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CIVIL LIBERTIES: JUDICIAL IMMUNITY, PRISONERS' RIGHTS, TITLE VII AND SCHOOL DESEGREGATION

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The character of an appellate court is determined more by its interpretation and application of opinions of the United States Supreme Court than by its enunciation of new doctrine. Because many of the civil liberties cases decided by the United States Court of Appeals for the Seventh Circuit during 1979-80 were decisions of panels composed of members of the circuit as well as judges from other jurisdictions sitting by designation, the Seventh Circuit cannot be said to speak with a consistent voice even in its application of Supreme Court precedent. Such application during the 1979-80 term ranged from strictly literal to expansive.

In the 1979-80 term the Seventh Circuit considered a broad range of civil rights issues including: housing discrimination,[1] employment discrimination,[2] freedom of religion,[3] residential picketing,[4] the scope of liability under section 1983,[5] judicial immunity,[6] school desegregation,[7] prisoners' rights,[8] and the bases for constitutional due process

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1. *E.g.*, Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980); Blockman v. Sandalwood Apartments, Duvan, Inc., 613 F.2d 169 (7th Cir. 1980).

2. *E.g.*, Holder v. Old Ben Coal Co., 618 F.2d 1198 (7th Cir. 1980); Grayson v. Wickes Corp., 607 F.2d 1194 (7th Cir. 1979); Carroll v. Talman Federal Savings & Loan Assoc., 604 F.2d 1028 (7th Cir. 1979); Kamberos v. GTE Automatic Electric, Inc., 603 F.2d 598 (7th Cir. 1979).

3. *E.g.*, Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979); International Soc'y for Krishna Consciousness v. Brown, 600 F.2d 667 (7th Cir. 1979).

4. *E.g.*, Brown v. Scott, 602 F.2d 791 (7th Cir. 1979).

5. *E.g.*, Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980); Mescall v. Burrus, 603 F.2d 1266 (7th Cir. 1979).

6. Lopez v. Vanderwater, 620 F.2d 1229 (7th Cir. 1980); Ashbrook v. Hoffman, 617 F.2d 474 (7th Cir. 1980); Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979).

7. United States v. Board of School Comm'rs, No. 79-1875 (7th Cir. Apr. 29, 1980); Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980); Johnson v. Board of Educ., 604 F.2d 504 (7th Cir. 1979).

8. *E.g.*, Trapnell v. Riggsby, 622 F.2d 290 (7th Cir. 1980); Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980); Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980); Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980).

rights.[9] Because restrictions on time and length make reasonable discussion of all the issues addressed impossible, only cases in the following areas will be discussed: judicial immunity under 42 U.S.C. § 1983, prisoners' rights, employment discrimination under Title VII of the Civil Rights Act and school desegregation.

JUDICIAL IMMUNITY

The judicial immunity doctrine as it related to liability under 42 U.S.C. § 1983 was most recently defined by the United States Supreme Court in *Stump v. Sparkman*.[10] In *Sparkman*, the Court reversed the Seventh Circuit's finding that judicial immunity did not protect an Indiana judge who had ordered the sterilization of a minor upon petition of her mother in an *ex parte* proceeding.[11]

Traditionally, judicial immunity applied to all judicial acts except those done in the clear absence of jurisdiction.[12] The Seventh Circuit in *Sparkman* assumed that "jurisdiction" meant only subject matter jurisdiction and the Supreme Court accepted this standard without analysis or discussion.[13] The Supreme Court did not agree, however, that the judge in *Sparkman* had acted in the clear absence of subject matter jurisdiction. Because the judge was not specifically precluded from acting as he did under Indiana law, the Supreme Court held that he had performed a judicial act which was within the subject matter jurisdiction of the court and was, therefore, immune.[14] It is within this context that the Seventh Circuit again addressed the issue of a judge's liability for damages under section 1983, in *Lopez v. Vanderwater*,[15] *Ashbrook v. Hoffman*,[16] and *Harris v. Harvey*.[17]

Lopez v. Vanderwater

In *Lopez v. Vanderwater*, the plaintiff alleged a denial of civil

9. *E.g.*, Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980); Coyne-Delaney Co. v. Capital Dev. Bd., 616 F.2d 341 (7th Cir. 1980); Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980); McElearney v. University of Ill., 612 F.2d 285 (7th Cir. 1979); Agustin v. Quern, 611 F.2d 206 (7th Cir. 1979); Thompson v. Schmidt, 601 F.2d 305 (7th Cir. 1979); Kyees v. County Dept. of Pub. Welfare, 600 F.2d 693 (7th Cir. 1979).

10. 435 U.S. 349 (1978). For a general discussion of liability under 42 U.S.C. § 1983 *see* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION (1979).

11. 435 U.S. 349 (1978).

12. Laycock, *Civil Rights and Civil Liberties*, 54 CHI.-KENT L. REV. 390 (1977) [hereinafter cited as Laycock].

13. 435 U.S. at 357.

14. *Id.* at 364.

15. 620 F.2d 1229 (7th Cir. 1980).

16. 617 F.2d 474 (7th Cir. 1980).

17. 605 F.2d 330 (7th Cir. 1980).

rights arising from the defendant judge's actions in sentencing the plaintiff to prison without the benefit of a hearing. Plaintiff's complaint alleged that the defendant judge caused a criminal complaint to be filed, prepared an arrest warrant on his own motion, entered a guilty plea and jury waiver without plaintiff's knowledge, and arraigned, convicted and sentenced plaintiff to Vandalia State Prison without a hearing or waiver of his right to a trial. These events allegedly occurred at a police station in the middle of the night while plaintiff was locked in a cell, during hours when the court was not in session and when only the judge and a few police officers were present.[18]

The district court granted the defendant's motion for summary judgment under the doctrine of judicial immunity after Vanderwater's Chief Judge expressed the opinion that assignment of a case to Vanderwater's court was not a prerequisite for subject matter jurisdiction.[19] On appeal, the Seventh Circuit reversed. Judge Tone, writing for the panel, applied a two-step analysis drawn from *Stump v. Sparkman*[20] and *Bradley v. Fisher*.[21] In order for immunity to attach: first,

18. 620 F.2d at 1231. The plaintiff's complaint alleged that defendant Vanderwater, an associate judge of the Illinois Sixteenth Judicial Circuit, had been the part-owner of an apartment building in Aurora. Although the record does not reflect whether he retained ownership after he became a judge, he continued to collect rent each week on behalf of the owners. Flor Lopez, formerly a tenant in the building, had fallen behind in his rent and had moved out when requested to do so by Vanderwater. *Id.*

Approximately one month later, Vanderwater got a telephone report from another tenant that Flor Lopez was back in the building. Vanderwater asked the tenant to call the police and went to the building armed with a handgun. Vanderwater found Lopez asleep in his former apartment, awakened him, detained him at gunpoint and held him for the police. Lopez was searched, arrested for criminal trespass at the urging of Vanderwater, and taken to the Aurora police station. According to the deposition of Lopez, he had returned to the building to pay Vanderwater the back rent. *Id.* at n.1.

When Vanderwater arrived at the police station, the facilities of the Aurora Branch Court and prosecutor's office, which are housed in the same building, were locked. Vanderwater then called one of the partners who owned the building and asked him to come down to sign a complaint against Lopez. In deposition Vanderwater stated that he originally intended to charge Lopez with criminal trespass but reconsidered and charged him with theft after Lopez was found to be in possession of a key to the apartment. When Vanderwater's former partner arrived at the station, he found Vanderwater and one of the arresting officers alone in the prosecutor's office. Vanderwater prepared a complaint which was signed by the others and he also prepared an arrest warrant for Lopez. At about that time he also stated that he would put Lopez in Vandalia State Prison for 240 days. Vanderwater also filled out a form indicating a plea of guilty and a waiver of a jury trial. *Id.* at 1232.

Although Lopez was in his cell during this period and claims never to have signed the plea and waiver form, he was arraigned, convicted and sentenced by Vanderwater in the booking area of the station. After spending some six days in jail, Lopez was released from custody at the request of his attorney and a month later the judgment of conviction was vacated. Vanderwater was eventually removed from the bench by the Illinois Courts Commission. *Id.* at 1233. Lopez brought suit under 42 U.S.C. § 1983, alleging that Vanderwater had abused his authority as a judge.

19. *Id.* at 1233 n.3.

20. 435 U.S. 349 (1978).

the act, even if "malicious," "corrupt" or "in excess, . . . of jurisdiction," must not have been taken in the "absence of jurisdiction";[22] second, the action must have been a "judicial act."[23]

In a footnote, the court attempted to clarify the distinction between "in excess" and "clear absence" of all jurisdiction.[24] The distinction, according to the court, is that a probate judge could be held liable for trying a criminal matter but a criminal judge would not be held liable for convicting a defendant of a non-existent crime.[25] The court also indicated that under *Sparkman*, an inquiry is required into whether the act at issue is one "normally performed by a judge" *and* whether the parties had the expectation of dealing with the judge in his judicial capacity.[26]

Even though Vanderwater had not been assigned to the Aurora Court and the acts in question had occurred outside the courtroom proper, the court held that there was no "clear absence of jurisdiction."[27] The Seventh Circuit reached that conclusion because it is not clear under Illinois law that judicial assignments are jurisdictional and because many valid judicial acts occur outside a courtroom.[28] On the "judicial acts" issue the court upheld the conclusion of the district court, that Vanderwater's acts in arraigning, convicting and sentencing Lopez were those "normally performed by a judge," thus meeting the first portion of the *Sparkman* "judicial acts" test.[29] However, the court declined to apply the second portion of the test,[30] "whether the parties dealt with the judge in his judicial capacity." The court recognized that Lopez was "*unable* to deal with Vanderwater in his judicial role" because he was *unaware* of the proceeding and because in this case the judge was also the complainant.[31] Rather than concluding from these facts that the judge's acts were non-judicial, the court concluded that these facts made the *Sparkman* standard "inapplicable" in this case.[32] As a result, Vanderwater was found to be absolutely immune from lia-

21. 80 U.S. (13 Wall.) 335 (1872).
22. 620 F.2d at 1233.
23. *Id.*
24. *Id.* at 1233 n.4.
25. *Id.* at 1234 n.8.
26. Stump v. Sparkman, 435 U.S. 349, 362 (1978).
27. 620 F.2d at 1234.
28. *Id.*
29. *Id.*
30. *Id.* at 1235.
31. *Id.*
32. *Id.* The court relied upon the fact that Linda Sparkman was unaware of the hearing on her mother's petition for sterilization as support for the proposition that the "expectations of the parties" requirement of *Sparkman* was not relevant to *Lopez*. *Id.* at 1235 n.11.

bility for his acts in arraigning, convicting and sentencing Lopez in an *ex parte* proceeding in which the judge was also the moving party.[33]

The court, however, found Vanderwater liable for those acts which were of a prosecutorial nature. Because Vanderwater made the decision to prosecute, prepared the charge and the plea, prepared the waiver of trial and presented himself with the charge and plea form, the court found he had committed acts which were not normally judicial in nature and which were, therefore, unprotected by judicial immunity.[34] Furthermore, the court observed that these acts also were undertaken in the "absence of all jurisdiction" since prosecutorial acts are not within the Illinois Circuit Judge's grant of jurisdiction in the Illinois Constitution.[35]

Through this device, and the absence of prosecutorial immunity, the court found that Vanderwater was not immune for the violations of the plaintiff's rights including due process, right to counsel, right to a jury trial and confrontation of witnesses.[36]

The court rejected the defendant's argument that he could not be found to have acted outside of his power as a judge and also be found to have acted "under color of state law" as required by section 1983. Recognizing this apparent inconsistency, which was referred to by the dissent in *Sparkman*, the court concluded that in this case it was only because Vanderwater was a judge that his prosecutorial acts were possible and that it was this improper "use of . . . office" which exposed him to liability.[37]

While the result of the *Lopez* case is not likely to come under much criticism, the difficulty the court had in reaching its conclusion demonstrates some of the difficulties implicit in the *Sparkman* "subject matter jurisdiction" standard and the importance of developing a careful analysis of the "judicial acts" portion of the *Sparkman* test.

Justice Stewart, writing for the dissent in *Sparkman*, pointed out that the limitation of the "absence of all jurisdiction" requirement to subject matter jurisdiction held the danger that judges of general jurisdiction would not be constrained from carrying out egregious acts such as sterilization or imprisonment.[38] According to Justice Stewart this raises the spectre of judges who are free like "loose cannon to inflict

33. *Id.* at 1235.
34. *Id.*
35. *Id.* at 1235 n.13.
36. *Id.* at 1235-36.
37. *Id.* at 1237.
38. 435 U.S. at 367 n.5.

indiscriminate damage."[39] In an earlier analysis of *Sparkman*, Professor Douglas Laycock pointed out that this limitation to "subject matter jurisdiction only" is not mandated by earlier cases and that *Bradley v. Fisher*,[40] upon which the Seventh Circuit relied in *Sparkman*, can be read to support the requirement of personal jurisdiction as well.[41] It is this subtle and seemingly almost inadvertent alteration of the traditional immunity standard which made *Sparkman* a difficult case. It has, in effect, shifted the inquiry to the issue of the general powers of the court rather than its power over the person before the court.[42]

Although there are obvious inequities which flow from the adoption of the subject matter jurisdiction standard, those issues are beyond the scope of this discussion.[43] The central issue raised by *Lopez* is whether the Seventh Circuit was correct in concluding that *Sparkman* necessarily required a finding that Judge Vanderwater had subject matter jurisdiction and that he performed a judicial act when he caused Lopez to be incarcerated through an *ex parte* criminal proceeding.

Implicit in the Supreme Court's discussion in *Sparkman* was the assumption that state law controls the extent of a judge's discretion in the area of parental rights and in ordering tubal ligations.[44] The issue

39. *Id.* at 367.

40. 80 U.S. (13 Wall.) 335 (1872).

41. Laycock, *supra* note 12, at 393.

42. Once this shift had been accomplished, the Supreme Court could quite logically conclude, as it did in *Sparkman*, that courts of general jurisdiction are free to operate without liability except as specifically restricted by the statutes which empower them to hear certain types of cases. It is also this alteration in the traditional standard which forced the Seventh Circuit in *Lopez* to rely upon liability for prosecutorial acts in a case which clearly called for some sort of liability for the judge in question. That the Seventh Circuit concluded that a judge of general jurisdiction could arraign, convict and sentence a defendant in an *ex parte* criminal proceeding *without* incurring liability for those acts is ample evidence that Justice Stewart's concern regarding "loose cannons" was well founded. *See* text accompanying note 39 *supra*.

43. For a discussion of these issues *see* Laycock, *supra* note 12.

44. *See* text accompanying note 41 *supra*. 435 U.S. at 358-60. After accepting the Seventh Circuit's assertion that "subject matter jurisdiction" was the standard to be applied, the Supreme Court in *Sparkman* disagreed that the judge acted in "clear absence of all jurisdiction." *Id.* at 357-58. This conclusion was based upon the Court's analysis of the Indiana Code, which included a broad jurisdictional grant. *Id.* at 358. The Court noted that while there was no express authority to order a tubal ligation in the Indiana statutes it was more important that there was no Indiana statute and no case law prohibiting the judge from hearing a petition of the type presented by the mother. *Id.* There was, in fact, some statutory authority for Indiana courts to order the sterilization of institutionalized persons and authority for parents to consent and contract for surgery on behalf of their children. IND. CODE § 16-8-4-2 (1973). Most importantly, Indiana had never specifically circumscribed the power of the court to hear such a petition. 435 U.S. at 358. Thus, the Court concluded that because Judge Stump presided over a court of general jurisdiction "the lack of a specific statute authorizing his approval of the petition" did not subject him to liability. *Id.* at 359-60. The natural implication is that, had such a limitation existed, Judge Stump might well have been liable because the acts performed would have been outside the jurisdiction granted by the state.

before the Court in *Sparkman* involved a proceeding which was not specifically controlled by state or federal law. However, because the Court looked to Indiana law to determine the scope of Judge Stump's immunity in a case controlled by Indiana law, it is not unreasonable to conclude that a case which dealt with actions prohibited by state or federal decisions, statutes or the Constitution should be analyzed in the same manner.

A close reading of *Sparkman* indicates that the judge in *Lopez* may have lacked the jurisdiction necessary to claim immunity in light of the clear mandates of the fifth, sixth and fourteenth amendments, not to mention possible limitations imposed by the Illinois Constitution and case law.[45] If it is necessary to look to the law empowering the court in question to determine whether the judge had the power to act as he did, the Seventh Circuit may have unnecessarily concluded that because Judge Vanderwater sat in a court of general jurisdiction he was unconstrained by restrictions placed upon criminal prosecutions by the Constitution or by Illinois law.

In *Lopez*, the Seventh Circuit also addressed the effect which the denial of due process would have on the jurisdictional issue. The court relied on *Sparkman* for the proposition that "grave procedural errors were not sufficient to deprive a judge of all jurisdiction."[46] But the Seventh Circuit failed to note that neither *Sparkman* nor *Bradley* dealt with rights which were specifically embodied in the Constitution.[47] It is not a necessary conclusion from *Sparkman* that *ex parte* criminal proceedings which result in the loss of liberty through the denial of the right to a trial by jury and which thereby *directly* violate the Constitution are within the "subject matter jurisdiction" of the court, even a court of general jurisdiction.

The "judicial acts" inquiry which is mandated by *Sparkman* was

45. It is well established that the sixth amendment right to a public trial has been made applicable to the states. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968). The fundamental nature of a defendant's right to be present and to a public trial was recognized much earlier in Illinois. People v. Kirilenko, 1 Ill. 2d 90, 115 N.E.2d 297 (1953). Although this right may be waived by the defendant under certain circumstances, *see, e.g.*, Illinois v. Allen, 397 U.S. 337 (1970) and Taylor v. United States, 414 U.S. 17 (1973), Illinois courts have consistently held that it is constitutionally impermissible to try a defendant *ex parte* without a voluntary waiver of that right by the defendant. *See, e.g.*, People v. Davis, 39 Ill. 2d 325, 235 N.E.2d 634 (1968); People v. Mallett, 30 Ill. 2d 136, 195 N.E.2d 687 (1964); People v. Etheridge, 35 Ill. App. 3d 981, 343 N.E.2d 55 (3d Dist. 1976).

46. 435 U.S. at 359.

47. Neither the denial of a license to practice law (*Bradley*) nor a child's right to be free from parentally imposed sterilization (*Sparkman*) has been treated with the attention given to criminal proceedings in which the rights of the defendant are well known and which require constitutionally guaranteed procedures such as a trial.

quickly disposed of by the Seventh Circuit in *Lopez*. The two-step inquiry which is required prior to finding a judge immune requires first, that the challenged acts were those "normally performed by a judge" and second, that the parties "dealt with the judge in his judicial capacity."[48]

There can be little disagreement that the *Lopez* case falls within the first portion of the test; arraigning, convicting and sentencing a defendant are clearly acts which judges normally perform.

However, the second portion of the test, regarding the expectations of the parties, presented a problem which the court resolved by finding that this portion of the test simply did not apply to this case.[49] This treatment is unfortunate in that the Seventh Circuit bypassed an opportunity to develop what may prove to be an important limitation upon the immunity granted the judiciary in *Sparkman*. The Seventh Circuit justified ignoring the second requirement by pointing out that the judicial act requirement was met in *Sparkman* although the *subject* of the petition was unaware that judicial proceedings had been instituted on her behalf.[50] This, the court concluded, indicated that the Supreme Court must not have found the second criterion relevant in *Sparkman*.[51] The result of this analysis by the Seventh Circuit is to make the second criterion meaningless and to suggest that the Supreme Court included a useless test in *Sparkman*.

A more logically consistent reading of *Sparkman* suggests that the second criterion *was* met in that case. It was not met by Linda Sparkman, who, under Indiana law, was apparently not a necessary party, but by her mother who *was* a party and who approached the judge in his judicial capacity. It was the expectation of the mother that was at issue in *Sparkman* and it was her expectation that met the second portion of the judicial act requirement.

This "expectation of the parties" portion of the judicial acts test takes on increased importance in light of the Supreme Court's rejection of personal jurisdiction as a threshhold requirement for a claim of judicial immunity. In requiring *some* consideration of the expectations of the parties before the Court, the *Sparkman* test can be read to amelioriate some of the potential for abuse which is inherent in the "pure" subject matter jurisdiction standard.[52] The requirement that, *in addi-*

48. 435 U.S. at 359.
49. 620 F.2d at 1235.
50. *Id.* at 1235 n.11.
51. *Id.*
52. Laycock, *supra* note 12, at 401.

tion to the acts in question being the sort performed by judges, the parties had the expectation of "dealing with the judge in a judicial capacity" implies inquiry first, into whether the person injured was properly a party to the proceeding in question and, second, whether they had a legally sufficient awareness of the judicial proceeding and the judge's role.

In *Sparkman*, since there was apparently no requirement in Indiana law that a minor child be a party to the petition submitted to the court by the mother, liability did not attach. However, in criminal prosecutions, a defendant is a necessary party whose presence at trial is constitutionally mandated, unless waived.[53] Therefore, a criminal defendant's presence or proof of his voluntary absence after a trial commences may well be necessary before a judicial act can occur even under *Sparkman*. This standard might well have been used to justify the imposition of liability for conducting an *ex parte* criminal proceeding.

The importance of leaving open this inquiry into whether a "judicial act" actually occurred is illustrated by the possibility raised by *Lopez* that, on slightly different facts, the judge could have escaped liability completely. Because the opinion assumed almost unlimited judicial immunity, the case actually turned upon the fact that the judge did not interpose a prosecutor between the arrest and the arraignment.[54] Had Judge Vanderwater induced a state's attorney to carry out the prosecutorial functions in the *Lopez* case, both the judge and the prosecutor might well have been able to rely upon immunity and Mr. Lopez would have been precluded from seeking relief, other than appeal, for his clearly unlawful incarceration.

Although *Lopez* may be seen as an indication that *Sparkman* did not create a grant of absolute immunity for all actions undertaken by a judge, the method employed by the Seventh Circuit to reach that conclusion did little to clarify the proper application of the *Sparkman* test. Because the court accepted without thorough discussion the subject matter jurisdiction standard which it had created, and because it chose to ignore the expectations requirements of *Sparkman*, the court was compelled to rely upon prosecutorial acts as a means of finding liability. In so doing the Seventh Circuit may have unnecessarily reinforced the aspect of *Sparkman* which effectively puts the acts of judges outside the reach of section 1983 liability.

53. See note 45 *supra*.
54. 620 F.2d at 12.

Ashbrook v. Hoffman

In *Ashbrook v. Hoffman*,[55] a panel of the Seventh Circuit addressed another aspect of the judicial immunity question: what factors determine whether an officer of the state who is not a judge may claim judicial immunity under *Sparkman*.

The plaintiff, Charles Ashbrook, was granted an undivided one-half interest in a restaurant as part of a court ordered divorce decree. Florence Ashbrook sued Charles for partition and the court, contrary to Indiana law, appointed Charles' and Florence's attorneys as partition commissioners for the sale.[56] Plaintiff claimed that Harlan Hoffman, Florence's attorney, and James Hooper, Charles' attorney, failed to properly advertise the sale. In addition, plaintiff alleged that Hoffman aided Florence in bidding on the property in violation of state law, causing plaintiff a loss of $70,000. After the sale, Hooper refused to accede to Charles' wishes that the sale be attacked. Thereafter, the attorneys represented to the court that they had distributed Charles' share of the proceeds. Charles claimed that, rather than distributing the proceeds, the attorneys had deposited his share with the Clerk of the Court and, after Hooper withdrew as Charles' counsel, a lien for fees was granted to Hooper without notice or a hearing being given to Charles.[57] The defendant commissioners contended that they were absolutely immune from plaintiff's section 1983 claims under *Stump v. Sparkman* because they were performing duties intimately related to the judicial process or were executing directives of the supervising court.[58] The Seventh Circuit agreed, and affirmed the conclusion of the district court that Indiana partition commissioners are entitled to "absolute quasi-judicial immunity" from liability for damages under section 1983.[59]

The court in *Ashbrook* relied upon *Imbler v. Pachtman*,[60] a prosecutorial immunity case, for the principle that officers who perform acts which are an "integral part of the judicial process" are also absolutely immune for their quasi-judicial conduct.[61] According to the

55. 617 F.2d 474 (7th Cir. 1980).
56. *Id.* at 475.
57. *Id.*
58. *Id.* at 476.
59. *Id.* at 475.
60. 424 U.S. 409 (1976).
61. 617 F.2d at 476. The court listed cases from several other circuits as examples of court related officers who had been granted immunity under the *Imbler* rationale. Kermit Constr. Corp. v. Credito Y Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976) (receivers); Lockhart v. Hoenstine, 411 F.2d 455 (3d Cir.), *cert. denied*, 396 U.S. 941 (1969) (prothonotaries); Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959) (justices of the peace).

court, the policy considerations underlying the determination of immunity are: (1) the necessity of freedom from harassment for officials who must make discretionary judgments, and (2) the belief that delegated officers should not be a "lightning rod" for attacks aimed at the court.[62] The Seventh Circuit concluded that a grant of immunity for acts committed by officers in the performance of an "integral part of the judicial process" was the appropriate standard to meet those policy objectives.[63] The court did not address the policy considerations regarding good faith in the performance of those acts, which was a central issue discussed by the Supreme Court in *Wood v. Strickland*,[64] another case involving quasi-judicial immunity.

The Seventh Circuit recognized that the central issue was, therefore, the nature of the relationship between the acts of the official in question and the judicial process.[65] The court concluded that the duties of Indiana partition commissioners entitled them to quasi-judicial immunity.[66] In support of that conclusion, the court reviewed what it considered to be the relevant aspects of the tasks of the commissioners.[67] These factors, according to the court, suggest the kind of integral relationship that warranted not only quasi-judicial immunity, but the absolute immunity of *Sparkman* rather than the qualified "good faith" immunity of *Wood v. Strickland*.[68]

Judge Wood, writing for the panel, concluded that the acts alleged in the complaint were official duties in "aid of the court"[69] requiring immunity. Possible improprieties in the advertising of the property, in disposal of proceeds short of misappropriation, in the bidding process and in an alleged cover-up of wrongdoing are all activities for which the commissioners are absolutely immune.[70] The Seventh Circuit held that the court supervised attorney-commissioners were properly dismissed from the suit.[71]

62. 617 F.2d at 476.
63. *Id.*
64. 420 U.S. 308 (1975).
65. 617 F.2d at 476, *citing* Daniels v. Kieser, 586 F.2d 64, 69 (7th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979).
66. 617 F.2d at 476.
67. Partition proceedings begin with a complaint and result in a decree of partition; commissioners are appointed and reviewed by a court; commissioners make a judgment whether the property at issue may be divided without damage to the owners; commissioners prepare a report of partition which, if confirmed by the court, is entered in the record book. *Id.*
68. *Id.* at 477. The court suggested that the presence of an appeal process was also a justification for absolute quasi-judicial immunity. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*

There is general agreement that some sort of quasi-judicial immunity is available for public officials who are not actually members of the judiciary.[72] The scope of that immunity, however, is not settled. The two major and conflicting trends are grounded, first, in differences regarding the method of determining whether a particular official is entitled to quasi-judicial immunity[73] and, second, if such immunity applies, whether it is absolute or qualified.[74]

In determining whether an official may claim quasi-judicial immunity, both trends begin with an analysis of the functions of the officer in light of the rationale underlying judicial immunity: that those who must make discretionary judgments should not be punished for carrying out their official function.[75] One trend, exemplified by *Ashbrook*, then looks to the relationship between the challenged act and the judicial process to determine whether the act was an "integral part of that process."[76] The other trend, exemplified by the Supreme Court's analysis in *Wood v. Strickland*, looks to whether the challenged acts fell within the scope of the discretionary judgments which the official was called upon to make.[77]

The first method of analysis is obviously less than precise and gives little guidance as to what constitutes an "integral part" of the judicial process. This leads, of necessity, to a standardless case-by-case decision-making process that gives little direction to the courts and which may actually impede officials from acting for fear that their function is not "integral." As pointed out in *Ashbrook*, this also leads to immunity for officials with extremely diverse duties.[78] The common thread which binds them is that they are "intimately associated with the judicial process."[79] However, since the nature of this "association" remains undefined, this standard does not really address the objectives

72. Johnson v. Wells, 566 F.2d 1016 (5th Cir. 1978); Smith v. Rosenbaum, 460 F.2d 1019 (3d Cir. 1972); Lucarel v. McNair, 453 F.2d 836 (6th Cir. 1972); *but see* McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972); Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970); Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959).

73. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971).

74. *See, e.g.*, McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972).

75. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951).

76. 617 F.2d at 476, *citing* Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute immunity for prosecutors).

77. *See, e.g.*, 420 U.S. 308 (1975).

78. 617 F.2d at 476.

79. *Id.*

of the doctrine. As the Fourth Circuit pointed out, functions performed by judges which require judicial immunity are not performed by many officials who, "though intimately related to the judicial process," do not make or carry out judicial decisions.[80]

The better methodology can be found in *Wood v. Strickland*.[81] In *Wood*, the Supreme Court analyzed the status of school board officials, not on the basis of their relationship to the judicial process but rather on the basis of the similarities between their function and that of a court.[82] Because they were required to make determinations which were both legislative *and* adjudicatory, immunity was found to attach.[83] It is submitted that a test which looks to the existence of discretionary power, rather than an abstract relationship to the judicial system, most closely meets the policy objectives associated with judicial immunity.

This is not to say, of course, that officials who carry out specific orders of the court should not be entitled to the immunity that the court may claim in issuing that order.[84] Under such circumstances the relationship is clear and there should be little question that the instrument of the court is entitled to absolute immunity. The question is whether those officials whose functions are merely "related to" the judicial process but who are not acting "pursuant to" the direction or order of the court should also be able to avail themselves of the immunity granted to the judiciary.

There is little support in the Supreme Court's treatment of judicial immunity for the extension of absolute immunity to officers outside the judiciary.[85] In fact, the *Sparkman* case makes clear that there are limitations even upon the judiciary's ability to avail itself of absolute immunity.[86] Rather, in *Wood*, which did recognize quasi-judicial immunity, the Court found that the appropriate level of immunity to be applied was not absolute, but qualified.[87] Even though school board officials were required to act in an adjudicatory capacity, the defendant was not immune if "he knew or reasonably should have known" that the action he took violated the rights of students.[88] Presumably then,

80. *See, e.g.*, McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972).
81. 420 U.S. 308 (1975).
82. *Id.* at 318-20.
83. *Id.* at 319.
84. *See* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION ch. 7 (1979). *See also*, O'Connor v. Donaldson, 422 U.S. 563 (1975).
85. *See* Stump v. Sparkman, 435 U.S. 349 (1978); Wood v. Strickland, 420 U.S. 308 (1975).
86. *See* text accompanying notes 22-25 *supra*.
87. 420 U.S. at 318.
88. *Id.* at 322.

even if quasi-judicial immunity were found to attach to officials related to the court, the proper scope of that immunity would be bound by the limitations of objective and subjective good faith from *Wood*.[89] Since many court personnel do not engage in the level of discretionary decision-making evidenced in *Wood*, it makes sense, as was pointed out in *McCray v. Maryland*,[90] to hold that clerks and other types of court personnel are protected by only qualified immunity when not acting pursuant to court order.[91]

These considerations militate against the extension of absolute immunity adopted by the Seventh Circuit in *Ashbrook*. The status of partition commissioners is admittedly a difficult case, which does not fit neatly into previously defined categories. Apparently, a commissioner has a certain amount of discretion in determining whether a parcel can be divided and how it should be sold.[92] While this is clearly an adjudicatory function, it is certainly not substantially more so than the function of a school board, which required only qualified immunity in *Wood*.[93] On the other hand, it appears that any action which is undertaken by the commissioner must receive the confirmation of the court. In this respect, the commissioner is closer to a court official who acts *pursuant* to court order and who, therefore, becomes cloaked in the immunity of the court.

Whether one agrees that commissioners should be absolutely immune or not, the lack of clarity on the part of the Seventh Circuit in reaching its conclusion is likely to have consequences for section 1983 litigation which may have been unintended. In light of *Sparkman*, the concept of a broad grant of absolute judicial immunity is well established. There exists not only the potential, therefore, for judges to perform egregious acts subject only to the remedy of appeal, but *Ashbrook* indicates that such absolute immunity may be extended to many types of court officers as well. In failing to make clear the nature of the acts which are "integral to the judicial process" or which are "intimately associated with the judicial process," the Seventh Circuit has provided the basis for a wide range of public officials to claim absolute judicial immunity.

Had the court clearly distinguished those who act pursuant to

89. This conclusion is buttressed by the finding of qualified immunity in O'Connor v. Donaldson, 422 U.S. 563 (1975), in which a state psychiatrist had not acted pursuant to court order.
90. 456 F.2d 1 (4th Cir. 1972).
91. *Id.*
92. 617 F.2d at 476.
93. 420 U.S. 308 (1978).

court order from other types of officers, this problem would have been largely eliminated. A better approach might well have been to make clear that quasi-judicial immunity, under *Wood*, allowed only a claim of qualified immunity, but that in this case, the officers in question were cloaked in the immunity of the court because the court, in approving their partition report, adopted their acts and placed the defendants under its immunity umbrella. As the case stands now, the status of quasi-judicial acts and immunity, both absolute and qualified, is likely to be the source of continuing section 1983 litigation in the Seventh Circuit.

Harris v. Harvey

The third important case in the area of judicial immunity decided by the Seventh Circuit recently is *Harris v. Harvey*.[94] In *Harris*, the Seventh Circuit rejected the claim that judicial immunity extended to out of court statements made to the news media.[95] In addition, the court made clear that the doctrine of judicial immunity does not preclude the introduction into evidence of judicial acts for purposes of proving improper motive on the part of the defendant judge.[96]

The plaintiff, a black police officer, was accused of police brutality by a defendant accused of committing felonious battery. An investigation made by the Racine Police Department found no basis for the charges of brutality and did not discipline the plaintiff.[97] The Racine County District Attorney, however, presented a John Doe petition to Judge Harvey for a finding of probable cause for prosecution pursuant to Wisconsin law.[98]

The plaintiff charged that Judge Harvey then used the John Doe proceeding to carry out an earlier threat to get "that black bastard" by threatening witnesses at the hearing who failed to incriminate the plaintiff.[99] The judge apparently told a newspaper reporter that he was conducting a John Doe hearing regarding Harris and that plaintiff would be charged with criminal violations. At the completion of the hearing, the judge went on radio to read the warrants for plaintiff's arrest and he made the statement that plaintiff refused to testify at the

94. 605 F.2d 330 (7th Cir. 1980). Although the opinion discusses other potentially important issues as well, this article will focus exclusively on the immunity issue.

95. *Id.* at 336-37.

96. *Id.* at 337.

97. *Id.* at 333.

98. *Id.* Wisconsin law authorizes a judge to issue an arrest warrant after a probable cause hearing in which the defendant need not be present. WIS. STAT. § 968.26 (1979).

99. 605 F.2d at 333.

John Doe proceeding.[100]

Over the next year, the judge embarked upon a course of action in which he commented publicly on the charges against the plaintiff; publicly accused plaintiff of numerous types of criminal conduct; falsely stated that plaintiff's accuser had passed a lie detector test; demanded of the City Attorney that plaintiff be disciplined or else Judge Harvey would commence criminal proceedings; and instituted a second John Doe investigation on allegations of ticket fixing. In addition, there was a substantial amount of unrebutted evidence regarding defendant's racial motivations in acting as he did.[101]

Harris brought suit against Judge Harvey and the Racine County District Attorney under section 1983. The district court dismissed the action against the District Attorney because the complaint failed to allege that he acted out of racial animus.[102] However, the trial court held that a denial of equal protection was adequately alleged against defendant Harvey. The judge ruled that Harvey acted under color of law and in the absence of jurisdiction.[103] A claim for equitable relief was denied because of the remoteness of further damage from future criminal proceedings against Harris. Damage claims arising from "in court" actions by the defendant were also dismissed under the *Sparkman* doctrine.[104] The jury was charged with deciding whether the defendant had injured the plaintiff through non-judicial acts which were motivated by racial animosity. The jury found for the plaintiff and awarded compensatory damages of $60,000 and punitive damages of $200,000.[105]

A three-judge panel of the Seventh Circuit affirmed the district court opinion in all respects. In an opinion by Judge Cummings, it agreed that a racially motivated campaign, which included intentional torts and which was carried out under color of law, was a denial of equal protection and was within the scope of section 1983.[106]

On the issue of judicial immunity, the Seventh Circuit held that the district court had properly applied *Sparkman* in finding that Judge Harvey's acts outside the courtroom, which were not part of his judicial function, were taken in the absence of all jurisdiction. The court referred specifically to the numerous comments made by the judge to the

100. *Id.* at 334.
101. *Id.* at 333-35.
102. *Id.* at 335.
103. *Id.* at 337.
104. *Id.* at 335.
105. *Id.* at 336.
106. *Id.* at 338.

press and city officials. The Seventh Circuit held that these acts were not judicial because (1) they were not normally functions performed by a judge and (2) the parties did not deal with the judge in a judicial capacity. Prosecutorial immunity was found inapplicable because the acts alleged were not of a prosecutorial nature.[107]

The Seventh Circuit also rejected the defendant's argument that the acts complained of were subject to absolute judicial immunity under the doctrine enunciated in *Barr v. Matteo*,[108] which extended absolute immunity to allegedly libelous statements made by a federal executive official to "explain and justify official proceedings." The court stated that *Barr* was distinguishable because it dealt with federal officials and presumably did not apply to state officials. In addition, the panel rejected the defendant's reliance upon dicta in an earlier Seventh Circuit opinion, *Skolnick v. Campbell*,[109] in which the court had indicated that *Barr v. Matteo* carried the potential for an extension of judicial immunity. The Seventh Circuit held that the acts of defendant Harvey were outside the scope of those immunized by *Barr*.[110]

The court was also confronted with the "color of law"/"absence of jurisdiction" inconsistency which was pointed out in *Sparkman*. The Seventh Circuit held that Judge Harvey was acting under color of law when he made use of his office to injure Harris.[111] Finally, the court upheld the district court's ruling that the defendant's judicial acts were admissible to show the defendant's state of mind or motive.[112] The doctrine of judicial immunity was held to protect a judge from liability for money damages but not to require that those acts be excluded from evidence.[113]

The Seventh Circuit's rejection in *Harris* of an extension of judicial immunity beyond the "judicial acts" limitation of *Sparkman* is a necessary conclusion. Exceptions to the judicial acts requirement as a basis for absolute judicial immunity would substantially undercut the policy which underlies the doctrine of judical immunity—the elimination of vexing litigation for acts taken in a judicial capacity.[114] However, the Seventh Circuit's treatment of *Barr v. Matteo* was more conclusory than analytical and may have confused the issue by declin-

107. *Id.* at 336.
108. 360 U.S. 564 (1959).
109. 398 F.2d 23 (7th Cir. 1968).
110. 605 F.2d at 337.
111. *Id.*
112. *Id.*
113. *Id.*
114. *See* text accompanying note 62 *supra*.

ing to clearly do away with *Barr* as a basis for the extension of absolute immunity from liability under section 1983.

First, it should be pointed out that the immunity portion of the *Barr* opinion was not adopted by a majority of the Supreme Court.[115] Justice Harlan's opinion in *Barr v. Matteo* was joined by Justices Frankfurter, Clark and Whittaker.[116] Justice Black concurred in the outcome of the case but did not specifically address the immunity issue.[117] Thus, the discussion of immunity in the Harlan opinion has limited precedential value.

In addition, it is important to note that *Barr v. Matteo* was decided in 1959, long before the doctrine of qualified immunity had been fully developed. The reasoning of the *Barr* opinion is premised upon the propriety of extending absolute immunity to executive officers because of the discretion inherent in such offices.[118] This reasoning was clearly rejected in subsequent cases involving claims of absolute immunity for state executive officers[119] and even quasi-judicial officers.[120]

The Supreme Court in *Butz v. Economou*[121] made clear that whatever residual validity remains in the doctrine enunciated in *Barr v. Matteo* is limited to libel actions for officials who act within the scope of their authority. *Barr v. Matteo* is simply inapplicable to cases involving allegations of the denial of constitutional rights.

The distinction made by the court in *Harris* focused on the fact that *Harris* involved a state official and that *Barr* involved a federal officer. This distinction is not terribly helpful in explaining why the immunity doctrine in *Barr* should not be applied to the facts in *Harris*. It has been recognized for some time that distinctions between state and federal officials for purposes of establishing liability for the denial of civil rights would be incongruous. The Supreme Court has also made clear that, absent an expression of congressional intent to the contrary, there is no reason for according a different degree of immunity to federal officials than that accorded state officials.

As a result, the panel would have been on firmer ground in clearly rejecting the claim of absolute immunity based upon *Sparkman* and *Butz*. Since judicial immunity applies only to those acts which are

115. 360 U.S. 564 (1959).
116. *Id.*
117. *Id.* at 576-78 (Black, J., concurring).
118. *Id.* at 573.
119. *E.g.*, Scheuer v. Rhodes, 416 U.S. 232 (1974).
120. *E.g.*, Wood v. Strickland, 420 U.S. 408 (1975).
121. 438 U.S. 478 (1978).

"normally performed by a judge," the actions of the judge in *Harris* could hardly be the subject of absolute judicial immunity. Such acts are not subject to judicial immunity precisely because they are outside the scope of the judge's authority. Once that authority has been exceeded neither *Barr*, *Sparkman* nor *Butz* supports the notion that some other form of immunity would arise. Even qualified immunity applies only to those acts within the scope of an official's authority.

Reliance upon the "scope of authority" test, as defined by *Sparkman*, would have provided a bright line test which would eliminate the ambiguities inherent in the "protection of the court" language borrowed from *Barr*. The suggestion in *Harris* that there may be a basis for a claim of good faith qualified immunity for constitutional violations arising from extra-judicial acts taken in "protection of the court" can only lead to confusion in the judicial immunity doctrine and provides an unnecessary invitation to further litigation.

PRISONER'S RIGHTS

Among the cases concerning the rights of prisoners decided by the Seventh Circuit in the 1979-80 term,[122] three decisions interpreted the bounds of the liberty interests entitling convicted prisoners and pretrial detainees to constitutional due process recently defined by the United States Supreme Court. While closely following Supreme Court rulings which narrowly defined the constitutional rights of pretrial detainees and prisoners seeking parole,[123] the Seventh Circuit continued to follow a more liberal approach to determining the due process rights of inmates subjected to disciplinary action in prison.[124]

Stringer v. Rowe

In *Stringer v. Rowe*,[125] the Seventh Circuit reversed an order granting summary judgment dismissing a *pro se* suit by an inmate alleging violation of his constitutional rights by prison officials in the course of disciplinary actions. Stringer had been placed in disciplinary segregation and subsequently transferred to another prison without being afforded a hearing.[126] Stringer also complained that he was unnec-

122. Trapnell v. Riggsby, 622 F.2d 290 (7th Cir. 1980); Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980); Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980); Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980).

123. Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980); Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980).

124. Trapnell v. Riggsby, 622 F.2d 290 (7th Cir. 1980).

125. 616 F.2d 993 (7th Cir. 1980).

126. *Id.* at 994.

essarily sprayed in the face with mace by prison officers in violation of his eighth amendment rights and, further, that prison officials failed to deliver to him some of his personal papers after transfer, giving rise to a claim under section 1983.[127]

The district court, which did not address the issue of whether "the placement of Stringer in disciplinary segregation infringed a liberty interest protected by the Due Process Clause,"[128] dismissed the *pro se* complaint for failure to challenge the disciplinary procedures employed. Giving Stringer's complaint a liberal reading, the Seventh Circuit concluded that it sufficiently alleged that prison regulation AR804 created a right not to be placed in segregation absent a finding of serious misconduct.[129] Since the district court had not recognized that a regulation may create entitlement to due process and because the defendant did not address the issue, the case was remanded for further proceedings. The district court was also ordered to appoint counsel for the plaintiff.[130]

In suggesting that AR804 might establish a liberty interest entitling an inmate to the protection of the due process clause, the court followed its previous holdings which liberally interpreted the Supreme Court's decision in *Meachum v. Fano*.[131] *Meachum* rejected the "grievous loss" theory previously developed in the Seventh Circuit, which required that due process be afforded prisoners in every instance of substantial deprivation. Declaring that conviction extinguished a prisoner's liberty interest as derived from the Constitution, the Court concluded that due process rights held by convicted prisoners are only those which are created by the state "by statute, by rule or regulation."[132] Despite the sources listed, the Court looked only to statute and did not analyze the circumstances in *Meachum* in order to discern whether policy or practice provided sufficient expectation to establish a liberty interest.[133] The Seventh Circuit, however, subsequently focused on the language which broadened the inquiry: "[t]he predicate neces-

127. *Id.* at 995.

128. *Id.* at 996.

129. *Id.* The text of Administrative Regulation 804 is set out in the Appendix to the opinion.

130. *Id.* at 1001. In ordering the district court to appoint counsel the Seventh Circuit made known its view that the suit was not frivolous and raised serious factual disputes. "By appointing counsel in cases such as this one, the district court not only insures that the meritorious claims of a civil rights *pro se* plaintiff are not defeated, but eases the burdens placed both on the district court and on this court when the plaintiff has filed an inartfully drawn and arguably incomplete complaint." *Id.*

131. 427 U.S. 215 (1976).

132. *Id.* at 229.

133. *Id. See* Comment, *Two Views of a Prisoner's Right to Due Process: Meachum v. Fano*, 12 HARV. CIV. R. CIV. LIB. L. REV. 405, 415 (1977).

sary to trigger the Due Process Clause is not restricted to statutorily-created rights; it may also be found in official policies or practices."[134]

As indicated by *Averhart v. Tutsie*,[135] due process protections are not available in the context of prerelease parole board proceedings absent *express* statutory directives limiting the parole board's discretion. The Seventh Circuit, however, apparently takes a different view of due process requirements in disciplinary actions within the institution and finds that sufficient basis for such rights may be created by internal rules, guidelines, policies and practices.[136] Thus, *Stringer* was remanded to the district court to determine whether prison regulation AR804 created a right to be free from disciplinary segregation absent a finding of serious misconduct.[137]

Averhart v. Tutsie

Application of the restrictive interpretation of the liberty interests of prisoners recently adopted by the United States Supreme Court[138] is presented by *Averhart v. Tutsie*.[139] Plaintiffs challenged the procedures for parole release determinations of the Indiana Parole Board as violative of the due process clause of the fourteenth amendment and of their rights under the Indiana Administrative Adjustment Act (A.A.A.).[140] The Seventh Circuit upheld the district court's determination that the parole procedure satisfied due process and that the A.A.A. did not apply to parole board proceedings.

Following *Greenholtz v. Nebraska Penal Inmates*,[141] the Seventh Circuit stated that an inmate does not have a protectible expectation of

134. Durso v. Rowe, 579 F.2d 1365, 1369 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979).

135. *See* text accompanying notes 138-44 *infra*.

136. *See, e.g.*, Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980); Arsberry v. Sielaff, 586 F.2d 37 (7th Cir. 1978); Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979).

137. 616 F.2d at 999. With respect to the eighth amendment claim the court adopted the view recently expressed by the Ninth Circuit that the use of chemical agents to subdue individual inmates, as distinguished from large disturbances, is "justified only under narrowly defined circumstances." *Id.* As part of that justification, defendants bear the burden of explaining why lesser measures could not have been used. *Id.* at 1000. In addition to finding inconsistencies in defendants' reports concerning the macing incident which created genuine issues of material facts, the court noted that defendants had failed to disclose any facts regarding the reasonableness of the use of mace under the circumstances. *Id.* at 999-1000.

Dismissal of the remaining claim concerning Stringer's lost papers was affirmed on the grounds that requisite to a section 1983 claim is a showing that the actions of the prison officials resulting in plaintiff's loss were either intentional or in reckless disregard for plaintiff's rights. *Id.* at 1000. The court found that the conduct alleged amounted to no more than negligence and thus was insufficient to establish a section 1983 claim. *Id.*

138. *See, e.g.*, Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979).

139. 618 F.2d 479 (7th Cir. 1980).

140. IND. CODE § 4-22-1-1 (1976).

141. 442 U.S. 1 (1979).

parole unless that expectation is expressly created by state statute.[142] Since "a validly obtained conviction . . . extinguishes a convict's liberty interest in release," the state had no obligation to offer any kind of parole system.[143] Moreover, even where such a system is created, the mere possibility of parole does not create a protectible expectation. To create such an interest "the state statute must be phrased in such a way that it creates a real expectation of and not just a unilateral hope for parole."[144]

In *Greenholtz*, the Supreme Court found that the Nebraska statute limited the parole board's discretion by expressly mandating parole under defined circumstances. Such limitations, the Court reasoned, created a sufficient expectation. The Seventh Circuit held, however, that the Indiana statute imposed no such limitation on the board's discretion in release determination. Moreover, while the Supreme Court was required to interpret independently the Nebraska statute since the state courts had not yet done so, the Seventh Circuit adopted the decision of the Indiana Supreme Court which expressly distinguished the Indiana and Nebraska statutes and held that the Indiana "parole release statute creates no expectancy of release . . . our Legislature has invested the Parole Board with almost total discretion in such matters."[145]

Jordan v. Wolke

In *Jordan v. Wolke*,[146] the Seventh Circuit reversed the District Court for the Eastern District of Wisconsin, which had issued an injunction prohibiting the overcrowding of pretrial detainees at the Milwaukee County Jail and requiring that detainees be allowed contact visitation with family members. Pretrial detainees are persons charged

142. 618 F.2d at 480-81.

143. *Id.*.

144. *Id.* at 481.

145. *Id., citing* Murphy v. Indiana Parole Bd., 397 N.E.2d 259 (Ind. 1979).

146. 615 F.2d 749. Eighty per cent of the inmates at Milwaukee County Jail (MCJ) were detainees. They were housed in eleven cellblocks consisting of five cells, a corridor and a day room. Each cell, which measured nine feet by ten feet, contained two double bunk beds plus a toilet and a sink. The area per inmate in each cellblock was 59 square feet. The American Correctional Association standard is 50 square feet per inmate in the cell and 35 square feet in the day room, totalling approximately 85 square feet, almost twice that of the Milwaukee County Jail. The majority criticized the district court injunction mandating a minimum space of 118.5 square feet per inmate, including the corridor, on grounds that it far exceeded the American Correctional Association standard of 85 square feet. The court neglected to note, however, that the latter did not include corridor space which accounts for 20 square feet per inmate.

The district court injunction also required that the institution replace the visiting facilities, which are arranged so that inmates and visitors are separated by a plexiglass window, with facilities which permit contact visitation.

with crimes who are confined because they do not qualify for release on bail or on their own recognizance. Applying its interpretation of the standard set down by the Supreme Court in *Bell v. Wolfish*,[147] the Seventh Circuit ruled that neither condition amounted to "punishment" and, thus, did not offend the Constitution.[148]

In *Wolfish*, the Supreme Court reasoned that a detainee awaiting trial does not have a constitutional right not to be confined prior to trial if detention is necessary to assure his presence at trial.[149] Further, the Court held that once the detainee is confined, his liberty interest extends only to the right not to be punished.[150] That right, however, is confined by the narrow concept of "punishment" adopted by the majority opinion. Rejecting the compelling necessity standard applied by the Second Circuit, the Court ruled that only conditions and regulations which are intentionally punitive or which are excessive in relation to legitimate purposes are to be condemned.[151] The majority, which was sharply criticized by three of the dissenting justices,[152] found none of the conditions or practices complained of to be excessive relative to the institutional interests served.[153]

The harshness of the *Wolfish* holding, however, did not dictate the same result in *Jordan*. The living conditions at the Milwaukee County Jail were considerably more crowded and oppressive than those challenged in *Wolfish*.[154] Moreover, while detainees in *Wolfish* complained of body cavity searches following contact visits regardless of probable cause, detainees in *Jordan* were denied contact visitation altogether.[155]

147. 441 U.S. 520 (1979).
148. 615 F.2d at 753.
149. 441 U.S. at 535.
150. *Id.*
151. *Id.* at 535-40.
152. Separate dissenting opinions were written by Justice Marshall and Justice Stevens, Justice Brennan concurring. Commentaries have also criticized the opinion of the Court. *See, e.g.*, *The Supreme Court, 1978 Term: Conditions of Confinement for Pretrial Detainees*, 93 HARV. L. REV. 99 (1979).
153. 441 U.S. at 542.
154. Judge Swygert, dissenting in *Jordan*, charged that differences between the two institutions were substantial. Both institutions contained 20 inmates to a unit. However, the Metropolitan Correctional Center (MCC) at issue in *Wolfish* housed only two inmates per cell as compared to four at MCJ. Moreover, the rooms at MCC contained more than 1½ times the space per occupant as compared to MCJ. Further, detainees at MCC had access every day to a common room which contained "recreational and exercise equipment, telephones, color television sets [and] books." 615 F.2d at 754 (Swygert, J., dissenting). Milwaukee facility day rooms contained only "a table and a television set. The detainees are confined to their cell blocks except for *two hours per week* for recreation and visiting." *Id.* (emphasis added). The dissenting opinion also makes note of the substantial amenities in the modern design of the MCC which are totally lacking at MCJ. *See also* note 146 *supra*.
155. 615 F.2d at 751.

As noted by Judge Swygert in his dissent, despite the deference accorded prison officials under *Wolfish*, the conditions in *Jordan* were burdensome enough to permit a finding that they were excessive relative to the purposes allegedly served.[156] The majority, however, summarily rejected the view that the factual circumstances warranted a different result.

The majority gave no deference whatsoever to the testimony of experts who described the debilitating and damaging effects of the alleged deprivations on detainees.[157] By failing to recognize the punitive character of these conditions, particularly in the instance of visitation rights, which could be administratively cured without much difficulty, the Seventh Circuit has further narrowed the concept of "punishment." Virtually all scrutiny is abandoned in the presence of minimal rationalization. Because of the extreme deference given institutional interests, confinement alone without conviction extinguishes virtually all expectation of liberty. By interpreting *Wolfish* more restrictively than the opinion requires, the Seventh Circuit gives credence to the notion that the courts will hesitate to infer the presence of impermissible punishment unless faced with a case of "loading a detainee with chains and shackles and throwing him in a dungeon."[158]

TITLE VII

During 1979-80 the Seventh Circuit heard appeals involving both procedural and substantive issues in a large number of cases brought under Title VII of the Civil Rights Act.[159] For the most part these decisions were routine determinations; those of particular note are discussed below.

Of significance in the realm of procedure, the Seventh Circuit, in *Grayson v. Wickes Corp.*, joined the Fourth, Fifth, Sixth and Ninth

156. On the issue of overcrowding the court stated simply: "We do not see a material distinction between the facts in *Wolfish* and the facts in the case at bar." 615 F.2d at 753. With respect to contact visitation the court reasoned that since the Supreme Court in *Wolfish* upheld body cavity searches after contact visitation as reasonable, it could not say that it was not preferable to ban contact visitation altogether so that such searches would be unnecessary. *Id.* at 754. The Seventh Circuit did not recognize any distinction in the character of the two deprivations. The authors believe that it is unreasonable to conclude that contact visitation *necessarily* requires body cavity searches. Other less onerous security measures could be taken, such as keeping a guard present during visitation and screening visitors for metal objects and packages.

157. 615 F.2d at 756 (Swygert, J., dissenting). The majority in both *Wolfish* and *Jordan* made much of the temporary nature of the detention in order to rationalize the harshness of the result. 441 U.S. at 536, 526 n.3; 615 F.2d at 756. There is, however, no doctrine which allows constitutional deprivations merely because they are of brief duration.

158. 441 U.S. at 539 n.20.

159. 42 U.S.C. § 2000e (1976).

Circuits in holding that jury trials need not be provided in Title VII suits.[160] The court also ruled that dismissal of an action brought by the EEOC on grounds of laches requires a showing of both inexcusable delay on the part of the EEOC and material prejudice to the defendant as a result of the Commission's delay.[161] In *Eirhart v. Libbey-Owens-Ford Co.*,[162] the court determined that a consent decree entered into with the EEOC is not a "written interpretation or opinion of the Commission" entitling defendant to immunity from suit in another jurisdiction under section 713(b) of the Civil Rights Act.[163] Finally, in a case of first impression, the court ruled that rule 68 of the Federal Rules of Civil Procedure should be given a liberal construction in Title VII cases.[164] The unique interpretation given rule 68 in *August v. Delta Air*

160. 607 F.2d 1194 (7th Cir. 1979). *See* Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

161. EEOC v. Massey-Ferguson, Inc., 622 F.2d 271 (7th Cir. 1980). In another action, the court held that failure of the EEOC to act promptly on a charge filed with the Commission does not create an actionable wrong since delay by the Commission does not bar plaintiff's cause of action but rather gives plaintiff the alternative of seeking private enforcement. Stewart v. EEOC, 611 F.2d 679 (7th Cir. 1979). The pertinent provisions of the Equal Employment Opportunity Act, (42 U.S.C. § 2000e-5(b) and 5(f)(1) (1976)) provide:

> [T]he Commission shall serve a notice of the charge [to the respondent] . . . within ten days, and shall make an investigation thereof. . . . The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge. . . . If a charge filed with the Commission . . . is dismissed . . . or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference . . . , whichever is later, the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

162. 616 F.2d 278 (7th Cir. 1980).

163. Section 713(b) (42 U.S.C. § 2000e-12 (1976)) provides, in pertinent part:

> (b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission . . .

164. *See* August v. Delta Air Lines, Inc., 600 F.2d 699 (7th Cir. 1979), aff'd, 49 U.S.L.W. 4241 (U.S. Mar. 9, 1981). FED. R. CIV. P. 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the

Lines, Inc.[165] merits further discussion.

Rejecting an argument that rule 68 mandates in every instance an award of costs to the defendant if the final judgment obtained by the plaintiff is not more favorable than defendant's offer, the Seventh Circuit has determined that, at least in Title VII cases, the trial judge may exercise discretion in allowing costs.[166] In *August v. Delta Air Lines, Inc.*, the court reasoned that rule 68 operates only in favor of those who make good faith offers of settlement.[167]

In *August*, defendant had made a settlement offer of $450 during the initial stages of discovery, four months after the suit was commenced. Plaintiff, who was seeking in excess of $20,000 in back pay for an allegedly discriminatory firing, rejected the offer. Over a year later, the trial court entered judgment for the defendant and ordered each party to bear its own costs of litigation.[168] Defendant's motion for costs incurred after the date of the rule 68 offer was denied on the grounds that defendant's minimal offer was neither reasonable nor made in good faith and, thus, did not constitute an effective offer.[169]

In the only two cases to consider the issue of whether application of rule 68 is discretionary, the courts adhered to a literal construction of the mandatory language.[170] Without giving any consideration to elements of good faith or the reasonableness of a rule 68 offer, the district court in *Dual v. Cleland* awarded costs to the defendant in a Title VII suit, concluding that the "plain language of the rule eliminates the Court's discretion."[171] The *Dual* court relied primarily on the analysis

making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

165. 600 F.2d 699 (7th Cir. 1979), *aff'd on other grounds*, 49 U.S.L.W. 4241 (U.S. Mar. 9, 1981).

166. 600 F.2d at 702.

167. *Id.*

168. *Id.* at 700.

169. The Seventh Circuit set out in a footnote the relevant portion of the trial judge's opinion. *See* 600 F.2d at 700 n.3. Defendant's offer here might also have been considered defective under the reasoning of Scheriff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978), in which the court held that a rule 68 offer to be valid in civil rights cases must include payment of accrued attorneys' fees because attorneys' fees in such cases constitute part of the costs. The terms of the offer here are somewhat ambiguous; it is unclear whether the offer of $450 was to include or to be in addition to attorneys' fees. The trial judge's opinion suggests the latter and notes that the sum was probably insufficient to have covered plaintiff's accrued costs.

170. Dual v. Cleland, 79 F.R.D. 696 (D. D.C. 1978); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D. N.Y. 1974).

171. 79 F.R.D. at 697.

in *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*,[172] in which an unsuccessful plaintiff in a patent suit was assessed defendant's costs after rejecting its rule 68 offer. Reasoning that rule 68 is to be distinguished from rule 54(d)[173] which allows discretion in awarding costs to the prevailing party, the *Hanger* court based its conclusion that rule 68 is non-discretionary both on the language of the rule itself and on the language modifying rule 54(d).[174] As the Seventh Circuit conceded, the argument has some force because infusion of discretion into rule 68 awards would create some overlap with rule 54(d).[175]

Nevertheless, the Seventh Circuit concluded that a literal application of the rule in cases where the offer is a sham would defeat the purpose of rule 68, which is to encourage settlements,[176] as well as defeat the purpose of the counsel fee provisions of the Civil Rights Act, which is to encourage injured parties to seek judicial relief.[177] The court noted that rather than encouraging negotiated settlements between litigants, "a minimal rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs."[178] Further, automatic application of the rule would thwart the national policy embodied in Title VII by discouraging rather than encouraging individuals injured by racial discrimination to seek judicial relief.[179] Concluding that a liberal reading of rule 68 is justified in Title VII cases the court held:

> In a Title VII case the trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case.[180]

The Seventh Circuit also decided three cases that dealt with the

172. 63 F.R.D. 607 (E.D. N.Y. 1974). Although plaintiff in *Hanger* raised the issue of the reasonableness of the defendant's $25 offer, the court rejected the claim.

173. FED. R. CIV. P. 54(d) provides in pertinent part:

> (d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . .

174. 63 F.R.D. at 610-11.

175. 600 F.2d at 701.

176. *Id. See, e.g.*, Staffend v. Lake Central Airlines, Inc., 47 F.R.D. 218 (N.D. Ohio 1969); 7 MOORE'S FEDERAL PRACTICE ¶ 68.02 (2d ed. 1979).

177. 600 F.2d at 701.

178. *Id.*

179. *Id.*

180. *Id.* at 702. On appeal, the Supreme Court held that it was unnecessary to read a reasonableness requirement into rule 68. The Court stated that in addressing the issue of reasonable or sham offers the Seventh Circuit had not confronted "the threshhold question" whether rule 68 applies at all to the situation where judgment is entered in favor of the defendant-offeror. The

sufficiency of plaintiffs' claims of discrimination under Title VII. In *Minkus v. Metropolitan Sanitary District*,[181] the district court dismissed a suit by an orthodox Jew whose religious practices precluded him from taking a competency exam which defendant administered only on Saturday. Reversing summary judgment and remanding for further proceedings, the Seventh Circuit reaffirmed its earlier holding that "whether an employer can reasonably accomodate a person's religious beliefs without undue hardship 'is basically a question of fact.' "[182]

Summary judgment for defendant was also reversed in *Carroll v. Talman Federal Savings & Loan Association*,[183] where the district court had determined that imposition of a dress code on female employees but not on male employees did not constitute discrimination under section 703(a)(2) because no employment opportunity was denied.[184] The Seventh Circuit held that the dress code violated section 703(a)(1) because it was discriminatory with respect to the "compensation, terms, conditions, or privileges of employment."[185]

In *Holder v. Old Ben Coal Co.*,[186] the court affirmed a district court ruling that the plaintiff had failed to establish a prima facie case of sex discrimination because she had failed to prove that she was qualified for an unskilled job. Under *McDonnell Douglas Corp. v. Green*,[187] lack of qualifications bars an inference of discrimination; therefore, defendant was not required to show a non-discriminatory reason for not hiring plaintiff. In reaching its conclusion, however, the Seventh Circuit infused the term "unskilled" with notions of minimal skills which the defendant had not described at the time plaintiff applied either in its advertising or in its collective bargaining agreement.[188]

Court concluded that such a judgment is *not* a "judgment obtained by the offeree" and thus is not covered by rule 68. 49 U.S.L.W. 4241, 4242.

181. 600 F.2d 80 (7th Cir. 1979).

182. *Id.* at 81, *citing* Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978).

183. 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

184. *Id.* at 1029. Section 703(a) (42 U.S.C. § 2000e-2(a) (1976)) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

185. 604 F.2d at 1033. *See* note 233 *infra*.

186. 618 F.2d 1198 (7th Cir. 1980).

187. 411 U.S. 792, 802 (1973).

188. 618 F.2d at 1200. Plaintiff had applied for two jobs labeled "unskilled" at defendant strip mining company: general laborer and truck driver. The company did not announce any skill requirements, nor did the union contract state any qualifications although explicit qualifications

By establishing its own definition of minimal qualifications for "unskilled" jobs, the court went far beyond the burden of proof set forth in *McDonnell Douglas* or *Teamsters v. United States*,[189] upon which it relied. In *Teamsters*, the Supreme Court stated that as part of his or her burden, plaintiff must show that rejection did not result from "an absolute or relative lack of qualifications."[190] This Holder did: she applied for a position designated "unskilled" and established that she lacked none of the skills required.[191] The Seventh Circuit, however, misconstrued the procedural requirement to mean that plaintiff must show not only that she was qualified but also that defendant did not "prefer" more experienced or better qualified applicants. Thus, the court shifted the entire burden of showing that defendant had no legitimate reason for preferring the male applicants to the Title VII plaintiff.

Since defendant was never put to its proof, the court made its own determination of defendant's legitimate reasons for rejecting plaintiff. There is ample indication from the opinion that the court considered plaintiff's prior training and experience as a beautician not only unrelated to but antithetical to qualifications for an unskilled job at a mine.[192] Putting aside the issue of whether such an inference by the court is appropriate absent an objective definition of qualifications from the defendant, the court's reasoning disregards the fact that all work experience imparts skills and capabilities. This is not to say that an employer may not prefer specific kinds of work experience.[193] Such preferences, however, should be made known to applicants at the outset to dispel any inference of discrimination. The burden at trial, however, should remain on the defendant to show that its actions were explained by legitimate preferences. The court should not, as it did in *Holder*, supply its own conclusions about such preferences because judicial procedure, the safeguard of fairness, is subverted in the process.

School Desegregation

The Seventh Circuit considered three important school desegregation cases during the 1979-80 term. In a decision recently vacated and remanded by the United States Supreme Court, the Seventh Circuit

were listed for skilled jobs. Plaintiff, who had attended high school and a beauty college, had some work experience in a small factory and had briefly driven a truck. Most of her work experience was as a beautician. *Id.* at 1198-1200.

189. 431 U.S. 324 (1977).

190. 431 U.S. at 358 n.44.

191. *See* 618 F.2d at 1203-04 (Swygert, J., dissenting).

192. *Id.* at 1199, 1201-03.

193. *See* Pond v. Braniff Airways, Inc., 500 F.2d 161 (5th Cir. 1974).

held that black students who were denied admission to their neighborhood schools because of racial quotas voluntarily imposed to prevent *de facto* segregation were not deprived of any right under federal law.[194] Reviewing challenges to the Indianapolis school desegregation plan, the court adopted a standard for determining segregative intent, which is required in race discrimination cases under the fourteenth amendment.[195] Finally, in a case of first impression, the court reviewed the standard to be applied when reviewing challenges to desegregation plans adopted pursuant to a settlement or consent decree.[196]

Johnson v. Board of Education

A new variation on the challenge to school desegregation plans was presented by *Johnson v. Board of Education*.[197] The plaintiffs, black high school students who had been refused admission to their Chicago neighborhood schools and voluntarily bused to other schools as part of the implementation of a school desegregation plan, challenged the plan on the grounds that it violated the Illinois School Code[198] and the equal protection clause of the fourteenth amendment.[199]

The unique posture of the case reflects the division of opinion with respect to the wisdom of busing as a remedy for racial discrimination in public schools.[200] The irony of *Johnson* is that the plan is challenged

194. Johnson v. Board of Educ., 604 F.2d 504 (7th Cir. 1979), *vacated and remanded*, 49 U.S.L.W. 3298 (Oct. 20, 1980). Certiorari had been granted by the Supreme Court in July. Subsequently, the Chicago School Board announced its decision to drop the Plan. On the basis of respondents' suggestion that the issue was thus mooted, the Supreme Court vacated the Seventh Circuit opinion and remanded the case for consideration of mootness.

195. United States v. Board of School Comm'rs, No. 79-1875 (7th Cir. April 29, 1980).

196. Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980).

197. 604 F.2d 504 (7th Cir. 1979), *vacated and remanded*, 101 S. Ct. 339 (1980).

198. ILL. REV. STAT. ch. 122, § 34-18 (1975), provides in pertinent part:

> The board shall exercise general supervision and management of the public education and the public school system of the city, and shall have power:
>
> . . . .
>
> 7. To divide the city into sub-districts and apportion the pupils to the several schools, but no pupil shall be excluded from or segregated in any such school on account of his color, race, sex, or nationality. The board shall, as soon as practicable, and from time to time thereafter, change or revise existing sub-districts or create new sub-districts in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race, sex or nationality. . . .

199. 604 F.2d at 507. Plaintiffs had sought both declaratory judgment and injunctive relief.

200. While calling for commitment to equal access to quality education, both blacks and whites have challenged reliance on busing plans as a means of achieving that goal. *See, e.g.*, Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Armor, *White Flight, Demographic Transition, and the Future of School Desegregation* (1978) (Rand Paper Series, The Rand Corp.).

Concern over the possible negative effects of extensive busing was recently expressed by Jus-

by members of the very class harmed by past discrimination.

In 1975, the Chicago Board of Education adopted the "Student Racial Stabilization Plan" (Plan) in an effort to arrest the trend toward segregated enrollments and overcrowding at two public high schools, Gage Park and Morgan Park, on the south side of Chicago.[201] Under the Plan, racial quotas with respect to admission were established at the two schools, and selection of incoming students was determined by lottery within each racial group.[202] Students who were excluded under the quotas were offered the choice of attending an "under-utilized" school.[203] Of the eighteen high schools which were designated "under-utilized" and thus available to students excluded under the Plan, only six had significant white enrollments and all of them were located on the north side of Chicago.[204]

At the time the Plan was adopted there were more white students than black students in the targeted attendance area. Since that time the white enrollment has declined substantially.[205] As a result, no white student has ever been denied admission to Gage Park or Morgan Park, but hundreds of black and Hispanic students have been denied admission.[206] Plaintiffs alleged that the quota system on its face constituted illegal discrimination under both state and federal law. In addition, plaintiffs contended that since no white student was ever denied admission, the Plan was constitutionally deficient because the entire burden of desegregation was placed upon the black students.[207]

The court found none of the plaintiffs' arguments persuasive. Reviewing the Illinois School Code,[208] the court found that while the statute appeared on its face to prohibit consideration of race as a basis for

tice Powell, dissenting from the Court's dismissal of certiorari in Estes v. Metropolitan Branches, Dallas NAACP, 444 U.S. 437, 438 (1980): "It is increasingly evident that use of the busing remedy to achieve racial balance can conflict with the goals of equal educational opportunity and quality schools."

As the eventuality of Congressional action to prohibit mandatory busing becomes more certain, the authors believe that alternatives to busing must be developed to assure that the goal is not discarded with the remedy.

201. 604 F.2d at 507-08.

202. *Id.* at 510-11. The quotas were 48% black, 42% white, 8% Hispanic and 2% principal's option at Gage Park, and 50% black and 50% white at Morgan Park. *Id.*

203. *Id.* at 512.

204. *Id.* The closest alternative schools were 11 and 18 miles away from the southside schools. *Id.* Under the original plans, students were required to use public transportation to reach the under-utilized schools; however, upon the suggestion of the court the Board modified the plans and provided buses for the students. *Id.* at 513.

205. *Id.* at 509-13.

206. *Id.* at 511-12.

207. *Id.* at 518.

208. *See* note 198 *supra*.

excluding any pupil from a particular school, the statute also empowered the Board to revise attendance areas in order to prevent segregation.[209] Reconciling both statutory objectives, the court "decline[d] to ascribe to the statute a prohibition inconsistent with its underlying purposes. . . ."[210]

Next, the court turned to the constitutional claim. As a threshold matter the court noted that the challenged Plan did not involve a fundamental right since no constitutional right to attend a particular school had ever been recognized by the courts.[211] The Plan, however, did rest on racial classifications which, in the court's view, mandated strict scrutiny regardless of whether the classification was "benign."[212] Applying the dual compelling state interest-least restrictive alternative means test,[213] the Seventh Circuit upheld the Plan. In the court's view the interest of the state in alleviating overcrowding and preventing segregation was compelling.[214] Considering the second prong of the test, the court determined that defendant had adequately shown that the Plan was necessary to stabilize the integrated character of the schools.[215]

In reaching its conclusion, the Seventh Circuit found ample support in the school desegregation cases of the 1970s in which the Supreme Court approved remedies involving the use of racial classifications.[216] Further, the court found that the decision in *Bakke*,[217] which was rendered subsequent to the district court's ruling, did not require reversal. *Bakke* was distinguished primarily on the grounds that plaintiff there was absolutely excluded from attending the medical school, whereas in *Johnson*, plaintiffs were provided the opportunity of attending alternative schools.[218]

The court also rejected plaintiffs' argument that they were made to bear the entire burden of the remedy, thus demonstrating that defend-

209. 604 F.2d at 513-15.
210. *Id.* at 514.
211. *Id.* at 515.
212. *Id.* at 515, *citing*, University of Calif. Regents v. Bakke, 438 U.S. 265, 291 (Powell, J.,), 357 (Brennan, J., concurring in part and dissenting in part) (1978). *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Loving v. Virginia, 388 U.S. 1 (1967).
213. In order for a classification to survive strict scrutiny, the defendant government body must demonstrate its necessity for the achievement of a compelling state interest and that it is the least restrictive way to accomplish the interest.
214. 604 F.2d at 516.
215. *Id.* at 516-17.
216. *Id.* at 517-18, *citing*, McDaniel v. Barresi, 402 U.S. 39 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
217. University of Calif. Regents v. Bakke, 438 U.S. 265 (1978).
218. 604 F.2d at 518.

ants had not chosen the least discriminatory alternative.[219] Although no white student had been denied admission to either Gage Park or Morgan Park, the court noted that white students were precluded from transferring to any other school until the quotas for white students had been exceeded. Since the Plan was designed to address declining white enrollment, the court found no inequity.[220]

Armstrong v. Board of School Directors

In *Armstrong v. Board of School Directors*,[221] a panel of the Seventh Circuit[222] considered the propriety of a settlement reached in the fifteen year old Milwaukee school desegregation suit. In a case of first impression, the Seventh Circuit rejected a challenge by intervening plaintiffs who contended that the settlement was improperly accepted by the district court because it stopped short of providing the relief available in fully litigated school desegregation suits.[223] In so doing, the panel established that the standard for the review of desegregation plans initiated pursuant to settlement or consent decree was no different from the standard that is applied to the settlement of other types of federal class action litigation.[224] The panel rejected plaintiffs' contention that in cases where intentional discrimination or other constitutional violations had been found to exist, the interests of unnamed class members could be protected only if the settlement incorporated remedies which would be available for a fully litigated dispute.[225]

The settlement at issue in *Armstrong* was arrived at in an attempt to resolve a suit originally filed against Milwaukee schools in 1965.[226] After nearly a decade and a half of litigation, the district court found that the defendants had engaged in intentional discrimination with "pervasive, systemwide impact" and ordered the parties to submit proposed desegregation plans.[227] A settlement agreement was subsequently negotiated by the parties and submitted to the court.[228] After a

219. *Id.* at 518-19.
220. *Id.* at 518.
221. 616 F.2d 305 (7th Cir. 1980).
222. The panel was composed of Judges Cudahy and Sprecher of the Seventh Circuit and Senior District Judge Dumbauld of the Western District of Pennsylvania.
223. 616 F.2d at 316.
224. *Id.* at 317-19.
225. *Id.* at 316.
226. *Id.* at 308.
227. *Id.* at 309. Segregative intent must exist before a school board will be found to have violated the fourteenth amendment. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).
228. 616 F.2d at 309.

series of fairness hearings designed to allow class members to raise objections to the settlement, the district court entered an order approving the settlement plan.[229] It was from this order that the intervening class members appealed.[230]

The intervening plaintiffs in *Armstrong* asserted that the principles usually applied by federal courts to protect the interests of the public and class members in class actions for money damages are inadequate in cases where important constitutional violations have been found to exist.[231] In order to adequately protect class members and the public such settlements should meet the same standards as remedies which result from full litigation.[232] According to the plaintiffs, a lesser standard would allow considerations such as the offer of substantial attorneys' fees or crowded court dockets to influence the redress of the violation of constitutional rights.[233]

In rejecting the plaintiffs' arguments with regard to the need for a higher standard in constitutional litigation, the panel reviewed the traditional posture of federal courts favoring settlement of complex litigation.[234] In addition, it pointed to the procedures mandated by rule 23(e) of the Federal Rules of Civil Procedure and to the requirement, imposed by courts of appeals, that district courts approve settlements only where a settlement is found to be "fair, reasonable and adequate."[235] The panel suggested that these procedures evidence the sensitivity of federal courts to the need to protect class members' interests in settlements or consent decrees.[236] However, it rejected plaintiffs' contention that the "abuse of discretion" standard of review for the

229. Armstrong v. Board of School Directors, 471 F. Supp. 800 (E.D. Wis. 1979).

230. While the substance of the settlement is of interest it is not at the heart of the issue on appeal. The settlement is reproduced in the district court opinion, 471 F. Supp. 800, 813-20 (E.D. Wis. 1979), and will not be discussed here. Rather, this article will focus upon the Seventh Circuit's approach to the standard of review to be applied to the settlement.

Because intentional discrimination had been found to exist, the court could have imposed interdistrict relief under Milliken v. Bradley, 418 U.S. 717 (1974) if the case had been fully litigated and plaintiffs had shown that intentional racially discriminatory acts of officials had caused interdistrict segregation. The settlement which was agreed to by the Milwaukee Schools and by counsel for the named plaintiffs did not include interdistrict relief but the Milwaukee school system did agree to a payment of attorneys' fees totalling over $800,000, pursuant to 42 U.S.C. § 1988, as part of the settlement agreement. The court approved both the plan and the fees.

231. 616 F.2d at 316 nn. 14 & 15.

232. *Id.*

233. The settlement in this case included payment of $550,000 in fees and $13,428.11 to named plaintiffs and $300,000 in fees and $27,350 in expenses for counsel for absent class members. The litigation lasted almost 15 years. *Id.* at 312.

234. *Id.* at 312-13.

235. *Id.* at 313, *citing*, Dawson v. Patrick, 600 F.2d 70 (7th Cir. 1979); Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

236. 616 F.2d at 313-15.

findings of the district court was inappropriate.[237] The panel viewed plaintiffs' challenge to the settlement in this case as an attack upon the propriety of resolving *any* desegregation litigation by settlement.[238] Noting judicial acceptance of settlement and consent decrees in other settings, such as Title VII employment cases, the Seventh Circuit determined that settlement and consent decrees were appropriate means of resolving school desegregation cases as well.[239]

Recognizing that plaintiffs' concerns were not wholly without foundation,[240] the court in *Armstrong* noted that factors such as the duration of the litigation and the possibility of large attorneys' fees in settlement offers might persuade counsel to settle for less than what "might be procured through vigorous negotiation," could adversely affect the interests of class members and the public.[241] The court concluded, however, that currently applicable principles for the review of settlements in class actions were adequate but that two factors currently in use should be emphasized in constitutional litigation.[242]

First, the panel suggested that federal courts should apply settlement principles with particular care and should give clear reasons for their acceptance of settlements and consent decrees. Second, a settlement which authorizes violation of clearly established constitutional or legal principles must be rejected. The court, however, qualified this second factor by making clear that the constitutional violation must appear as a legal certainty on the face of the agreement.[243] This approach, according to the panel, would guarantee that litigants retain flexibility in negotiating a settlement while avoiding the undercutting of important national policies.[244]

While it is axiomatic that settlement of litigation is a worthwhile goal both in terms of minimizing the resources devoted to litigation and implementing remedies to resolve the conflicts from which the litigation arose, it is not at all clear that the court in *Armstrong* struck the proper balance between these considerations and the interests of plaintiffs in cases in which intentional constitutional violations have been found to exist. In light of the panel's special attention to the use of currently applicable standards to achieve a partial resolution of plain-

237. *Id.* at 317-19.
238. *Id.* at 316.
239. *Id.* at 317 & n.17.
240. *Id.* at 319.
241. *Id.* at 313.
242. *Id.* at 319.
243. *Id.*
244. *Id.* at 319-20.

tiffs' concerns,[245] it seems that the panel may also have been less than completely comfortable with the standards which currently are applied to class actions.

It must be pointed out that the dilemma which the panel sought to address—the conflict between the desirability of settlement and the protection of the constitutional rights of class members and the public—was created at least in part by the panel's view of plaintiffs' challenge as a general attack upon the settlement of any litigation of constitutional dimensions.[246] Plaintiffs' attack, however, can be fairly characterized as being limited to cases, such as *Armstrong*, where discrimination with segregative intent had already been found to exist. Such a limited reading of plaintiffs' challenge might result in an analysis which differed from that of the panel in two important respects.

First, the panel's reliance upon Title VII cases would be misplaced since the ruling would apply only to cases in which violations of the fourteenth amendment occurred. This may be important because proof of intentional discrimination is required to sustain a cause of action for violation of the equal protection clause, but is not required for a Title VII violation. Thus, the requirement advanced by the plaintiffs—that settlements in desegregation cases track those remedies resulting from full litigation—would provide a disincentive for school authorities to begin or continue intentional discrimination. If *intentional* discrimination could be found to exist, lengthy litigation and the offer of high attorneys' fees would be less likely to be used to lessen the remedial impact of the litigation. In addition, if the possibility exists that intentional discrimination could be found, a school board would have a much greater incentive to settle without lengthy litigation than it has under the standards set forth in *Armstrong*.

Second, the interests of class members would be more fully protected. Although litigation involving unintentional segregation would still be subject to the same settlement standards which are presently applicable, remedies for intentionally perpetuated segregation could not be bargained away by attorneys or the courts. Since *de facto* segregation is more difficult both to identify and to resolve, the latitude in settlement and the concern for deference to the district court's familiarity with the litigants expressed in *Armstrong*, may be more properly applied to non-intentional violation of constitutional rights.

245. *See* text accompanying notes 232-44 *supra*.
246. 616 F.2d at 316.

United States v. Board of School Commissioners of Indianapolis

In *United States v. Board of School Commissioners of Indianapolis*,[247] a panel consisting of Chief Judge Fairchild and Judges Swygert and Tone was confronted with multiple challenges to a district court ordered interdistrict desegregation plan. Both plaintiffs and defendants challenged the plan as being either too broad or too narrow.[248] In upholding the interdistrict remedy which ordered the busing of black children from Indianapolis schools to schools in surrounding districts, the court discussed the method to be used in determining when interdistrict relief is appropriate. Because such relief is dependant upon a finding of intentional discrimination rather than merely discriminatory impact, the panel also discussed the method to be used to determine whether discrimination is, in fact, intentional.[249] While there were other issues in the case, discussion here will be limited to the methodology for proving intentional discrimination as outlined by the Seventh Circuit.

The panel began by pointing out that in *Washington v. Davis*,[250] the Supreme Court established that liability for racial discrimination under the fourteenth amendment required proof of discriminatory purpose on the part of the governmental agency in question.[251] However, other than making clear that such purpose could be inferred from the totality of the facts, including the fact of disparate impact, *Washington* gave little direction as to how proof of intent could be shown.[252] The *Arlington Heights*[253] decision suggested possible lines of inquiry which might be used to prove the existence of purposeful discrimination including: "historical background of the decision," "the specific sequence of events leading up to the decision," "departures from normal procedural sequence," "substantive departures . . . particularly if the factors usually considered . . . strongly favor a decision contrary to the one reached" and "legislative or administrative history."[254]

Applying these considerations to the *Indianapolis* case, the panel reviewed the history of the recently enacted unified government plan in Indianapolis (UNIGOV) as well as the legislative and judicial history favoring segregation in Indiana.[255] From facts which tended to show a

247. No. 79-1875 (7th Cir. Apr. 29, 1980).
248. Slip op. at 3.
249. *Id.* at 4-5.
250. 426 U.S. 229 (1976).
251. Slip op. at 4-5.
252. *Id.*
253. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).
254. *Id.* at 266-68.
255. Slip op. at 6-8.

history of segregative intent in the state going back at least to 1867,[256] and tailoring of the UNIGOV plan to specifically exclude consolidation of the school districts covered by the new countywide government, which perpetuated previous segregated conditions,[257] the Seventh Circuit concluded that a finding of discriminatory purpose was not clearly erroneous.[258] In addition, the panel examined the relationship between housing patterns and school racial population, which was recognized as a proper factor to consider in creating remedies to segregation if the housing patterns could be shown to be purposefully discriminatory.[259] In an earlier decision remanding this case for further findings of fact, the Seventh Circuit adopted a four-part test for establishing the relationship between housing patterns and interdistrict desegregation remedies.[260] First, discriminatory practices must have caused segregative housing patterns. Second, state action, either direct or indirect, must have initiated, supported or contributed to these practices. Third, this action, while not the sole cause, must have had a substantial effect in bringing about the segregated conditions. Fourth, even if the discriminatory practices have ceased, a continuing segregative effect will be enough to trigger interdistrict remedies.[261]

The district court did not attempt to apply this standard to any acts other than the location of public housing in Indianapolis. Therefore, the Seventh Circuit limited its review to the actions of the Housing Authority of the City of Indianapolis (HACI), since the Seventh Circuit had already decided that discriminatory public housing policies were sufficient to support interdistrict relief.[262]

The panel upheld the district court's finding of a discriminatory intent in housing site selections after noting that: (a) all housing projects which were inhabited overwhelmingly by blacks were located in the Indianapolis Public School District;[263] (b) one project was built across the street from a largely white school and annexed by the old city on the housing authority's request over objections by the Indianapolis school system that existing school facilities were inadequate;[264] (c) the School Commission refused the use of land in a white community

256. *Id.* at 7.
257. *Id.* at 8-10.
258. *Id.* at 11.
259. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974).
260. Slip op. at 11-12.
261. *Id.*
262. *Id.* at 12-13.
263. *Id.* at 15.
264. *Id.*

for a new school to replace the high school set aside for blacks;[265] (d) HACI never attempted to secure cooperation agreements from surrounding communities to allow the construction of public housing outside of Indianapolis public school boundaries.[266] On these facts the panel affirmed the district court's finding of segregative intent.[267]

In a vigorous dissent, Judge Tone essentially agreed that the factors in *Arlington Heights* should be used to determine whether discrimination is purposeful.[268] However, he disagreed completely with their application in this case, contending that the history of school district and city boundaries in Indiana did not indicate that they were in the main co-terminus before UNIGOV.[269] He rejected the panel majority's reliance upon the history of discrimination in Indiana, stating in a footnote that past discrimination in Indiana did not "lend much weight" to the conclusion that current policies were also discriminatory because "most if not all states" share a common discriminatory history.[270] Thus, Judge Tone apparently rejected the notion that the past and present existence of society-wide invidious discrimination is a factor to be considered in determining whether discrimination is intentional.

In addition, Judge Tone apparently rejected the majority's view of the burden of proof in proving discriminatory intent. The majority was content to review whether the district court's finding of intentional discrimination with regard to the creation of UNIGOV and the exclusion of the schools from its powers was supported by the facts. Judge Tone maintained in dissent that facts tending to show discriminatory purpose merely shift the burden of proof to the defendant. Once a non-discriminatory basis for the action is established, the burden shifts back to the plaintiff and may be rebutted by a showing that the state would have taken the action in the absence of the invidious purpose.[271] Thus, Judge Tone would impose upon the plaintiff the burden of showing that an invidious purpose was not merely a substantial factor in the government action but rather the determining factor. His conclusion is that the facts in *Indianapolis* do not support the conclusion that the UNIGOV-school district division occurred primarily for invidious purposes. By this same reasoning, Judge Tone concludes that the major-

265. *Id.*
266. *Id.* at 16.
267. *Id.*
268. *Id.* at 29 (Tone, J., dissenting).
269. *Id.* at 37-40 (Tone, J., dissenting).
270. *Id.* at 33 n.9 (Tone, J., dissenting).
271. *Id.* at 35 (Tone, J., dissenting).

ity's reliance on failure of the housing authority to seek approval of sites outside the Indianapolis Public School District to find discriminatory intent misplaced the burden of proving discriminatory intent.[272]

Under the standard proposed by Judge Tone, discrimination would be extremely difficult, if not impossible, to prove in any situation where some valid governmental purpose could be asserted. If invidious intent must be shown to be the determining factor in government action and if the segregationist history of our society is to be viewed as irrelevant in proving the existence of that intent, all but the most blatantly discriminatory actions will escape sanction. The result would likely be a diminution of the importance of section 1983 litigation, increasing reliance upon statutory remedies such as Title VII and a severe reduction in the likelihood of the imposition of interdistrict remedies in desegregation litigation.

While it is true that all states share a history of institutionalized racial segregation, the widespread nature of this invidious discrimination seems to be more a reason for carefully examining that history than for ignoring it. The history of *de jure* segregation, rather, makes the analysis of historical conditions necessary to understand the present. The view of the majority in the *Indianapolis* case, which recognizes that the present can only be understood in this manner, is an absolute necessity if we are to avoid the perpetuation of systemic segregation by allowing government to avoid responsibility for the past.

272. *Id.* at 49-54 (Tone, J., dissenting).