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Civil Liberties: Desegregation, Prisoners' Rights and Employment Discrimination in the Seventh Circuit

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CIVIL LIBERTIES: DESEGREGATION, PRISONERS' RIGHTS AND EMPLOYMENT DISCRIMINATION IN THE SEVENTH CIRCUIT

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When the Supreme Court of the United States decides great questions of individual liberty, the Court enjoys, among its many responsibilities, the luxury of articulating large principles of constitutional democracy. When the courts of appeals deal with similar issues, their parts are often the less glamorous work of applying those large principles to the resolution of stubbornly diverse and occasionally petty disputes. So it is with many of the cases discussed in this survey of the Seventh Circuit's work in civil liberties law during the 1977-78 term. The Supreme Court has said that school districts must be desegregated only to the extent necessary to undo earlier deliberately racial decisions,[1] that the votes of citizens should be substantially equal,[2] and that individuals maintain a zone of privacy free from unjustified governmental regulation;[3] to the United States Court of Appeals for the Seventh Circuit has fallen the questions of how one school district came to have racially identifiable schools, of what to do about council districting in Indianapolis, and of whether a school bus driver may wear a beard.

DESEGREGATION

Few constitutional issues excite the public temper so much as does the question of whether to bus school children to correct racial imbalances. The public schools of Indianapolis are far from unique, but their desegregation process so far has consumed ten years of litigation

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1. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 418 U.S. 717 (1974).

2. Reynolds v. Sims, 377 U.S. 533 (1963).

3. Griswold v. Connecticut, 381 U.S. 479 (1965).

with little prospect of soon being resolved.[4] There was never much doubt that some deliberately segregative decisions had been made by officials. Under familiar principles of contemporary desegregation cases, the presence of *de jure* segregation in one part of the system places an often unmeetable burden of proof on the defendant to disprove segregative intent in other parts.[5] Thus, the important question has been remedial.

The district court's remedial orders have twice been formulated just before important new statements of principle by the United States Supreme Court. The first major pupil transportation decree[6] required student reassignments throughout the metropolitan area, including the Indianapolis Public School District, the remainder of Marion County, and some areas beyond the county line. After the Supreme Court's decision in *Milliken v. Bradley*,[7] prohibiting court-ordered interdistrict transportation of pupils for purposes of desegregation in the absence of special circumstances, it clearly became necessary to discontinue busing outside Marion County.[8]

The question then became whether the transportation should be limited to the Indianapolis Public School District or should extend throughout Marion County. The problem largely grew out of the so-called Uni-Gov measure, which reorganized urban government so as to make the city of Indianapolis coextensive with Marion County.[9] The school district, however, was not included in the consolidation. The result was an unlawfully segregated school district within a larger city. In the district court's judgment, the black population of Marion County is so substantially within the Indianapolis School District that an effective remedy for school segregation must include those sections of the city of Indianapolis (*i.e.*, Marion County) outside the school district. An earlier order[10] to that effect recently was remanded by the Supreme Court for reconsideration in light of *Washington v. Davis*,[11] giving rise to this year's installment in the case.

4. *See generally* the excellent discussion in Marsh, *The Indianapolis Experience: The Anatomy of a Desegregation Case*, 9 IND. L. REV. 897 (1976).

5. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

6. United States v. Board of School Comm'rs, 368 F. Supp. 1191 (S.D. Ind. 1973), *rev'd on rehearing*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

7. 418 U.S. 717 (1974).

8. *See* United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

9. The reorganization included some exceptions not relevant here. *See generally* 47 IND. L.J. 101 (1971).

10. United States v. Board of School Comm'rs, 541 F.2d 1211 (7th Cir. 1976), *vacated*, 429 U.S. 1068 (1977).

11. 426 U.S. 229 (1976).

In *Washington v. Davis*, the United States Supreme Court held that a conclusion of unconstitutional racial discrimination required a finding of intentional governmental action; a disparate impact on some racial group, although sometimes *evidence* of intention, is not, in itself, unconstitutional discrimination. Accordingly, county-wide busing in Indianapolis must be predicated upon a finding that by failing to consolidate the Indianapolis schools there has been some intention to discriminate. The problem is the definition of intention. Intention is indisputably present when one acts both with actual knowledge that an action will cause a certain result and with the subjective desire for the known consequence.[12] If this is the standard required by *Washington v. Davis*, the establishment of county-wide busing for Indianapolis would require an evidentiary finding that those who adopted Uni-Gov did so for the basest motives. Such proof would be practically impossible. However, the law also has evolved, and sometimes applied, the drastically different conception that one intends the natural and probable consequences of one's actions.[13] This approach would allow county-wide busing in Indianapolis if the perceivable effect of excluding the schools from consolidation was racial imbalance—as of course it was.[14]

Choosing between the first, or subjective, idea of intention and the second, objective, view is not purely a logical enterprise.[15] The social choice is between deference to state officials[16] and acceptance of strong judicial authority.[17] The doctrinal choice is between a broad or narrow reading of *Washington v. Davis*. Nothing in the Supreme Court's opinion shows the way and the Seventh Circuit's opinion in *United States v. Board of School Commissioners*[18] reflects the differing points of view. Judge Swygert holds to the objective definition,[19] Chief Judge Fairchild to a modified version of the subjective,[20] and Judge Tone to

12. *See, e.g.*, MODEL PENAL CODE § 2.02(2)(a)(i) (Official Draft, 1962).

13. *See* Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644.

14. *See* 368 F. Supp. at 1204. The discussion in the text deals with the action of the state legislature in exempting the schools from consolidation. Similar issues are raised by the county government's limitation of public housing project construction to the central school district—that is, the issue is one of "intention."

15. *See* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

16. For example, their decisions stand unless they belong to the Klan—the subjective standard parodied.

17. For example, the state's defenses are unnatural and improbable unless the judge thinks the same way—the objective standard parodied.

18. 573 F.2d 400 (7th Cir. 1978).

19. *See* 573 F.2d at 411.

20. *See* 573 F.2d at 415 (Fairchild, J., concurring).

the view that the litigation has gone on long enough without clear issue.[21] Surely it is enough for purposes of the present survey to say that the choice is fundamental and as yet unmade.[22]

PRISONERS' RIGHTS

Much of the work of the United States Court of Appeals for the Seventh Circuit continues to deal with the rights of prisoners. Two recent cases explored the effects of the United States Supreme Court's decision in *Moody v. Daggett*.[23] In *Solomon v. Benson*,[24] the court overruled in part an earlier decision[25] which had held that the procedural standards of the due process clause were applicable to classification of a prisoner as a "special offender" if that classification affected eligibility for transfers, furloughs, and minimum security programs.[26] The *Solomon* opinion reasoned that "[t]he mere extension to prisoners of institutional programs by established prison policy"[27] did not merit due process protection, after the Supreme Court's decision in *Moody* that such programs have "no legitimate statutory or constitutional entitlement sufficient to invoke due process."[28]

However, the Seventh Circuit found it unnecessary in *Reddin v. Israel*[29] to interpret the scope of *Moody*. At the time of that appeal, Reddin was incarcerated at the Wisconsin State Prison in Waupun for a 1974 manslaughter conviction. At the time of his Wisconsin conviction, Reddin was on parole from Kentucky. Reddin challenged a detainer placed against him by the Kentucky Parole Board that requested the Wisconsin warden to notify the Board thirty days before Reddin's release. Reddin claimed that, because of the detainer, he was restricted to a maximum security classification instead of being eligible for minimum security confinement.[30] The District Court for the Eastern District of Wisconsin gave Reddin summary judgment[31] on his al-

21. *See* 573 F.2d at 416 (Tone, J., dissenting).

22. Meanwhile, the case has once again been remanded to the district court for further factual findings.

23. 429 U.S. 78 (1976). *Moody* held that a federal parolee, imprisoned for federal crimes clearly constituting parole violations, was not constitutionally entitled to an immediate parole revocation hearing, where a parole violator warrant was issued and lodged with the institution of his confinement as a "detainer" but was not executed.

24. 563 F.2d 339 (7th Cir. 1977).

25. Holmes v. United States Bd. of Parole, 541 F.2d 1243 (7th Cir. 1976).

26. 563 F.2d at 343. The court expressly reserved the question in cases when such a classification affects eligibility for parole. *Id.* at 343 n.7.

27. *Id.* at 342-43.

28. 429 U.S. at 88 n.9.

29. 561 F.2d 715 (7th Cir. 1977).

30. *Id.* at 717.

31. Reddin v. Gray, 427 F. Supp. 386 (E.D. Wis. 1977).

legation that he had been denied due process because the Wisconsin prison had given effect to a detainer which had been issued without a prompt parole revocation hearing by the Kentucky officials. The United States Court of Appeals for the Seventh Circuit found summary judgment inappropriate, since the defendant alleged that Reddin would not be eligible for minimum security classification even in the absence of the detainer. In so doing the court stated, "[I]t is not possible on this record to decide whether any adverse effect resulting from the detainer, standing alone, results in a grievous loss to Reddin in the constitutional sense."[32]

In another case, however, the court of appeals adopted a standard broadly protective of prisoners' rights, to be applied in connection with adverse institutional decisions. In *Ware v. Heyne*,[33] an inmate brought a section 1983[34] action against state correctional officials who allegedly denied him due process of law by not giving him advance written notice of the charges against him in a prison disciplinary proceeding. The officials argued that the severity of the plaintiff's deprivation should be judged by "focusing solely on the impact of the discipline that Ware actually received after the hearing, rather than on the potential loss that Ware could have received.[35] The District Court for the Southern District of Indiana found for the plaintiff and awarded him damages and injunctive relief.[36] The Seventh Circuit affirmed, holding that the "potential diminishment"[37] of a prisoner's chances to obtain clemency or parole, rather than the actual impact of a challenged practice, is the standard to be used in deciding whether there is a "grievous loss"[38] cognizable under the due process clause. Applying the broader standard and relying on the Indiana Reformatory *Inmate Handbook*, the court of appeals concluded that the violation with which the plaintiff was charged could have subjected him to penalties including loss of good time and segregation from other inmates. These penalties were deemed sufficient loss to invoke the due process clause.

Furthermore, the court applied the rule in *Procunier v. Navarette*[39] that a "good faith" defense to section 1983 damage awards is unavailable where the constitutional right in question was "clearly established" and the defendants "knew or should have known of the existence of the

32. 561 F.2d at 718.
33. 575 F.2d 593 (7th Cir. 1978).
34. 42 U.S.C. § 1983 (1976).
35. 575 F.2d at 595.
36. *Id.* at 594.
37. *Id.* at 595.
38. *Id.*
39. 434 U.S. 555 (1978).

right and that their conduct violated that right."[40] Since the requirement of written notice to prisoners of charges against them clearly had been established in *United States ex rel. Williams v. Twomey*,[41] the court rejected the officials' defense of good faith.

In yet another case, however, the court rejected several challenges to the proceedings by which probation may be revoked for alleged subsequent law violations. In *United States v. Smith*,[42] the Seventh Circuit expressly adhered to the law of other circuits[43] that "a district court may revoke probation when 'reasonably satisfied' that the probationer has violated a condition of his probation,"[44] even though the defendant later was acquitted of the state court charge. The court of appeals also held that admission of hearsay evidence at probation revocation hearings is harmless error where the evidence does not contain "a damaging identification"[45] and where another witness who is available for cross-examination testifies on the same subject matter.[46] Without having to decide the question, the court concluded in dictum that even a suggestive lineup at probation revocation hearings would be relevant to the question of whether the evidence is sufficient to support a finding of a probation violation.[47]

EMPLOYMENT DISCRIMINATION

The employment discrimination cases decided by the United States Court of Appeals for the Seventh Circuit during the past term illustrate the variety and breadth of the issues more than they expound a particular doctrinal theme. Employment discrimination litigation has moved beyond instances of overt discrimination on the basis of race or gender; recently, the court has decided issues concerning the legality of grooming policies, mandatory retirement, antinepotism rules, and the validity of statistical proof in disparate impact cases. The statutory bases of the cases are as varied as the subject matter.

40. 575 F.2d at 595-96.
41. 479 F.2d 701 (7th Cir. 1973).
42. 571 F.2d 370 (7th Cir. 1978).
43. *E.g.*, United States v. Chambers, 429 F.2d 410 (3d Cir. 1970).
44. 571 F.2d at 372.
45. *Id.* at 374.
46. This is a familiar point of evidence, even in more formal proceedings. *Cf.* FED. R. EVID. 803(24).
47. The court cited for dictum the opinion in Gagnon v. Scarpelli, 411 U.S. 778 (1973). Although that case does recognize that not all procedures at probation revocation hearings must match those of a criminal trial, the Supreme Court's opinion does not directly support the proposition that unreliable evidence may nonetheless be relevant.

Pence v. Rosenquist

In *Pence v. Rosenquist*,[48] the Court of Appeals for the Seventh Circuit held that the suspension of a public school bus driver violated the due process clause of the fourteenth amendment. Michael Pence was employed by the school district both as a tenured mathematics teacher and as a part-time bus driver. After growing a "neat and groomed"[49] mustache, Pence was suspended from his bus driver duties—although not from his teaching position—pursuant to a state policy requiring a "neat and clean appearance."[50] He sued the school district superintendent, assistant superintendent, and the members of the school board for damages. The defendants moved to dismiss on the grounds that (1) the school board in its capacity as a municipal corporation was not subject to liability under section 1983, (2) there was no jurisdiction for the suit because the plaintiff had failed to meet the $10,000 statutory requirement for such suits,[51] and (3) the individual school board members were immune from liability. The district court granted the defendants' motion to dismiss on the first two grounds but allowed action against individual school board members under section 1983. On the merits the trial court held that any "liberty" interest Pence had in his appearance was too minor to warrant federal court intervention. The court of appeals reversed, holding that a motion to dismiss based on defendants' immunity should have been denied and that defendants had not adequately justified their grooming policy. The court stated that on remand defendants would be given the "opportunity to plead and prove justification if they can."[52]

Before discussion of the court's ruling on the section 1983 immunity issue, one preliminary point not raised in the court of appeals should be mentioned. Even though there was already reason in 1976 to question the district court's dismissal of the action against the school board because the board was a municipal corporation and because the plaintiff had failed to meet the requisite amount in controvery, the United States Supreme Court decision of June 1978 in *Monell v. Department of Social Services*[53] makes it clear that a damage action under section 1983 may be maintained against any municipal corporation.

48. 573 F.2d 395 (7th Cir. 1978).
49. *Id.* at 396.
50. The Illinois Office of Education indicated that the policy was a general statement of grooming for school personnel and not a specific prohibition of beards and mustaches. *Id.* at 397. It was unclear whether the modified district policy of no beards or mustaches was a regular, well-known policy, but the court of appeals assumed that it was. *Id.* at 396-97.
51. 28 U.S.C. § 1331 (1976).
52. 573 F.2d at 400.
53. 98 S. Ct. 2018 (1978).

Yet *Monell* does not determine the breadth of immunity in the *Pence* case.[54] To resolve this issue, the court of appeals relied on an extension of *Wood v. Strickland*.[55] In *Wood*, the Supreme Court held that, in the context of school discipline, a school board member is not immune from liability for damages under section 1983 if he or she had reason to know that the disciplinary action taken would violate the constitutional rights of the student. The Seventh Circuit had previously extended the *Wood* immunity standard to actions affecting the constitutional rights of teachers and administrators.[56] Without discussion, the *Pence* court stated that there was no reason not to extend that immunity principle to include part-time school district bus drivers.[57] The extension is probably correct because the policies resolving the immunity question concern the government official, not the victim.[58]

On the merits, the court of appeals held that Pence had a constitutionally protected liberty interest in his appearance and that the school board's anti-mustache policy was irrational and arbitrary, in violation of the fourteenth amendment's due process clause.[59] To reach this decision the court rejected as too sweeping one of its earlier decisions, *Miller v. School District No. 167*,[60] which held, as did the trial court in *Pence*, that any liberty interest in appearance is too minor to be constitutionally protected. The Seventh Circuit court also distinguished the present case from *Kelley v. Johnson*,[61] a 1976 Supreme Court decision that upheld a similar grooming policy for police officers.[62]

The result in *Pence* is interesting for three reasons. First, after the court of appeals' decision, some public employees now have a constitutionally protected right to have a mustache, while others do not. The

54. *Id.*

55. 420 U.S. 308 (1975).

56. *See* Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976).

57. 573 F.2d at 398.

58. There is flexibility to decide a government official's liability in terms of a particular plaintiff. Liability depends on a finding that the official acted in ignorance or disregard of settled, undisputable law. Whether the law is settled often depends on the status of the victim, and whether the official knew or should have known the law often depends on the nature of the alleged violation. *See* Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

59. The court stated that the analysis and result would be the same under the equal protection analysis. *But see* discussion in text accompanying note 59 *infra*.

60. 495 F.2d 658 (7th Cir. 1974). In an opinion by then Judge Stevens, the court upheld the discharge of a teacher for reasons of dress and grooming.

61. 425 U.S. 238 (1976).

62. The *Kelley* Court assumed that personal appearance was a constitutionally protected liberty interest. *Id.* at 244-45, 249 (Powell, J., concurring). *But see Id.* at 250-53 (Marshall, J., dissenting). The *Pence* court used that assumption to withdraw the holding of *Miller*, but did not explain how the state's justification supporting the policy in *Kelley* was distinguishable from the state's justification in *Pence*.

position or job is determinative. One suspects that the reason the Seventh Circuit considered the school board policy in *Pence* irrational was that the policy applied to Pence as a bus driver but not as a classroom teacher. This logic is not supported by *Kelley*, however, which considered the job and the employment context relevant. In any event, given the typical standard of review, it is difficult to distinguish legitimate state interests concerning police officers from legitimate state interests concerning school bus drivers.

The second point of interest is the Seventh Circuit's standard of review. Generally, state regulation not involving a fundamental right or a suspect classification is subject to the most lenient standard of review. Courts not only have accepted any state purpose to uphold a state regulation, but have even supplied a purpose that the state might have considered.[63] Because the defendants in *Pence*, as in *Kelley*, offered the justification of community attitudes for its policy,[64] one would assume the validity of the grooming policy under the traditionally lenient standard of review.

Third, it is interesting that if Pence had challenged, as gender-based discrimination, the validity of the grooming policy under Title VII of the Civil Rights Act of 1964,[65] he probably would have lost. The courts of appeals have considered grooming policies under Title VII and now are uniform in their approach: although application of a grooming standard may have a disparate impact on male employees,[66] such discrimination is insignificant[67] and not of the kind Congress had

63. *See* Dandridge v. Williams, 397 U.S. 471, 486 (1970); Allied Stores v. Bowers, 358 U.S. 522, 530 (1959); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 563 (1947).

64. 573 F.2d at 398.

65. 42 U.S.C. §§ 2000e—2000e-15 (1970 & Supp. V 1975).

66. The theory is that hair length regulations and grooming standards discriminate on the basis of sex either because employers do not apply the same rules to women, or because the rules disproportionately burden men. In instances where men and women compete for the same jobs (*i.e.*, positions not subject to the statutory bona fide occupational qualification defense), the no beard rule (or other grooming policy) has a disparate impact on men. Traditionally, under the theory of disparate impact, such a rule would violate Title VII unless it was justified by business necessity or was related to job performance. (The distinction between business necessity and job performance is explored in the text at note 96 *infra*.) In the grooming cases the courts have either sustained employer arguments of business necessity or concluded that such policies do not sufficiently inhibit equal employment opportunity and thus do not violate Title VII. On the other hand, it is clear that such policies are not defensible simply because the policy does not exclude all males. *See* cases cited at note 68 *infra*.

67. By contrast, Title VII is more successfully utilized where, for example, women are fired from jobs because of pregnancy or the adoption of children. This was the impetus of the litigation in Airline Stewards & Stewardessess Ass'n v. American Airlines, Inc., 573 F.2d 960 (7th Cir. 1978), *petition for cert. filed*, 46 U.S.L.W. 3781 (U.S. June 12, 1978) (No. 77-1758), in which the court of appeals held that the possibly onerous effect of retroactive seniority does not impose a special investigative burden on trial courts approving Title VII settlements.

in mind in enacting Title VII.[68]

The court indicated its doubt that the defendant school board would be able to justify its grooming policy on remand. One suspects that justifications paralleling those in *Kelley* will not be sufficient, especially in light of the court's higher standard of review; but to the extent the court finds the policy irrational because it applies to bus drivers and not classroom teachers, the school board might extend its grooming policy to all employees.[69]

Gault v. Garrison

A more fundamental potential conflict with the Supreme Court is illustrated by *Gault v. Garrison*,[70] in which the Court of Appeals for the Seventh Circuit struck down as unconstitutional a state mandatory retirement policy. Julia Gault, a tenured biology teacher over the age of sixty-five, alleged that the defendant school board's policy of mandatory retirement at age sixty-five violated her rights to equal protection and due process under the fourteenth amendment.[71] The district court granted defendant's motion to dismiss, but on appeal the

68. *See, e.g.*, Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (*en banc*); Knott v. Missouri Pac. R.R. Co., 527 F.2d 1249 (8th Cir. 1975); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973).

69. The court's withdrawal of *Miller*, *supra* note 60, leaves open the question whether the school board may apply a no beard policy to classroom teachers.

70. 569 F.2d 993 (7th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3681 (U.S. April 24, 1978) (No. 77-1517).

71. Ms. Gault filed suit under 42 U.S.C. § 1983 (1970). Neither the validity of the cause of action nor immunity was an issue in this case. *See* discussion accompanying note 58 *supra*.

The plaintiff did not allege a violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976) [hereinafter ADEA] because at the time of filing the statute did not cover state and local government employers, and the prohibitions were limited to individuals between the ages of 40 and 65. In 1974 the Act was amended to cover state and local governments, 29 U.S.C. § 630(b) (1976); and in 1978 the Act was amended to extend the prohibitions to individuals between the ages of 40 and 70, Pub. L. No. 95-256, 92 Stat. 189 (to be codified at 29 U.S.C. § 631(a)), except that bona fide executives or policymakers, Pub. L. No. 95-256, 92 Stat. 189 (to be codified at 29 U.S.C. § 631(c)(1)), or tenured employees at higher education institutions, Pub. L. No. 95-256, 92 Stat. 189 (to be codified at 29 U.S.C. § 631(d)), may be compelled to retire at age 65.

For Judge Pell, in dissent, the congressional policy embodied in the ADEA was persuasive evidence that the state's mandatory retirement policy was not unconstitutional. However, the congressional decision to prohibit discrimination between the ages of 40 and 65 (now 70) for private as well as public employers does not determine the constitutionality of employment policies of the state.

The ADEA also allows an employer to discriminate on the basis of age in those instances where age is a bona fide occupational qualification (bfoq). 29 U.S.C. § 623(f)(1) (1976). The availability of this defense often turns on the adequacy of individual testing mechanisms. *See* Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom.* Brennan v. Greyhound Lines, Inc., 419 U.S. 1122 (1975) (employer's refusal to hire individuals over the age of 35 as intercity bus drivers lawful since evidence demonstrates relationship of age and ability,

court of appeals reversed. The Seventh Circuit treated the constitutional issues in *Gault* within the framework of *Massachusetts Board of Retirement v. Murgia*,[72] a recent United States Supreme Court decision upholding the constitutionality of a policy of mandatory retirement at age fifty for state police officers.[73] In so doing, the Seventh Circuit attempted to distinguish the facts in *Gault* from those in *Murgia*. It is questionable, however, whether the facts in these two cases are distinguishable in the way indicated by the Seventh Circuit.

In *Murgia*, the Supreme Court applied the rational basis test to uphold the constitutionality of a Massachusetts statute requiring retirement of the state's uniformed officers at age fifty. The plaintiff alleged that the statute violated the equal protection clause of the fourteenth amendment by disqualifying him from continued employment despite his fitness. A three-judge court agreed with the plaintiff, holding the statute irrational in the context of a scheme that assessed the capabilities of officers individually by annual physical examinations.[74] The Supreme Court agreed with the lower court that the rational basis test was the appropriate standard of review,[75] but disagreed with the court's conclusion that the state had failed to establish that the age classifica-

and individual testing not available). The bfoq exception is discussed in Note, *Age Discrimination in the Employment Act of 1967*, 90 HARV. L. REV. 380, 400 (1976), and note 85 *infra*.

72. 427 U.S. 307 (1976).

73. This term, the United States Court of Appeals for the Seventh Circuit also decided a mandatory retirement case brought under the ADEA. In Minton v. Whirlpool Corp., 569 F.2d 1012 (7th Cir. 1978), the plaintiff challenged the validity of his mandatory retirement pursuant to a company retirement plan. Since the Supreme Court had upheld the validity of such action in United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977), the Court affirmed the district court's grant of defendant's motion for summary judgment. However, the 1978 amendments to the ADEA reverse the *McMann* Court's interpretation of the statute. These amendments provide that it is lawful for an employer to make different benefits available upon retirement depending on the employee's age upon hiring, but that (1) no employee benefit plan shall excuse the failure to hire a covered individual and (2) no seniority system or benefit plan shall require or permit the involuntary retirement of a covered individual. Pub. L. No. 95-256, 92 Stat. 189 (to be codified at 29 U.S.C. § 623(f)(2)).

74. 376 F. Supp. 753 (D. Mass. 1974). Initially, the district court dismissed plaintiff's complaint seeking a three-judge court on the ground that the complaint did not allege a substantial constitutional question. 345 F. Supp. 1140 (D. Mass. 1972). The United States Court of Appeals for the First Circuit, in an unpublished opinion, set aside that judgment and directed that a three-judge court be convened.

75. The Court rejected the use of a strict scrutiny test since it found that age is not a suspect classification and that government employment is not a fundamental right. 427 U.S. at 312-14. The Court's refusal to treat age as a suspect classification may be justified by distinguishing age and racial classifications and acknowledging the reasons for strict scrutiny in race cases. There are several reasons for strict scrutiny where race is involved that do not apply where age is the issue. First, unlike racial minorities, the aged have not experienced a history of purposeful unequal treatment. Second, age does not define a discrete and insular minority, because everyone, in the normal course of events, will be a particular age. Third, and apparently most persuasive to the Court, generalizations on the basis of age and ability are more likely to be factually correct than generalizations on the basis of race. *See* Note, *The Age Discrimination in the Employment Act of 1967*, 90 HARV. L. REV. 380, 386 (1976).

tion was rationally related to legitimate state interests.[76] Massachusetts justified the statute on the basis that it protected the public by assuring the physical preparedness of its uniformed police. Conceding that not all police officers were physically unfit at age fifty, the Court accepted the generalization that there is a factual correlation between age and ability. The Court read the testimony below as establishing that the activities of uniformed police are rigorous and demanding, that "the risk of physical failure . . . increases with age, and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group."[77] The fact that the state assessed the capabilities of officers individually by annual examination did not defeat the program's rationality, but augmented it, since "the legislative judgment to avoid the risk posed by even the healthiest 50-year-old officers would be implemented by annual examinations between ages 40 to 50 which serve to eliminate those younger officers who are not at least as healthy as the best 50-year-old officers."[78]

In *Gault*, the United States Court of Appeals for the Seventh Circuit applied the rational basis test, as directed by the Supreme Court, but found that the state's retirement policy for teachers was not supported by any identified state interest. Assuming that the state purpose was to prevent the retention of unfit teachers,[79] the court rejected the adequacy of that purpose and noted the lack of evidence supporting the relationship between age and teacher fitness.[80]

The court of appeals distinguished the facts of *Gault* from those of *Murgia* in two ways. First, the court viewed teaching as mentally, rather than physically, demanding. The court did not assume that mental ability decreased with age. Instead, it accepted the plaintiff's allegation that essential knowledge and experience is gained through years of practice. Second, the court considered the consequence of an unfit police officer more likely to be irreparable than that of a teacher:

76. Justice Marshall dissented on the basis that the Court should reject mechanical application of the rational basis test whenever strict scrutiny is inappropriate. He argued that in order to sustain the legislation defendants must show a reasonably substantial interest and a scheme reasonably closely tailored to achieving that interest. In this case Justice Marshall agreed that the purpose of mandatory retirement is legitimate and compelling, but viewed the means chosen as over-inclusive and the availability of less restrictive alternative means as particularly relevant. 427 U.S. at 325 (Marshall, J., dissenting).

77. 427 U.S. at 311.

78. *Id.* at 316 n.10.

79. Judge Pell, in dissent, offered a second reason supporting the mandatory retirement policy: the surplus of teachers and a desire to open up more job opportunities. 569 F.2d at 999-1000 (Pell, J., dissenting). The court did not decide whether this reason was permissible.

80. 560 F.2d at 996.

> [I]f a teacher becomes unfit, whether because of age or other factors, it does not become a matter of such immediacy that there is no time or opportunity to take appropriate procedural steps for his or her removal. If the procedures normally taken for removal of an allegedly unfit teacher are used, there is greater assurance that unfit teachers will be removed while the rest will be able to continue performing their jobs, putting to use the experience and knowledge gained over the years.[81]

It is unclear from the Seventh Circuit opinion what the state must do to sustain its burden of proof. Under the traditional rational basis test, the assumed state interest in removing unfit teachers would be sufficient, and the courts would not require the state to use the narrowest means available for achieving that appropriate end.[82] In *Murgia*, there was evidence to support the general notion that physical ability diminishes with advancing age. The state introduced no such evidence to support its conclusion in *Gault*. Although the court appears to reject the possibility of such proof,[83] there may at some point be a demonstrable nexus between age and mental ability. On the other hand, in *Murgia* there was no indication that individual testing was inadequate to eliminate unfit police officers. It is unclear whether similar individualized testing is possible to determine mental ability, but the court in *Gault* suggested that the mandatory retirement program was irrational because normal procedural safeguards were available to remove unfit teachers of any age.[84] To the extent the Supreme Court accepts factually supported generalizations concerning age and ability in the face of individualized testing, it appears that the defendant in *Gault* could uphold its age requirement by factually supporting its age-ability generalizations, even though individual procedures are available.[85]

81. *Id.*

82. *See* cases cited at note 63 *supra*.

83. 569 F.2d at 996.

84. *Id.* Justice Marshall apparently agrees. *See* 427 U.S. at 327 n.8 (Marshall, J., dissenting). The availability of these procedures for removal was another basis on which Ms. Gault alleged she was denied equal protection. The court of appeals held that the distinction between teachers afforded procedural safeguards prior to termination and those not afforded such safeguards also must be justified by a legitimate state interest.

85. In employment cases brought under Title VII, 42 U.S.C. §§ 2000e—2000e-15 (1970 & Supp. V 1975), the availability of individual testing makes the acceptance of generalized notions of ability unreasonable, while the inadequacy of tests to determine ability on an individual basis supports the use of such generalizations. This distinction typically arises in terms of the bona fide occupational qualification (bfoq). 42 U.S.C. § 2000e-2(e) (1970 & Supp. V 1975). *Compare* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 n.5 (5th Cir. 1969), *with* Bowe v. Colgate Palmolive Co., 272 F. Supp. 332, 357 (S.D. Ind. 1967), *rev'd*, 416 F.2d 711 (7th Cir. 1969). Under a narrow interpretation of the bfoq exception, an employer may exclude all women from a particular job only if women are unable to perform, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971), or, less restrictively, if all or substantially all women are unable to do the job, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). The bfoq defined in terms

One point emerges from a reading of *Pence* and *Gault*. The Seventh Circuit, like the Supreme Court, is not mechanically applying the rational basis test and accepting any conceivable state interest to uphold noneconomic regulations.[86] As Justice Marshall says in his dissent in *Murgia*, this stricter standard of review is laudable.[87] Better yet would be the formal adoption of this standard, under which cases could be more effectively presented and results more realistically evaluated.

Yuhas v. Libbey Owens Ford Co.

A different exclusionary device, a no spouse rule, was upheld in *Yuhas v. Libbey Owens Ford Co.*[88] The defendant company had a policy against hiring as an hourly employee the spouse of a present hourly employee.[89] After being denied jobs on the basis of the rule, Dorothy Yuhas and Nancy Anderson, wives of the defendant's employees, challenged the rule as sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[90] The district court found the policy violative of the statute, but the court of appeals reversed. The primary disagreement between the courts was over the defendant's burden of proof.

The district court found that the plaintiffs had established a prima facie case by showing the disparate impact of the no spouse rule, which had disqualified seventy-one women and three men.[91] Attempting to justify the rule in the face of its impact, the company introduced evidence that (1) hourly employees married to each other were absent or tardy more often than other workers, (2) employment of both partners caused administrative problems in scheduling vacations and work as-

of job performance is similar, though not identical, to the rational basis test, for if an employment criterion predicts job success, the criterion is surely rational.

86. *See* cases cited at note 63 *supra*.

87. *See* 427 U.S. at 317-18 (Marshall, J., dissenting). *See also* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). For the best statement of the opposite view *see* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

88. 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978).

89. The company policy did not apply to executives nor did the company terminate an hourly employee who married another hourly employee. Whether these exclusions affect the validity of the policy is discussed at note 98 *infra*.

90. 42 U.S.C. §§ 2000e—2000e-15 (1970 & Supp. V 1975).

91. The defendant first argued that the plaintiff had not established a prima facie case because the disparate impact theory of discrimination should not apply to cases of sex discrimination. The court rejected the argument that the Supreme Court decision in General Electric v. Gilbert, 429 U.S. 125 (1976), which held that the exclusion of pregnancy from a company disability plan did not violate Title VII, limits the disparate impact theory of discrimination to race cases. Rather, the court noted that subsequent to the *Gilbert* decision the Court explicitly affirmed the applicability of the disparate impact theory to sex discrimination in Dothard v. Rawlinson, 433 U.S. 321 (1977), holding that an Alabama prison guard minimum height and weight requirement, which had a disparate impact on women, was not job related.

signments because both partners wanted the same vacation and shift assignments, and (3) employment of both partners undermined employee morale and efficiency because the relationship between the spouses interfered with their relationships with other workers. The district court found the defendant's evidence unconvincing and, therefore, insufficient to satisfy the defendant's burden of proving that the rule was job related. The court of appeals upheld the lower court's findings concerning the first two justifications, but reversed the finding concerning employee morale and efficiency.

The trial court concluded that the defendant had not shown that the no spouse rule was related to job performance, measured by the level of production. The Seventh Circuit agreed that there was no evidence of a nexus between the no spouse rule and the level of production, but rejected the level of production as the sole determinant of job performance. First, the court of appeals assumed that the rule intangibly improves the work environment since it is "generally a bad idea to have both partners in a marriage working together."[92] Second, it examined the "animating spirit"[93] of *Griggs v. Duke Power Co.*,[94] and held that *Griggs* invalidated only those employment practices with a disparate impact that place "women at a disadvantage because they failed to develop certain personal characteristics as a consequence of their environmental or genetic backgrounds."[95]

92. 562 F.2d at 499.

93. *Id.*

94. 401 U.S. 424 (1971). *Griggs*, the first Supreme Court decision interpreting Title VII, rejected motive as the sole trigger of a violation of Title VII, and established the rule that an employment criterion with a disparate impact must be job related. In *Griggs*, the defendant company had to establish that the intelligence test cutoff score and high school diploma requirement predicted successful job performance. *Griggs* was reaffirmed in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), which added that, if the defendant established the job relatedness of an employment criterion with a disparate impact, the plaintiff had the opportunity to show that another test or device without the undesirable impact would adequately serve the employer's legitimate business interests. *Griggs* and *Albemarle Paper* have been used to invalidate most employment rules having a disparate impact and not job related. Most litigation has focused on whether the plaintiff established a sufficiently disparate impact or whether the employer met its burden of proof, rather than whether the theory of *Griggs* and *Albemarle Paper* is applicable to a particular employment standard. *See* cases discussed in SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 104-65 (1976).

Another Seventh Circuit case this term, United States v. City of Chicago, 573 F.2d 416 (7th Cir. 1978), found there was "no merit" to the contention that subsequent cases modified the *Griggs* and *Albermarle Paper* rule that a prima facie case may be established without a showing of discriminating purpose. The case was remanded on the issue of the legality of written examinations and subjective efficiency ratings alleged to discriminate against the promotion of blacks and Hispanics in the Chicago Fire Department. The court of appeals found that the district court misapprehended the nature of the "content validity" test, did not give sufficient deference to the E.E.O.C. "criterion validity" guidelines, and should have gone beyond "face validity" in its analysis of "efficiency ratings."

95. 562 F.2d at 500.

The court of appeals appeared to accept the trial court's standard and allocation of proof that the defendant must show that an employment practice with a disparate impact is job related. In typical disparate impact cases, the employer must show that a particular employment criterion, such as a minimum height and weight requirement, is related to how well employees perform their jobs; for example, the state might prove that big and strong people make better prison guards. However, in *Yuhas* both courts agreed that there was no evidence to show that the no spouse rule improves job performance or affects productivity. On the other hand, not all employment practices are designed to measure an employee's job skills. Some employment practices are adopted to better the overall profitability of a business. It is arguable that *Griggs* allows this broader defense of business necessity, as distinguished from a more specific job skills analysis.[96] In accepting the employer's no spouse rule, the Seventh Circuit may have implicitly rejected the narrow definition as the only defense to any employment practice with a disparate impact. However, the broader defense of business necessity is still measured by productivity in the sense of profitability.

Essentially, the court upheld the validity of the no spouse rule because it agreed with the employer's assumption that the rule is a "good idea."[97] It is unclear, however, what employer interest this good idea protects.[98] Rather it seems that if the no spouse rule were in fact a

96. Such a distinction is suggested in 85 HARV. L. REV. 1482 (1972), which criticizes a district court for construing *Griggs* as authorizing only those employment criteria that predict success with respect to specific job skills. The article points out that the essential employer interest is making a profit, and that job performance alone is of little interest to the employer. Although the federal courts have not explicity adopted the distinction, various decisions are premised on the acceptance of a broader business necessity defense. *See, e.g.*, Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975) (absolute refusal to consider for employment any person convicted of a crime other than traffic offense violates Title VII); Lane v. Inman, 509 F.2d 184 (5th Cir. 1975) (revocation of taxi driver permit for marijuana conviction upheld since "obviously" related to decision of entrusting the operation of taxicabs); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (*en banc*), *cert. denied*, 406 U.S. 950 (1972) (total ban on hiring persons with prior criminal convictions violates Title VII but lawful to consider recent convictions); Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972) (discharge of bellman because of previous conviction for theft and receiving stolen goods does not violate Title VII).

Any defense not related to job performance must be carefully articulated to avoid allowing any employer interest to justify unintentional discrimination, and thereby dilute the effect of *Griggs*. For example, customer or co-worker preference is a legitimate employer concern that may affect the profitability of a business. However, to allow this interest to justify the denial of jobs to blacks or women would encourage boycotts of employers who hire black or women employees, defeating Title VII's purpose of eliminating societal discrimination. *See* 85 HARV. L. REV. 1482, 1486-88 (1972).

97. 562 F.2d at 499-500.

98. The court listed four reasons in support of the assumption that it is generally a bad idea to have both partners in a marriage working together. First, the marital relationship generates

good idea, the absence of the rule would affect productivity or, at least, the administrative costs of maintaining the same level of productivity would be unreasonable. Since the court accepted the assumptions implicit in the no spouse rule, rather than demanding factual support, the court's conclusion that the rule improves employee morale and creates a pleasant work environment is unconvincing to those who question the underlying assumptions.[99]

The second part of the court's justification for its decision, its analysis of the spirit of *Griggs*, is also unsettling. The court read *Griggs* as meaning that the reason an employment criterion has a disparate impact is relevant to the level of proof needed to show that criterion's relation to job performance or the broader business interest of the employer. However, it is difficult to understand how the reason women are generally shorter than men,[100] or the reason fewer blacks have high school diplomas than whites,[101] is relevant to an employer's burden of proof if the height or diploma requirement has a disparate impact. The critical question under Title VII is whether height or a diploma is likely to predict success on a particular job, making reasonable a requirement that restricts equal employment opportunity. In the same way, the validity of the no spouse rule does not depend on why the rule

intense emotions that would interfere with a worker's job performance. This reason assumes that although in typical situations a worker can put aside these feelings during work, the presence of the spouse makes such an accommodation impossible. The basis of neither assumption is explored. Second, the court reasoned that resolution of grievances would be hampered because both spouses would take the same side in a dispute over a grievance involving one spouse. It is unclear why the assumed loyalty would hamper resolution of grievances unless one spouse was a union steward or in a position of authority over the other spouse. The court's third reason is similar: numerous problems would arise if one spouse were promoted to a supervisory position. This potential conflict of interest could be resolved by a more narrowly drawn rule, as in other employment situations, *i.e.*, that employees may not exercise supervisory authority over spouses or other members of the family or that supervisory evaluations must be made by someone else. Fourth, the court reasoned that a no spouse rule eliminates the possibility that the already employed spouse will interfere in the hiring process on behalf of the other spouse. Any such interference would only be possible if the employer allowed it. However, the appearance of impropriety may be a sufficient worry. Also, it may be that a decision on the merits is more difficult simply because there is already a personal relationship with one spouse.

The first three reasons offered by the court are equally applicable to already employed persons who marry, but the no spouse rule does not apply to that situation. The fourth reason is applicable to other close relationships, such as parents, aunts and uncles, but again the employer's rules do not affect these relationships. The disturbing part of the court's analysis is that these reasons, offered in support of an assumption, are themselves unproven assumptions.

99. Many university affirmative action plans, for example, reject antinepotism rules. In *Yuhas* the fact that the company did not apply its rule to executives and present hourly employees who marry raises a question concerning how good an idea the no spouse rule is. Arguably the reasons for the no spouse rule are at least as applicable to those employees excluded from the rule as to those covered employees.

100. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977).

101. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

disproportionately affects women if it is job related or protects a legitimate business interest.[102] To the extent that any disparate impact is the result of intentional racial or sexual discrimination, the court may be less likely to accept as legitimate various articulated business interests.[103]

Employment practices such as the one raised in *Yuhas* represent difficult questions concerning the standard and allocation of proof applicable in Title VII litigation. Clearly, the Seventh Circuit is correct in recognizing that not all employer defenses are capable of expression in statistical terms, and that job skill is not the only legitimate employer concern. On the other hand, these problems of application do not warrant accepting the assumption that a no spouse rule is valid without some evidence of its effect; nor do they warrant limiting the scope of *Griggs* in terms of the burden of proof depending on the reason for a rule's disparate impact. The result in *Yuhas* has the potential effect of justifying most unintentional dicriminatory employment practices, thereby stifling rather than animating the essence of *Griggs*.

CONCLUSION

This article has examined civil rights and civil liberties cases decided by the United States Court of Appeals for the Seventh Circuit during its 1977-78 term. These decisions have confronted issues of desegregation, prisoners' rights and employment discrimination. Some

102. The reason for the impact would be relevant if the definition of discrimination were limited to intentional discrimination. But *Griggs* and *Albemarle Paper, supra* note 94, and *Dothard, supra* note 91, reject that limitation for the purposes of Title VII. The reason for the impact may also play a part in determining whether an employment criterion has a sufficiently disparate impact to trigger the analytical framework of *Griggs*. However, the reason for the impact should not change the allocation or the standard of the burden of proving job relatedness or business necessity.

103. The court stated, "This would be a different case if plaintiffs had shown that defendant historically employed more men than women . . . because it intentionally discriminated against women." 562 F.2d at 500. It is difficult to articulate the doctrinal basis in *Yuhas* which would lead to a different result in this hypothetical case, since a valid job related employment criterion is a defense to intentional discrimination as well as to disparate impact discrimination. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Previous exclusion of women on the basis of sex, however, would ease the plaintiff's burden of establishing the disparate impact of the rule. Moreover, a finding that the employer had intentionally excluded women would generally be accompanied by a court order to take affirmative action to eliminate the effects of the illegal behavior. In such a case a no spouse rule may be eliminated if the court finds that it too greatly impairs affirmative action results. On the other hand, it may not be necessary to invalidate a no spouse rule if sufficient numbers of single women and women married to non-defendant employees are available.

of these issues have been resolved; others will continue to be litigated. Some of the Seventh Circuit's decisions have followed doctrines enunciated by the Supreme Court. Others put the court of appeals in potential conflict with the Supreme Court and may require further clarification.