amount of fees to be awarded to a prevailing plaintiff. After a settlement with several of the defendants on the merits, the plaintiff in Strama v. Peterson\textsuperscript{416} filed a request for fees seeking $80.00 per hour for lead counsel and application of a multiplier of 1.5 for all attorneys. The lower court granted the requested fees but rejected the multiplier and instead increased the rate of lead counsel from $80 to $125 per hour. The increased rate was justified by the results obtained, the high quality of representation, the ability of counsel for the plaintiff and the fact that the fee arrangement was contingent. Relying on two earlier cases dealing with the use of a multiplier,\textsuperscript{417} the Seventh Circuit concluded it would be improper to award lead counsel a bonus beyond the usual billing rate. In support of its ruling, the court noted that the issues were relatively simple and few; counsel's time was spread over a three year period, he was not precluded from accepting other cases, the contingent nature of the fee alone does not justify the use of a multiplier and the fact that the rate requested, although relatively modest, was the same for all activities including out-of-court time.\textsuperscript{418}

In another case, In re Illinois Congressional Districts Reapportionment Cases,\textsuperscript{419} the lower court multiplied the “lodestar”\textsuperscript{420} rate by three to arrive at a total award of $384,645.00. The case involved the reapportionment of congressional districts in Illinois, and the trial court justified the adoption of a multiplier by referring to the “magnitude and complexity of the case; the advancement of the public interest in the result by ensuring fair representation; the excellent quality of work done by plaintiff’s lawyers; and the persuasiveness of plaintiff’s plan.”\textsuperscript{421} After indicating that the use of a multiplier is left to the sound discretion of the trial court, the court of appeals concluded that although it was not an abuse of discretion to utilize a multiplier, the multiplier of three was excessive and reduced it to 20 percent.

In reaching this conclusion, the court of appeals first determined that the trial judge had properly considered the following factors in determining that a multiplier was appropriate: the contingent fee arrangement, the magnitude and complexity of the case, the excellent

\textsuperscript{416} 689 F.2d 661 (7th Cir. 1982).
\textsuperscript{417} 689 F.2d at 665. Strama was cited by the court in support of its reversal of a 1.5 multiplier applied by the lower court in Johnson v. Brelje, 701 F.2d at 1211-12. The court indicated its reluctance to approve a multiplier based solely on “results achieved.” \textit{Id.} at 1212.
\textsuperscript{418} 704 F.2d 380 (7th Cir. 1983).
\textsuperscript{419} 704 F.2d 382. After this article went to press, the Supreme Court limited the use of a multiplier in Blum v. Stenson, 104 S. Ct. 1541, 1547-50 (1984).
\textsuperscript{420} This is determined by multiplying the number of hours by a reasonable hourly rate.
\textsuperscript{421} This is a reasonable hourly rate. 
quality of the attorneys' work, the public interest served by the attorneys for the plaintiff in assuring fair representation for the public, and the fact that the plaintiff's attorneys were to some extent precluded from taking other employment because of this case. Nevertheless the court found that a multiplier of three was simply excessive. This reduction was justified in part by the fact that the case was very brief, thus reducing the risk; however, the court gives the impression that a multiplier of three is never appropriate, particularly when the base rates are as high as $165.00 per hour.

Cases involving an award of attorney fees frequently raise a question of whether a prevailing plaintiff should be compensated for time spent in pre-litigation administrative proceedings. In Ciechon v. City of Chicago, the plaintiff, a career paramedic, challenged her discharge from the Chicago Fire Department. Prior to initiating litigation, her attorney represented her in the disciplinary proceedings before the city personnel board. Relying on the reasoning in New York Gaslight Club, Inc. v. Carey and Chrapliwy v. Uniroyal, Inc., the court concluded that the 1976 Fees Act should be interpreted the same as the fee provision under Title VII. Noting that the fee provisions in Title VII and § 1988 are similar in purpose and design and that vigorous representation at administrative proceedings should be encouraged, the court of appeals indicated the lower court had not abused its discretion in awarding fees for counsel's time spent at the administrative hearing.

Another common issue, particularly in litigation which takes several years, is whether the court should use the prevailing hourly rates at the time the services were rendered or the normally inflated current rate at the time fees are actually awarded. The court, in Gautreaux v. Chicago Housing Authority, approved the use of current rates for over 3,000 hours of work between 1965 and 1980. It noted that counsel had received no fees during an intensely inflationary period, the number of hours claimed was conservative, the attorney claiming fees stands as a "surrogate for the teams of volunteer lawyers" who worked on the case but did not claim fees and the defendant had the use of the

422. 686 F.2d 511 (7th Cir. 1982). See supra notes 92-96 and 269-71 and accompanying text.
424. 670 F.2d 760, 765-67 (7th Cir. 1982).
427. 686 F.2d at 525.
428. 690 F.2d 601 (7th Cir. 1982).
money until the time of decision.\textsuperscript{429}

A number of decisions involve questions of plaintiffs' entitlement to fees under the 1976 Fees Act.\textsuperscript{430} The defendant in \textit{Gautreaux} argued that § 1988 did not apply because the case was not pending on the effective date of the Act, October 19, 1976.\textsuperscript{431} Although the trial court first found intentional racial discrimination by the defendant and entered a remedial order in 1969, the history of the litigation clearly suggests it was still pending, for purposes of awarding attorney fees, subsequent to October 1976. Several factors in the prolonged \textit{Gautreaux} litigation were found significant. The housing authority's response to court orders was found to range from "lethargic to obdurate." There were ongoing disputes about the propriety and the efficacy of the relief granted early in the litigation. The pendency of this case after the effective date of the Act was clearly not the result of "thinly-disguised attempts to generate an issue solely in order to come within the pendency rule."\textsuperscript{432} Here the plaintiffs had put unremitting pressure on the housing authority for twelve years and did not seek fees until the litigation was drawing to a close; the court remarked that there might not have been time to pause for litigation of the fee issue.

The court also noted that in cases such as this, where broad equitable relief is sought to remedy constitutional violations, the liability phase is only a preliminary hurdle with the most extensive efforts devoted to the remedial stage "where the parties struggle, often for years, over the scope and details of injunctive relief."\textsuperscript{433} Once it was concluded that the case was pending on the relevant date, the court had no problem approving the fee award covering the entire period of

\textsuperscript{429} \textit{Id.} at 612-13. Although counsel had not kept complete and standardized time records contemporaneous with the activities, this was not a problem because the defendant did not challenge the number of hours claimed nor could counsel have foreseen the potential for recovering fees prior to the passage of the Act in 1976. \textit{Id.} at 612-13 n.28. Compare this with \textit{Voca v. Playboy Hotel of Chicago, Inc.}, 686 F.2d 605 (7th Cir. 1982), in which the court affirmed a denial of fees based, in part, on counsel's inadequate fee schedule. The schedule lacked a sufficient description of the work performed, the identity of the persons who performed it, and the normal billing rates; most disturbing, the attorney sought compensation for two court appearances which were never made. \textit{Id.} at 608.

\textsuperscript{430} The lower court's denial of fees to prevailing defendants was affirmed in \textit{Clark v. Universal Builders, Inc.}, 706 F.2d 204, 213 (7th Cir. 1983), based on the standard established in \textit{Christiansburg Garment Co. v. E.E.O.C.}, 434 U.S. 412, 421 (1978).

\textsuperscript{431} On a related issue, the court held that the plaintiffs' request for fees was timely because, "[a]bsent a fixed time limitation, the only constraint on when the plaintiffs file for attorneys' fees under Rule 54(d) of the Federal Rules is laches," and such a claim must demonstrate both undue delay and prejudice. 690 F.2d at 612.

\textsuperscript{432} \textit{Id.} at 608.

\textsuperscript{433} \textit{Id.} at 610.
A plaintiff, who prevailed through a favorable settlement in an action brought under § 1983, was denied fees because the court characterized the litigation as "functionally a habeas corpus suit and nothing but a habeas corpus suit." The plaintiff alleged a violation of his civil rights in a prison disciplinary proceeding and a consent decree restored his good time and expunged the disciplinary proceeding from his record, but did not provide damages. Although agreeing that the plaintiff prevailed, the court found that the primary relief provided by the consent decree—the restoration of good time—was beyond the court's power in a § 1983 action. While expungement has been ordered in an action under § 1983, it was sought in this case only as a "predicate for getting good time restored" and thereby reducing the time of imprisonment. Therefore, a § 1983 plaintiff who prevails by way of settlement can be denied an award of fees where the relief obtained in the settlement is beyond the scope of what the court could have ordered under § 1983. Presumably this ruling is limited to the rather unusual situation where the only relief obtained by settlement is beyond the scope of § 1983.

In several cases defendants argued that "special circumstances" dictated that fee requests either be denied or substantially reduced. In Gautreaux the court reaffirmed its position that fee awards should not be reduced simply because they are to be paid to nonprofit organizations which provide the legal representation for prevailing plaintiffs. The court also reiterated its position that the ability of a defendant to pay a fee award is not a special circumstance justifying denial of an

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434. Referring to its earlier decision in Crosby v. Bowling, 683 F.2d 1068, 1072 (7th Cir. 1982), holding that a defendant has the burden of demonstrating the existence of special circumstances which would make an award of fees unjust, the court pointed out that the housing authority had not argued that such special circumstances exist. 690 F.2d at 610-11.


436. Larsen v. Sielaff, 702 F.2d 116, 118 (7th Cir. 1983).

437. Id. at 118.

438. In a somewhat analogous situation one defendant, the Illinois Institute of Technology, had filed a cross claim against the other defendant, the Illinois Department of Rehabilitation Services, arguing that the state agency has the primary responsibility for providing the plaintiff with the services of a sign language interpreter. Jones v. Illinois Dept. of Rehabilitation Services, 689 F.2d 724 (7th Cir. 1982). Even though the court agreed with the lower court's conclusion that the primary burden of providing the interpreter services belonged to the state agency, the institute could not be considered a prevailing party for attorney fee purposes because its cross claim was simply a method of presenting a defense against the plaintiff's claim and it did not have a viable claim against the state agency. Id. at 733. Fees were sought in this case under the Rehabilitation Act of 1973, 29 U.S.C. § 794a (1976), but the court indicated that fee awards under this section "are governed by the same considerations controlling in § 1988 actions." Id. at 730 n.8.

439. 690 F.2d at 613. This holding is consistent with the subsequent decision in Blum v. Stenson, 104 S. Ct. 1541, 1545-47 (1984).
The court seemed to give conflicting messages on the question whether the size of a damage award can be treated as a special circumstance considered in awarding attorney fees. In *Lenard v. Argento* the court indicated it should not be considered, whereas in *Strama v. Peterson*, the court stated that usually fees should not be awarded “greatly in excess of a client's recovery.” While acknowledging that precedential value of a decision can be considered, the court expressed a concern that large fee awards based on relatively minor injury would encourage suits which do not further either the client's or the public's interest.

Related to the question of whether the size of a damage award should be considered is the “bright prospects” rule. Under this rule, fees are not awarded in cases likely to involve substantial monetary, rather than injunctive, relief because contingent fee arrangements attract competent counsel to handle such cases. In *Sanchez v. Schwartz* the court refused to adopt this rule.

The relationship between a contingent fee contract and an award of fees under § 1988 was considered in two cases. First, in *Sanchez v. Schwartz* the court held that a contingent fee contract should not serve “as an automatic ceiling on the amount of a statutory award.” Later, in *Lenard v. Argento*, the court considered a contract which provided that any fees awarded under § 1988 “shall be applied and credited, up to and including, but not to exceed the stated percentage of the amount recovered on the claim.” After citing *Sanchez*, the Seventh Circuit held that the lower court had properly reconsidered the disputed provision of the fee agreement and agreed that “it was the intention of Lenard and his attorneys that any award under § 1988 would be

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440. Lenard v. Argento, 699 F.2d 874, 899-900 (7th Cir.), cert. denied, 104 S. Ct. 69 (1983); Gautreaux, 690 F.2d at 613.
441. 699 F.2d at 899.
442. 689 F.2d 661, 665-66 (7th Cir. 1982).
444. 689 F.2d at 666.
445. 688 F.2d 503, 505 (7th Cir. 1982).
446. *Id.*
447. 699 F.2d 874, 897 n.21 (7th Cir. 1983). The percentages in the contract were 33 1/3% for trial, 40% for trial and appeal, and 50% for trial, appeal, and retrial. The lower court first awarded $180,500 in fees and then, on the defendants' motion to reconsider, reduced it to one-third of the judgment, or $120,000. Subsequently, on the plaintiff's motion to reconsider, the court found that the fee agreement was ambiguous and therefore permitted the use of extrinsic evidence to interpret the contract. After considering the affidavits of the plaintiff and his counsel, the court interpreted the agreement as a credit provision and not a limit on fees; the original order of $180,500 was then reinstated.
credited to any fees owing under the contingent contract." Any fees awarded beyond those provided by the contract would go to the attorneys. The court approved the use of extrinsic evidence to assist in arriving at an interpretation of the contract which would reflect the intention of the parties.

Problems frequently arise in fee litigation, both in allocating fault and fees, where there are multiple defendants. This is particularly difficult where, as in Crosby v. Bowling, there are both state and federal defendants and the state defendants contend they were administering the program in accordance with federal mandates. The plaintiffs in Crosby challenged federal and state regulations governing the Work Incentive (WIN) program established under Title IV of the Social Security Act. Although the lower court granted the plaintiffs' motion for summary judgment, finding certain provisions of the regulations in conflict with the federal statute, the defendants argued that the plaintiffs had not prevailed because they had not vindicated an important congressional policy. Rather, the defendants argued, they merely proved a technical inconsistency between the statute and regulations. This argument was based in large part on a subsequent amendment to the federal statute under which the sanction found invalid in this litigation would be permissible. Here the court of appeals found that the amendment to the statute reflected a change in the law rather than simply a clarification of prior law. The court also rejected the state defendants' argument that the plaintiffs, if they prevailed, did so only as to the federal defendants because the state had no choice but to conform to the federally mandated standards. In rejecting this argument the court noted that the state had actively participated in all phases of the litigation, opposing the plaintiffs' position. Also, the state continued to enforce the federal regulations even after they had been declared invalid by a federal district court in another jurisdiction.

The state defendants also used the federal coercion argument in

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448. Id. at 900. Cf. Cooper v. Singer, 719 F.2d 1496, 1506-07 (10th Cir. 1983) (If the client's § 1988 fee award "is less than the amount owed to the attorney under the contingent fee agreement, then the lawyer will be expected to reduce his fee to the amount awarded by the courts; if the fee award is greater than the amount . . . under the agreement, then the attorney shall be entitled to the full amount of the fee award."); Sullivan v. Crown Paper Bd. Co., Inc., 719 F.2d 667 (3d Cir. 1983).

449. 683 F.2d 1068 (7th Cir. 1982).

450. As noted by the court in Crosby, the circuit has not yet established a rule on the question of federal liability under § 1988. Id. at 1075.


452. 683 F.2d at 1071.

453. Id. at 1072.
claiming a special circumstance which militates against an award of fees. Because the record indicates that the state defendants willingly acquiesced in the application of the challenged provision, the court concluded the state was not the victim of coercion. Finally, the state defendants argued that the fee should be reduced to reflect their limited role in enforcing the federal regulations. The record indicates that the lower court took this into account in determining the amount of the award, which was approximately sixty percent of the amount requested by counsel for the plaintiff. Therefore, the court of appeals concluded that the lower court "gave due consideration to the degrees of liability attributable to the two classes of defendants." The message for state defendants, in actions challenging regulations which govern joint state-federal programs, is that they cannot sit back and willingly enforce regulations, vigorously oppose the plaintiffs' position in court and then seek to place the entire blame on the federal defendants. However, even in those circumstances some sort of apportionment reflecting the relative fault seems appropriate.

V. ENFORCEMENT OF CIVIL RIGHTS

A. Jurisdiction, Abstention and Right to Proceed in Federal Court

A question of subject matter jurisdiction arose in the context of a constitutional challenge to a rule of the Illinois Supreme Court governing the admission of lawyers, licensed in another jurisdiction, to the bar of Illinois without taking the Illinois bar examination. After he was denied admission by the Illinois Supreme Court because he did not meet the requirement for practice in the state of his license, the plaintiff in Lowrie v. Goldenhersh challenged the constitutionality of the state rule in federal court. The district court upheld the rule and on appeal, before addressing the merits of the constitutional issue, the Seventh Circuit considered whether the complaint presented a substantial fed-

454. Id. at 1073. Here the court noted that the state could have gone through an administrative hearing if the federal authorities threatened to terminate funding or could have brought a declaratory judgment action seeking a determination of the validity of the federal regulations. In rejecting the federal coercion argument, the court relied in part on Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980), and the Court's language suggesting that "fees can properly be taxed against those whose role is limited to enforcement of regulations that they had no role in promulgating." 683 F.2d at 1073. The court also noted the total lack of evidence in the record to indicate that the state defendants had even considered how they might avoid the alleged coercion. Id.

455. Id. at 1075.

456. 716 F.2d 401 (7th Cir. 1983). This case was decided before the decision in District of Columbia Court of Appeals v. Feldman, 103 S. Ct. 1303 (1983), and then the opinion was revised in part and reissued to reflect the Supreme Court decision.
general question sufficient to confer subject matter jurisdiction. Here the question was whether the complaint presented a constitutional attack on the Illinois Supreme Court Rule or simply sought review of that court’s denial of the plaintiff’s application. The court of appeals concluded there was subject matter jurisdiction because the plaintiff was attacking the constitutionality of the rule.457

Several cases raised “case or controversy” questions. In *Jones v. Illinois Department of Rehabilitation Services*458 the plaintiff sought an order requiring the defendants to provide him with the services of a sign language interpreter to enable him to effectively participate in and benefit from his classes at the Illinois Institute of Technology (IIT). The lower court entered an injunction requiring the Illinois Department of Rehabilitation Services to provide such interpreter services and the state agency appealed from this judgment. On appeal the plaintiff argued for the first time, that the case was moot because he had graduated from the IIT prior to oral argument.

In rejecting the mootness claim the court first noted that the question is capable of repetition as to the named plaintiff because in a highly technical profession it is possible that he may decide to return to graduate school.459 Second, the court found it capable of repetition because of the other hearing impaired students attending IIT who are also clients of the state agency. Here the court pointed to the fact that there was one deaf student enrolled at IIT and another one who had been accepted for the following school year. In addition, the court took judicial notice of the substantial number of deaf individuals approaching the age of college or professional education. Based on this the court concluded that “the situation presented by this case is reasonably certain to occur at IIT and at other colleges and universities in Illinois and other states.”460 The court’s willingness to look to persons other than

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457. *Id.* at 406-08. This issue is also considered in *Feldman*, 103 S. Ct. at 1314-17; *Dasher v. Supreme Court of Texas*, 650 F.2d 711, 716 (5th Cir.), *reversed on other grounds*, 658 F.2d 1045 (5th Cir. 1981); *Brown v. Board of Bar Examiners of State of Nevada*, 623 F.2d 605, 609 (9th Cir. 1980); *Doe v. Pringle*, 550 F.2d 596, 597 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977). In *Feldman* the Court stated:

United States District Courts, therefore, have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case. They do not have jurisdiction, however, over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court’s action was unconstitutional.

103 S. Ct. at 1317.

458. 689 F.2d 724 (7th Cir. 1982). *See supra* notes 369-71 and accompanying text.

459. The court arrived at this conclusion even though the plaintiff disclaimed any current intent to attend graduate school. *Id.* at 728.

460. *Id.*
the named plaintiff in a non-class suit when applying the “capable of repetition” exception to the mootness doctrine is quite significant. While it is clear that members of a class can supply the controversy, even after a named plaintiff’s claim has become moot, looking to other persons in a case not brought as a class action is somewhat unique.

In a subsequent non-class case, Corgain v. Miller, the court used the fact that others might be in the same position as the named plaintiffs to support a finding that the challenge to the adequacy of the prison library was moot. The implication seems to be that others might be at the facility long enough to complete a challenge to the library system before it becomes moot.

The plaintiffs’ standing to challenge Indiana’s drug paraphernalia statute was summarily considered in Nova Records, Inc. v. Sendak. None of named plaintiffs had been arrested or prosecuted under the statute, but two other arrests had been made. The plaintiffs operate retail businesses in Indiana and displayed for sale some items which might be covered by the statute. In order to avoid arrest and seizure of such articles from their businesses, the plaintiffs brought an action challenging the statute both facially and as applied. Citing Steffel v. Thompson, the Court of Appeals concluded the plaintiffs have standing to bring a pre-enforcement challenge to the statute on its face because “the potential application of the statute poses a sufficient risk to the plaintiffs.” However, because none of the plaintiffs had been arrested or subjected to prosecution under the statute, the court decided there was no case or controversy regarding application of the statute to the plaintiffs.

Four cases, in federal court on the basis of federal questions, considered whether pendent jurisdiction over state law claims was appropriate. All four reaffirmed the familiar notion that the federal court can dismiss the pendent state claims when the federal claims are disposed of prior to trial. However, in Lyznicki it was appropriate for the court to decide the pendent claim on the merits because, although the due process claim had been dismissed, a first amendment claim had

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461. 708 F.2d 1241 (7th Cir. 1983).
462. Id. at 1246. The court also indicated “there is no reasonable expectation [the named plaintiffs] will be subjected to the allegedly inadequate library system . . . again.” Id.
463. 706 F.2d 782 (7th Cir. 1983).
465. 706 F.2d at 786 (emphasis in original).
466. Id.
467. Lyznicki v. Board of Education, School District 167, Cook County, 707 F.2d 949, 953 (7th Cir. 1983); Cook v. Weber, 698 F.2d 907, 910 (7th Cir. 1983); Bowers v. DeVito, 686 F.2d 616, 619 (7th Cir. 1982); Goldschmidt v. Patchett, 686 F.2d 582, 585 (7th Cir. 1982).
gone to trial.\textsuperscript{468}

Abstention issues were presented in several cases decided this term. The most extensive discussion is found in \textit{Evans v. City of Chicago}\textsuperscript{469} where the court considered both \textit{Younger}\textsuperscript{470} and \textit{Burford}\textsuperscript{471} abstention. Plaintiffs in \textit{Evans} brought a class action under 42 U.S.C. § 1983, raising constitutional challenges to the city's practices of delaying payment of tort judgments and paying tort judgments of $1,000 and less before paying larger judgments; the suit also challenged certain Illinois statutes which authorize the city's practices. The \textit{Younger} argument was based on the fact that a class action had been filed in an Illinois state court raising similar questions concerning the city's practice of delaying payment of tort judgments. A class settlement was eventually approved by the state court. In concluding that \textit{Younger} did not require dismissal of the federal action, the Seventh Circuit noted several factors in support of its decision: application of \textit{Younger} is most appropriate when the federal judiciary is injected into state initiated adjudication pending in state court; where \textit{Younger} has been applied to situations involving state court proceedings not initiated by the state, the relief requested in federal court would operate directly against a state court; the state court settlement did not resolve nor completely obviate the federal court constitutional challenges; and the named plaintiffs in federal court had not actively participated in the state litigation.\textsuperscript{472}

Similarly, in rejecting the defendants' abstension argument based on \textit{Burford}, the court cited several factors: the state statutes, which apply only to the City of Chicago, do not require the city to adopt the challenged practices; the challenged statutes are not particularly complex nor do they form a part of a complex statutory scheme; the state did not create a special agency or judicial system to deal with the issue nor otherwise indicate that the matter requires specialized expertise; and the litigation affects federal as well as state court judgments.\textsuperscript{473} More generally, the court noted that abstention is not required "merely because resolution of a federal question may invalidate a state statute or overturn a state policy."\textsuperscript{474}

\begin{itemize}
\item \textsuperscript{468} 707 F.2d at 953.
\item \textsuperscript{469} 689 F.2d 1286 (7th Cir. 1982). \textit{See also supra}, notes 204-15 and 265-68 and accompanying text.
\item \textsuperscript{470} \textit{Younger v. Harris}, 401 U.S. 37 (1971).
\item \textsuperscript{471} \textit{Burford v. Sun Oil Co.}, 319 U.S. 315 (1943).
\item \textsuperscript{472} 689 F.2d at 1294-95.
\item \textsuperscript{473} \textit{Id.} at 1295-96.
\item \textsuperscript{474} \textit{Id.} at 1295. \textit{See Zablocki v. Redhail}, 434 U.S. 374, 380 n.5 (1978).
\end{itemize}
Younger abstention was raised, for the first time on appeal, in *United Church of the Medical Center v. Medical Center Commission.*\(^{475}\) In this case the plaintiff raised due process challenges to proceedings before the commission without first exhausting those administrative proceedings. The court rejected the defendants' exhaustion argument, relying on *Patsy v. Florida Board of Regents.*\(^{476}\) In the context of the ruling on exhaustion, the court also rejected an argument, based on Younger abstention, as elaborated in *Middlesex County Ethics Commission v. Garden State Bar Association,*\(^{477}\) that the case should be dismissed because of the pending administrative proceedings.\(^{478}\) The court concluded that Middlesex did not require dismissal because the state administrative proceedings were defective and, therefore, would not have presented an adequate opportunity to raise the federal constitutional questions.\(^{479}\)

Another type of abstention, based on *Railroad Commission v. Pullman Co.*,\(^{480}\) was raised in *Quilici v. Village of Morton Grove,*\(^{481}\) which involved a constitutional challenge to a village ordinance prohibiting the possession of handguns within its borders. Because the plaintiff raised both state and federal constitutional issues, an amicus brief argued that the district court should have abstained under *Pullman* in order to give a state court an opportunity to construe the relevant state constitutional provision. Relying on the notion that federal courts are reluctant to abstain when fundamental rights are involved, the court concluded that abstention was not appropriate in this case.\(^{482}\) The court also noted that *Pullman* abstention is designed to minimize conflict between federal and state courts, and there is no such conflict here because the defendant Village voluntarily removed the case to federal court.\(^{483}\)

A plaintiff's right to proceed in federal court with a civil rights action was questioned in several cases. In *Blake v. Katter,*\(^{484}\) the plaintiff sued two state police officers claiming violation of his constitutional

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\(^{475}\) 689 F.2d 693 (7th Cir. 1982). *See supra* note 96.

\(^{476}\) 457 U.S. 496 (1982) (exhaustion of state administrative remedies is not a prerequisite to bringing an action under § 1983).


\(^{478}\) 689 F.2d at 697-98 n.3. This is consistent with the holding in *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). The court also noted that the administrative agency could not decide constitutional issues. 689 F.2d at 698 n.3.

\(^{479}\) 689 F.2d at 698 n.3.

\(^{480}\) 312 U.S. 496 (1941).

\(^{481}\) 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 194 (1983).

\(^{482}\) 695 F.2d at 265 n.2.

\(^{483}\) *Id.*

\(^{484}\) 693 F.2d 677 (7th Cir. 1982).
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rights during his arrest, detention, pretrial proceedings and trial. The court dismissed the complaint on the grounds that it was barred by the Indiana two-year statute of limitations for tort actions. On appeal the Seventh Circuit reversed, holding that the case was governed by a five-year statute of limitations because it involved public officers.485 While agreeing that § 1983 actions are governed by the most appropriate state limitation period,486 the court refused to utilize the general two-year statute for tort actions in Indiana.

An earlier decision in which the plaintiff claimed race discrimination under § 1981,487 Movement for Opportunity and Equality v. General Motors Corp.,488 invoked the two-year Indiana statute for tort actions as most analogous. This decision was influenced by the fact that Indiana has a two-year statute of limitations for employers’ liability for injuries to employees and employment related actions in general. In Blake it was not necessary to resort to analogies because the five-year statute expressly covers public officers.489

Another issue arose in Blake because the named plaintiff died of natural causes while the case was on appeal. The court rejected the defendants’ argument that the civil rights claims asserted were for “personal injuries” within the meaning of the Indiana survival statute490 and, therefore, abated when the named plaintiff died. This argument was summarily rejected; without explanation the court concluded the injuries alleged are not “personal injuries” within the meaning of the survival statute.491

In two cases the court held that the alleged misconduct of the de-

485. IND. CODE § 34-1-2-2 (1976) provides in part: “Second. All actions against a sheriff, or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty, within five (5) years.”
488. 622 F.2d 1235 (7th Cir. 1980).
489. 693 F.2d at 680.
490. IND. CODE § 34-1-1-1 (1976) limits the situations in which actions for personal injuries to the deceased party survive.
491. 693 F.2d at 683. See also McFadden v. Sanchez, 710 F.2d 907, 910-11 (2d Cir.), cert. denied, 104 S. Ct. 39 (1983) (state statute preventing survival of claims for punitive damages not applicable to § 1983 action). On the merits, the court affirmed the dismissal of the fourth amendment claim, based on an alleged unreasonable delay between arrest and a determination of probable cause, because the arraignment had been continued at Blake’s request. The dismissal of his speedy trial claim under the sixth amendment was reversed as was the dismissal of his claim that the officers used unnecessary physical force during the arrest. Although this latter claim was asserted under the eighth amendment, the court properly treated it as a fourteenth amendment claim since the eighth amendment does not apply to pretrial detainees. Blake, 693 F.2d at 681-82. A pleading error was not fatal. Compare, Jafree v. Barber, 689 F.2d 640, 643-45 (7th Cir. 1982) (per curiam).
fendants did not give rise to a claim under § 1983. First, in Johnson v. Miller, the plaintiff was arrested twice on the basis of valid state warrants, but after preliminary hearings she was promptly discharged because she was the wrong person. While recognizing that the plaintiff might have remedies under state law, the court concluded that the officers’ conduct was not actionable under § 1983, stating:

The execution of a warrant by an officer who if he were more careful might have noticed that the warrant had been issued by mistake is not the stuff out of which a proper federal case is made. The Fourth Amendment and § 1983 have higher objects in view than getting arresting officers to backstop the mistakes of their superiors.

Here the officers may have been careless, but there was no allegation that they had obtained a warrant which they knew to be based on a mistaken identity.

In a subsequent case, Bowers v. DeVito, the court held that officers and physicians of the Illinois Department of Mental Health, and private physicians associated with a health center under contract with the state department, are not liable to the estate of a person killed by a former mental patient released from state custody a year earlier. Even if the defendants were careless, or reckless, the court concluded “there is no constitutional right to be protected by the state against being murdered by criminals or madmen.” Because the complaint alleged only a failure to protect the deceased from a dangerous madman and because the state has no duty under the federal constitution to provide such protection, the failure to protect the deceased cannot be actionable under § 1983.

An interesting collateral estoppel issue arose in a case involving the discharge of a police officer. In Lee v. City of Peoria disciplinary proceedings were initiated against Lee; he was charged with giving false testimony to the board of commissioners in claiming he had been home ill on a particular day. Lee’s sole defense at the disciplinary proceedings was that he was in fact home in bed on the date in question;

492. 680 F.2d 39 (7th Cir. 1982).
493. Id. at 42. A similar reluctance to elevate ministerial errors into constitutional claims is discussed in relation to the due process materials. See supra notes 193-97 and accompanying text.
494. 686 F.2d 616 (7th Cir. 1982).
495. Id. at 618.
496. Id. The court distinguished the situation where a state puts a person in a position of danger from private persons and then fails to provide protection. Here the state would be an active tortfeasor as in the situation where prison personnel are found liable under § 1983 for the violence of one inmate against another. See, e.g., Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974). In contrast, the defendants here did not place the deceased in a position of danger; they simply failed to protect her adequately. 686 F.2d at 618.
497. 685 F.2d 196 (7th Cir. 1982).
he made no suggestion that the charge was racially motivated on the part of the board. It was determined that Lee had given false testimony and he was discharged immediately. He then filed a complaint in state court seeking review of the decision, but for the first time he included an allegation that the discharge was the result of racial discrimination on the part of the board. In a brief order, the state court simply sustained the decision of the board and there was no further appeal from this ruling. Subsequently, Lee filed a charge with the EEOC claiming racial discrimination in his discharge; he received a notice of right to sue and filed a Title VII action in federal court. The defendants moved to dismiss, in part on res judicata and collateral estoppel grounds, and the district court granted the motion.

On appeal the Seventh Circuit affirmed the dismissal based on res judicata, concluding that Lee could have raised and litigated his racial discrimination claim as a defense to the discharge proceedings. Under state law, if in fact Lee was discharged solely because of his race, this would have been a defense to the disciplinary proceedings. Because he raised this in his complaint seeking judicial review of the discharge proceedings, the court concluded that “Lee’s claim of racial discrimination was properly before the state court and was necessary to the state court’s determination.” The court noted that its decision is consistent with the Restatement because, if the second lawsuit were allowed and the plaintiff was successful, “it would directly undermine the validity of the state decisions and the city’s right to discharge Lee which the decisions established.”

Both res judicata and collateral estoppel issues were considered in Crowder v. Lash. A prison inmate, who was a plaintiff in a successful class action for equitable relief relating to conditions in a detention unit of the prison on eighth amendment grounds, brought an individual action for damages based in part on conditions in the same unit. Defendants argued that his suit for damages based on the eighth amendment was barred because it could have been raised in the class action. The court first noted that the res judicata defense was waived because it was not timely raised as an affirmative defense. Even if it had been properly raised it would have been rejected because Crowder was not one of

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499. 685 F.2d at 198.
500. Id. at 201.
501. Restatement (Second) of Judgments § 22, Comment b (1980).
502. 685 F.2d at 201.
503. 687 F.2d 996 (7th Cir. 1982).
504. Id. at 1008.
the original plaintiffs in the former litigation and may not have been allowed to join as a named plaintiff if he had insisted on including a damage claim which would have raised new issues.\(^5\)05

The plaintiff in *Crowder* argued in the lower court that the defendants should be collaterally estopped from relitigating the eighth amendment issue in the damage action. His argument was rejected by the lower court but the court of appeals reversed and remanded for application of the teachings of *Parklane Hosiery Co. v. Shore*.\(^5\)06 The record disclosed “no reason why plaintiff should be prevented from using collateral estoppel in this case.”\(^5\)07

**B. Liability Issues**

1. Respondeat Superior

Questions concerning the liability of an entity for the actions of its agents and employees were considered in four cases. The plaintiff in *Iskander v. Village of Forest Park*\(^5\)08 raised constitutional questions concerning her arrest and detention, for shoplifting, by a store detective and a subsequent strip search by the local police department. Named as defendants were the store detective, police officers, Zayre, Inc., and the Village of Forest Park. Assuming there was state action for purposes of § 1983,\(^5\)09 the court stated:

> Just as a municipal corporation is not vicariously liable upon a theory of respondeat superior for the constitutional torts of its employees, . . . a private corporation is not vicariously liable under § 1983 for its employees’ deprivations of others’ civil rights.\(^5\)10

Therefore, the plaintiff had to show that the store detective was acting pursuant to an impermissible policy or constitutionally forbidden rule, procedure, policy or custom of Zayre. Finding that the store’s policy concerning the detaining of shoplifting suspects was entirely legitimate, the court concluded that Zayre could not be found liable.

Applying the same standard to the Village of Forest Park, the court decided that the question of its liability for the strip search had to be submitted to the jury because the plaintiff had presented evidence that the police department “customarily conducted strip searches in a

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504. *Id.* at 1008-09.
507. 690 F.2d 126 (7th Cir. 1982).
508. *Id.* at 128.
509. *Id.*
room with a window facing a corridor through which numerous individuals might be passing at any given time.”

Thus there was a triable issue as to the liability of the village for the strip search, but the trial court had given erroneous instructions concerning both the standard for the village’s liability as well as the legality of strip searches.

In a subsequent action seeking damages from a sheriff in his official capacity, *Wolf-Lillie v. Sonquist*, the court further elaborated on situations in which a municipal entity can be held responsible for the actions of its officials. After noting that a local governmental entity “will be liable when through the execution of a government’s policy or custom, whether made by its law-makers or by those whose edicts or acts may fairly be said to represent official policy” the court found the sheriff could be liable in his official capacity because the evidence demonstrated a widespread practice of executing outdated writs. Apparently this practice was known to the sheriff. The court made it clear that a well-settled practice can constitute a “custom or usage,” and this is sufficient for municipal liability even though the custom has not received formal approval through the normal decision-making channels. “Informal actions, if they reflect a general policy, custom, or pattern of official conduct which even tacitly encourages conduct depriving citizens of their constitutionally protected rights, may well satisfy the amorphous standards of § 1983.”

Village responsibility for the alleged harassment of a business by various city officials was at issue in *Reed v. Village of Shorewood*.

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511. Id. at 129 (emphasis original). Under Bell v. Wolfish, 441 U.S. 520 (1979), strip searches must be reasonable and the test “requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.” Id. at 559. See *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983) (city policy requiring strip searches of all women arrested and detained in city jails, regardless of charges or reason to believe they are concealing weapons or contraband, violates the fourth and fourteenth amendments); *Tikalsky v. City of Chicago*, 687 F.2d 175 (7th Cir. 1982) (woman arrested for disorderly conduct and subjected to a visual strip search; jury award of $30,000 reinstated). *Contra* *Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983) (visual body cavity search at county jail, conducted by female attendant, did not violate fourth amendment rights of female arrested for felonious assault).

512. As to the liability of the village for the actions of the police officers in arresting the plaintiff, the court held there could be no liability because the village policy was entirely legitimate. 690 F.2d at 129.

513. 699 F.2d 864 (7th Cir. 1983). See supra notes 221-25 and accompanying text.

514. Even though the county was not named as a defendant the court noted that an “official capacity suit [against a governmental official] is merely another form of claim against the government entity itself.” Therefore, damages can be awarded against a defendant in his official capacity only if the governmental entity would be liable. Id. at 870.

515. Id.

516. Id.

517. 704 F.2d 943 (7th Cir. 1983). See supra notes 128-32 and accompanying text.
The plaintiffs claimed that the "interference with their business was a policy orchestrated at the highest level of government in the Village of Shorewood." If this allegation can be proved, the village is liable. Because municipal entities act only through agents, the task on remand will be to identify those agents whose acts reflect governmental policy. The acts of such policy makers, or acts carried out pursuant to their direction, can trigger municipal liability.

Finally, in *Lenard v. Argento* the plaintiff sued several police officers and the Village of Melrose Park claiming a violation of his constitutional rights as a result of events surrounding his arrest. The allegation relating to the village was that "its policy and custom of failing to properly screen, hire, train and supervise its police employees encouraged and sanctioned the misbehavior complained of [in the complaint]." It was further alleged that it was "the policy of the Village to encourage, sanction and 'cover-up' acts of misconduct by its police employees." Regarding the allegation of failure of supervisory officials to supervise, control or train the offending officers, the court indicated a plaintiff must show that the official "at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." Inaction will trigger municipal liability only if there is a pattern of constitutionally offensive acts along with a failure to invoke remedial measures and "the supervisor's inaction amounts to deliberate indifference or tacit authorization of the offensive acts." After careful examination of the transcript, the court concluded there was insufficient evidence to establish a failure to properly screen, hire, train and supervise police officials and the department acted reasonably in its method of investigating complaints about particular officers.

A related issue arose in *McBride v. Soos* where the court had to determine whether the defendants either caused or participated in the failure to hold a pre-extradition hearing. The plaintiff, who was arrested in St. Louis, was extradited to Indiana pursuant to an extradition

518. *Id.* at 953.
520. *Id.* at 885.
521. *Id.*
524. 699 F.2d at 886.
525. 679 F.2d 1223 (7th Cir. 1982).
warrant issued by the Governor of Indiana. The defendant officers were assigned to go to Missouri and pick up the plaintiff; they had been advised both by their superiors and Missouri authorities that the plaintiff had waived extradition. The federal court complaint alleged that the defendants deprived McBride of due process by extraditing him to Indiana without complying with all the requirements of Missouri law.

The lower court held that the defendants were personally involved in the violation of the Missouri statute which requires Missouri authorities to hold a judicial hearing before delivering a fugitive to the demanding state. On appeal the Seventh Circuit disagreed, commenting that it is "unreasonable to require the demanding state agents to be familiar with the procedural safeguards enacted in the asylum state's extradition statutes and then further require them to ensure that the statutory safeguards have been followed." Because the Indiana officers had done all they were statutorily required to do before accepting custody of McBride, they did not cause nor participate in the alleged deprivation and therefore McBride did not have a cause of action against them.

2. Immunity

A number of decisions this term considered both absolute and qualified immunity. Members of the state parole board were granted an absolute immunity from § 1983 damage actions in United States ex rel. Powell v. Irving. Because members of the parole board perform an adjudicatory function in reviewing parole applications, the court concluded that all of the policy reasons supporting an absolute immunity for judges apply as well to parole officials. Further, the court noted that there are sufficient other sanctions, including habeas corpus, for arbitrary parole denials by state officials. The court did, however, indicate that the plaintiff could pursue his request for declaratory relief.

In Goldschmidt v. Patchett the Supreme Court decision ex-

526. Id. at 1227.
527. Id. Based on this, the Seventh Circuit concluded that the lower court should have granted the defendants' motion for a directed verdict at the close of the plaintiff's case. Id. at 1228.
528. 684 F.2d 494 (7th Cir. 1982).
529. Id. at 49. The court relied heavily on Sellars v. Procunier, 641 F.2d 1295, 1303 (9th Cir.), cert. denied, 454 U.S. 1102 (1981). See also Evans v. Dillahunty, 711 F.2d 828, 830-31 (8th Cir. 1983).
530. 684 F.2d 497.
531. 686 F.2d 582 (7th Cir. 1982).
tending absolute immunity to prosecuting attorneys was found broad enough to cover a prosecuting attorney who mailed a letter to the attorney plaintiff threatening to prosecute both him and a newspaper if he did not stop publishing a particular ad in the paper. Addressing the plaintiff’s argument that Imbler does not apply to investigative activity by a prosecuting attorney, the court simply noted that the activities in this case were not investigative and not the sort which could be performed by a layman with the same effectiveness as a letter from the prosecutor’s office. The court characterized the prosecutor’s actions as an exercise of the quasi-judicial function and therefore absolutely immune. While recognizing that a prosecutor’s decision to prosecute or not prosecute is protected by absolute immunity, Judge Swygert in dissent argues that a threat to prosecute is not a part of this decision and cannot be characterized as quasi-judicial conduct. The court did note that private persons who may have conspired with the prosecutor could be sued under § 1983 and would not enjoy the immunity of the prosecutor.

Two types of absolute immunity were asserted by defendants in Reed v. Village of Shorewood. One defendant asserted an absolute immunity in the exercise of his “judicial” responsibilities as a liquor control commissioner; he argued that he was acting in a judicial capacity when passing on renewal and revocation questions presented by the licensing proceeding before the commission. Relying in part on Butz v. Economou, the court examined the role and function of a commissioner and concluded he acts like a “first-line adjudicator,” like a trial judge. Therefore, he was granted an absolute immunity from damage suits when acting on the revocation or renewal of liquor licenses.

The next question was whether the members of the Village Board of Trustees enjoy an absolute immunity in the exercise of their legislative responsibilities. They had reduced the number of Class A liquor licenses in the village from four to three. The primary question here was whether the absolute immunity of legislators applies to local lawmakers. Citing cases from several other circuits, the court rather

533. Hampton v. City of Chicago, 484 F.2d 602, 608-09 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974), supports the argument that prosecutors do not enjoy an absolute immunity when the challenged activities are investigative.
534. 686 F.2d at 586 (Swygert, J., dissenting).
535. Id. at 585.
536. 704 F.2d 943 (7th Cir. 1983).
538. 704 F.2d at 951-52. The court also noted that it would make no difference that the defendant was a local rather than state judicial officer. Id. at 952.
summarily concluded they were correct in granting local legislative officials an absolute immunity. This was done even though the court recognized that there may be fewer safeguards against arbitrary legislative action at the local level than either the state or federal level.

The two cases dealing with qualified immunity do not require extensive discussion. In *Jaworski v. Schmid*⁴⁰ the question was whether the administrator of the Wisconsin Department of Corrections, who enjoys a qualified immunity, could assert it as a defense when a state statute indemnifies him for any damage liability incurred as a result of the good faith execution of his duties. The plaintiff claimed the defendant had violated his due process rights in rescinding the plaintiff's parole.⁴¹ Relying on prior decisions holding that questions of immunity under § 1983 are governed by federal law, the court easily concluded that the defendant's qualified immunity is not affected by the state indemnification provision.⁴² The other case, *Johnson v. Brelje*,⁴³ presented constitutional issues concerning the commitment of criminal defendants found unfit to stand trial and assigned to the Chester Mental Health Center. The plaintiffs' claims for damages were defeated by the defendants' qualified immunity because the rights asserted by the plaintiffs were not clearly established when the defendants acted. The closest question related to the telephone policy, limiting calls to two per week, which was found to illegally restrict access to the courts. Although noting that a constitutional right of meaningful access to the courts had been clearly established, the court indicated it was aware of no prior cases which had relied on this right to hold invalid a regulation of a mental health facility.⁴⁴

An important question concerning the qualified immunity defense

⁴³⁹. *Id.* at 952-53.
⁴¹. The court did not mention United States *ex rel.* Powell v. Irving, *supra* note 528, even though this case also involved parole. The cases were decided on the same date and Judge Bauer sat on both panels.
⁴². 684 F.2d at 500-01.
⁴³. 701 F.2d 1201 (7th Cir. 1983). *See supra* notes 138-44 and 414-15 and accompanying text.
⁴⁴. *Id.* at 1210-11. While the restrictive policy was held invalid in this case, the court did indicate that it might be constitutional under other circumstances if based on a compelling governmental interest. Thus the court concluded that reasonable persons could not have known that the telephone policy violated clearly established rights of the plaintiffs. In an earlier case discussing the "clearly established" part of the qualified immunity standard, the court stated:

It is clear that in order to apply this first prong of the qualified immunity test an appellate court must rely on the district court's findings of fact as to: (1) when the violation was committed; (2) whether a given official knew or reasonably should have known about the right at the time the violation was committed; and (3) whether a given official knew or reasonably should have known that his conduct violated the constitutional rights at issue.

*Owen v. Lash,* 682 F.2d 648, 656 (7th Cir. 1982).
relates to the allocation of the burden of proof. In *Gomez v. Toledo* the Supreme Court made it clear that a qualified immunity is an affirmative defense which must be pleaded by the defendant. However, the Court left open the question of who must prove the defense. While two earlier Seventh Circuit decisions seem to hold that the defendant has to both plead and prove the defense, the court in *Crowder v. Lash* indicated the law is still unsettled in the circuit. The court did, however, recognize that most other circuits have placed the burden of proof on the defendant. The burden of proof was discussed in *Crowder* in the context of applying the recent Supreme Court decision in *Harlow v. Fitzgerald*. After indicating that *Harlow* had revised the qualified immunity standard by attempting to eliminate the subjective factor, the court noted that a qualified immunity defense would ordinarily fail if the constitutional right in question was clearly established when the challenged conduct took place. However, it indicated that “extraordinary circumstances may exist under which an official may be able to prove that he neither knew nor should have known of the relevant legal standard.” Here again the burden of proof seems to be placed on the defendant.

While there is certainly a need to clarify the burden of proof issue in this circuit, the decision in *Harlow* seems to have resolved the matter. No doubt a qualified immunity is an affirmative defense which must be pleaded by the defendant. Once it is pleaded, the trial court will have to make a determination of whether the law was “clearly established” at the time the challenged conduct took place. This objective standard presents a legal question which generally will not require proof of facts. Facts become relevant only where a defendant attempts to show “extraordinary circumstances” indicating he neither knew nor should have

547. 687 F.2d 996 (7th Cir. 1982).
548. Id. at 1002. The basis for concluding that the law was unsettled, despite the two cases cited earlier, see supra note 546, was the decision in Johnson v. Miller, 680 F.2d 39 (7th Cir. 1982), in which the court indicated that absent an allegation of knowing or intentional constitutional deprivation, a plaintiff's complaint fails to state a cause of action under § 1983.
549. 687 F.2d at 1003.
551. The subjective element addresses the question whether the official took the action with malicious intention to cause a deprivation of constitutional rights or other injury. Wood v. Strickland, 420 U.S. 308, 321-22 (1975).
552. 687 F.2d at 1007. This aspect of the defense “would turn primarily on objective rather than subjective factors.” Id.
known of the relevant clearly established law. The Seventh Circuit in Crowder agrees that this burden of proof is on the defendant. Therefore, it would seem that all questions concerning the burden of pleading and proof have now been resolved.

C. Damages

The Seventh Circuit dealt with the question of awarding damages for constitutional torts in two different contexts. In Jones v. Reagan\(^5\) it considered whether a cause of action can be brought against federal officials directly under the constitution where no claim is made of injury other than violation of a constitutional right. In other decisions,\(^5\) the Seventh Circuit struggled with the question of whether so-called presumed damages for violation of constitutional rights can be awarded when suit is brought under § 1983.\(^5\) The decisions reflect much disagreement and quite a bit of confusion as to the value to be accorded constitutional rights.

In the case of Jones v. Reagan\(^5\) black noncommissioned officers in the United States Army Reserve brought suit against their military superiors alleging that they were transferred to another unit solely because they were black and the officer commanding the unit wanted it to be all white. The court refused to find a cause of action despite its acknowledgement that the fifth amendment protects against racial discrimination and that the Supreme Court in Davis v. Passman\(^5\) had specifically held that a fifth amendment violation can be redressed by damage actions in federal court.\(^5\)

The Supreme Court in Carlson v. Green\(^5\) held that a presumption was created in favor of an implied right of action unless the defendant can show "special factors counselling hesitation."\(^5\) The "special factor" relied upon by the Seventh Circuit in Jones was that the plaintiff alleged no monetary injury.\(^5\) The court distinguished the plaintiff's

\(^{553}\) 696 F.2d 551 (7th Cir. 1983).

\(^{554}\) See infra notes 584-97 and accompanying text.


\(^{556}\) 696 F.2d 551 (7th Cir. 1982).

\(^{557}\) 442 U.S. 228 (1979).

\(^{558}\) Id. at 248-49.

\(^{559}\) 446 U.S. 14 (1980).

\(^{560}\) Id. at 18.

\(^{561}\) 696 F.2d at 555.
suit in *Davis* as one for breach of contract where damages are easily measured, although the plaintiff there also sought damages for humiliation and other intangible injury. It can be similarly argued that the plaintiffs in *Jones* suffered humiliation and degradation due to the racially discriminatory conduct of the defendant; nonetheless the court reasoned that since plaintiffs sought only punitive damages in their lawsuit, they must not have suffered any emotional distress or other compensable injury.  

Punitive damages were disallowed partially because of the traditional tort principle that punitives should not be provided absent an award of compensatory damages. Further, the court reasoned that an award of punitive damages created a significant potential for overdeterrence since extensive damages would be awarded against a military officer who could not be indemnified by the government or by an insurance policy. Such an award would thus deter officers from making any kind of transfer of an individual who was of a different race from his own. The court concluded in a rather sweeping statement that “damage remedies for constitutional torts are not appropriate and hence not available, unless expressly authorized by Congress, if no monetizable injury is alleged.”

The Supreme Court in the recent case of *Chappell v. Wallace* reached the same conclusion as the Seventh Circuit on the question of whether military personnel may sue their superiors, but its analysis was quite different. Factually the cases were very similar in that the plaintiffs in *Chappell* were also alleging racial discrimination. The Court posed the same question as the Seventh Circuit, i.e., whether “special factors counselling hesitation” were present so as to preclude a cause of action directly under the Constitution, but the factors it relied upon were significantly different from those of the Seventh Circuit. It based its decision on the need for special regulations in relation to military discipline and the resulting need for a special and exclusive system of military justice. Further it noted the explicit constitutional grant of plenary authority by Congress to control the military and its exercise of that authority through a comprehensive internal system of justice which deals with complaints and grievances, such as those presented by

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562. *Id.* at 554.  
563. *Id.* (citations omitted).  
564. *Id.*  
565. *Id.* at 555.  
567. *Id.* at 2364.  
568. *Id.* at 2365.
the plaintiffs. In short, the Court concluded that “the unique disciplinary structure of the military establishment and Congress’ activity in the field constitute ‘special factors’ which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers.”

Although Chappell affirms that military personnel may not sue their superiors, the Seventh Circuit’s analysis—relying on a lack of “monetizable” injury—is troublesome. It is doubtful that lack of quantifiable injury is the type of “special factors counselling hesitation” which the Supreme Court had in mind in its decisions regarding the implication of a cause of action directly under the constitution. In disposing of the case on a Rule 12(b)(6) motion for failure to state a claim, the district court prematurely determined that there were no actual damages. The court of appeals stated that even if there was some actual injury involved in the case, “it is too trivial to be measurable in damages” and thus does not give rise to a viable claim. Apparently the opinion rests on the assumption that constitutional rights have no intrinsic value, and therefore, to use the court’s terminology; “no monetizable injury” has been alleged.

The Seventh Circuit supported its conclusion in Jones by citing Carey v. Piphus in which the Supreme Court held that presumed damages are not permissible under § 1983 when only procedural due process rights are violated. However, the Court in Carey specifically

569. Id. at 2366. See also Busch v. Lucas, 104 S. Ct. 367 (1983), in which the Court similarly focused on an elaborate remedial system that had already been constructed by Congress in denying a cause of action directly under the constitution. Plaintiff brought an action for an alleged defamation and retaliatory demotion. Congress in its Civil Service Commission regulations had already created a very explicit and detailed remedy for such conduct and the Court found that it would be inappropriate to supplement that regulatory scheme with a new nonstatutory damage remedy. Id. at 2412-17.

570. 103 S. Ct. at 2367. Note that it was in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), that the Supreme Court first acknowledged its power to recognize causes of action directly under the constitution.


572. This approach can be contrasted with an earlier Seventh Circuit decision, Seaton v. Sky Realty Company, 491 F.2d 634 (7th Cir. 1974), in which the court held that damages are presumed to flow from racial discrimination.
noted that cases awarding damages for deprivation of substantive constitutional rights were not affected by its decision. Further, *Carey* dealt only with the relief issue—not the existence of a cause of action.

The Seventh Circuit’s sweeping statement that a cause of action for constitutional torts is available only when there is monetizable injury suggests a dangerous precedent. Its conclusion that plaintiff suffered no injury rested perhaps in part on plaintiff’s faulty pleading, i.e., at oral argument plaintiff’s counsel described the suit as one purely for punitive damages, suggesting an absence of any compensatory type injury. However, the court’s conclusion reflects a much deeper position, i.e., that constitutional rights have no intrinsic value and thus damages should not be presumed to flow from their violation.

The value to be assigned constitutional rights has been the subject of heated debate both in the courts and among legal scholars since the Supreme Court handed down its opinion in *Carey v. Piphus*. The Seventh Circuit’s position is far from clear. In the earlier case of *Konczak v. Tyrrell* the court refused to expand *Carey* to encompass substantive constitutional claims. Later in *Kincaid v. Rusk* it held that plaintiffs in § 1983 actions must demonstrate some compensable injury in order to recover, even if they allege viable first amendment claims. Unfortunately, this conflict has not been resolved.

Justice Stewart, sitting by designation in the Seventh Circuit, au-

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577. *Id.* at 265.
578. 696 F.2d at 554.
579. See, e.g., Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus*, 93 Harv. L. Rev. 966 (1980); *Love, Damages: A Remedy For The Violation of Constitutional Rights, 67 Calif. L. Rev. 1242* (1979). The courts are also divided as to which constitutional rights, if any, give rise to viable claims for presumed damages. See, e.g., Basiardanes v. City of Galveston, 682 F.2d 1203, 1220 (5th Cir. 1982) (first amendment violations unaccompanied by any “real” injury justify an award of only nominal damages); *Williams v. Board of Regents of Univ. Sys.*, 629 F.2d 993, 1005 (5th Cir. 1980), *cert. denied*, 452 U.S. 926 (1981) (damages must be proved, rather than presumed in § 1983 actions); *Phillips v. Dist. of Columbia*, No. 80-2171, slip op. (D.C. Cir. Jan. 11, 1983) (holding that plaintiff was not entitled to damages for the intrinsic value of his eighth amendment right to be free of cruel and unusual punishment). But see, *Corriz v. Naranjo*, 677 F.2d 892, 897 (10th Cir. 1982) *appeal dismissed*, 103 S. Ct. 5 (1982) (damages are available for violation of plaintiff’s substantive rights, i.e., his liberty interests and bodily integrity); *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1272 (8th Cir. 1981) (“Damages for emotional harm are to be presumed where there is an infringement of a substantive constitutional right.”); *Herrera v. Valentine*, 653 F.2d 1220, 1228 (8th Cir. 1981) (substantial compensatory damages are recoverable for violation of liberty and privacy interests protected by fifth and fourth amendments); *Hodge v. Seiler*, 558 F.2d 284, 285 (5th Cir. 1977) (damages may be presumed to flow from the denial of a constitutional right).
581. *Id.* at 17. Note, however, the court did not have to reach the issue directly since it found that claims of actual injuries sufficiently supported the judgment.
582. 670 F.2d 737 (7th Cir. 1982).
583. *Id.* at 747.
thored the recent opinion in *Owen v. Lash*, another case seeking damages for violation of first amendment rights. While overruling the district court’s characterization of the issue as involving simply the denial of procedural due process controlled by *Carey*, Justice Stewart failed to answer the more difficult question of whether a plaintiff who proves a violation of substantive rights can recover damages in the absence of proof of consequential injury. After discussing the conflicting case precedent, he remanded to the district court for a determination of whether the defendant was qualifiedly immune from liability for damages—thus obviating the need to address the consequential injury question.

In two decisions this term the damage question arose in the context of proper jury instructions. In *Freeman v. Franzen*, the defendants challenged jury instructions which included consideration of the loss of constitutional rights as “an element of damages.” The jury was told that in fixing the amount of liability in this prison guard brutality case, it could consider the nature, extent and duration of the injury, general pain and suffering, humiliation, mental distress, and the violation of the constitutional right. Including the latter as a separate and independent element of damages appears to suggest that the constitutional right has some intrinsic compensable value. The Seventh Circuit reasoned that the jury instruction was included to distinguish between a common law action for battery and a violation of civil rights so as to insure that plaintiff “received full compensation for his injuries.” It specified, however, that the instructions would not mislead the jury into awarding damages in the absence of actual injury. Further, it noted that evidence of actual physical injury to the plaintiff amply supported the damage award without the use of any presumed damage concept. It stressed that the primary purpose of § 1983 is to compensate for injuries, therefore suggesting that had there not been proof of actual physical injury in the case, the court would not have approved an award of damages beyond the one dollar nominal amount.

584. 682 F.2d 648 (7th Cir. 1982).
585. *Id.* at 659. Justice Stewart uses the term “consequential injury” to denote that violation of a substantive constitutional right itself constitutes actual injury. *Id.* at 657 n.9.
586. *Id.* at 660.
587. 695 F.2d 485 (7th Cir. 1982), *cert. denied sub. nom.*, Branche v. Freeman, 103 S. Ct. 3553 (1983).
588. *Id.* at 492.
589. *Id.* at 492 n.4.
590. *Id.* at 493.
591. *Id.* at 494.
permitted in *Carey*. Thus while perhaps a broad reading of the case might justify the conclusion that constitutional rights violations may augment a damage award, the court’s reasoning suggests that injury to constitutional rights could not independently support a judgment.

A different conclusion was reached by another Seventh Circuit panel in *Lenard v. Argento*. There the trial court instructed the jury that they could award “substantial damages” for civil rights violations without proof of actual injury. The Seventh Circuit found that it was error to instruct the jury as to a separate and distinct category of damages classified as “substantial damages.” However, the objection was to the use of the word “substantial,” rather than to the underlying concept that presumed damages are permissible. In fact, the court held that in light of the circumstances of that case—alleging a conspiracy to deprive plaintiff of equal protection of the law by the use of brutal and excessive force—“it was proper for the jury to consider an award of damages for these violations in the absence of discernable consequential injuries.” The court specified that on remand the plaintiff should be allowed to argue damages flowing from the nature of the constitutional deprivation, in addition to mental distress, humiliation and other types of injury that were caused as a result of the violation of civil rights.

Since the Supreme Court has refused to review both *Freeman* and *Lenard*, the question of whether a jury can properly be instructed to award damages for violation of constitutional rights, absent proof of “actual injury,” remains confusing. In light of the conflict in the Seventh Circuit as well as that among the appellate courts, clarification from the high court is surely needed.

**VI. PRISON LITIGATION**

While many of the issues which arise in prison litigation are not

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592. *Id.* at 493.
593. 699 F.2d 874 (7th Cir.), *cert. denied*, 104 S. Ct. 69 (1983).
594. *Id.* at 888-89. Use of the phrase “substantial damages” by the district court eleven times, plus inclusion as a category in the verdict form, was found to have greatly influenced the large verdict and was thus impermissible. *Id.* at 889.
595. *Id.*
597. *See supra* notes 585 and 591.
peculiar to such cases, there are enough matters unique to such litigation to warrant a separate section. Some issues which arose in the context of prison litigation have already been discussed. The first issue, which is certainly not unique to prison cases, concerns the trial court's obligation to appoint counsel for an indigent who cannot pay for representation. Several cases involve the application of the factors established in *Maclin v. Freake*.

(1) whether the merits of the indigent's claim are colorable; (2) the ability of the indigent plaintiff to investigate crucial facts; (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel; (4) the capability of the indigent litigant to present the case; and (5) the complexity of the legal issues raised by the complaint.

Application of these factors in *Merritt v. Faulkner*, led the court to conclude that the district court had abused its discretion in denying the plaintiff's request for appointed counsel. This ruling was heavily influenced by the fact that the plaintiff is functionally blind in both eyes and the case involves some complex medical practice issues.

In another case, *McKeever v. Israel*, the court reversed a refusal to appoint counsel where the district court failed to exercise its discretion under § 1915(d) because it did not recognize the authority to appoint counsel. Here again, application of the *Maclin* factors led the court to conclude that it was an abuse of discretion to refuse to appoint counsel. The critical factor seems to be the plaintiff's performance during trial and other proceedings in the trial court. This information was not necessarily available to the trial judge when the request for counsel was denied; however, there were repeated requests, including one on the day of trial.

The trial court's refusal to appoint counsel was upheld in *Childs v. Duckworth* where the trial court made a finding that the plaintiff "has a fairly clear understanding of what he wants to present here." The court noted that the issues in the case, questions concerning the plaintiff's religious beliefs and his sincerity, were within his knowledge and Childs demonstrated his ability to articulate his case. The lower

598. *See, e.g.*, supra section I-D relating to the first amendment.
599. These cases do not suggest there is a constitutional right to representation; rather, they deal with the trial court's exercise of discretion under 28 U.S.C. § 1915(d) (1982). This section provides that the court may request an attorney to represent an indigent unable to employ counsel.
600. 650 F.2d 885, 887-89 (7th Cir. 1981) (per curiam).
602. 689 F.2d 1315 (7th Cir. 1982).
603. 705 F.2d 915 (7th Cir. 1983).
604. *Id.* at 922.
court's refusal to appoint counsel was also upheld in *Caruth v. Pinkney*, but on different grounds than those utilized by the trial court. In denying appointment of counsel, the lower court referred to the lack of compensation for appointed lawyers in civil cases, the availability of pro bono legal services through organizations in cases found meritorious, and the fact that private attorneys will often accept cases on a contingent fee basis if there is a potential for recovery. While rejecting these factors, the court of appeals indicated there was no abuse of discretion in failing to appoint counsel because of questions about the merits of the plaintiff's claim, the plaintiff's ability to comprehend and adequately present his claim and access to a prison library and law clerk.

A related issue concerns the function and duties of the trial judge when a plaintiff is proceeding pro se. This issue arose in *Lewis v. Faulkner* where the defendant filed a "motion to dismiss, or in the alternative, for summary judgment" and the plaintiff failed to respond. The lower court dismissed the case, relying heavily on the affidavit submitted in support of the motion. Because the consequences of failing to respond would not be evident to the non-lawyer in this situation, the court took this opportunity to establish a general rule "that a prisoner who is a plaintiff in a civil case and is not represented by counsel is entitled to receive notice of the consequences of failing to respond with affidavits to a motion for summary judgment." Noting its reluctance to impose additional duties on the trial judges, the court suggested that counsel for defendants in prisoner civil rights actions should include notice to the plaintiffs that "any factual assertion in the movant's affidavits will be accepted by the district judge as being true unless the plaintiff submits his own affidavits or other documentary evidence contradicting the assertion.'

Prisoners' constitutional right of access to the courts was discussed in two cases. First, in *Corgain v. Miller* the court considered the adequacy of the library services available to state prisoners held at the United States Penitentiary in Marion, Illinois pursuant to contracts with various states. The lower court found certain deficiencies and the

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606. *Id.* at 1048.
607. *Id.* at 1050.
608. 689 F.2d 100 (7th Cir. 1982).
609. *Id.* at 102. Here the court relied on decisions in two other circuits, *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968), and *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975).
610. 689 F.2d at 102.
611. 708 F.2d 1241 (7th Cir. 1983).
defendants were ordered to submit a plan for library services which would assure meaningful access to the courts. All of the plans were eventually approved and on appeal inmates from Massachusetts and Washington contest the adequacy of the plans submitted for their respective states. After noting that an adequate law library is only one of the acceptable methods of providing access to the courts, the court considered whether a suitable alternative had been provided here. Both Massachusetts and Washington had chosen an alternative found acceptable by the court.

Massachusetts provided a list of eight legal service resources available to Massachusetts prisoners for criminal and civil proceedings. The State of Washington had contracts with a law firm and a legal services organization for the provision of legal services to inmates transferred out of the state. It was found that these alternatives, at a minimum, would enable inmates to obtain the citations needed to utilize the otherwise adequate library system at the prison. Therefore, the plans were upheld as being facially adequate.612

In the other case, Jones v. Franzen,613 inmates challenged the photocopy policy of the state prison in Pontiac. The court rejected this challenge, holding that the reasonableness of the policy “becomes relevant only after the prisoner has shown that the policy is impeding that access [to the courts], for if it is unreasonable but not impeding he has not made out a prima facie case of violation of his constitutional rights.”614 Because the plaintiff had shown neither a substantial likelihood of prevailing at trial nor irreparable injury, the court of appeals reversed the issuance of a preliminary injunction.

An action for damages, resulting from the wrongful taking of a typewriter table during a prison shakedown, required the court to examine the question of exhaustion in light of § 7 of the Civil Rights of Institutionalized Persons Act of 1980.615 The district court in Owen v. Kimmel616 dismissed the § 1983 claim for failure to exhaust, relying on an earlier Seventh Circuit decision in Secret v. Brierton.617 Subsequent to the district court decision, the Supreme Court, in Patsy v. Florida Board of Regents,618 held that exhaustion of administrative remedies is

612. Id. at 1248-51. Inmates were left free to challenge the adequacy of the plans as implemented.
613. 697 F.2d 801 (7th Cir. 1983).
614. Id. at 803.
616. 693 F.2d 711 (7th Cir. 1982).
617. 584 F.2d 823 (7th Cir. 1978).
not a prerequisite to filing a §1983 action. However, the Supreme Court noted a narrow state and local prisoner exception to the general rule, an exception contained in § 7 of the Civil Rights of Institutionalized Persons Act of 1980. Under this Act, exhaustion of administrative remedies may be required if “the Attorney General has certified or the court determined that [state prison] administrative remedies are in substantial compliance with minimum acceptable standards promulgated under subsection (b).” If a case falls within the limited §1997e exception to the no exhaustion rule, then the district court must “continue such case for a period not to exceed ninety days in order to require exhaustion,” but only if the court believes that such a requirement “would be appropriate and in the interests of justice.”

Holding that Secret v. Brierton is no longer controlling, the Seventh Circuit remanded the case to the district court for a determination of whether the Indiana State Prison grievance procedures meet the minimum standards under §1997e(b)(2).

The eighth amendment prohibition against cruel and unusual punishment was relied upon by inmates in several cases. In Smith v. Fairman the lower court found that the institutional practice of housing two prison inmates in a single cell violated the eighth amendment and ordered wide ranging relief, including the elimination of double occupancy cells. Under the decision in Rhodes v. Chapman, double celling by itself does not violate the eighth amendment. The Supreme Court noted that prison conditions “must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportion-

619. Id. at 512.
622. Id.
623. Under §1997e(b)(2), the minimum standards shall provide:
   (A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in formulation, implementation, and operation of the system;
   (B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;
   (C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;
   (D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and
   (E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.
624. 690 F.2d 122 (7th Cir. 1982), cert. denied, 103 S. Ct. 2125 (1983).
ate to the severity of the crime warranting imprisonment.”\textsuperscript{626} While recognizing that the prohibition of cruel and unusual punishment is a fluid concept which evolves with the standards of decency in society, the Court cautioned against judges substituting their subjective views for those of society and indicated the judgment must be on the basis of “objective factors to the maximum possible extent.”\textsuperscript{627}

Based on its earlier decision in \textit{Madyun v. Thompson},\textsuperscript{628} the court in \textit{Smith v. Fairman} indicated that \textit{Rhodes} mandates a “totality of the conditions of confinement”\textsuperscript{629} approach to cruel and unusual punishment cases. Reviewing the facts, the court agreed that conditions at the prison were far from perfect, but determined that the inmates are not subjected to wanton and unnecessary inflictions of pain because “their food is good, their cells are clean, and their health is maintained.”\textsuperscript{630} While indicating sympathy with the lower court’s desire to remedy conditions at the prison, the court held that the district judge found a constitutional violation “largely because prisoners were compelled to spend long hours in small cells.”\textsuperscript{631} Recognizing that life in the two man cell is “unpleasant and regrettable,” the court relied on \textit{Rhodes} in indicating that such conditions “are part of the penalty that criminal offenders pay for their offenses against society.”\textsuperscript{632}

In another eighth amendment case the plaintiff argued that a penalty imposed by a disciplinary committee—fifteen days in segregated confinement—for failing to submit to a frisk search was so disproportionate to the severity of the offense as to constitute cruel and unusual punishment.\textsuperscript{633} Referring to its earlier decision in \textit{Chapman v. Kleindienst},\textsuperscript{634} the court stated that “courts reviewing the proportionality of prison disciplinary measures must consider the ‘circumstances surrounding the segregation decision,’ including, first, the circumstances surrounding the offense, second, the prisoner’s disciplinary record, and third, the offense for which he originally was incarcerated.”\textsuperscript{635} Here the court found that the lower court had properly considered and app-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{626} Id. at 347.
\item \textsuperscript{627} Id. at 346.
\item \textsuperscript{628} 657 F.2d 868 (7th Cir. 1981).
\item \textsuperscript{629} Id. at 874.
\item \textsuperscript{630} 690 F.2d at 125.
\item \textsuperscript{631} Id.
\item \textsuperscript{632} Id. at 126, quoting, Rhodes v. Chapman, 452 U.S. at 347.
\item \textsuperscript{633} Madyun v. Franzen, 704 F.2d 954, 960-61 (7th Cir. 1983). \textit{See supra} notes 61-68 and accompanying text for a discussion of the first amendment issues raised by the plaintiff’s refusal to submit to a frisk search by a female guard.
\item \textsuperscript{634} 507 F.2d 1246, 1252 (7th Cir. 1974).
\item \textsuperscript{635} 704 F.2d at 961.
\end{itemize}
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plied each of these factors. The court also indicated that unconstitutional disproportionality of punishment would generally require punishment far more severe than fifteen days in segregation and usually punishment for offenses less dangerous than refusal to submit to a search. 636

Questions of what procedures are required in prison disciplinary proceedings arose in several contexts. In *McCollum v. Miller* 637 several inmates, in habeas corpus petitions, challenged the constitutionality of prison disciplinary proceedings. Three of the cases were remanded for a determination of whether they could properly be maintained as habeas corpus cases. 638 The fourth inmate sought added procedural safeguards, including a more detailed notice of the charges against him. 639 However, the additional information sought by the inmate would have tipped him off to the name of the informants against him. Recognizing that the notice received was so general as to make it difficult to prepare a defense, the court had to attempt to balance the inmate's due process rights against the dangers to the informants which would result from disclosing their names. The court found the record insufficient to make a determination of how many and what types of additional safeguards could be provided, but it did make some suggestions. For example, it might be possible to have the inmate's attorney review the investigative report; the investigative report could be under oath and the investigator could appear at the hearing for cross examination; it might be possible for the discipline committee to interview some of the informants. The court concluded that the inmate did not receive the process due under the fifth amendment, but was unable to ascertain how much more process could have been provided without jeopardizing the lives, as well as the willingness to inform, of the

636. *Id.* This case can be compared to the eighth amendment claim in *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982), where the plaintiff had been sentenced to a seclusion unit, some of it in a strip cell, for nearly forty-six consecutive months. After a jury verdict for the defendant on the eighth amendment issue, the appeal centered on the availability of offensive collateral estoppel to preclude the relitigation of the constitutionality of conditions in the seclusion unit. *See supra* notes 503-07 and accompanying text.

637. 695 F.2d 1044 (7th Cir. 1982).

638. Because there was no automatic relationship between the finding of an infraction and the length of imprisonment and these inmates did not seek release from a particular unit, the court could not decide on the basis of the record whether or not habeas corpus was appropriate. *Id.* at 1047. This is contrary to the usual situation where an inmate attempts to proceed under § 1983 and the question is whether habeas corpus is the only appropriate remedy. *See Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973).

639. Here habeas corpus was appropriate because it can be utilized to seek release from a particular unit within the prison and the inmate had lost good time because of the infraction. 695 F.2d at 1047.
informants.\textsuperscript{640}

State inmates, who were transferred to federal custody without procedural safeguards, claimed due process violations in \textit{Corgain v. Miller}.\textsuperscript{641} The primary question was whether the inmates were deprived of a protected liberty interest, provided by either federal or state law. Relying on the analysis in \textit{Meachum v. Fano},\textsuperscript{642} the court held that "[a] prisoner has no federal liberty interest in remaining within the state prison system any more than he has such an interest in remaining at a particular institution within the state system."\textsuperscript{643} The court pointed out that the disciplinary reasons for a transfer in this case "invoke federal constitutional protection only if those reasons are unconstitutional, and then the restriction is substantive, not procedural."\textsuperscript{644} The question of whether the inmates had a state created liberty interest was remanded because the lower court did not address the issue and the record was not adequately developed.\textsuperscript{645}

The relationship between institutional regulations governing disciplinary proceedings and the due process clause was considered in \textit{Caruth v. Pinkney}.\textsuperscript{646} A prison regulation required that the hearing before the disciplinary committee be commenced "\textit{no more than 72 hours} after the commission of the chargeable offense or the discovery of it."\textsuperscript{647} The court held that the failure to comply with a prison regulation does not automatically amount to a constitutional violation. There must be an independent determination of whether the safeguards provided by the regulation are also required by the constitution. Here the court found that due process does not impose such a seventy-two hour rule.\textsuperscript{648}

In a related matter, the court held that a state regulation requiring consideration of an inmate for a minimum security assignment six

\textsuperscript{640} 695 F.2d at 1048-49. Defects in the procedures were also found in Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982), where the inmate was frequently sentenced to continued seclusion without having an opportunity to explain or deny the charges and, on at least one occasion, was sentenced to continued seclusion without being present at the "hearing."

\textsuperscript{641} 708 F.2d 1241 (7th Cir. 1983).

\textsuperscript{642} 427 U.S. 215 (1976) (no federal liberty interest in the context of disciplinary transfers from one state institution to another).

\textsuperscript{643} 708 F.2d at 1252.

\textsuperscript{644} \textit{Id.} at 1253. An example is a transfer of an inmate in retaliation for the exercise of first amendment rights. \textit{See} Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978), \textit{cert. denied}, 440 U.S. 916 (1979). Both the stigma attached to a transfer and the possibility of adverse affects on future conditions of confinement were rejected as federal liberty interests. 708 F.2d at 1253.

\textsuperscript{645} 708 F.2d at 1254.

\textsuperscript{646} 683 F.2d 1044 (7th Cir. 1982), \textit{cert. denied}, 459 U.S. 1214 (1983).

\textsuperscript{647} \textit{Id.} at 1052 (emphasis original).

\textsuperscript{648} \textit{Id.}
years after admission did not create a protected liberty interest in the minimum custody status sought by the inmate. The plaintiff was denied reclassification because he had served only two years; the decision to change the security classification of such inmates was placed solely within the discretion of the Department of Corrections. Therefore, any expectations the inmate had in being considered for a lower security clearance did not rise to the level of a protected interest under the due process clause.  

An inmate's claim that an unprovoked beating by a prison guard unconstitutionally deprived him of liberty under the due process clause of the fourteenth amendment was sustained in *Freeman v. Franzen*. The court adopted the test set forth in *Johnson v. Glick* for determining whether a plaintiff establishes a deprivation of liberty under § 1983. The factors to be considered include the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.  

Based on these factors, the court concluded that the lower court had not erred in instructing the jury that the plaintiff could recover damages for a deprivation of liberty without due process.  

Finally, due process claims were raised in the context of a denial of parole. First the court held that the challenge could be presented under § 1983, rather than in a habeas corpus proceeding, because while the relief sought might improve plaintiff's chances of parole, "the question of release would still remain within the discretion of the parole board." In denying parole, the board simply indicated that "parole at this time would deprecate the seriousness of the crime for which you

649. Kincaid v. Duckworth, 689 F.2d 702, 704-05 (7th Cir. 1982), cert. denied, 103 S. Ct. 2126 (1983). The court also rejected an equal protection challenge to the regulation on the grounds that it treats persons convicted of murder under the old statute differently than those convicted under the revised version. *Id.* at 704.

650. 695 F.2d 485 (7th Cir. 1982), cert. denied, 103 S. Ct. 3553 (1983). See supra notes 587-92 and accompanying text.


652. 695 F.2d at 492, quoting, Johnson v. Glick, 481 F.2d at 1033.

653. 695 F.2d at 492.

654. Walker v. Prisoner Review Board, 694 F.2d 499 (7th Cir. 1982). In an earlier case, United States *ex rel.* Scott v. Illinois Parole and Pardon Board, 669 F.2d 1185 (7th Cir.), cert. denied, 459 U.S. 1048 (1982), the court held that "Illinois law creates an expectancy of release on parole which is entitled to due process protection." 694 F.2d at 501.

were convicted and promote disrespect for the law.”

The statement then recited the crimes which were considered. The court held that this was a sufficient articulation of the board’s reasons for denying parole.

The plaintiff also claimed he was denied due process by the board’s refusal to allow him to review the entire record which the board had considered. Here the court noted that the “relevant inquiry is whether, after taking into account the inherently flexible nature of due process, the combination of procedures available to the parole candidate is sufficient to minimize the risk that a decision will be based on incorrect information.”

The board’s rule gives parole candidates access to all documents which the board considers in denying parole. While recognizing that due process does not always require compliance with administrative regulations, the court held that this regulation is clearly intended to “implement the Board’s constitutional obligation to accord parole candidates due process in connection with denials of parole.”

Therefore, the case was remanded to the lower court to determine whether the board had in fact considered papers which were not provided to the plaintiff.

First amendment issues were considered in several prison cases. Religious freedom was at stake in *Childs v. Duckworth* where an inmate challenged the prison’s denial of his request for organized religious services, the prohibition on using candles and incense in his cell, the refusal of permission to order a crystal ball and refusal of his request to borrow books through the interlibrary loan system for further study. The question was whether “the restrictions imposed on the exercise by Childs of his professed beliefs were necessary for the operational security of the prison.”

Quoting from *Cruz v. Beto*, the court indicated that while every religious sect does not have to be provided identical facilities for worship, an inmate must be provided “a reasonable opportunity of pursuing his faith comparable to the oppor-

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656. 694 F.2d at 501.
657. Id. at 502.
658. Id. at 503.
659. Compare Caruth v. Pinkney, 683 F.2d 1044 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983); see supra notes 646-48 and accompanying text.
660. 694 F.2d at 504.
661. Id. at 505.
662. One of these cases, Madyun v. Franzen, 704 F.2d 954 (7th Cir. 1983) has already been discussed above. See supra notes 61-68 and accompanying text (religious claim) and notes 272-81 (equal protection claim).
663. 705 F.2d 915 (7th Cir. 1983).
664. Id. at 920.
tunity afforded fellow prisoners who adhere to conventional religious precepts.”

Applying this principle, the court then affirmed the lower court’s denial of relief. The refusal to accommodate Childs’ request for group services was reasonable because he never supplied the “information required to start any organization, he never obtained a sponsor, and was secretive about his group’s rituals.” Such a lack of information presented a security risk. Also, the court noted that Childs was the only inmate making requests for satanic meetings and the prison authorities found that Childs was not sincere in his professed beliefs. Concerning the religious articles, the court found that the denial by prison authorities was “a sensible and reasonable precaution for the authorities, in the interest of prison security and the safety of the inmates and staff.” Also, the limitations on religious articles were based on rules which “operate in a neutral fashion” and which were not applied to Childs in a disparate manner. Finally the denial of books on inter-library loan was upheld because it is generally intended only for personal study rather than group use. It was also noted that the plaintiff failed to establish that the refusal to lend him the books in any way related to the practice of his religion.

The right to correspond with a newspaper reporter and two individuals whose names were provided by a religious organization was at issue in Owen v. Lash. The lower court the plaintiff prevailed, but on procedural due process grounds rather than his first amendment claim. Because the lower court found that the justifications advanced by prison officials to support the restrictions on the plaintiff’s freedom to correspond had to be rejected, the court of appeals held that the plaintiff “had been deprived of the substantive right to correspond secured by the First and Fourteenth Amendments.” Another case,

666. 705 F.2d at 920, quoting, Cruz, 405 U.S. at 322.
667. Id. at 921.
668. Id.
669. Id.
670. Id. at 922. In dissent, Judge Cudahy points to testimony which suggests that prison authorities may have dealt with satanism differently than other religions. He would have remanded the case for further development of the record on this point and the appointment of counsel. Id. at 923-924.
671. Id. at 922.
672. 682 F.2d 648 (7th Cir. 1982). For a discussion of the damage issue in this case, see supra notes 584-86 and accompanying text.
673. Id. at 653. As discussed earlier, see supra notes 579-86 and accompanying text, prevailing on the basis of the first amendment rather than procedural due process grounds could be significant when considering the claim for damages.
Crowder v. Lash,674 involved first amendment claims relating to the censorship of general correspondence and reading material, interference with the free exercise of religion and interference with legal literature and correspondence regarding legal matters. The lower court had directed a verdict in favor of the defendants on all first amendment issues. On appeal, the directed verdict on the plaintiff's general correspondence and reading claim was upheld, but it was reversed insofar as it related to his right to legal literature and correspondence regarding legal matters.675 Since the plaintiff was released from the institution by the time of trial, the only remaining issue was his claim for damages. Because the defendants claimed a qualified immunity, the issue was whether the plaintiff's first amendment rights were clearly established at the time of the challenged conduct. Therefore, the court had to determine the first amendment rights of prison inmates relating to legal literature and correspondence between 1969 and 1973. The court also found that the plaintiff's right to the free exercise of religion, limited only by security interests, was clearly established during the relevant period of time. Therefore, the directed verdict on this aspect of the first amendment claim was also reversed.676

ADDENDUM

After this article went to press, the Supreme Court decided Hudson v. Palmer, — U.S. —, 104 S. Ct. 3194 (1984), extending the Parratt analysis to intentional deprivations of property. This article discussed the lower court decision in Hudson, notes 216-220 and accompanying text, and more generally the question of whether Parratt should be extended to intentional deprivations. In Hudson the Supreme Court reasoned that the underlying rationale of Parratt was that due process is not violated where deprivations of property are affected through random and unauthorized conduct of a state employee, making predeprivation procedures impossible, provided the state has an adequate post-deprivation remedy. It could “discern no logical distinction between negligent and intentional deprivation of property insofar as the ‘practicability’ of affording predeprivation process is concerned.” Because the state of Virginia provided an adequate remedy for the random unauthorized intentional conduct of its employee, the destruction

674. 687 F.2d 996 (7th Cir. 1982).
675. Id. at 1007.
676. Id. at 1003-05.
of the plaintiff's personal property did not violate the Fourteenth Amendment.

On the other hand, note that the Supreme Court summarily affirmed the Seventh Circuit holding in *Vail v. Board of Educ. of Paris Union Sch. Dist. No. 95*, discussed notes 226-247 and accompanying text, refusing to extend *Parratt* analysis to an intentional termination of an implied contract of employment, reasoning that *Parratt* applies only where a predeprivation hearing would be meaningless. In *Board of Educ. of Paris Union Sch. Dist. No. 95 v. Vail*, — U.S. —, 104 S. Ct. 2141 (1984), the Supreme Court unfortunately affirmed the case in a per curiam decision by an equally divided vote, thus casting little light on the questions posed in this article regarding the potential scope of the *Parratt* decision.