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CIVIL LIBERTIES: EMPLOYMENT DISCRIMINATION, DUE PROCESS, IMMUNITIES, AND EXHAUSTION OF REMEDIES

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During its 1978-79 term, the Seventh Circuit followed an increasingly common practice when, in more than half its cases,¹ it released its decisions as “unpublished opinions” under Seventh Circuit Rule 35.² The rule purports to prohibit the publication³ or citation⁴ of the “rule 35 opinion,” which is assertedly “non-precedential.”⁵ Putting aside the questions whether a court of appeals has the power to deprive its decisions of precedential value,⁶ whether rule 35 exceeds the rulemaking

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1. In calendar year 1978, the Seventh Circuit decided 1,126 cases by opinion. THE JUDICIAL BUSINESS OF THE UNITED STATES COURTS FOR THE SEVENTH CIRCUIT 8 (1979). The court does not release statistics to distinguish between published and Circuit Rule 35 “unpublished orders.” *Id.* An examination of the advance sheets for 591 F.2d through 601 F.2d shows that of the 459 decisions coming from the Seventh Circuit, 265, or 57.8%, were by “unpublished order.” Twenty-eight of the “unpublished orders,” or a total of 10.6% of all “unpublished orders,” reversed the decision or order before the court.

2. 7TH CIR. R. 35 is typical of the “unpublished opinion” rules which have been promulgated by each of the circuits. See Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1207-08 (1978) (circuit by circuit comparison of unpublished opinion rules) [hereinafter referred to as *Reynolds & Richman*].

3. 7TH CIR. R. 35(b)(2)(iii) provides that unpublished orders:

Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as “affirmed,” “enforced,” “reversed,” “reversed and remanded,” and so forth.

4. 7TH CIR. R. 35(b)(2)(iv) provides that unpublished orders:

Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit or in any written document or in oral argument or (b) by any such court for any purpose.

5. See, e.g., *United States v. Erving*, 388 F. Supp. 1011, 1017 (W.D. Wis. 1975) (Court refusing to consider an unpublished order, even when “[n]o other relevant decision of the United States Court of Appeals for the Seventh Circuit has been cited by counsel, nor am I aware of any.”)

Unpublished opinions, however, have been cited to the United States Supreme Court by the Solicitor General to support a claim of a conflict among the circuits to justify the grant of a petition for writ of certiorari. See *United States v. Addonizio*, Pet. for Writ of Cert., O.T. 1978; No. 78-156 at 17 (citing three unpublished opinions to support claim of conflict among the circuits). Cf. *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (resolving intra-circuit conflict between decisions reached in published and unpublished opinions).

6. In *Hicks v. Miranda*, 422 U.S. 332 (1975), the Court held that whenever its appellate,

powers vested in a court of appeals by 28 U.S.C. § 2071,⁷ or whether the rule is an unconstitutional prior restraint of first amendment rights,⁸ the Seventh Circuit's frequent use of rule 35 means that its published opinions generally concern⁹ those issues which the court of appeals deems important. An author may be the least reliable critic of his own work,¹⁰ and it is likely that important issues lurk among the decisions issued under rule 35 opinions.¹¹ This article, however, deals only with those Seventh Circuit published opinions touching upon civil liberties in four areas: procedural due process,¹² employment discrimination,¹³ constitutional immunities,¹⁴ and exhaustion of remedies.¹⁵

rather than its certiorari, jurisdiction was invoked, it was required to "deal with [the] merits," *id.* at 344, and its summary affirmance, or dismissal for want of a substantial federal question, was an adjudication binding upon the lower federal courts. *Id.* at 344-45. While this rule has been sharply criticized, *see Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913 (1976) (Brennan, J., dissenting from denial of certiorari), it remains applicable to all questions actually raised in the appeal to the Supreme Court. *Mandel v. Bradley*, 432 U.S. 173 (1977).

In contrast with the broad discretionary jurisdiction of the Supreme Court, the courts of appeals have only limited power to choose those cases which they will decide on the merits. With the exception of interlocutory appeals pursuant to 28 U.S.C. § 1292(b) (1977), *see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475-76 (1978), and appeals in habeas corpus cases by state prisoners where the district court has refused to certify that there is probable cause to appeal, 28 U.S.C. § 2253 (1977), a court of appeals lacks the power to decide which cases it will decide on the merits. *Garrison v. Patterson*, 391 U.S. 464 (1968).

The "non-precedential" aspect of 7TH CIR. R. 35 thus appears to be directly contrary to the rule of *Hicks v. Miranda*, 422 U.S. 332 (1975), that any adjudication by a court having appellate jurisdiction is entitled to precedential effect.

7. 28 U.S.C. § 2071 (1977) vests the courts of appeals with the power to promulgate "rules for the conduct of [that court's] business." 7TH CIR. R. 35 goes much farther, with its impact upon law book publishers, courts in other jurisdictions, and litigants. The contention that the rule is in excess of the powers delegated by 28 U.S.C. § 2071 was raised but not adjudicated in *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 258 n.1 (1978). *See* Brief for Petitioner at 56 *id.*

8. The constitutional arguments are canvassed in Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 141-45 (1977).

9. The one exception is where the court of appeals reverses a published decision of the district court. 7TH CIR. R. 35(c)(1)(v).

10. This point was made by Mr. Justice Stevens in his speech at the Illinois State Bar Association's Centennial Dinner, Springfield, Illinois (January 22, 1977), *quoted in Reynolds & Richman*, *supra* note 2, at 1192:

[A] rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.

11. The Seventh Circuit has disposed of cases remanded from the United States Supreme Court through unpublished orders. *See* Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 317-40 (1977). Rule 35 has since been amended. *See* 7TH CIR. R. 35(c)(1)(vi).

12. *See* text at notes 17-135 *infra*.

13. *See* text at notes 136-226 *infra*.

14. *See* text at notes 227-56 *infra*.

15. *See* text at notes 257-86 *infra*.

Other civil liberties issues decided in published opinions also have been noted.¹⁶

DUE PROCESS

Several of the decisions which the Seventh Circuit chose to publish in its 1978-79 term¹⁷ arose from cases in which persons claiming to have been aggrieved by state or federal action complained that they had been deprived of liberty or property without due process of law.¹⁸ The threshold question in each of these cases was whether the alleged deprivation was the product of state or federal action.¹⁹ In those cases where the jurisdictional question was resolved in the plaintiff's favor,²⁰ a second issue was whether the liberty or property interest involved was sufficient to invoke the protections of the due process clause of the fifth or fourteenth amendments.²¹

16. *International Soc'y for Krishna Consciousness v. Bowen*, 600 F.2d 667 (7th Cir.), *cert. denied*, 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (No. 79-239) (right of municipality to limit charitable solicitation); *Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) (abortion law); *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir.), *cert. denied*, 48 U.S.L.W. 3239 (U.S. Oct. 1, 1979) (No. 78-1917) (compulsory retirement of aged judges); *Hanson v. Circuit Court*, 591 F.2d 404 (7th Cir.), *cert. denied*, 100 S. Ct. 79 (1979) (availability of federal remedy for collateral review of state-court fine-only convictions; issue reversed); *Citizens for a Better Environment v. Village of Schaumburg*, 590 F.2d 220 (7th Cir.), *cert. granted*, 441 U.S. 922 (1979) (right of municipality to limit charitable solicitation); *Scherer v. Kelley*, 584 F.2d 170 (7th Cir. 1978), *cert. denied sub nom.*, *Scherer v. Webster*, 440 U.S. 964 (1979) (access to government files).

17. *See* note 1 *supra*.

18. For the purposes of this article, invasions upon specific constitutional rights, such as infringement upon first amendment freedoms, are treated as deprivations of a liberty interest.

19. This is the conceptual approach mandated in *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir. 1978), where the court held that the question of state action must be answered as a jurisdictional matter, before considering any other issues. *Id.* at 404. For a discussion of *Robinson*, see text accompanying notes 232-44 *infra*.

20. No state action was found in *Musso v. Suriano*, 586 F.2d 59 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979), where the court reaffirmed the rule that government funding and general regulation does not support a finding of state action. Similarly, in *Gibson v. Dixon*, 579 F.2d 1071 (7th Cir. 1978), the court applied *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149 (1978), and held that a bank which repossessed an automobile after default of a loan which was secured by the vehicle does not act under color of state law, even though the self-help remedy was authorized by statute. State action was found in *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir. 1978), where the court provided an affirmative answer to the question of whether a public defender acts under color of state law. For a discussion of *Robinson*, see text accompanying notes 232-44 *infra*.

21. Even if there is no liberty or property interest, it appears that relief could be obtained on proof of a denial of equal protection of laws. *See Sterling v. Village of Maywood*, 579 F.2d 1350 (7th Cir. 1978) (tenant has no property right to continued municipal water service once the landlord has requested termination of that service, but failure of municipality to restore water service to tenant because landlord has refused to pay water bills denied tenant equal protection of law). The same analysis was applied in *Durso v. Rowe*, 579 F.2d 1365 (7th Cir. 1978), discussed in the text at notes 86-96 *infra* where the court held that due process rights may be found in official practices and policies and that the district court erred in dismissing a prisoner's claim that "defendants purposefully denied him a hearing before terminating his work-release status even though hearings were customarily afforded to other inmates similarly situated." *Id.* at 1372.

At one time, it appeared that the due process clause would be implicated whenever governmental action involved "important interests."²² Beginning with *Board of Regents v. Roth*,²³ however, the United States Supreme Court has narrowly circumscribed the liberty interests protected by the fifth and fourteenth amendments.²⁴ The Court has limited to express constitutional²⁵ or statutory²⁶ or contractual entitlements²⁷ those property rights which come within the protections of the amendments. During the 1978-79 term, the Seventh Circuit scrupulously applied these decisions in its published opinions.

22. *Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Suspension of issued [drivers'] licenses thus involves state action that adjudicates important interests of the licensees."). See also *Fuentes v. Shevin*, 407 U.S. 67, 86-87 (1972) (possessory interest in household possessions was "clearly . . . sufficient to invoke the protection of the Due Process Clause"); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (termination of welfare benefits "involves state action that adjudicates important rights"); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341-42 (1969) (prejudgment garnishment was an obvious taking of property because it may "as a practical matter drive a wage-earning family to the wall").

23. 408 U.S. 564 (1972).

24. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court held that the liberty to work is not within the scope of the fourteenth amendment. But see *id.* at 588-89 (Marshall, J., dissenting). In *Roth*, the liberty interest implicated in not renewing a public employee's contract was limited to situations where the state employer had made a charge which "might seriously damage [the employee's] standing and associations in his community." *Id.* at 573 (majority opinion). This charge must be made publicly in order to trigger a liberty interest. *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

The liberty protected by the fourteenth amendment was further circumscribed in *Paul v. Davis*, 424 U.S. 693 (1976). The Court held that one whom the state has branded as an "active shoplifter" and who consequently was inhibited "from entering business establishments for fear of being suspected of shoplifting and possibly apprehended," *id.* at 697, is not thereby deprived of any liberty under the fourteenth amendment. *Id.* at 712. See also *Greenholtz v. Nebraska Penal Inmates*, 99 S. Ct. 2100 (1979) (parole release decision does not per se implicate liberty interest); *Leis v. Flynt*, 439 U.S. 438 (1979) (no liberty interest in connection with appearance by out-of-state lawyer in criminal case); *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (transfer of prisoner involving significant change in conditions of confinement "not subject to audit under the Due Process Clause").

The present scope of the liberty directly protected by the fourteenth amendment appears to extend only to intrusions on the personal security of persons who are not under conviction of crimes. See *Bell v. Wolfish*, 441 U.S. 520, 534-35 & 535 n.17 (1979); *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977).

Not all members of the Court subscribe to this view of liberty. See *Greenholtz v. Nebraska Penal Inmates*, 99 S. Ct. 2100, 2109-11 (1979) (Powell, J., concurring in part); *Meachum v. Fano*, 427 U.S. 215, 229-35 (1976) (Stevens, Brennan, & Marshall, JJ., dissenting).

25. Cf. *United States v. Bodcaw Co.*, 99 S. Ct. 1066 (1979) (limiting the compensation necessary to satisfy fifth amendment in federal condemnation proceedings).

26. *Greenholtz v. Nebraska Penal Inmates*, 99 S. Ct. 2100 (1979) (statutory entitlement to parole release consideration); *Memphis Light, Gas & Water Div. v. Craft*, 426 U.S. 1 (1978) (entitlement by state case law to continuation of municipal electrical service when a bona fide dispute exists about correctness of bill); *Goss v. Lopez*, 419 U.S. 565 (1975) (statutory entitlement to public education); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (statutory entitlement to "good time" credits); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (statutory entitlement to "conditional liberty" of parolee absent wrongdoing).

27. *Bishop v. Wood*, 426 U.S. 341 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972).

Liberty Interests

The 1978-79 decisions of the Seventh Circuit interpreted the United States Supreme Court's limitations upon the type of liberty implicated in the due process clause of the fourteenth amendment. A liberty interest is involved when police officers use excessive force,²⁸ make arrests without sufficient grounds,²⁹ or do anything to deprive an accused of a fair trial.³⁰ As required by *Board of Regents v. Roth*,³¹ however, the Seventh Circuit rejected claims of public employees that their discharge³² or nonpromotion³³ had implicated a constitutionally protected liberty interest.³⁴ On the other hand, a discharge from public employment because of the assertion of first amendment rights would infringe upon a liberty interest,³⁵ even when the speech involved was internal criticism of a school administration.³⁶

Similarly, as required by *Meachum v. Fano*,³⁷ the court of appeals rejected liberty interests asserted by prisoners in deprivation of "good time"³⁸ and in transfers, both from the general prison population to segregated confinement³⁹ and from a work release program back to the

28. See, e.g., *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), discussed *infra* at notes 50-71; *White v. Rochford*, 592 F.2d 381, 383 n.2 (7th Cir. 1979), discussed *infra* at notes 72-84; *Davis v. Freels*, 583 F.2d 337 (7th Cir. 1979), discussed *infra* at notes 252-54.

29. *Butler v. Goldblatt Bros. Inc.*, 589 F.2d 323 (7th Cir. 1978) (arrest without probable cause).

30. *Hampton v. Hanrahan*, 600 F.2d 600, 632 (7th Cir. 1979) (prosecutor generating pre-trial publicity which may have caused pre-trial prejudice against criminal defendants), discussed *infra* at notes 50-71; *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978) (destruction of criminal defendant's legal papers and eavesdropping on that defendant's attorney-client communications).

31. 408 U.S. 564 (1972).

32. *Eichman v. Indiana State Univ. Bd. of Trustees*, 597 F.2d 1104, 1109-10 (7th Cir. 1979); *Paige v. Harris*, 584 F.2d 178, 184 (7th Cir. 1978), discussed *infra* at notes 90-109.

33. *Webster v. Redmond*, 599 F.2d 793, 796-98 (7th Cir. 1979).

34. The current state of the law was thoroughly discussed in *Paige v. Harris*, 584 F.2d 178, 183-85 (7th Cir. 1978), and the pertinent United States Supreme Court cases were again analyzed to reach the same conclusions in *Webster v. Redmond*, 599 F.2d 793, 796-99 (7th Cir. 1979). The discussion of liberty interests in *Webster* added nothing to what had been said in *Paige*, and it is difficult to reconcile these repetitive analyses with the Seventh Circuit's frequent use of unpublished opinions. See note 1 *supra*.

35. In *Eichman v. Indiana State Univ. Bd. of Trustees*, 597 F.2d 1104 (7th Cir. 1979), the court treated the "free speech claims" that the employee had been discharged because of criticism of the school, *id.* at 1108-09, as distinct from the question of whether the discharge had invaded a liberty interest, see *id.* at 1109-10, concluding that discharge did not involve any liberty interests. This analysis, however, overlooks the "incorporation" of the first amendment rights involved into the liberty aspect of the fourteenth amendment.

36. *Eichman v. Indiana State Univ. Bd. of Trustees*, 597 F.2d 1104, 1108 (7th Cir. 1979), applying *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979).

37. 427 U.S. 215 (1976).

38. *Arsberry v. Sielaff*, 586 F.2d 37 (7th Cir. 1978). The property rights involved in *Arsberry* are discussed in text at notes 92-99 *infra*.

39. *Id.*

general prison population.⁴⁰ Nevertheless, prisoners continue to possess liberty interests which implicate specific constitutional or statutory guarantees. Thus, a prisoner who alleged that he been transferred from one prison to another because he had, *inter alia*, complained about an inadequate law library⁴¹ was held to have made out an actionable claim.⁴² Similarly, a convicted murderer was allowed to proceed with his action for money damages resulting from noncompliance with constitutionally mandated extradition procedures.⁴³ Liberty interests would also be found in cases involving disproportionate punishment⁴⁴ or reckless disregard of a prisoner's essential medical needs,⁴⁵ both of which would implicate express eighth amendment protections.⁴⁶

The contrast between liberty interests directly secured by the fourteenth amendment and those which are "incorporated" from the first ten amendments is illustrated by *Hampton v. Hanrahan*⁴⁷ and *White v. Rochford*,⁴⁸ 1979 Seventh Circuit cases which each resulted in majority, concurring, and dissenting opinions.⁴⁹

Hampton arose from a 4:30 a.m. raid upon an apartment allegedly

40. *Durso v. Rowe*, 579 F.2d 1365 (7th Cir. 1978). The property right which may be involved in a transfer from work release to the general prison population is discussed *infra* in the text accompanying notes 86-97.

41. *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978) (prisoner transferred from prison farm to maximum security institution because he had been rendering legal assistance to other prisoners and attempting to create a law library at the prison farm, as well as to create a "writ department" and an "inmate council").

42. *Id.* at 232-33. The prisoner was not precluded from recovering more than nominal damages if he was able to prove that he had been wrongfully transferred from the farm. *Id.* at 233.

43. *McBride v. Soos*, 594 F.2d 610 (7th Cir. 1979) (liberty interest in compliance with extradition procedures created by U.S. CONST. art. IV, § 2, cl. 2 and 18 U.S.C. § 3182 (1977)).

44. *See Chapman v. Pickett*, 586 F.2d 22 (7th Cir. 1978) (maintaining prisoner in segregated confinement for seven months for failure to clean up work area sufficiently disproportionate to be cruel and unusual, especially when prisoner's reason for failure to have cleaned up work area was legitimized four months before release from segregated confinement by change in prison policy).

45. *Green v. Carlson*, 581 F.2d 689 (7th Cir. 1978), *cert. granted*, 99 S. Ct. 2880 (1979) (deliberate indifference to medical needs resulting in death of prisoner). *Green* is also of interest for its holding that the state survivorship rule would not be applied to deny a remedy when the alleged wrongdoing had caused death. *See id.* at 692-95, distinguishing and analyzing *Robertson v. Wegmann*, 436 U.S. 584 (1978).

46. The liberty interests protected by the fourteenth amendment were not at issue in these cases because the alleged wrongdoing had been committed by federal officials, without any involvement by a state. The court's analysis was therefore limited to the specific constitutional protections of the eighth amendment. It is obvious, however, that the same analysis would be applied to "incorporate" the eighth amendment protections into the liberty interest of the fourteenth amendment in a case involving alleged wrongdoing by state officials.

47. 600 F.2d 600 (7th Cir. 1979).

48. 592 F.2d 381 (7th Cir. 1979).

49. A careful reading of all three opinions is required in each case to discern the actual decision of the court. For example, in *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), the majority opinion of Judge Swygert directed that sanctions be imposed on remand for noncompliance with pre-trial discovery orders. *Id.* at 642. Judge Pell, dissenting in part, was of the opinion that sanctions should not be imposed, *id.* at 656, and joined with concurring Chief Judge

used by the Black Panther Party to store weapons.⁵⁰ Two of the occupants of the apartment were killed during the raid,⁵¹ and the seven surviving occupants—four of whom required hospitalization⁵²—were held for various state criminal charges which were subsequently dismissed.⁵³

The case was before the Seventh Circuit on appeal from the district court's grant of directed verdicts at the close of an eighteen-month jury trial.⁵⁴ At issue were the claims of the survivors and the personal representatives of the two persons killed during the raid for money damages for injuries sustained before, during, and after the raid.⁵⁵

The constitutional injury contended in the case arose from the allegedly excessive force used during the raid.⁵⁶ Plaintiffs also sought damages for an alleged pre-raid conspiracy to interfere with the first amendment rights of the Black Panther Party,⁵⁷ and for the post-raid injuries resulting from the alleged cover-up of the "true facts"⁵⁸ about the raid.⁵⁹ In its analysis of the "cover-up claim" the Seventh Circuit

Fairchild, *id.* at 649 and 656, in directing the district court to give consideration to the question of sanctions.

50. *Id.* at 605. The private arsenal consisted of "19 unregistered weapons, including 12 shotguns and rifles, among which were a stolen Chicago Police Department riot gun and 2 sawed-off shotguns, 7 handguns and several hundred rounds of ammunition." *Id.* at 655 (Pell, J., dissenting in part).

51. *Id.* at 605. The manner in which the deaths came about was unresolved. Defendants offered evidence to show that the occupants of the apartment had fired first, *id.* at 614, while the surviving occupants of the apartment each testified that none of the survivors had fired a gun during the raid. *Id.* at 625. The plaintiffs also presented evidence to show that Fred Hampton, one of the persons killed during the raid, had been drugged by a paid informant, *id.* at 614 n.15, and then shot deliberately by the raiders. *Id.* at 625.

52. *Id.* at 616.

53. The survivors were charged with attempted murder, aggravated battery and unlawful use of weapons. *Id.* The indictments were dismissed when it became clear that no physical evidence was available to corroborate the raiders' version of the incident, *id.* at 619-20, and in an attempt to avoid federal indictments of the raiders for civil rights violations. The federal grand jury returned no indictments against the raiders. *Id.* at 620. A Cook County grand jury was convened to consider the evidence against the raiders and returned indictments for conspiring to obstruct justice. *Id.* at 618-20. The raiders were acquitted in a bench trial. *Id.* at 620.

54. *Id.* at 606. Also on appeal were two contempt judgments which arose from bizarre circumstances. *Id.* at 644-48. The case had previously been before the Seventh Circuit on appeal from the district court's granting of a motion to dismiss against all defendants other than those who had individually participated in the raid. *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

55. In addition to the persons who individually participated in the raid, the defendants included the State's Attorney of Cook County, several of his assistants, several federal law enforcement agents, and various Chicago police officers who allegedly participated in the "cover-up." 600 F.2d at 606-07.

56. *Id.* at 623-24, 635 n.35 (Swygert, J.); *id.* at 648 (Fairchild, C.J., concurring); *id.* at 660 (Pell, J., concurring in part).

57. *Id.* at 635 n.33 (Swygert, J.); *id.* at 648 (Fairchild, C.J., concurring).

58. *Id.* at 632.

59. The alleged coverup was intended to spread a "distorted, if not false, account of the raid which justified the officers' actions." *Id.* at 627.

appears to have recognized a new liberty interest.

Part of the alleged cover-up was press conferences held by defendant Edward Hanrahan, then Cook County State's Attorney, to publicize what were claimed to be false statements about the raid, casting the survivors of the raid in a bad light.⁶⁰ In the same vein, Hanrahan staged a re-enactment of the raid for television broadcast to support the propriety of the raiders' conduct.⁶¹

Although this media publicity placed the survivors of the raid in what may have been an unjustified bad light, no liberty interest would have been implicated⁶² but for the fact that the survivors were then facing state criminal charges.⁶³ As such, the survivors were entitled to an opportunity to prove that the media publicity would have impaired their right to a fair trial,⁶⁴ and thereby obtain at least nominal damages.⁶⁵

Hampton thus provides a significant remedy to a person who is convicted of a crime, has his conviction reversed because of prejudicial publicity created by the prosecutor, and then is subsequently acquitted at a new trial.⁶⁶ In *Hampton*, however, the criminal prosecutions were dismissed without any trial.⁶⁷ It might well be, as Judge Pell stated in his dissenting opinion,⁶⁸ that *Hampton* was being prosecuted "to demonstrate the existence of a widespread and sinister conspiracy among top law enforcement officials, state and federal."⁶⁹ If this is so, it is of little significance: One of the interests protected by the due process clause is the individual's "feeling that the government has dealt

60. *Id.* at 616-17, 627-28, 632.

61. *Id.* at 616-17.

62. *Id.* at 649 (Fairchild, C.J., concurring), citing *Paul v. Davis*, 424 U.S. 693, 712 (1976).

63. 600 F.2d at 616 ("Despite further potential pre-trial prejudice to the survivors' criminal defense, Hanrahan continued to publicize the incident and decided to employ additional media tactics to promote the raiders' version of the incident.").

64. An accused's right to a fair trial is secured by the sixth amendment, as "incorporated" into the due process clause of the fourteenth amendment. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences.").

65. *Carey v. Piphus*, 435 U.S. 247 (1978).

66. At least under the circumstances of *Hampton*, the prosecutor would not be immune for these injuries. See 600 F.2d at 632 (Swygert, J.); *id.* at 649 (Fairchild, C.J., concurring). Immunities are discussed *infra* in the text at notes 227-56.

67. The state criminal indictments were dismissed, 600 F.2d at 620, apparently as the result of an agreement between the state prosecutor and the federal prosecutors conducting a grand jury investigation of alleged civil rights violations which may have been committed in the course of the raid.

68. *Id.* at 649-67. Judge Pell was especially critical of the intemperance of the attorneys for several of the plaintiffs. *Id.* at 650-53.

69. *Id.* at 650 (Pell, J., dissenting in part).

with him fairly,⁷⁰ and if the plaintiffs in *Hampton* chose to pursue this aspect of the case at the expense of their claims for substantial money damages,⁷¹ such is their right.

A lack of fair dealing by the government was the basis for the Seventh Circuit's decision in *White v. Rochford*.⁷² There, three children had been riding in an automobile driven by their uncle, who was arrested for drag racing.⁷³ The complaint, filed on behalf of two of the three children,⁷⁴ alleged that the arresting officers took the uncle into custody and over his protests abandoned the three children with the automobile, resulting in mental pain and anguish.⁷⁵ On an appeal from the district court's order granting a motion to dismiss, the sole question before the Seventh Circuit was the legal sufficiency of the complaint. In three opinions,⁷⁶ a divided panel reversed and remanded for trial.⁷⁷

A sharp cry of outrage at the officers' conduct permeates the opinion of Judge Sprecher, which apparently was intended to be the majority opinion.⁷⁸ Starting with the proposition that the liberty interests protected by the fourteenth amendment center "to some degree on bodily integrity,"⁷⁹ Judge Sprecher concluded that the failure of the arresting officers to have considered the welfare of the three children within the automobile amounted to gross negligence.⁸⁰

70. *Carey v. Phipus*, 435 U.S. 247, 262 (1978).

71. 600 F.2d at 650 (Pell, J., dissenting in part).

72. 592 F.2d 381 (7th Cir. 1979).

73. *Id.* at 382. The record before the Seventh Circuit did not reveal the ultimate disposition of the criminal charge, *id.* at 386, the legality of which was not at issue in the case. *Id.* at 389 (Kilkenny, J., dissenting).

74. *Id.* at 382. The third child was not a litigant.

75. *Id.* On appeal, plaintiffs claimed that the police officers knew that one of the children was asthmatic and would be especially susceptible to injury if abandoned in the automobile. *Id.* at 385 n.8. Judge Sprecher noted that this allegation could be added in an amended complaint, and assumed for purposes of his decision that such an amendment had been made. *Cf.* 28 U.S.C. § 1653 (1977) (defective allegations of jurisdiction may be amended on appeal). Dissenting Judge Kilkenny was sharply critical of this consideration which he described as "allegations raised as an afterthought on appeal." 592 F.2d at 393 (Kilkenny, J., dissenting).

76. *Id.* at 382-86 (Sprecher, J.); *id.* at 386-88 (Tone, J., concurring); *id.* at 388-95 (Kilkenny, J., dissenting).

77. *Id.* at 386. The court affirmed dismissal of the superintendent of the police department whose personal involvement in the incident had not been alleged and whose dismissal was not contested by plaintiffs.

78. This assumption is based on a reading of Judge Kilkenny's dissent, which suggests that it was prepared in response to Judge Sprecher's opinion, and then modified and supplemented when circulation of the dissent resulted in Judge Tone's concurring opinion.

79. 592 F.2d at 383.

80. *Id.* at 385.

Dissenting Judge Kilkenney⁸¹ would have affirmed dismissal of the case on the ground that the officers had no duty to the children within the car.⁸² Such a duty was obvious to Judge Tone, however, who in his concurring opinion succinctly pointed out that the officers' duty was to refrain from infringing upon the "federally protected right [of the children] to be free from unjustified intrusions on their personal security."⁸³ As analyzed by Judge Tone, the officers infringed upon this right when they arrested the only adult occupant of the car without providing alternative protection for the children, thereby exposing them "to danger as occupants of an immobilized car on a highspeed expressway and to the cold."⁸⁴

The decision in *White* reaffirms the role of the liberty interest protected by the due process clause of the fourteenth amendment in establishing an individual's right to personal security irrespective of the infringement of any other expressly guaranteed constitutional right. With respect to the property interests protected by the due process clause, however, the 1978-79 decisions of the Seventh Circuit illustrate that the protections of the fourteenth amendment extend only to express or implied statutory or contractual rights.

Property Interests

Express or implied property rights were at issue in five of the published decisions of the Seventh Circuit in its 1978-79 term. In *Webster v. Redmond*⁸⁵ and *Durso v. Rowe*⁸⁶ the court respectively construed Illinois statutes to reject claims of entitlements to promotion of a holder of a "principal's certificate" to a position as a school principal⁸⁷ and to continuation of a prisoner's work release status, absent misconduct.⁸⁸ The court's analysis in these decisions reveals that absent state court construction of the statute, the Seventh Circuit does not intend to afford deference to the views of the district court regarding the meaning

81. Judge Kilkenney, a Senior Circuit Judge from the Ninth Circuit, was sitting by designation. *Id.* at 382.

82. *Id.* at 394 (Kilkenney, J., dissenting).

83. *Id.* at 387 (Tone, J., concurring).

84. *Id.*

85. 599 F.2d 793 (7th Cir. 1979).

86. 579 F.2d 1365 (7th Cir. 1978).

87. *Webster v. Redmond*, 599 F.2d 793, 799, 801 (7th Cir. 1979) (construing various sections of the Illinois School Code, ILL. REV. STAT. ch. 122, § 1 (1977)).

88. *Durso v. Rowe*, 579 F.2d 1365, 1370 (7th Cir. 1979) (construing the Illinois Unified Code of Corrections, ILL. REV. STAT. ch. 38, § 1003-8-7(e) (1977)).

of Illinois statutes.⁸⁹ A similar result was reached in *Paige v. Harris*,⁹⁰ where the Seventh Circuit construed the employment regulations of a federal agency and concluded that a contractual entitlement to continued employment should be implied as a matter of law.⁹¹ In *Arsberry v. Sielaff*,⁹² however, the Seventh Circuit refused to construe an Illinois statute in the first instance, remanding that issue to the district court and noting that abstention should be considered.⁹³

There was uniform recognition in the Seventh Circuit's published decisions that the question of whether a property right had been created by official policies or practices⁹⁴ was in the first instance for the district court. Thus, in *Durso v. Rowe*,⁹⁵ while rejecting the claim of entitlement based upon state law,⁹⁶ the court of appeals remanded the case to the district court in order to allow the prisoner to prove a property right based on uniform practice.⁹⁷ Similarly, in *Arsberry v. Sielaff*,⁹⁸ the district court was directed to consider in the first instance the prisoner's claims of an established policy for earning "good time" and the imposition of segregated confinement only upon evidence of serious misconduct.⁹⁹

The only novel aspect of these property right decisions is the relief mandated in *Paige v. Harris*.¹⁰⁰ There, the Seventh Circuit held that an attorney employed for twenty years by the Department of Housing and

89. There is no mention of the reasoning of the district court, *Webster v. Redmond*, 443 F. Supp. 670 (N.D. Ill. 1978), which was reversed in *Webster*, 599 F.2d at 803.

90. 584 F.2d 178 (7th Cir. 1978).

91. *Id.* at 182-83.

92. 586 F.2d 37 (7th Cir. 1978).

93. *Id.* at 48 n.6. While the court stated that it was making "no suggestion that this issue is or is not an appropriate issue calling for abstention," *id.*, the footnote devoted to this issue is reminiscent of "telling them not to think of a white bear." *Lakeside v. Oregon*, 435 U.S. 333, 345 (1978) (Stevens, J., dissenting).

94. *See Perry v. Sindermann*, 408 U.S. 593, 601-03 (1972).

95. 579 F.2d 1365 (7th Cir. 1978).

96. The Seventh Circuit's construction of ILL. REV. STAT. ch. 38, § 1003-8-7 (1977), is not beyond question. The statute requires a hearing in "disciplinary cases which may involve . . . a change in work, education, or other program assignment." *Id.* § 1003-8-7(e). The Seventh Circuit agreed that the case involved a change in work, 579 F.2d at 1370, and remanded for determination of whether the transfer at issue was for disciplinary reasons, *id.* at 1373, apparently because it had been made after adverse newspaper publicity. A fairer reading of the statute would be to construe it as prohibiting "a change in work, education, or other program assignment" which disadvantages the prisoner for other than disciplinary reasons. This apparently is the view of the Illinois Department of Corrections, which promulgated a regulation setting out a detailed procedure for notice and hearing prior to any decision to revoke work-release status subsequent to the removal of Durso from work-release. *Id.* at 1370 n.4. The Seventh Circuit agreed with the district court and refused to afford any weight to this construction of the statute. *Id.*

97. *Id.* at 1371.

98. 586 F.2d 37 (7th Cir. 1978).

99. *Id.* at 47.

100. 584 F.2d 178 (7th Cir. 1978).

Urban Affairs should not have been discharged summarily, and directed that there be a trial in the district court to determine if the discharge had been without just cause.¹⁰¹ Although the court cited *Arnett v. Kennedy*¹⁰² for its definition of just cause,¹⁰³ it provided no explanation for this type of relief other than a reference to "the extensive controversy which this case has aroused."¹⁰⁴

Generally, the relief granted when an employee has been discharged without a constitutionally required hearing is to require reinstatement unless an adequate hearing is held which reaffirms the discharge decision.¹⁰⁵ In *Piphus v. Carey*,¹⁰⁶ however, where the Seventh Circuit dealt with an action for money damages from a denial of procedural due process, the court held that a district judge could retrospectively determine if a due process hearing would have produced a different result.¹⁰⁷ This portion of *Piphus* was approved by the United States Supreme Court.¹⁰⁸ *Paige v. Harris* thus applied *Piphus* to a case seeking equitable relief, and rendered more meaningful the judicial remedy available to a tenured employee who has been discharged without "the process which is due."¹⁰⁹

"The Process That Is Due"

After it is determined that an interest is within the protections of the due process clause, the question that must be answered is "the process that is due."¹¹⁰ This was the question before the Seventh Circuit in *Rud v. Dahl*¹¹¹ and *Christopher v. United States Board of Parole*.¹¹²

101. *Id.* at 185.

102. 416 U.S. 134, 156-59 (1974).

103. 570 F.2d at 185.

104. *Id.*

105. *See, e.g., Perry v. Sindermann*, 408 U.S. 593 (1972): "Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed on the grounds for his nonretention and challenge their sufficiency." *Id.* at 603.

106. 545 F.2d 30 (7th Cir. 1976), *rev'd on other grounds*, 435 U.S. 247 (1978).

107. 545 F.2d at 32.

108. 435 U.S. at 261 n.16.

109. A similar remedy is available to a person who claims to have been aggrieved by state (or federal) action resulting from the exercise of first amendment rights. Under *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), once the plaintiff has shown that the exercise of first amendment rights played a substantial role in the adverse action, it was the government's burden to show to the district court by a preponderance of the evidence that the same result would have been reached "in the absence of the protected conduct." *Id.* at 287. This remedy was mandated by the Seventh Circuit in *Buise v. Hudkins*, 584 F.2d 223, 229-30 (7th Cir. 1978) (acts of jailhouse lawyers), and *Eichman v. Indiana State Univ. Bd. of Trustees*, 597 F.2d 1104, 1108-09 (7th Cir. 1978) (criticism of employer).

110. *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972).

111. 578 F.2d 674 (7th Cir. 1978).

Rud, which started as an unpublished opinion,¹¹³ was a challenge to the legality of the Illinois statute¹¹⁴ pertaining to adjudication of incompetency and appointment of a conservator to manage the person and estate of an incompetent.¹¹⁵ Although the case had been brought as a class action,¹¹⁶ the district court had not reached this issue,¹¹⁷ and this noncompliance with rule 23(c)(1) of the Federal Rules of Civil Procedure was not challenged on appeal.¹¹⁸

The challenge to the statute was two-fold: First, the plaintiff alleged that the notice served on him was constitutionally inadequate;¹¹⁹ second, the plaintiff maintained that no adjudication of incompetency could take place in the absence of counsel for the alleged incompetent.¹²⁰ Both challenges were rejected by the Seventh Circuit. The notice was held adequate¹²¹ under the tests of *Mullane v. Central Hanover Bank & Trust Co.*,¹²² and the court held that counsel was not essential to insure the accuracy of the fact finding process.¹²³

The shortcoming of the court's opinion in *Rud* is the possible situation in which a person may be incompetent to respond to notice of an incompetency hearing, but may still be competent to manage his assets under state law. Judge Tone, in a concurring opinion, appeared to acknowledge such a possibility by resting his vote to affirm upon the absence of any particularized allegations of prejudice from the inadequate notice in the complaint.¹²⁴ The panel majority, however, went further and held that "there are no set of facts that [the plaintiff]

112. 589 F.2d 924 (7th Cir. 1978).

113. 578 F.2d at 674.

114. ILL. REV. STAT. ch. 110 ½, § 11-2 (1977).

115. 578 F.2d at 675.

116. The proposed class was "all persons adjudicated incompetent in Cook County, Illinois on or after June 17, 1976." *Id.* at 675-76.

117. *Id.* at 676.

118. FED. R. CIV. P. 23(c) requires that a determination of whether a case may be maintained as a class action should be made "[a]s soon as practicable after the commencement of an action." See *Peritz v. Liberty Loan Co.*, 523 F.2d 349 (7th Cir. 1975), where the court held that this rule precluded class certification after a ruling on the merits.

119. The claim was that the notice "did not offer any definition of the terms 'incompetent' or 'conservator,' did not state on its face the legal standard governing adjudications of incompetency, and did not specify the legal consequences and practical ramifications resulting from the granting of the petition." 578 F.2d at 677. There was, however, no claim that the named plaintiff did not understand the notice. *Id.* at 679 (Tone, J., concurring).

120. *Id.* at 676.

121. *Id.* at 677.

122. 339 U.S. 306 (1950). No mention was made of *Covey v. Sanders*, 351 U.S. 141 (1952), and its holding that notice to a known mental incompetent who is without the protection of a guardian does not measure up to the process that is due for a tax forfeiture of real property.

123. 578 F.2d at 679.

124. *Id.*

could prove at trial rendering the notice constitutionally deficient."¹²⁵ Given this holding, it is incredible that the court initially decided to release its decision as an unpublished opinion; a decision upholding the constitutionality of a state statute can hardly be described as devoid of precedential effect.¹²⁶

The procedures provided to the plaintiff in *Christopher v. United States Board of Parole*¹²⁷ were also held to be constitutionally adequate. There, a federal prisoner had been granted parole,¹²⁸ only to have the parole grant rescinded following adverse newspaper publicity and complaints from the sentencing judge and law enforcement officials.¹²⁹ The basis for rescinding the parole grant was "new information" received by the parole board from a person who implicated the prospective parolee in a robbery and a number of burglaries.¹³⁰

In a decision announced prior to the United States Supreme Court's evaluation of the liberty interest present in the parole release decision,¹³¹ the Seventh Circuit held that a federal prisoner "who has been given an effective date of parole does have some justifiable expectation sufficient to trigger the protections of the Due Process Clause."¹³² The "process that is due," however, did not include the right to confront and cross-examine the person whose unverified statements were the basis for rescinding the parole grant.¹³³

As Judge Swygert pointed out in his dissenting opinion, this result does not ensure that "the fact finding process is as complete and reliable as possible."¹³⁴ The panel majority, however, appeared willing to analogize the lack of cross-examination to the power of a sentencing judge to rely upon hearsay statements in imposing sentence.¹³⁵ The

125. *Id.* at 678.

126. The court's explanation for its decision to reissue its unpublished order as a published decision is brief: "The court has subsequently decided to issue the decision as an opinion." 578 F.2d at 674. Thus, it is unclear whether the opinion was published at the behest of one of the parties, at the request of "any person" as permitted by 7TH CIR. R. 35(d)(3), or by the court sua sponte.

127. 589 F.2d 924 (7th Cir. 1978).

128. *Id.* at 925.

129. *Id.* at 926.

130. *Id.* at 926 n.7.

131. In *Greenholtz v. Nebraska Penal Inmates*, 99 S. Ct. 2100 (1979), the Court rejected decisions holding that the granting of parole per se implicates a liberty interest, *see, e.g.*, *Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), and held that any liberty interest must appear from the statutes creating the parole system in question. Under the *Greenholtz* analysis, a federal prisoner has a liberty interest in the rescission of an unexecuted grant of parole by virtue of the United States Parole Commission regulations governing rescission hearings. 28 C.F.R. § 2.34 (1979).

132. 589 F.2d at 927.

133. *Id.* at 928-32.

134. *Id.* at 933 (Swygert, J., dissenting).

135. *Id.* at 932. *But see* *United States v. Harris*, 558 F.2d 366 (7th Cir. 1977), where the

result was that the prisoner fared no better than if the court had held that his parole grant had not involved a liberty interest.

EMPLOYMENT DISCRIMINATION

In its 1978-79 term, the Seventh Circuit decided a number of routine employment discrimination actions¹³⁶ which had been brought under title VII of the Civil Rights Act of 1964.¹³⁷ These cases are exceptional only in their continuation of the de novo review of the evidence standard first articulated by the Seventh Circuit in *Stewart v. General Motors Corp.*¹³⁸ Also, the court departed from decisions in other circuits¹³⁹ in holding that the time limitations of title VII for the filing of a charge of discrimination with the Equal Employment Opportunity Commission¹⁴⁰ are a jurisdictional prerequisite, rather than a statute of limitations which may be waived by the employer.¹⁴¹ The harshness of this rule was ameliorated in two subsequent decisions which held that this jurisdictional prerequisite could be satisfied by an EEOC charge filed by a third person.¹⁴²

The Seventh Circuit's most significant title VII decisions, *Ekanem v. Health & Hospital Corp.*¹⁴³ and *Burlington Northern Co. v. EEOC*,¹⁴⁴ are each a step backward from the court's longstanding regard for the

Seventh Circuit held that a criminal defendant is entitled to deny and rebut hearsay allegations of serious criminal misconduct presented to the sentencing judge. *Id.* at 375.

136. *Davis v. Weidner*, 596 F.2d 726 (7th Cir. 1979); *Roesel v. Joliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979); *Taylor v. Phillips Indus., Inc.*, 593 F.2d 783 (7th Cir. 1979).

137. 42 U.S.C. § 2000e (1976).

138. 542 F.2d 445, 449 (7th Cir. 1976) (independent examination of the evidence to determine whether defendant's conduct constitutes a violation of title VII). *Compare with* *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417-18 (1977) (review of district court's factual findings in discrimination case governed by "clearly erroneous" standard of FED. R. CIV. P. 52(a)).

139. On statute of limitations, *see Kirk v. Rockwell Int'l Corp.*, 578 F.2d 814, 818 (9th Cir. 1978); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (5th Cir. 1975).

140. Hereinafter referred to as EEOC. 42 U.S.C. § 2000e-5(d) (1970) required that an EEOC charge be filed within 90 days of the alleged discriminatory act. This time limit was changed to 180 days by the 1972 amendments to title VII, when the relevant provision was renumbered as 42 U.S.C. § 2000e(5)(e) (1976). The 1972 amendment applies to all charges still pending with the EEOC at the time of the enactment of the law. *See Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 242-43 (1976).

141. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1151 (7th Cir. 1978).

142. *Eichman v. Indiana State Univ. Bd. of Trustees*, 597 F.2d 1104, 1107-08 (7th Cir. 1979) (filing of EEOC charge by third person naming plaintiff as person aggrieved by retaliatory actions of employer sufficient to satisfy jurisdictional prerequisites of title VII); *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 361 (7th Cir. 1978), *cert. denied*, 432 U.S. 385 (1979) (starting date of title VII class action determined by first charge filed by class member, irrespective of whether or not earliest charge had been filed by named plaintiff).

143. 589 F.2d 316 (7th Cir. 1978).

144. 582 F.2d 1087 (7th Cir. 1978), *cert. denied*, 440 U.S. 1097 (1979).

broad remedy intended by Congress in title VII.¹⁴⁵ *Ekanem* illustrated the Seventh Circuit's de novo review of the evidence standard for appellate review in title VII cases and held as a matter of law that a district court is powerless to grant interim relief when an employee has been discharged in retaliation for the filing of an EEOC charge. *Burlington Northern* dealt with access to the investigative file compiled by the EEOC in reviewing employment discrimination charges, and held that at least prior to certification of a class, information about an employer's general employment policies may not be disclosed by the EEOC. Each decision is an anomaly which should eventually be corrected by the en banc court or by the United States Supreme Court.

Ekanem v. Health & Hospital Corp.

The Seventh Circuit's decision and reasoning in *Ekanem v. Health & Hospital Corp.*¹⁴⁶ is flatly at odds with the decision of the Ninth Circuit in *Smallwood v. National Can Co.*¹⁴⁷ Both cases were appeals from orders of the respective district courts granting an injunction to title VII plaintiffs.¹⁴⁸ The Ninth Circuit applied the "clearly erroneous" test¹⁴⁹ to the findings of the district court,¹⁵⁰ concluded that those findings were supported by sufficient evidence,¹⁵¹ and rejected the challenge to the sufficiency of the finding of irreparable harm¹⁵² on the ground that the injunction had been issued in response to a statutory provision, dispensing with any need for a further showing of irreparable harm.¹⁵³

In contrast to the accepted and ordinary approach to appellate review reflected in the Ninth Circuit's opinion, the decision of the Seventh Circuit in *Ekanem* reads almost as if the panel majority¹⁵⁴ were

145. See, e.g., *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976); *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971); *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

146. 589 F.2d 316 (7th Cir. 1978).

147. 583 F.2d 419 (9th Cir. 1978).

148. In *Smallwood*, a permanent injunction had been granted to a plaintiff who had been improperly denied reinstatement by a union in retaliation for having filed a title VII class action. *Id.* at 420. In *Ekanem*, a preliminary injunction had been granted, ordering the reinstatement of one plaintiff who had allegedly been discharged in retaliation for his filing of an EEOC charge, and prohibiting further retaliation against another employee who had supported the EEOC charge, and who had initially been discharged but then reinstated by the company. 589 F.2d at 317.

149. FED. R. CIV. P. 52(a). See *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

150. 583 F.2d at 420.

151. *Id.*

152. *Id.* at 420-21.

153. *Id.*

154. Judge Sprecher, dissenting, would have affirmed the grant of the preliminary injunction as within the district court's discretion. 589 F.2d at 322 (Sprecher, J., dissenting).

deciding the case in the first instance. The unsigned opinion for the panel majority¹⁵⁵ opened with a review of the proceedings in the district court, which had included a five and one-half day evidentiary hearing.¹⁵⁶ It is difficult to discern from the majority opinion the basis upon which the district court had found a reasonable probability that the plaintiffs would ultimately prevail on the merits.¹⁵⁷ The findings of the district court are described only in passing,¹⁵⁸ apparently because those findings had been adopted from proposed findings submitted by plaintiffs' counsel.¹⁵⁹ This denigration of the district court's findings of fact was unjustified—even if findings are “not the product of the workings of the district judge's mind, [they] are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence.”¹⁶⁰

The willingness of the panel majority to decide the case as in the first instance is shown in its discussion of “Insufficient Likelihood of Prevailing on the Merits.”¹⁶¹ After articulating the legal standard for proving a “disparate treatment case,”¹⁶² the majority analyzed the evidence in the light most favorable to the employer¹⁶³ and concluded that

155. The panel majority opinion was announced per curiam on behalf of Cummings and Wood, JJ., 589 F.2d at 317. No mention was made of the Ninth Circuit's opinion in *Smallwood v. National Can Co.*, 583 F.2d 419 (9th Cir. 1978).

156. 589 F.2d at 318.

157. The crucial finding, referred to in Judge Sprecher's dissent, *id.* at 322 (Sprecher, J., dissenting), appears to be that the company had a policy of “retaining and reassigning employees who were performing satisfactorily when their jobs were phased out.” *Id.* The district court apparently concluded that the company had failed to provide a sufficient explanation to justify its failure to have followed this policy for plaintiffs, who had been critical of the employer's personnel practices. This explanation for the district court's grant of a preliminary injunction, however, is nowhere to be found in the panel majority opinion.

158. *Id.* at 318-19.

159. *Id.* at 318.

160. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964).

161. 589 F.2d at 319-21.

162. *Id.* at 319-20. “Disparate treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.” *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

163. The panel majority's discussion of the likelihood of success on the merits contains absolutely no hint of the basis upon which the district court had granted a preliminary injunction. Instead, the panel majority discusses the employer's overall personnel practices, 589 F.2d at 320, the length of time between the plaintiffs' 1975 EEOC charge and the 1977 discharge, *id.*, the “bona fide business reason” for phasing out the plaintiffs' jobs, *id.*, and the testimony that discrimination had not been involved in a decision to hire another employee for a vacant position. *Id.* at 320-21.

The conventional starting point for appellate review is to view the record in the light most favorable to the prevailing party in the district court. *See, e.g.*, *Barnes v. St. Catherine's Hosp.*, 563 F.2d 324, 329 (7th Cir. 1977); *Aunt Mid, Inc. v. Fjell Oranje Lines*, 458 F.2d 713, 716-19 (7th Cir. 1972); *George v. American Airlines, Inc.*, 295 F.2d 311, 313 (7th Cir. 1961); *Lewis Machine Co. v. Aztec Lines*, 172 F.2d 746, 748 (7th Cir. 1959). Had the panel majority applied this princi-

the plaintiffs had failed to meet their burden.¹⁶⁴ The district court had reached the opposite result, but the panel majority provided no indication of what error had been committed by the district court. There is no suggestion that the district court applied an improper legal standard, nor is there a holding that any of the findings of fact made by the district court were clearly erroneous.¹⁶⁵

The "independent examination of whether defendant's conduct constitutes a violation of Title VII"¹⁶⁶ standard for review in cases where the plaintiff prevailed in the district court¹⁶⁷ is especially inappropriate in a case dealing with disparate treatment, as did *Ekanem*. It is a rare case in which an employee can obtain direct evidence of disparate treatment. Such claims are established, if at all, through inferential proof. It is the plaintiff's burden to present facts which support an inference that the employer's actions "are more likely than not based on the consideration of impermissible factors."¹⁶⁸ The employer may then show that there was a legitimate reason for the action,¹⁶⁹ a claim which may be rebutted by employee evidence showing that the claimed basis for the employer's decision is pretextual.¹⁷⁰

There is no indication in the opinion of the panel majority that the district judge in *Ekanem* failed to follow this framework. As Judge Sprecher stated in his dissenting opinion, the district court "found that the employer maintained a policy and practice of retaining and reassigning employees who were performing satisfactorily when their jobs

ple, it would have started its analysis of the likelihood of success on the merits from the same point as Judge Sprecher did in his dissenting opinion, *i.e.*, with the finding of the district court that "the employer maintained a policy and practice of retaining and reassigning employees who were performing satisfactorily when their jobs were phased out." 589 F.2d at 322 (Sprecher, J., dissenting).

164. Plaintiffs' burden was to show "a reasonable probability of success on the merits." *Id.* at 319, quoting *Kolz v. Board of Educ.*, 576 F.2d 747, 748 (7th Cir. 1978). The panel majority held that neither plaintiff had met this burden. 589 F.2d at 321.

165. These two areas delimit the task of a court of appeals: "If it concludes that the findings of the District Court are clearly erroneous, it may reverse them under FED. R. CIV. P. 52(a). If it determines that the District Court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417-18 (1977).

166. *Stewart v. General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976).

167. This standard has not always been applied in cases where the title VII plaintiff has not prevailed in the district court. *See, e.g., Barnes v. St. Catherine's Hosp.*, 563 F.2d 324, 328-29 (7th Cir. 1977), where in affirming the denial of title VII relief, the court of appeals stated the ordinary rules for appellate review: "We are not to redetermine the facts *de novo* upon appellate review. Where the evidence is in dispute, the prevailing party is entitled to have it viewed on review in the light most favorable to it." *Id.* at 329.

168. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978).

169. *See Board of Trustees v. Sweeney*, 439 U.S. 24 (1978).

170. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

were phased out.”¹⁷¹ This policy had not been followed when the jobs of the two plaintiffs in *Ekanem* had been phased out,¹⁷² and absent any evidence that the plaintiffs had not been performing satisfactorily,¹⁷³ it was permissible for the district court to infer that the employer’s dissatisfaction with the plaintiffs’ involvement in pending EEOC charges was the basis for their discharge.¹⁷⁴ The fact that the district judge made this inference after he had listened to five and one-half days of testimony¹⁷⁵ should entitle his finding to deference by the court of appeals, especially on review of an order granting a preliminary injunction.¹⁷⁶

The panel majority provided no indication why it was rejecting the district court’s inference of disparate treatment. While the panel majority might have decided the case differently had it been sitting as the district judge, this is not sufficient ground for reversal¹⁷⁷ under ordinary principles of appellate review. The Seventh Circuit’s decision in *Ekanem* thus suggests to successful title VII plaintiffs that they must be prepared to re-try their case on appeal, unless and until the court of appeals abandons the “independent examination” standard for appellate review.¹⁷⁸

The alternative holding in *Ekanem* is of even greater impact upon title VII plaintiffs: the panel majority held that as a matter of law a district court is powerless in the usual case to grant a preliminary injunction at the behest of an employee who has been discharged in violation of title VII.¹⁷⁹ This holding undermines the enforcement scheme fashioned by Congress in title VII, and is based on a questionable application of the United States Supreme Court’s decision in *Sampson v.*

171. 589 F.2d at 322.

172. A total of six jobs had been phased out, and three employees were immediately transferred to other positions. *Id.* at 319.

173. Evidence of unsatisfactory job performance was apparently not presented in the case.

174. Questions of “design, motive and intent with which men act” are uniquely for the district court. *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949). See, e.g., *Barnes v. St. Catherine’s Hosp.*, 563 F.2d 324 (7th Cir. 1977), where the Seventh Circuit expressed its unwillingness to interfere with the district court’s “refus[al] to draw an arguably permissible inference of racial discrimination.” *Id.* at 328.

175. 589 F.2d at 318.

176. This was the standard applied by the Seventh Circuit in another appeal from an order granting a preliminary injunction decided in its 1978-79 term, *Preston v. Thomas*, 589 F.2d 300 (7th Cir. 1978). That case concerned a “deadlock” imposed at an Illinois penitentiary following a serious riot. *Id.* at 302. The district court concluded that “no emergency existed justifying the continuation of the lock-up,” *id.*, and the court of appeals, noting that FED. R. CIV. P. 52(a) requires that “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses,” *id.*, refused to reject this finding as “clearly erroneous.” *Id.* at 302-03.

177. See note 167 *supra*.

178. See notes 167-68 *supra*.

179. 589 F.2d at 322.

Murray.¹⁸⁰

In *Sampson*, the basic claim was that a federal agency had failed to follow Civil Service Commission regulations in its decision to discharge a probationary employee.¹⁸¹ Before exhausting administrative remedies,¹⁸² the employee applied for relief from the district court, and succeeded in obtaining a preliminary injunction.¹⁸³ The United States Court of Appeals for the District of Columbia Circuit affirmed,¹⁸⁴ applying "the traditional standards governing more orthodox 'stays.'"¹⁸⁵ This, the United States Supreme Court held, was error: "Use of the Court's injunctive power, however, when discharge of probationary employees is at issue, should be reserved for [the genuinely extraordinary situation]."¹⁸⁶ On this basis, the Supreme Court held that the showing of lost wages and claim of damage to reputation "falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case."¹⁸⁷

Notwithstanding the careful limitation of *Sampson* to cases involving *probationary* federal civil service employees,¹⁸⁸ the panel majority of the Seventh Circuit in *Ekanem* read *Sampson* as applicable to "Title VII cases *generally*."¹⁸⁹ Such an application of *Sampson* is of questionable validity. *Sampson* involved a contract for personal services and the claim of the employee that the employer had committed a breach of that contract.¹⁹⁰ This claim was at issue before the Civil Service Commission, which was in a position "to weigh [the employee's] contentions

180. 415 U.S. 61 (1974).

181. Under Civil Service Commission regulations, a probationary employee may be dismissed simply "by notifying him in writing as to why he is being separated and the effective date of the action." 5 C.F.R. § 315.804 (1979). When, however, the discharge is to be "for conditions arising before appointment," *id.* § 315.805, notice of the reasons and an opportunity to be heard are required. 415 U.S. at 66. The employee in *Sampson* contended that her discharge was "for conditions arising before appointment," and that she had not been provided with the notice and opportunity to be heard required by 5 C.F.R. § 315.805. 415 U.S. at 66.

182. *Id.*

183. The district court initially granted a temporary restraining order until it could hear the testimony *ore tenus* of the person who had made the decision to discharge the employee. *Id.* The temporary restraining order was converted into a preliminary injunction when the government refused to produce the witness. *Id.* at 67.

184. *Murray v. Kunzig*, 462 F.2d 871 (D.C. Cir. 1972).

185. 415 U.S. at 83-84.

186. *Id.* at 92 n.68.

187. *Id.* at 91-92.

188. The Court's opinion in *Sampson* is carefully limited to cases involving probationary employees who complain only that their discharge violates Civil Service Commission regulations. *Id.* at 80. The Court stated that "[w]e are dealing in this case not with a permanent Government employee . . . but with a probationary employee." *Id.* at 81.

189. 589 F.2d at 321 n.13 (emphasis supplied).

190. 415 U.S. at 83 ("Respondent's only substantive claim . . . was that petitioners had violated the regulations promulgated by the Civil Service Commission.").

and to order necessary relief without the aid of the District Court injunction."¹⁹¹ A preliminary injunction was viewed as disruptive of the normal Civil Service Commission processes¹⁹² and, absent extraordinary circumstances, an improper interference with the government's internal affairs.¹⁹³

None of these considerations are involved in a title VII case where an employee is not suing for specific performance of an employment contract, but is maintaining a civil action to be "made whole" for the employer's alleged unlawful employment practices.¹⁹⁴ The EEOC is unable to provide any relief other than an attempt to conciliate the dispute.¹⁹⁵ When, as in *Ekanem*, the time period allowed by Congress for the EEOC's conciliation efforts has expired,¹⁹⁶ the employee (or former employee) has a statutory right to "seek relief through a private enforcement action in a district court."¹⁹⁷ In fashioning such relief, a district court may employ "full equitable powers."¹⁹⁸ Thus, in a title VII case, an application for a preliminary injunction should be judged by traditional standards governing more orthodox 'stays' without any need to show a genuinely extraordinary situation to establish irreparable harm.¹⁹⁹ This is precisely the standard articulated by Congress when it authorized the EEOC to seek a preliminary injunction "while the charge is pending,"²⁰⁰ and there is no reason why a different standard should be applied after a private enforcement action is filed.

Until it is reversed by the en banc court or by the United States Supreme Court, the rule adopted by the Seventh Circuit in *Ekanem* means that persons aggrieved by unlawful employment practices in Illinois, Indiana, and Wisconsin will be unable to obtain interim relief in a title VII case absent a genuinely extraordinary situation. Such a step backward from the remedy intended by Congress is regrettable.

191. *Id.* at 77.

192. *Id.* at 78.

193. *Id.* at 83 & 92 n.68.

194. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

195. The EEOC may also bring a civil action if it chooses to do so, after it has been unable to secure a conciliation agreement. See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358-60 (1977).

196. 42 U.S.C. § 2000e-5(f)(1) (1976) requires that the EEOC is entitled to 180 days to attempt to conciliate the charge and to bring its own action, failing which the employee may obtain a "right to sue" letter, and file a private action. In *Kamberos v. GTE Automatic Elec. Co.*, 603 F.2d 598 (7th Cir. 1979), the court held that back pay in a private enforcement action may not be obtained for the time after the EEOC has concluded that the complaint cannot be conciliated but before a "right to sue" letter is issued.

197. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1977).

198. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

199. *Sampson v. Murray*, 415 U.S. 61, 83-84 & 92 n.68 (1974).

200. 42 U.S.C. § 2000e-5(f)(2) (1976).

Burlington Northern Co. v. EEOC

The Seventh Circuit took another backward step from the remedy intended by Congress in its decision in *Burlington Northern Co. v. EEOC*.²⁰¹ At issue was section 709(e) of title VII²⁰² by which it is unlawful for the EEOC "to make public in any manner" any information which had been obtained by the EEOC in investigating title VII violations.²⁰³ The case arose after individual right to sue letters had been issued and several private class actions filed.²⁰⁴ The private litigants sought access to the EEOC national investigative file through a subpoena duces tecum,²⁰⁵ and the employer filed an independent action to enjoin release of the information.²⁰⁶

The jurisdictional basis for such a lawsuit is not clear.²⁰⁷ Section 709(e) does not explicitly create a private right of action,²⁰⁸ and the Seventh Circuit's discussion of the sparse legislative history of the statute²⁰⁹ fails to reveal any indication of congressional intent to create a private right of action.²¹⁰ Assuming, however, that the Seventh Circuit had jurisdiction to consider the merits of the company's claims, the correctness of its decision is far from clear.

In the view of the Seventh Circuit, the EEOC's ability to conciliate employment discrimination charges would be undercut if private litigants were permitted to obtain access to the investigative file.²¹¹ For this reason, the court held that at least "prior to certification of a class,"²¹² the EEOC could disclose only information "directly relevant

201. 582 F.2d 1097 (7th Cir. 1978).

202. 42 U.S.C. § 2000e-8 (1976).

203. Section 709 of title VII, 42 U.S.C. § 2000e-8(e) (1976) provides as follows:

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceedings under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.

204. Three potential, *i.e.*, as yet uncertified, class actions were pending at the time the case was before the Seventh Circuit. 582 F.2d at 1098 & 1098 nn. 2-4.

205. *Id.* at 1098.

206. *Id.*

207. The opinion refers merely to an "action to enjoin release of the information," *id.* at 1098, and does not discuss the jurisdictional issue.

208. *Cf. Touche Ross & Co. v. Redington*, 99 S. Ct. 2479 (1979) (Securities Exchange Act of 1934); *Chrysler Corp. v. Brown*, 440 U.S. 281 (1979) (Freedom of Information Act).

209. *See Sears, Roebuck & Co. v. EEOC*, 581 F.2d 941, 947 (D.C. Cir. 1978).

210. The only reference to the legislative history of section 709(e) in the Seventh Circuit's opinion is a footnote which recites that the section was contained in title VII as originally enacted in 1964. 582 F.2d at 1101 n.10.

211. *Id.* at 1100-01.

212. *Id.* at 1101.

to the individual plaintiff's claims."²¹³

The court of appeals recognized that its decision would hinder private efforts to negotiate and settle under title VII,²¹⁴ but concluded that this would be consistent with its perception of the intended role of the EEOC to be "the primary means of insuring equal employment opportunity."²¹⁵ This construction of title VII is contrary to the retention of a private right of action in title VII for "[a]n aggrieved person unwilling to await the conclusion of extended EEOC proceedings."²¹⁶ Nor does the Seventh Circuit's construction of title VII square with the congressional recognition during debate on the 1972 amendments to title VII²¹⁷ of "the enormous backlog of cases before the EEOC and the consequent delays of 18 to 24 months encountered by aggrieved persons awaiting administrative action on their complaints."²¹⁸

The Seventh Circuit's decision in *Burlington Northern* resurrects many of the arguments rejected by Congress' refusal to restrict private class actions in the 1972 amendments to title VII,²¹⁹ and is a hindrance to the implementation of the remedy intended by Congress in title VII. Although the court purported to limit its holding to situations "prior to certification of a class,"²²⁰ information about an employer's general policies may, under *McDonnell Douglas v. Green*,²²¹ be "directly relevant to the individual plaintiff's claims."²²² Thus, while *Burlington Northern* may be read as supporting a liberal application of the class action prerequisites of rule 23 of the Federal Rules of Civil Procedure in title VII cases,²²³ it increases the difficulty faced by a private litigant

213. *Id.*

214. *Id.*

215. *Id.* at 1102.

216. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 366 (1977).

217. 42 U.S.C. § 2000e (1976).

218. 432 U.S. at 369 (footnotes omitted).

219. In considering the 1972 amendments to title VII, Congress was asked by employers to limit private class actions under title VII to those persons who were specifically named in EEOC charges. See, e.g., *Hearings before the Subcomm. on Labor, Senate Comm. on Labor and Public Welfare on S.2515*, 92d Cong., 1st Sess. 261-62 (1971) (testimony of Gerald Smetana). While the Seventh Circuit recognized that Congress had rejected these arguments, 582 F.2d at 1101, it made no mention of the fact that this issue had been settled by the United States Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975).

220. 582 F.2d at 1101.

221. 411 U.S. 792 (1973).

222. The Seventh Circuit held that "[a]t least prior to certification of a class," information obtained by the EEOC in investigating an employment discrimination charge which is "involved" in a private title VII action—its test for disclosure under section 709(e)—"is only that directly relevant to the individual plaintiff's claims." 582 F.2d at 1101. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972), however, the United States Supreme Court held that information about an employer's "general policy and practice with respect to minority employment" would be relevant to an individual title VII action. *Id.* at 804-05.

223. Several courts have held that a title VII case may not be allowed to proceed as a class

who has accepted the invitation of Congress to prosecute a private enforcement action.²²⁴ As is true for the Seventh Circuit's decision in *Ekanem v. Health & Hospital Corp.*,²²⁵ further consideration by the en banc court or review of the issue by the United States Supreme Court is required to restore title VII within the Seventh Circuit to the remedy intended by Congress.²²⁶

IMMUNITIES

The 1978-79 published decisions of the Seventh Circuit illustrate the immunity rules fashioned by the United States Supreme Court for cases seeking money damages for the deprivation of federal rights. Judges²²⁷ and prosecutors²²⁸ are absolutely immune from suit, as are officials who are involved in decisions to initiate administrative proceedings.²²⁹ An affirmative defense of "good faith" is available to other defendants in accordance with common law principles,²³⁰ although such a defense is not available absent a common law basis or strong public policy reasons.²³¹

Absolute immunity was afforded to public defenders in *Robinson v. Bergstrom*.²³² There, appointed appellate counsel had failed to initiate a timely appeal on behalf of a convicted murderer,²³³ and six years

action absent a prima facie showing of class discrimination. *See, e.g.*, *Garrett v. R.J. Reynolds Indus., Inc.*, 81 F.R.D. 25 (M.D.N.C. 1978). By holding that information about an employer's policies is "not directly relevant" prior to class certification, 582 F.2d at 1101, the Seventh Circuit appears to reject the need for a showing of discrimination as a prerequisite for class certification.

224. The Seventh Circuit was of the opinion that the ability of a district court to appoint counsel to a title VII litigant, and the possibility that attorney's fees would be awarded to a litigant who prevailed, 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(k) (1976), substantially alleviated the difficulties resulting from non-disclosure of the EEOC investigative file. 582 F.2d at 1101. This conclusion is difficult to accept—even if counsel is appointed by the district court, funds must still be advanced to duplicate the discovery already present in the EEOC files, and the possibility of obtaining an award of attorney's fees in the future simply does not provide an incentive for counsel to duplicate work already done by the EEOC.

225. 589 F.2d 316 (7th Cir. 1979).

226. The Seventh Circuit acknowledged a conflict among the circuits. *Compare* *Sears, Roebuck & Co. v. EEOC*, 581 F.2d 941 (D.C. Cir. 1978) (followed by Seventh Circuit) *and* *EEOC v. Joseph Home Co.*, 607 F.2d 1075 (4th Cir. 1979) (following *Burlington Northern*) *with* *H. Kessler & Co. v. EEOC*, 472 F.2d 1147 (5th Cir.) (en banc), *cert. denied*, 412 U.S. 939 (1973) (disclosure permissible).

227. *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967).

228. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

229. *Butz v. Economou*, 438 U.S. 478, 515 (1978).

230. *See, e.g.*, *Procurier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state governor, state national guard officials); *Pierson v. Ray*, 386 U.S. 547 (1967) (police officers).

231. *See* *Downs v. Sawtelle*, 574 F.2d 1, 14 (1st Cir. 1978) (social worker not entitled to good faith immunity).

232. 579 F.2d 401 (7th Cir. 1978).

233. *Id.* at 402.

elapsed before, with the assistance of new counsel, the prisoner was able to secure an affirmance of his conviction.²³⁴ The prisoner brought a civil rights action,²³⁵ apparently on the theory that the delay in the appeal of his conviction had deprived him of federal rights.²³⁶

In affirming the district court's denial of relief, the court of appeals held first that public defenders act "under color of state law,"²³⁷ and then addressed the question whether the public defender is entitled to absolute immunity from suit.²³⁸ Implicit in this analysis is the assumption that a convicted defendant is entitled to a reasonably speedy appeal.²³⁹ The holding that public defenders act under color of state law lays the groundwork for an action seeking prospective injunctive relief if public defenders fail to furnish this right to convicted defendants.²⁴⁰

The Seventh Circuit's conclusion that public defenders are absolutely immune from suits brought under section 1 of the Civil Rights Act of 1871²⁴¹ was based upon the need for "encouragement of free exercise of discretion and recruitment of persons for public defender positions."²⁴² Similar arguments were subsequently rejected by the United States Supreme Court when raised on behalf of federal executive officials in *Butz v. Economou*,²⁴³ and the correctness of the absolute immunity fashioned in *Robinson* is unclear.²⁴⁴

The "good faith" immunities applied by the Seventh Circuit in its 1978-79 published decisions are less controversial.²⁴⁵ In *Chapman v.*

234. *Id.* The prisoner was convicted in 1968; his conviction was affirmed by the appellate court six years later in 1974.

235. 42 U.S.C. § 1983 (1976).

236. 579 F.2d at 403. The prisoner alleged that he had been denied access to various prison programs because of the delay and that he could not seek federal habeas corpus relief due to his failure to exhaust state remedies.

237. *Id.* at 403-08. The court adopted the "instrumentality theory" of *Chalfant v. Wilmington Inst.*, 574 F.2d 739 (3d Cir. 1978) (en banc), to hold that "[t]he fact that the Public Defender is a state instrumentality is sufficient to show state action." 579 F.2d at 408.

238. *Id.*

239. If, as the court held, it is not correct to consider the immunity question before determining if there was state action and therefore jurisdiction, *id.* at 403-04, it would also have been incorrect to consider the immunity question if the plaintiff had failed to allege a denial of federal rights.

240. *Cf. Smith v. Twomey*, 486 F.2d 736 (7th Cir. 1973) (state prisoner complaining of delay in adjudication of direct appeal; dismissal upheld because of pendency of argument of state appeal).

241. 42 U.S.C. § 1983 (1976).

242. 579 F.2d at 409.

243. 438 U.S. 478, 504-08 (1978).

244. This question may have been resolved by the United States Supreme Court's decision in *Ferri v. Ackerman*, No. 78-5981 (U.S. Dec. 4, 1979) where the Court held that an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit.

245. The same is true for the court's application of absolute immunities to the official who

Pickett,²⁴⁶ a prisoner sought money damages for violations of his first and eighth amendment rights.²⁴⁷ A good faith defense was available for the first amendment issues, because the rights involved had not been clearly established at the time of the wrongdoing.²⁴⁸ The same was not true for the eighth amendment violation, which the court held involved rights which had been clearly established since 1910, when the United States Supreme Court decided *Weems v. United States*.²⁴⁹

The same analysis was applied in *Buise v. Hudkins*,²⁵⁰ where the court held that the rights involved had been clearly established, thereby avoiding a defense of good faith.²⁵¹ A different immunity analysis was involved in *Davis v. Freels*.²⁵² There, the court was concerned with the basis upon which a police officer could justifiably use fatal force, and answered that question by reference to the common law defense for an assault action.²⁵³ *Davis* is of especial interest for its example of an excellent offer of proof of testimony by a ballistics expert.²⁵⁴

With the exception of *Robinson*, the Seventh Circuit's 1978-79 opinions dealing with immunities break no new ground. The same is not true for the exhaustion of remedies requirement fashioned by the court in *Secret v. Brierton*,²⁵⁵ discussed below.²⁵⁶

institutes bar disciplinary charges, *Kissell v. Breskow*, 579 F.2d 425 (7th Cir. 1978), and to prosecutors for acts done in connection with prosecutorial duties, *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), where the court found absolute immunity for acts done in connection with prosecution of criminal cases and good faith immunity for investigation and public statements. See *Daniels v. Kieser*, 586 F.2d 64 (7th Cir. 1978) (prosecutor who allegedly lied to obtain bench warrant), *cert. denied*, 441 U.S. 931 (1979).

246. 586 F.2d 22 (7th Cir. 1978).

247. The first amendment rights involved punishment for the exercise of religious beliefs—refusal to handle pork by a Black Muslim. *Id.* at 25. The eighth amendment violation consisted of disproportionate punishment for the prisoner's refusal to handle pork. *Id.* at 27-28.

248. *Id.* at 25-26, following *Procunier v. Navarette*, 434 U.S. 555 (1978).

249. 217 U.S. 349 (1910), discussed at 586 F.2d at 28.

250. 584 F.2d 223 (7th Cir. 1978).

251. *Id.* at 232-33.

252. 583 F.2d 337 (7th Cir. 1978).

253. *Id.* at 341. The standard adopted is that of 6 AM. JUR. 2d *Assault and Battery* § 161 (1963):

In a civil action for assault, the defendant's belief that the plaintiff intended to do him bodily harm cannot support a plea of self-defense unless it was such a belief as a reasonable person of average prudence would have entertained under similar circumstances. It is not necessary that the danger which gave rise to the belief actually existed; it is sufficient that the person resorting to self-defense at the time involved reasonably believed in the existence of such a danger, and such reasonable belief is sufficient even where it is mistaken. In forming such reasonable belief a person may act upon appearances. In other words, it is sufficient that the danger was reasonably apparent.

254. 583 F.2d at 343-45. In addition to presenting the opinion in the offer of proof, counsel presented testimony by the expert to support a finding under FED. R. EVID. 702 that the expert testimony presented "specialized knowledge" which would assist the jury. Exclusion of the expert testimony resulted in a new trial. *Id.* at 346.

255. 584 F.2d 823 (7th Cir. 1978).

256. See text accompanying notes 264-86 *infra*.

EXHAUSTION OF REMEDIES

In *Monroe v. Pape*,²⁵⁷ the United States Supreme Court held that state remedies need not be exhausted before a litigant seeks a federal remedy under 42 U.S.C. § 1983.²⁵⁸ This principle has been reaffirmed in numerous cases,²⁵⁹ notwithstanding complaints and innovative attempts to fashion an exhaustion requirement in section 1983 cases by the lower federal courts in response to prisoner civil rights cases.²⁶⁰

The Seventh Circuit's first attempt to fashion an exhaustion requirement for section 1983 cases came in 1976 in *Bonner v. Coughlin*.²⁶¹ There, with respect to a prisoner's claim that his property had been seized by prison guards, a divided panel of the Seventh Circuit held that there was no final taking of property as long as the prisoner could pursue a state remedy through the Illinois Court of Claims.²⁶² Rehearing was granted on this issue, and the en banc court rejected this quasi-exhaustion requirement.²⁶³

The Seventh Circuit's most recent attempt to apply an exhaustion requirement in section 1983 cases came last term in *Secret v. Brierton*.²⁶⁴ There, without any citation to the rejection of an exhaustion requirement by the en banc court in *Bonner*,²⁶⁵ a panel of the Seventh Circuit held that a prisoner must utilize prison grievance procedures before filing a civil rights action.²⁶⁶ Even assuming that, as the panel reasoned, its creation of an exhaustion requirement has not been foreclosed by the United States Supreme Court,²⁶⁷ and putting

257. 365 U.S. 167 (1961).

258. *Id.* at 183.

259. *E.g.*, *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975); *Allee v. Medrano*, 416 U.S. 802, 814 (1974); *Steffel v. Thompson*, 415 U.S. 452, 472 (1974); *Preiser v. Rodriguez*, 411 U.S. 475, 492 n.10 (1973); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971); *Damico v. California*, 389 U.S. 416, 417 (1967); *McNeese v. Board of Educ.*, 373 U.S. 668, 676 (1963).

260. *See, e.g.*, *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973), *rev'd* 516 F.2d 357 (4th Cir. 1975), *cert. dismissed as improvidently granted*, 426 U.S. 471 (1976).

261. 517 F.2d 1311, *aff'd in part on rehearing*, 545 F.2d 565 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932 (1978).

262. 517 F.2d at 1318 n.23 & 1318-20.

263. 545 F.2d at 568 n.7. *See id.* at 576-78 (Swygert, J., dissenting in part).

264. 584 F.2d 823 (7th Cir. 1978).

265. *Bonner* is cited only for its holding that negligent damage to property "would not state a claim under § 1983." *Id.* at 829.

266. *Id.* at 831.

267. The Seventh Circuit discussed several United States Supreme Court opinions to "extrapolat[e] . . . a non-rigid approach to the exhaustion approach." *Id.* at 828. This extrapolation borrowed heavily from one of the dissenting opinions in *McCray v. Burrell*, 516 F.2d 357, 375-77 (4th Cir. 1975) (Widener, J., dissenting in part), *cert. dismissed as improvidently granted*, 426 U.S. 471 (1976). The analysis stops with *Gibson v. Berryhill*, 411 U.S. 564 (1973), where the Court suggested that the question of whether exhaustion could ever be required in a section 1983 action was open. *Id.* at 574-75. Subsequent to *Gibson*, however, the United States Supreme Court has repeatedly made plain that exhaustion of state judicial or administrative remedies is not required

aside the conflict between the panel decision and the en banc decision in *Bonner*,²⁶⁸ there are several flaws in the court's exhaustion requirement.

First, the issue was apparently raised by the Seventh Circuit sua sponte after oral argument,²⁶⁹ and was decided by the court upon its analysis of the Illinois prison grievance procedure²⁷⁰ as well as its conclusion that the system was "capable of providing [the] remedy [sought by the plaintiff] within a reasonable time."²⁷¹ On its face, however, the grievance procedure does not provide any mechanism through which a prisoner may obtain money damages.²⁷² The fact is that on March 28, 1975, the Director of the Illinois Department of Corrections directed that no further grievances would be accepted "relating to the loss and/or destruction of residents' personal property," and that such matters should be directed by the prisoner to the Illinois Court of Claims.²⁷³ The adequacy of the Illinois grievance system is plainly a question of fact, and the clearly erroneous result reached by the Seventh Circuit when it resolved this question in the first instance shows the wisdom of the general rule that "factfinding is the basic responsibility of district courts, rather than appellate courts."²⁷⁴

Second, even if the Illinois grievance system provided a procedure through which a prisoner could obtain compensation for the loss of personal property, the grievance mechanism does not provide any means for the prisoner to be made whole for all of the damages which may have been incurred as the result of the wrongful taking of property. For example, in *Bonner v. Coughlin*,²⁷⁵ even though the prison had replaced the property which had been wrongfully seized,²⁷⁶ the prisoner was nonetheless entitled to seek damages from a jury for mental distress incurred upon discovery that his property had been

in a section 1983 action. *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975); *Steffel v. Thompson*, 415 U.S. 452, 472 (1974).

268. See note 262 *supra*.

269. 584 F.2d at 825.

270. The Seventh Circuit apparently limited its analysis to the express provisions of Illinois Department of Corrections Administrative Regulation 845. See 584 F.2d at 831-32.

271. *Id.* at 831.

272. The regulation provides that the chief administrative officer (prison warden) and the director of corrections may decide what action, if any, to take in response to a grievance. See ILLINOIS DEPARTMENT OF CORRECTIONS ADMINISTRATIVE REGULATION 845, § II(G), § II(N), reprinted at 584 F.2d at 831-32.

273. Memorandum, March 28, 1975, Chief of Administration, Illinois Department of Corrections to All Wardens (copy on file with the Chicago-Kent Law Review).

274. *DeMarco v. United States*, 415 U.S. 449, 450 (1974).

275. 517 F.2d 1311 (7th Cir. 1975), *aff'd in part on rehearing*, 545 F.2d 565 (7th Cir. 1976) (en banc).

276. 517 F.2d at 1314.

seized.²⁷⁷

The Seventh Circuit's holding in *Secret v. Brierton*²⁷⁸ that the prison grievance procedure is sufficiently adequate²⁷⁹ to require that it be exhausted is inconsistent with the court's opinion in *Fulton Market Cold Storage Co. v. Cullerton*.²⁸⁰ There, the court was primarily concerned with whether a section 1983 damage action was barred by the Tax Injunction Act of 1937.²⁸¹ After holding that the damage action was not barred,²⁸² the court turned to the question of whether abstention should be required because the plaintiff had not exhausted state remedies.²⁸³ In addition to applying the general rule that exhaustion is not required in a section 1983 action,²⁸⁴ the court observed that the state remedy could not afford complete relief because interest and attorneys' fees were unavailable.²⁸⁵ Under this reasoning, the prison grievance procedure in *Secret* is inadequate because it fails to provide the possibility that the prisoner could obtain damages for the loss of the use of improperly seized property or for emotional distress resulting from the seizure, damages which are recoverable in a section 1983 action.²⁸⁶ Thus, *Secret* is another instance where an unwarranted departure from accepted and ordinary principles awaits correction by the en banc court or by the United States Supreme Court.

CONCLUSION

Only a sampling of the cases decided by the Seventh Circuit in 1978-79 have been discussed in any detail. In its published opinions, the court applied conflicting standards in determining whether a property right was created by statutes or regulations,²⁸⁷ and in the title VII²⁸⁸ and prisoner civil rights²⁸⁹ cases the court announced decisions which apply an apparently erroneous standard of appellate review to factual determinations and fashioned rules which are of questionable

277. On remand, Bonner obtained a jury verdict in the amount of one hundred dollars as compensatory damages. *Bonner v. Coughlin*, No. 73 C 1468 (N.D. Ill. March 30, 1979).

278. 584 F.2d 823 (7th Cir. 1978).

279. *Id.* at 831.

280. 582 F.2d 1071 (7th Cir. 1978).

281. 28 U.S.C. § 1341 (1977).

282. 582 F.2d at 1074-80.

283. *Id.* at 1080-81.

284. The court stated that there is "no reason why this § 1983 action should be treated differently from others where exhaustion is not required." *Id.*

285. *Id.*

286. *See Carey v. Piphus*, 435 U.S. 247, 264 (1978).

287. *See* text at notes 85-109 *supra*.

288. *See* text at notes 136-226 *supra*.

289. *See* text at notes 264-86 *supra*.

validity. On the whole, however, the Seventh Circuit scrupulously applied decisions of the United States Supreme Court, and the few decisions of doubtful validity presumably will be ultimately corrected by the en banc court of appeals or by the Supreme Court.