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CONSTITUTIONAL LAW

I. MUNICIPAL LIABILITY FOR CIVIL RIGHTS VIOLATIONS

A. INTRODUCTION

In *Molina v. Richardson,*[1] the plaintiff filed a civil rights action against two Los Angeles police officers seeking compensatory and punitive damages pursuant to 42 U.S.C. section 1983[2] for alleged violations of his constitutional rights.[3] He named as an additional defendant the City of Los Angeles and sought damages from the city under the principle of vicarious liability, as the employer of the police officers, based, in part, on section 1983 and on the general "federal question" jurisdiction statute, 28 U.S.C. section 1331.[4] The city was granted a dismissal for failure to state a cause of action and the case against the officers resulted in a jury award of $65.75 compensatory damages against each of them.[5] Molina appealed the dismissal of the claim against the city. The Ninth Circuit, in affirming the dismissal, held that section 1983 precludes municipal liability based solely on the

1. 578 F.2d 846 (9th Cir. July, 1978) (per Wallace, J.; Grant, D.J., sitting by designation filed a dissenting opinion; the other panel member was Wright, J.).

2. 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Molina had been stopped by the police officers while driving in Los Angeles because the rear license plate of his automobile lacked a current registration sticker. He showed the sticker to the officers and gave an explanation. A dispute arose and Molina was forcibly removed from the vehicle by the officers, handcuffed, taken to the police station, and booked for resisting arrest. No charges were filed against him. The alleged violations included his "Fourth Amendment right to be free from arrest unless based upon probable cause, his guarantee under the Fifth and Fourteenth Amendments against deprivation of liberty without due process of law, and his right to be free from cruel and unusual punishment under the Eighth Amendment." 578 F.2d at 847.

4. 42 U.S.C. § 1331 (1976) provides in relevant part: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." Molina alleged damages in excess of $10,000 and, to meet the "federal question" requirement, asserted that "a cause of action for vicarious liability . . . may be inferred directly from the text of the Fourteenth Amendment." 578 F.2d at 848.

5. *Id.* at 847.

doctrine of respondeat superior and refused to find such cause of action arising directly from the fourteenth amendment.[6]

B. Municipal Liability under the Civil Rights Statutes

Pursuant to section five of the fourteenth amendment, and partially in response to unredressed violence against former slaves in the post-Civil War South,[7] Congress enacted the Ku Klux Klan Act of 1871, now codified as 42 U.S.C. sections 1981-1985 (the Act). It was not until ninety years later, in *Monroe v. Pape,*[8] that the United States Supreme Court expanded the scope of the Act by its interpretation of the phrase "under color of" state law.[9] The Court held that section 1983 granted a cause of action for damages against police officers who had allegedly violated plaintiffs' constitutional rights.[10]

In so doing, however, the Court limited the scope of potential defendants to individuals.[11] Relying primarily on the Congressional Debates surrounding the unsuccessful Sherman Amendment to the Act, the *Monroe* Court concluded that the 1871 Congress did not intend that local governments be included in the definition of "person" for purposes of section 1983.[12] The Court granted municipal governments absolute immunity from liability under the section.[13]

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6. *Id.* at 848.

7. Monroe v. Pape, 365 U.S. 167, 171-73 (1961).

8. 365 U.S. 167 (1961).

9. Quoting with approval the meaning given to "under color of" state law in United States v. Classic, 313 U.S. 325, 326 by Justice Stone (later Chief Justice): "[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 365 U.S. at 184.

10. *Id.* at 187. The Monroe family had been awakened in the middle of the night by thirteen Chicago police officers who broke into their home, ordered Mr. and Mrs. Monroe and their children into the living room, ordered them to strip naked, emptied the closets and drawers during a "search" throughout the home, and finally took Mr. Monroe to the police station where he was held for 10 hours without seeing a magistrate, and finally released without charges being filed. *Id.* at 169.

11. *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 Harv. L. Rev. 1534 (1972); Kates and Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act,* 45 S. Cal. L. Rev. 131 (1972); Note, *Damages Remedies Against Municipalities for Constitutional Violations,* 89 Harv. L. Rev. 922 (1976).

12. "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." 365 U.S. at 191 (footnote omitted).

13. *Id.* at 187.

While some lower courts avoided the harsh result of *Monroe v. Pape* by finding a cause of action against municipalities derived directly from the Constitution,[14] the Supreme Court, in *Moor v. County of Alameda,*[15] adhered to its holding in *Monroe* that a municipality is not a "person" under section 1983. In *Moor,* Justice Marshall, writing for eight members of the Court, held that the county was immune from liability notwithstanding a California statute making the county vicariously liable for the acts of its officers.[16]

Finally, seventeen years after the *Monroe* decision, in *Monell v. Department of Social Services,*[17] the Supreme Court reviewed once again the legislative history of the Act and decided that the *Monroe* Court had misinterpreted the intent of Congress, and overruled that portion of the holding in *Monroe v. Pape* which granted absolute immunity to municipal governments.[18] The *Monell* Court held that municipalities are, in fact, "persons" for purposes of section 1983.[19]

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14. *See* note 48 *infra.*

15. 411 U.S. 693 (1973).

16. One of the plaintiffs, Rundle, had attempted to hold the county liable through 42 U.S.C. § 1988, which provides, in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they . . . are deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts.

42 U.S.C. § 1988 (1970). His argument was that § 1983 was insufficient to vindicate his rights in that municipalities were immune from liability and that, therefore, California's vicarious liability statute should govern by way of § 1988. The Court held that the state's statute was inconsistent with federal law and § 1988, therefore, was not applicable. 411 U.S. at 706. The logic of this holding was somewhat strained by the particular facts of the case. Two plaintiffs, Moor and Rundle, were allegedly injured by the wrongful discharge of a shotgun by an Alameda County deputy sheriff while engaged in quelling a civil disturbance. *Id.* at 695. The cases were consolidated for purposes of appeal. *Id.* at 698. Moor was not a citizen of California and had relied on diversity jurisdiction. *Id.* at 696. Based on diversity jurisdiction, Moor was permitted to maintain his action for damages pursuant to California law for constitutional violations for which Rundle had no remedy. *Id.* at 721.

17. 436 U.S. 658 (1978).

18. *Id.* at 663.

19. *Id.* at 690. *See* Note, *Liability of State and Local Governments Under 42 U.S.C.*

In *Monell,* a class of female employees of New York City's Board of Education and Department of Social Services sued the city, the Board, the Department, and certain individuals in their official capacities for alleged violations of their constitutional rights by defendants' policy of forcing pregnant employees to take unpaid leaves of absence before medically necessary. The action was based upon section 1983.[20]

The Court meticulously re-examined the legislative debates on the Act of 1871 and determined that the *Monroe* Court's reliance on the rejection of the Sherman Amendment was misplaced.[21] In addition, only a few months prior to passage of the Ku Klux Klan Act, Congress had passed the Dictionary Act in which the word "person" is defined to "include corporations . . . as well as individuals."[22] Two years prior to the enactment of both Acts municipal corporations were included in the definition of corporations.[23] Thus, the *Monell* Court overruled the holding in *Monroe* that municipalities enjoy absolute immunity under section 1983.

Although vicarious liability was not an issue in *Monell,* as all individuals were sued only in their official capacities and the alleged violations resulted from government policy, the *Monell* Court concluded

> that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.[24]

The *Monell* Court, although not compelled to do so under the facts before it, denied any liability of municipalities based on the doctrine of respondeat superior.[25]

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§ 1983, 92 HARV. L. REV. 311 (1978).

20. 436 U.S. at 660-61.
21. *Id.* at 669.
22. 1 U.S.C. § 1 (1970); *see* 436 U.S. at 689 n. 53.
23. *Id.* at 688, *citing* Cowles v. Mercer County, 74 U.S. 118, 121 (1868).
24. 436 U.S. at 694.
25. *Id.*

C. Damages Actions Arising Directly out of the Constitution

In *Bell v. Hood,*[26] the Supreme Court decided that federal courts have jurisdiction to entertain actions for damages for the invasion of constitutional rights. In that case, plaintiffs brought, an action against FBI agents for alleged violations of plaintiffs' fourth and fifth amendment rights to be free from unreasonable searches and seizures and deprivation of liberty without due process.[27] The district court dismissed, and the Ninth Circuit affirmed, for want of federal jurisdiction under 28 U.S.C. section 41(1) (now 28 U.S.C. section 1331), the general "federal question" jurisdiction statute.[28] The Supreme Court reversed, holding that "where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit."[29] The *Bell* Court did not decide whether a cause of action for damages may be had directly out of the Constitution.

The opportunity to decide the second question, whether alleged deprivation of constitutional rights would give rise to a cause of action for damages not expressly authorized by statute, came before the Court in 1971, in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics.*[30] In an opinion written by Justice Brennan, the Court answered that question in the affirmative.[31] The case arose under a similar fact situation as that in *Bell v. Hood.* Plaintiff sued federal narcotics agents for alleged violations of his fourth and fifth amendment rights and sought damages in excess of the jurisdictional requirement as a result of defendants' unlawful conduct. The district court dismissed, and the Second Circuit affirmed, on the ground that the complaint failed to state a cause of action.[32]

In reversing, the Supreme Court made clear the fact that the fourth amendment protects citizens from unreasonable searches

26. 327 U.S. 678, 684-85 (1946).
27. *Id.* at 679.
28. *Id.* at 680.
29. *Id.* at 681-82. The two possible exceptions are (1) where the federal claim is immaterial and asserted only to obtain jurisdiction; and (2) where the claim is frivolous. *Id.* at 682-83.
30. 403 U.S. 388 (1971).
31. *Id.* at 397.
32. *Id.* at 390.

and seizures "carried out by virtue of federal authority"[33] and that the guarantee is not dependant upon a remedy provided by the state in which the violation occurred.[34] Acknowledging that special factors, in some cases, might call for hesitation in finding a cause of action directly out of the Constitution "in the absence of affirmative action by Congress,"[35] the Court found no such factors in *Bivens*.[36]

Justice Harlan, in his concurring opinion found the question involved to be "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted."[37] He determined that damages would be the only possible remedy for Bivens, and based his decision on (1) the inadequacy of state tort law remedies; (2) sovereign immunity barring suit against the agents' employer; (3) the inadequacy of injunctive relief; and (4) the irrelevance of the exclusionary rule.[38]

The *Bivens* decision was interpreted almost immediately as a possible route around the harshness of the *Monroe* decision.[39] The rationale was that due to municipal immunity from section 1983 liability (at least prior to *Monell*) the courts should infer "necessity" of a direct cause of action arising directly out of the fourteenth amendment against municipalities. State remedies may be inadequate.[40] In addition, section 1983 actions against the responsible officials, rather than the municipal employer, are often only illusory. The difficulty of identifying the responsible individual, the lack of financial means to support a judgment, and the broad "good faith" defense of officials acting within the scope of their employment often prevent plaintiffs from pursuing their claims against the responsible individuals.[41] Similarly, jurors are often unwilling to impose substantial judgments against

33. *Id.* at 392.

34. *Id.* at 409 (Harlan, J., concurring).

35. *Id.* at 396.

36. The special factors enumerated in the opinion include (1) federal fiscal policy; (2) liability of a congressional employee; and (3) "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents." *Id.* at 396-97.

37. *Id.* at 407 (Harlan, J., concurring).

38. *Id.* at 409-10 (Harlan, J., concurring).

39. *See generally* authorities cited at note 11 *supra*.

40. 403 U.S. at 391-95.

41. *See* Dellinger, *supra* note 11, at 1553; Kates and Kouba, *supra* note 11, at 136-37; Note, *supra* note 11, at 922-23.

individuals who have merely erred in doing their jobs.[42] Finally, social policy may favor spreading the risks and holding municipalities liable to deter continuation of governmental policies which prove to be contrary to constitutional requirements.[43]

In *City of Kenosha v. Bruno,*[44] the Supreme Court, by implication, extended the *Bivens* doctrine in holding that municipalities may be sued for constitutional violations directly under the fourteenth amendment.[45] In that case, plaintiffs brought suit under section 1983 for injunctive relief against the cities of Racine and Kenosha, Wisconsin. Relying entirely on *Monroe v. Pape,* the Court held that municipalities were not "persons" under section 1983 for purposes of injunctive relief. However, the Court remanded to the district court to consider jurisdiction under 28 U.S.C. section 1331 and the protection against denial of "liberty" and "property" without due process as provided by the fourteenth amendment.[46] The case has been read equally as an extension of *Monroe* to suits for injunctive relief and as an extension of the *Bivens* doctrine to include suits against municipalities as arising directly out of the fourteenth amendment.[47] Lower courts, relying on the "inadequacy of other remedies" argument of *Bivens,* and the implied carte blanche of *Bruno* have extended the *Bivens* doctrine to include suits against municipalities for violations of constitutional rights.[48] This is, in fact, what the

42. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. at 421-22 (Burger, C.J., dissenting).

43. Santiago v. City of Philadelphia, 435 F. Supp. 136, 148 (E.D.Pa. 1977).

44. 412 U.S. 507 (1973).

45. *Id.* at 514-15.

46. *Id.*

47. *See, e.g.,* Brault v. Town of Milton, 527 F.2d 730, 732, 735 n. 10 (2d Cir. 1975), *rev'd on other grounds,* 527 F.2d 736 (2d Cir. 1976) (en banc).

48. *See generally* Brault v. Town of Milton, 527 F.2d 730 (2d Cir. 1975), *rev'd on other grounds,* 527 F.2d 736 (2d Cir. 1976) (en banc); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977) (extension of *Bivens* doctrine to municipality for vicarious liability); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D.Cal. 1974) (zoning); *but see* Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978), *vacated,* 439 U.S. 974 (1978), *on remand,* 591 F.2d 426 (2d Cir. 1979) (The circuit court extended *Bivens* to action against municipality for acts of police officers sanctioned by the city. The Supreme Court remanded to the Second Circuit for further consideration in light of *Monell.* On remand, the circuit court decided that it would be unnecessary to extend *Bivens* because of the action, available since *Monell,* under § 1983.); Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), *vacated,* 438 U.S. 902 (1978), *on remand,* 589 F.2d 335 (8th Cir. 1978). *Cf.* Williams v. Brown, 398 F. Supp. 155 (N.D. Ill., 1975) (extended *Bivens* doctrine to a municipality for acts of police officers on respondeat superior theory; the holding was later rejected by the Seventh Circuit in Jamison v. McCurrie, 565 F.2d 483 (7th Cir. 1977), which refused to hold a city liable under the doctrine of respondeat superior).

Ninth Circuit was asked, but refused to do in *Molina v. Richardson.*

D. THE *Molina* DECISION

In affirming the district court's dismissal of Molina's claim against the city, the Ninth Circuit noted the Supreme Court's decision in *Monell* (decided only a few weeks prior to *Molina*) and determined that the new, but limited, municipal liability afforded under section 1983 did not extend to Molina's claim, which was allegedly based solely on respondeat superior.[49] The court then decided that plaintiff's argument for a cause of action arising directly out of the fourteenth amendment, by analogy to *Bivens,* was not constitutionally mandated[50] and would be an "unwise use of judicial power."[51]

E. THE *Monell* TEST

The Ninth Circuit summarily rejected Molina's section 1983 claim by following the dicta in *Monell* to the effect that a municipality cannot be held liable under that statute "solely because it employs a tortfeasor."[52] The doctrine of respondeat superior was not an issue before the Court in *Monell,* where the violations alleged were done pursuant to governmental policy.[53] In overruling *Monroe, Monell* made it clear that municipalities may be sued for constitutional violations subject to vindication under section 1983.[54] It is obvious, at least since the *Monell* decision, that a local government may be held liable to a plaintiff who can prove that an ordinance passed by the governmental unit constituted an uncompensated taking of property and the plaintiff was injured thereby.[55] It is equally obvious from the dicta in *Monell* that a municipality may not be held liable solely because a policeman, rather than a private individual, was involved in an automobile accident in which plaintiff was injured.[56] However, there is a broad range of possibilities between these two examples

49. 578 F.2d at 848.
50. *Id.* at 850.
51. *Id.* at 851.
52. 436 U.S. at 691.
53. *Id.* at 661.
54. *Id.* at 663.
55. *See* Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978). Indeed, causes of action for such violations have been granted prior to *Monell* by extending *Bivens. See, e.g.,* Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D.Cal. 1974).
56. 436 U.S. at 691.

in which to find varying degrees of culpable action or inaction on the part of the municipal employer. Should the municipal employer be liable for injuries occurring during a riot? What if the municipality had never trained its police officers in techniques and procedures for quelling a riot? The answer to the second question may, in fact, be in the affirmative. But to find the answer, more information is required than that contained in the *Monell* opinion.

The Ninth Circuit, without the benefit of further clarification as to where the line should be drawn, relied on the pleadings and argument of *Molina,* submitted prior to *Monell,* which did not meet the requisite degree of "official policy."[57] A more reasonable approach would have been to remand to the district court to determine whether Molina could have stated a cause of action to meet the new *Monell* test.[58] This is especially true since, at the time *Molina* was before the district court, a municipality was clearly not a potential defendant under section 1983, and he had no legal reason to argue otherwise. While the dicta denying vicarious liability is strong, the Supreme Court in *Monell* allowed for much latitude in its test for liability.

> Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" *even though such a custom has not received formal approval through the body's official decisionmaking channels.*[59]

57. Quoting *Monell,* the *Molina* court held: "Molina did not argue before the district court that the allegedly illegal conduct of the officers 'may fairly be said to represent [the city's] official policy.' Thus, *Monell* does not give Molina a section 1983 cause of action against the city." 578 F.2d at 848 (emphasis and alteration in the original).

58. It is not uncommon for appellate courts to remand for consideration in light of new law, *see* Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978) (extended *Bivens* and remanded in light of *Monell*), or with leave to amend the pleadings, *see* Hitt v. City of Pasadena, 561 F.2d 606 (5th Cir. 1977). In addition, the duty of the appellate court is to apply the law existing at the time of the decision. Cort v. Ash, 422 U.S. 66, 76-77 (1977); Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974).

59. 436 U.S. at 690-91 (emphasis added).

F. Denial of Extension of *Bivens*

In deciding that a direct, constitutional cause of action would not be appropriate under the circumstances of Molina's claim, the Ninth Circuit reviewed the history of the *Bivens* doctrine and the implications of its possible extension in this case.

First, the Ninth Circuit noted that one purpose of the *Bivens* decision was to fill a gap left by the legislature in creating a remedy for constitutional violations.[60] Section 1983 made available a cause of action for deprivations committed "under color of" state law.[61] The legislature has not acted in the same fashion to redress constitutional violations committed under color of federal law. The *Bivens* Court "strongly implied that specific congressional action might have precluded the judicial creation of a damages remedy in that case,"[62] thus, the Ninth Circuit concluded that the *Bivens* decision was not constitutionally mandated and; therefore, an extension of the doctrine is likewise not compelled.[63] Once the court found that an extension of the doctrine was not required by the Constitution, it went on to analyze the prudential considerations involved in such an extension to include municipal liability.

The *Molina* court based its decision not to extend *Bivens* to include vicarious liability of the municipal employer, in part, out of deference to the legislature. In comparing Molina's claim to that of Bivens, the court noted the immense body of legislation resulting from the fourteenth amendment.[64] Legislation pursuant to the enabling clause[65] of the fourteenth amendment has been sparse in the area of vicarious liability, however.[66] Because of that sparseness, the *Monell* Court had concluded that the legislative history of section 1983 shows an intent to exclude vicarious liability of municipalities.[67] The Ninth Circuit accepted this conclu-

60. 578 F.2d at 851.
61. *Id.*
62. *Id.* at 850.
63. *Id.* at 850-51.
64. Congress has produced legislation regulating state action not only in the Ku Klux Klan Act of 1871 and other 19th Century civil rights statutes but also, quite substantially, in the Civil Rights Act of 1964. *Id.* at 851.
65. U.S. Const. amend. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
66. 578 F.2d at 851 n. 12.
67. 436 U.S. at 691.

sion and determined that it would be inappropriate for the federal judiciary to disregard the clearly cautionary view of the legislature with regard to vicarious liability.[68] District Judge Grant, in his dissenting opinion to the *Molina* decision, strongly rejected this argument. Basing his analysis upon the ambiguity of the meaning of "person" in section 1983 from *Monroe* through *Monell* he argued:

> Indeed, it would seem to be an unwise use of judicial power, and inconsistent with the principles of clear statement, to extrapolate from the tarnished analysis of ambiguous statutory language in *Monroe* and conclude that Congress has explicitly determined to preempt the field of municipal liability when the result seriously restricts the remedies available to a court in constitutional adjudication.[69]

Next, the Ninth Circuit considered the doctrine of federalism. The court reasoned that if the federal judiciary creates a federal cause of action to resolve disputes between individual citizens and local governments, the "states and their political subdivisions will likely be inhibited from seeking creative, efficatious resolutions to such disputes."[70] While this argument has some merit, it is somewhat weakened by the number of federal court decisions granting broad injunctive relief against municipalities, notably in the areas of school desegregation and prisoners' rights litigation.[71] Indeed, as Judge Grant reasoned in his dissent, when considering the difficulties involved in holding individual municipal employees liable and the requirement of "official policy" to hold municipalities liable under section 1983, it would seem that municipal governments, not vicariously liable under the Constitution, would have less incentive to create more adequate hiring and training procedures to insure a reduction in constitutional violations of its employees.[72]

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68. In his concurring opinion in *Monell,* Justice Powell expressed his belief that municipal liability would be the same under § 1983 or the Constitution and that the better reasoned approach would be to find liability under the statute rather than through extension of *Bivens.* "Rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the Court does today." *Id.* at 713.

69. 578 F.2d at 855.

70. *Id.* at 852.

71. *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) and Brenneman v. Madigan, 343 F. Supp. 128 (N.D.Cal. 1972).

72. 578 F.2d at 855 (Grant, D.J., dissenting).

Finally, the court determined that section 1983 provides an adequate remedy against municipal governments. In so doing, it rejected both arguments of unwillingness of juries to hold individuals liable and deterrence of future wrongdoing as "speculative at best."[73]

G. Conclusion

The Ninth Circuit's decision to affirm the dismissal against the city based on section 1983 was unreasonable due to the recent decision of the Supreme Court in *Monell.* The arguments by Molina were made without the benefit of the Supreme Court's radical change in interpretation of municipal immunity under section 1983 and therefore, he should have been given the chance to reargue in light of *Monell.* In addition, while the court correctly determined that an extension of the *Bivens* doctrine was discretionary, the prudential considerations in the court's analysis were inadequate to justify the complete denial of a federal forum to redress the constitutional wrongs of which Molina complained. Had the court allowed Molina a chance to show that he had a cause of action under section 1983, the decision not to extend *Bivens* because section 1983 is adequate, may have been more easily justified; but to say that he has an adequate remedy under section 1983, and at the same time deny him the right to proceed under the statute, is, at best, inconsistent. As Justice Black stated in his opinion for the Court in *Bell v. Hood:* "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[74]

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73. *Id.* at 853. Perhaps *Molina* is a clear example of the faulty nature of the court's classification of these arguments as "speculative." Molina, allegedly for his failure to remove his driver's license from a clear plastic container, was removed by force from his automobile, handcuffed, taken to the police station and booked for resisting arrest. For this incident, he was awarded by jury verdict a total of $131.50. *Id.* at 847. It seems hardly likely that he was adequately compensated for his injuries.

74. 327 U.S. at 684.

II. MANDATORY MATERNITY LEAVES UNDER TITLE VII AND THE FOURTEENTH AMENDMENT

A. INTRODUCTION

In 1872, the United States Supreme Court upheld a state law denying women admission to the practice of law.[1] In a concurring opinion, Justice Bradley stated:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . .
>
> The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[2]

One hundred years later, in 1973, Karen deLaurier, a junior high school language teacher, became pregnant. In *deLaurier v. San Diego Unified School District*,[3] she challenged the school district's policy which required that she take a mandatory maternity leave of absence at the beginning of the ninth month of pregnancy and denied her the use of accumulated sick leave benefits while on the mandatory leave. Her challenge was based upon alleged violations of Title VII of the Civil Rights Act of 1964,[4] and the due process and equal protection clauses of the fifth and fourteenth amendments to the Constitution. The district court rejected the challenge, granting a summary judgment, and upheld the school district's policy both as to the mandatory leave and the denial of sick leave benefits.[5] Regarding mandatory

1. Bradwell v. The State, 83 U.S. (Wall. 16) 130 (1872).

2. *Id.* at 141 (Bradley, J., concurring).

3. 588 F.2d 674 (9th Cir. 1978) (per Wallace, J.; the other panel members were Hufstedler, J., concurring and dissenting, and Smith, D.J.).

4. 42 U.S.C. § 2000e-2 (1976) provides in relevant part:

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

5. 588 F.2d at 675.

maternity leaves, the Ninth Circuit found a prima facie case of discrimination under Title VII but affirmed the district court, holding that the school district successfully raised the defense of business necessity;[6] the court rejected deLaurier's fourteenth amendment arguments;[7] and Judge Hudstedler filed a vigorous dissent regarding the business necessity defense.[8]

No one in the United States today will deny that women are afforded substantially greater rights than at the time Justice Bradley wrote his concurring opinion to *Bradwell.* However, legislation and litigation in the area of sex discrimination, and particularly with reference to pregnancy and employment, have provided a complicated and confusing patchwork of rules and tests.[9] This Note will explore the existing guidelines under which Title VII and fourteenth amendment sex discrimination claims are brought, focusing on the Ninth Circuit's most recent application of those guidelines in its *deLaurier* opinion.

B. Title VII and Mandatory Maternity Leaves

The United States Supreme Court has fashioned a three-step analysis to be used in determining whether an employer's practices violate Title VII.[10] In *McDonnell Douglas Corp. v.*

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6. *Id.* at 683. Regarding the sick leave policy, the Ninth Circuit reversed, holding the denial of sick leave benefits discriminatory and remanding for further proceedings concerning the school district's defenses. This issue will not be discussed further because subsequent legislation renders it moot. *See* notes 68 & 69 *infra* and accompanying text.

7. *Id.* at 684.

8. *Id.* at 685-92 (Hufstedler, J., concurring and dissenting).

9. *Compare* Craig v. Boren, 429 U.S. 190 (1976) (sex classifications require intermediate level of scrutiny) *with* Frontiero v. Richardson, 411 U.S. 677 (1973) (four Justices concluded in plurality opinion that sex classifications require strict scrutiny). *See also* Geduldig v. Aiello, 417 U.S. 484 (1974) (pregnancy classification not gender-based discrimination). Justice Stevens commented on the confusing nature of existing law in his concurring opinion in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977):

> The general problem is to decide when a company policy which attaches a special burden to the risk of absenteeism caused by pregnancy is a prima facie violation of the statutory prohibition against sex discrimination. The answer "always," which I had thought quite plainly correct, is foreclosed by the Court's holding in *Gilbert*. The answer "never" would seem to be dictated by the Court's view that a discrimination against pregnancy in "not a gender-based discrimination at all." The Court has, however, made it clear that the correct answer is "sometimes."

Id. at 153-54 (Stevens, J., concurring) (footnotes omitted).

10. *See generally* Dothard v. Rawlinson, 434 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Green,[11] the Court first articulated its three-step test to clarify the confusion lower courts were experiencing in the placement of burdens of proof in a Title VII case.[12]

The Court, in a unanimous opinion written by Justice Powell, carefully outlined the three steps necessary to determine whether the employer has in fact violated the statute. First, the plaintiff must establish a prima facie case of discrimination.[13] Once this is established, the defendant is given the opportunity to rebut the prima facie case by showing "some legitimate, nondiscriminatory reason for the employee's rejection."[14] This, however, is not the end of the inquiry. The third step requires that although a prima facie case of discrimination may be successfully rebutted by some articulated, nondiscriminatory reason, the plaintiff must then be given "a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."[15]

The Prima Facie Case

Until 1974, a classification made on the basis of pregnancy was probably assumed to be a distinction made on the basis of sex. However, in that year the United States Supreme Court decided *Geduldig v. Aiello*[16] and declared that such a classification is not gender-based.[17] In its often-quoted footnote 20, the majority opinion stated, "[t]he program divides potential recipients

11. 411 U.S. 792 (1973). The *McDonnell* case involved a black former employee of the aerospace manufacturer who, after having been laid off after eight years of employment, actively and unlawfully protested the allegedly racial motivation of the employer's general hiring practices and his own discharge. Shortly thereafter, the employer advertised a position for which Green qualified. He applied and was rejected due to his unlawful protests against the corporation. *Id.* at 794-96. Green then made a timely claim with the Equal Employment Opportunity Commission (EEOC) and eventually brought suit in the district court charging Title VII violations. *Id.* at 796-98.

12. *Id.* at 801.

13. *Id.* at 802.

14. *Id.* This second step, often referred to as the business necessity defense, has been articulated by the Court in varying degrees of proof required to rebut the prima facie case. The quoted phrase in *McDonnell* is rather broad, presumably in deference to the employer who was subjected to illegal, disruptive protests by the plaintiff. In other cases, the articulated standard is more restrictive. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

15. 411 U.S. at 805.

16. 417 U.S. 484 (1974).

17. *Id.* at 496-97 n.20.

into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[18]

Geduldig involved an equal protection challenge by a pregnant woman to California's state disability insurance program which provided benefits to private employees for temporary disabilities not covered by workmen's compensation. The program excluded normal pregnancy and childbirth from its definition of eligible disabilities. Although the Court found that the state had legitimate interests in excluding pregnancy and childbirth, notably cost, the determination that the program was valid was based on the fact that the exclusion was not an invidious discrimination in violation of the equal protection clause.[19] The Court reasoned that the program, as it stood, protected men and women equally, and the denial of an additional benefit to women was, therefore, not discriminatory.[20]

Two years later, in *General Electric Co. v. Gilbert,*[21] the Court was confronted with a Title VII challenge to an almost identical disability program provided by a private employer. Following its reasoning in *Geduldig,* the *Gilbert* Court found that where men and women are entitled to the same benefits, the denial of an additional benefit to women for pregnancy-related disabilities was not gender-based discrimination in violation of Title VII.[22] From *Gilbert* it would be logical to assume that distinctions made on the basis of pregnancy—although clearly affecting only females—are not sufficient to establish a prima facie case of sex discrimination under Title VII.[23]

However, in *Nashville Gas Co. v. Satty,*[24] the Court distinguished *Gilbert* and invalidated an employer's policy which violated Title VII by its discriminatory effect on pregnant women.[25]

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18. *Id.*
19. *Id.* at 496-97 n.20.
20. *Id.* at 496-97.
21. 429 U.S. 125 (1976).
22. *Id.* at 136.
23. *See* Justice Stevens' comment at note 7 *supra.* Although *Gilbert* was a Title VII case and *Geduldig* was based on the equal protection clause, a challenge on due process grounds relating to pregnancy was successful in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).
24. 434 U.S. 136 (1977).
25. *Id.* at 142.

The challenged policy required that pregnant employees take a formal leave of absence during which the employee received no sick pay and also lost all accumulated job seniority.[26] In reference to the seniority issue, the *Satty* Court reasoned that, unlike the "additional benefit" in *Gilbert,* this program imposed an additional burden on women that men do not suffer,[27] thereby violating Title VII.[28]

It is clear from *Geduldig, Gilbert,* and *Satty* that in order to make out a prima facie case of sex discrimination regarding pregnancy-related classifications, the plaintiff must show that the challenged policy imposes an additional burden upon women which men need not suffer, rather than that it denies an additional benefit which men need not receive.[29]

Business Necessity

In *Griggs v. Duke Power Co.,*[30] black employees challenged the defendant employer's requirement of a high school diploma or the passing of a standardized intelligence test (unrelated to job performance) as a condition of employment or transfer as racial discrimination in violation of Title VII.[31] The district court found, and the court of appeals agreed, that although the company had been guilty of racial discrimination in the past, there was no intent or purpose to discriminate in the company's enactment of this policy which, therefore, did not violate the statute.[32]

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26. *Id.* at 137.

27. *Id.* at 142.

28. The Court remanded on the issue of sick leave benefits, finding the policy to be neutral on its face, for a determination of whether the policy had a discriminatory effect. *Id.* at 145-46.

29. On October 31, 1978 Congress amended Title VII overruling the holding in *Gilbert.* 42 U.S.C. § 2000e(k) (1978) was added, providing in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy . . . shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or unability to work.

30. 401 U.S. 424 (1971).

31. *Id.* at 425-26.

32. *Id.* at 428-30. The policy resulted in a disproportionate number of blacks being ineligible for employment or transfer. *Id.* at 429. The Court cited statistics for North Carolina from the 1960 census which indicated that 34% of white males and 12% of black males had completed high school. Even greater disparity was evidenced by an EEOC study of standardized tests such as those used by Duke Power. *Id.* at 430 n.6.

In reversing, the Supreme Court held that, even assuming the practice to be neutral both on its face and in its intent, if its effect is discriminatory it will fail unless the employer can show "a manifest relationship to the employment in question."[33] Chief Justice Burger declared for a unanimous Court[34] that "[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[35]

Since *Griggs*, the "business necessity" or "job-relatedness" defense has been considered in Title VII cases involving a broad spectrum of situations, other than standardized tests and diploma requirements.[36] However, the standard as enunciated by the *Griggs* Court to be used in determining the validity of a discriminatory employment practice is strict. "What Congress commanded is that any tests used must measure the person for the job and not the person in the abstract."[37]

The third step of the *McDonnell* analysis—plaintiff's rebuttal of the business necessity defense—had its genesis in the language of *General Electric Co. v. Gilbert*,[38] where the Court stated that a policy which is neutral on its face may nonetheless be prohibited if it is merely a pretext or subterfuge to "accomplish a forbidden discrimination,"[39] such as might easily be inferred from the facts of *Griggs*.[40] In *Dothard v. Rawlinson*,[41] the Supreme Court was faced with a Title VII attack upon Alabama's height and weight requirements for employment as prison guards which allegedly disqualified a disproportionate number of wo-

33. *Id.* at 432.

34. All Justices joined in the Chief Justice's opinion except Justice Brennan, who took no part in the consideration or decision of the case.

35. *Id.* at 431.

36. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (loss of seniority benefits during forced pregnancy leave held invalid); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements for prison guards held invalid); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (refusal to rehire civil rights activist).

37. 401 U.S. at 436.

38. 429 U.S. 125 (1976).

39. *Id.* at 136.

40. Duke Power actively discriminated against blacks prior to the effective date of Title VII (July 2, 1965) at which time the company no longer required blacks to remain in the lowest-paying jobs. But, at the same time, the employer instituted the challenged diploma and test requirements. These requirements, although applied equally to all employees, resulted in continued discrimination. 401 U.S. at 426-28.

41. 433 U.S. 321 (1977).

men applicants.[42] The *Dothard* Court emphasized that the availability of less discriminatory alternatives which satisfy the legitimate interests of the employer (business necessity) could sufficiently rebut that defense.[43]

C. The Fourteenth Amendment and Mandatory Maternity Leaves

The due process clause of the fourteenth amendment has been interpreted by the United States Supreme Court to protect an individual's freedom of choice regarding marriage and procreation against unwarranted governmental intrusion.[44] Restrictions placed upon pregnant employees, such as mandatory leaves of absence and denial of sick pay, obviously intrude in some way upon a woman's fundamental right to choose to bear a child. The issue of when such restrictions are sufficiently antagonistic to the woman's freedom of choice to be prohibited by the Constitution was addressed by the Supreme Court in *Cleveland Board of Education v. LaFleur.*[45]

In *LaFleur,* two pregnant teachers challenged a policy of the school board which required any teacher who became pregnant to take a mandatory maternity leave of absence, without pay, no later than five months prior to the expected date of birth of the child.[46] The school board advanced two interests allegedly served by the mandatory maternity leave: (1) continuity of classroom instruction requires a firm cut-off date to aid the school board in finding and hiring qualified substitutes; and (2) the physical inability of some teachers in the more advanced stages of pregnancy to adequately perform their duties requires an early cut-off date to protect the quality of instruction, as well as the health of the woman and her child.[47] The Court struck down the mandatory maternity leave policy as violative of the due process clause, notwithstanding the validity of the asserted interests.[48]

42. *Id.* at 323-28.
43. *Id.* at 329.
44. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1945).
45. 414 U.S. 632 (1974).
46. *Id.* at 635.
47. *Id.* at 640-41.
48. *Id.* at 639-48.

The Court found continuity of classroom instruction to be a legitimate interest,[49] but the mandatory leave policy of the school board did nothing to serve this interest because only two weeks' notice was required by the policy, not giving the board much time to find a qualified substitute. Also, a cut-off date much later in pregnancy would certainly give the board a greater opportunity to find replacements with sufficient advance notice.[50] The Court held the early cut-off date to be wholly arbitrary, bearing no rational relationship to the interest of continuity of instruction.[51]

The Court also found the second reason asserted by the school board, the pregnant teacher's physical incapacities, to be a legitimate interest in the protection of both the teacher's health and the quality of instruction.[52] However, the Supreme Court held that the mandatory leave rules amounted to an impermissible irrebuttable presumption, in violation of due process, that all pregnant teachers are incapable of continuing to work after the fourth month of pregnancy.[53] Thus, the *LaFleur* Court enunciated two alternative tests to determine whether the mandatory leave rules violate due process: (1) "the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's Constitutional liberty,"[54] or (2) if the rule creates an irrebuttable presumption which is neither necessarily nor universally true, it violates the due process clause.[55]

Justice Powell concurred in the result reached by the Court in *LaFleur* but felt that an equal protection, rather than due process, analysis was appropriate.[56] Without deciding whether the regulations of the school board constituted sex or disability classifications, or whether a sex-based classification would re-

49. *Id.* at 641.
50. *Id.* at 642-43.
51. *Id.* at 643. "In fact, since the fifth . . . month of pregnancy will obviously begin at different times in the school year for different teachers, the present . . . rules serve to hinder attainment of the very continuity objectives that they are purportedly designed to promote." *Id.*
52. *Id.* at 643-44.
53. *Id.* at 644-45.
54. *Id.* at 640.
55. *Id.* at 646.
56. *Id.* at 651 (Powell, J., concurring).

quire strict scrutiny, Justice Powell found that the challenged rules did not meet even a rational basis test.[57] Although the school board did articulate legitimate state interests, Justice Powell agreed with the Court in concluding that there was no showing that these interests were rationally furthered by the challenged rules.[58]

It is important to note that *LaFleur* arose prior to the Title VII amendment extending the reach of the statute to include state agencies and educational institutions.[59] Although a majority of the Supreme Court has not yet declared sex to be a suspect classification subject to strict scrutiny,[60] and it is not clear that rules relating to pregnancy necessarily involve sex-based classifications,[61] Title VII appears to require an analysis comparable to the traditional strict scrutiny equal protection analysis.[62] In addition, the statute, as amended in 1978, declares that classifications made on the basis of pregnancy are, for purposes of the statute, classifications made on the basis of sex.[63]

D. THE *deLaurier* Opinion

The Ninth Circuit began its discussion of deLaurier's claims with an analysis of the school district's policy of mandatory leave of absence under Title VII. The court agreed that a prima

57. *Id.* at 653 n.2.

58. *Id.*

59. *Id.* at 656 n.6.

60. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (intermediate level of scrutiny for sex classifications); Frontiero v. Richardson, 411 U.S. 677 (1973) (four Justices concluded in the plurality opinion that classifications on the basis of sex are suspect).

61. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974) (not gender-based discrimination); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. at 653 n.2 (1974) (Powell, J., concurring, stating that the issue need not be decided).

62. A strict scrutiny analysis under the equal protection clause typically requires a determination that 1) the challenged policy burdens a suspect class or infringes upon a fundamental right; 2) once this is determined, the policy is presumed to be unconstitutional unless the government can show a compelling interest; and 3) the policy must constitute the least restrictive means available. H. CHASE AND C. DUCAT, CONSTITUTIONAL INTERPRETATION 62 (2d ed. 1979).

A Title VII analysis similarly involves 1) a determination that the classification made by the challenged policy is prohibited by the statute. 42 U.S.C. § 2000e-2, for example, makes it an unlawful employment practice to discriminate on the basis of race, color, religion, sex, or national origin. 2) The employer is then given the opportunity to show that the policy is required as a business necessity. Griggs v. Duke Power Co., 401 U.S. at 431. 3) The policy may still be prohibited by Title VII if less discriminatory alternatives are available. Dothard v. Rawlinson, 433 U.S. at 329.

63. 42 U.S.C. § 2000e(k) (1978). *See* note 29 *supra*.

facie case of discrimination was presented[64] and concluded that the district court findings regarding business necessity were not clearly erroneous.[65] The court then distinguished the challenged leave policy from that of *Cleveland Board of Education v. LaFleur*[66] and found that the policy was neither arbitrary nor did it constitute an impermissible irrebuttable presumption in violation of the due process clause.[67] Finally, the court determined that the denial of accumulated sick leave benefits showed a prima facie case of discrimination under Title VII[68] and remanded that issue to the district court to provide the school district with an opportunity to show business necessity in defense of its policy.[69]

Title VII Claim

The Ninth Circuit had no difficulty finding that since "mandatory maternity leave is not the withholding of a potential benefit, but is a restriction on pregnant women's employment opportunities, it follows that such a policy does constitute a gender-based discrimination."[70] Following the "additional burden" analysis of *Nashville Gas Co. v. Satty*[71] as opposed to a finding of "additional benefit" of *Geduldig v. Aiello*[72] and *General Electric Co. v. Gilbert,*[73] the *deLaurier* court agreed that the policy was a prima facie violation of Title VII, and proceeded to discuss the defense of business necessity presented by the school district.

The district court found the mandatory leave policy to be justifiable as a business necessity.[74] In its findings of fact, the

64. 588 F.2d at 676.
65. *Id.* at 681.
66. 414 U.S. 632 (1974).
67. 588 F.2d at 682-83.
68. *Id.* at 684.
69. *Id.* at 685. Recent amendments, not applicable to *deLaurier,* to Title VII and California Education Code render unnecessary further discussion of the issue of sick leave benefits. 42 U.S.C. § 2000e(k) (relevant text is reproduced at note 29 *supra*) was added to Title VII on October 31, 1978 and effectively overruled *Gilbert* by declaring that pregnancy shall be treated, for all employment purposes, the same as other disabilities. In addition, while *deLaurier* was pending appeal, the California legislature amended the Education Code to the effect that sick leave benefits may be used during pregnancy leave. CAL. EDUC. CODE § 44978 (West 1976).
70. 588 F.2d at 677.
71. 434 U.S. at 351.
72. 417 U.S. 484.
73. 429 U.S. 125.
74. 588 F.2d at 678.

district court had enumerated four reasons for upholding the necessity of the policy: (1) health of the mother and child; (2) declining ability to perform; (3) the need for qualified substitutes; and (4) the need for sufficient lead time to find qualified substitutes and a date certain for such substitutes to commence employment.[75] The Ninth Circuit determined that the district court had applied the correct legal standard regarding the business necessity defense, and restricted further analysis to the issue of whether the findings were clearly erroneous.[76]

The Ninth Circuit divided the district court's findings into two groups and determined that the business necessity defense was supported alternatively by the first set of goals, relating to administrative and educational needs,[77] or the second, relating to the physical condition of the teacher.[78] The *deLaurier* court did not correctly apply the standards set out by the Supreme Court in *Griggs*[79] and *Dothard*,[80] in that no showing was made that any of the valid goals presented by the school district were furthered by the mandatory leave policy. As Judge Hufstedler pointed out in a separate concurring and dissenting opinion, although the business necessity defense is available in a broad range of Title VII cases, the defense is difficult to establish and

> is a highly restrictive and carefully limited defense . . . . The defense cannot be established merely by a showing that it is administratively convenient to the employer, or even by a showing that other practices would be highly inconvenient. The employer must show that the practice in question is *specifically* required for the operation of the business.[81]

Specifically, the school district offered no evidence either to show that the mandatory maternity leave commencing at the beginning of the ninth month of pregnancy was required to further the goals of finding qualified substitute teachers and protecting the

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75. *Id.* at 678-79 n.8.

76. *Id.* at 679.

77. *Id.* at 680.

78. *Id.*

79. 401 U.S. at 436. The policy must "measure the person for the job."

80. 433 U.S. at 332 n.14. The policy must be "necessary to safe and efficient job performance."

81. 588 F.2d at 687 (Hufstedler, J., concurring and dissenting) (emphasis in original) (citation omitted).

health of the mother and child or that teachers who were nine months pregnant could not adequately perform their duties.[82] Regarding the administrative goals, it is obviously convenient to have a date certain in order to hire a substitute for the pregnant teacher. It is equally convenient to have a date certain in order to hire a substitute for any other teacher who must take an extended leave of absence. Yet, according to the school district's policy, only pregnant teachers were required to give advance notification. There was no showing that there was a need for such disparate treatment, and further, there was no showing that the administrative goals would not have been served equally well by allowing the individual teacher to determine at what date her leave would begin, as long as sufficient advance notice were given.[83]

The court relied on medical testimony, which indicated that it is impossible to accurately predict the date a child will be born, to uphold the district's ninth-month rule as necessary to further the administrative goal of having a date certain.[84] However, Judge Hufstedler, in her dissent, broke down the statistical evidence as presented by the medical experts and found that in the year in which Karen deLaurier was pregnant only one or two pregnant teachers in the San Diego school district who desired to teach later than the beginning of the ninth month of pregnancy "would be likely to give birth before one week prior to their predicted delivery date."[85] This set of facts could hardly justify the requirement that all pregnant teachers must take a mandatory leave of absence four weeks prior to the earliest expected delivery date as a business necessity.

The *deLaurier* court found that the leave policy could alternatively be upheld as a business necessity due to the physical condition of pregnant teachers during the ninth month.[86] Again, there was no showing that teachers in the ninth month of pregnancy are unable to perform their duties or that unusual complications of pregnancy are more likely to occur in the ninth month

82. *Id.* at 688.

83. *Id.* Indeed, the California legislature has amended the Education Code so that the decision as to when maternity leave should commence is now to be made by the individual teacher and her physician. CAL. EDUC. CODE § 44965 (West 1976).

84. 588 F.2d at 680.

85. *Id.* at 688.

86. *Id.* at 680.

than at earlier stages of pregnancy. Nor was there any evidence that complications were more likely to occur among women who continued teaching than pregnant women generally.[87] As Judge Hufstedler correctly concluded, the district court's findings regarding the physical condition of the teacher were clearly erroneous.[88]

Even assuming that the school district's policy was justified, either by its need for a date certain or its concern for the health of mother and child, the evidence presented in *deLaurier* showed that a less restrictive alternative—the third step of the *McDonnell/Dothard* test—was available. Nothing in the evidence, as disclosed by the opinions of Judges Wallace or Hufstedler, showed that a cut-off date one week prior to the expected delivery or any other date chosen by the individual teacher and her physician would not further the legitimate interests of the school district. Thus, the *deLaurier* court failed to apply the correct standard by disregarding the third step to rebut the business necessity defense.

The Fourteenth Amendment Claim

Relying on dicta of the Supreme Court's opinion in *Cleveland Board of Education v. LaFleur,*[89] the Ninth Circuit held that the school district's mandatory ninth-month leave policy was neither arbitrary nor grounded upon an impermissible irrebuttable presumption.[90] The Ninth Circuit distinguished *LaFleur* on the basis of medical testimony regarding the inaccuracy of prediction of the expected delivery date[91] and found that "it is wholly rational for the district to terminate the teacher's freedom of choice at just that point where the unpredictability of pregnancy is most likely to come into play."[92] However, in discussing the same interests of continuity of education and administrative convenience as those asserted in *deLaurier,* the *LaFleur* Court noted: "Indeed, continuity would seem just as well attained if the teacher herself were allowed to choose the date

87. *Id.* at 689.

88. *Id.* at 690.

89. 414 U.S. 632 (1974).

90. 588 F.2d at 683. The *LaFleur* Court found that the policy before it, which required the leave of absence to begin at the fifth month of pregnancy, was arbitrary and wholly unrelated to the interests asserted by the school district. 414 U.S. at 639-43.

91. *See* text accompanying notes 84 and 85 *supra.*

92. 588 F.2d at 682.

upon which to commence her leave, at least so long as the decision were required to be made and notice given of it well in advance of the date selected."[93] The *LaFleur* Court, addressing the problem of unpredictability, implied that any mandatory cut-off date treating maternity unlike other disabilities might violate due process.

> It is, of course, possible that either premature childbirth or complications in the latter stages of pregnancy might upset even the most careful plans of the teacher, the substitute, and the school board. But there is nothing in these records to indicate that such emergencies could not be handled, as are all others, through the normal use of the emergency substitute teacher process.[94]

In short, although the challenged policy in *deLaurier* was not as restrictive as the policy held to violate due process in *LaFleur,* the asserted interests and the restrictions placed upon pregnant teachers in both cases are sufficiently similar to conclude that, according to the Supreme Court's reasoning, both policies are equally violative of due process.

E. Conclusion

The Ninth Circuit's analysis of the Title VII challenge to the mandatory leave policy was incomplete. The court considered the first step required by *McDonnell* and found a prima facie case of discrimination. The court then determined that the second step of the *McDonnell* test was met. In so doing, the court did not correctly analyze the business necessity defense. It failed to show any correlation between the admittedly valid interests asserted by the school district and the policy established to further those interests. Then, the court failed to consider less restrictive alternatives to the challenged policy, as required by *McDonnell* and *Dothard* to rebut the business necessity defense. Because of the recent amendments to the California Education Code, the *deLaurier* decision is not likely to have any serious effect on pregnant teachers in California. However, since Title VII reaches many more situations of employment discrimination than mandatory maternity leaves for teachers, the flawed reason-

93. 414 U.S. at 642.
94. *Id.* at 642 n.10 (citation omitted).

ing of the court may adversely affect women in other jobs, and any workers with a Title VII dispute in the Ninth Circuit.

Maxine Salzman

III. TITLE VII RIGHTS OF HOMOSEXUALS

A. INTRODUCTION

In *DeSantis v. Pacific Telephone and Telegraph Co., Inc.*,[1] the Ninth Circuit firmly shut the door to potential Title VII[2] and Section 1985(3)[3] protections for homosexuals. In this case plaintiffs consolidated three appeals and alleged that their respective employers discriminated against them in employment decisions because of their homosexuality.[4] In two cases plaintiffs had filed charges with the Equal Employment Opportunity Commission

1. 608 F.2d 327 (9th Cir. May, 1979) (per Choy, J.; Sneed, J., filed a concurring and dissenting opinion; Bonsal, D.J., was the third panel member).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1976) provides in pertinent part:

> It shall be unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . sex.

3. 42 U.S.C. § 1985(c) (1976) states in pertinent part:

> If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privilege and immunities under the law . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

4. Plaintiffs brought this appeal to the Ninth Circuit through a consolidation of three cases:

DeSantis v. Pacific Tel. & Tel. Co., Inc.: three homosexuals alleged impermissible discrimination; one claimed that he was not hired because a PT&T supervisor concluded that he was a homosexual and the other two claimed they were forced to quit their employment after being harassed by fellow workers and their supervisors. Plaintiffs filed charges with the Equal Employment Opportunity Commission (EEOC) which were rejected for lack of jurisdiction over claims of discrimination because of sexual orientation. Plaintiffs then sought declaratory, injunctive and monetary relief under Title VII and § 1985(c), as well as mandamus instructing the EEOC to process charges based upon sexual orientation.

Strailey v. Happy Times Nursery School, Inc.: a male homosexual alleged discrimination when he was fired after two years of service as a teacher because he wore a small gold ear loop to school. Plaintiff filed charges with the EEOC which were rejected and sought declaratory, injunctive and monetary relief.

Lundin v. Pacific Tel. & Tel. Co., Inc.: two female homosexuals claimed they were fired due to their known lesbian relationship. Plaintiffs sought monetary and injunctive relief.

(EEOC) which were rejected for lack of jurisdiction over claims of discrimination due to sexual orientation. In all three cases plaintiffs sought declaratory, injunctive and monetary relief. The district courts in each case dismissed the complaints for failure to state a cause of action[5] under the statutes.

B. Title VII Claim—Congressional Intent

Plaintiffs claimed that Title VII should be interpreted to prohibit employment discrimination on the basis of a person's sexual orientation. They argued that Congress, in formulating Title VII to prohibit sex discrimination in employment decisions, intended to include protection for sexual preferences as well as protection from gender-based discrimination. Plaintiffs contended that the district courts erred in dismissing their complaints for failing to state claims under the statute. The Ninth Circuit affirmed, thereby rejecting plaintiffs' argument that Title VII protections include sexual preference.

The court relied upon its earlier holding in *Holloway v. Arthur Anderson & Co.*,[6] in which the Ninth Circuit held that Title VII protections do not extend to transsexuals. In *Holloway*, the court found that Congress had not shown any intent to extend the term "sex" to other than its traditional meaning of gender. The court found that the sex discrimination provisions of the statute were limited and were only intended "to place women on an equal footing with men."[7] The court also noted that Congress, in subsequent legislative sessions, failed to adopt proposed amendments concerning sexual preference, making this refusal to broaden the term "sex" evident.[8] Based upon the findings of *Holloway*, the

5. Fed. R. Civ. P. 12(b)(5) allows dismissal upon motion that the pleadings fail to state a claim upon which relief can be granted. Plaintiffs were, therefore, foreclosed from proving their case upon the merits.

6. 566 F.2d 659 (9th Cir. 1977). *See* Note, *Title VII Rights of Transsexuals, Ninth Circuit Survey*, 9 Golden Gate U. L. Rev. 100 (1979).

7. 566 F.2d at 662. The court in *Holloway* stated:

> Congress has not shown any intent other than to restrict the term "sex" to its traditional meaning. Therefore, this court will not expand Title VII's application in the absence of Congressional mandate. The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex.

Id. at 663.

8. *Id.* at 662. These three bills were: H.R. 5452, 94th Cong., 1st Sess. (1975); H.R. 2667, 94th Cong., 1st Sess. (1975); H.R. 166, 94th Cong., 1st Sess. (1975), 121 Cong. Rec.

Ninth Circuit concluded "that Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."[9]

The court further used this denial of Title VII protections to dismiss additional claims. One claim involved being fired due to effeminacy, the employer relying upon a stereotype that male teachers should have a virile appearance.[10] Another claim alleged an impermissible interference with employees' rights of association due to discrimination against employees having homosexual relationships with certain friends.[11] Both claims were found lacking due to the absence of protection afforded to homosexuals by Title VII.

Similarly, the court rejected the allegation that discrimination based upon sexual preference represents impermissible use of different employment criteria for men and women as prohibited by the Supreme Court in *Phillips v. Martin Marietta Corp.*[12] An employer using such a policy, reasoned the Ninth Circuit, whether dealing with men or women is using the same criterion, namely, the preference of an employee for sexual partners of the same sex.

Disproportionate Impact

Plaintiffs also argued that homosexual discrimination falls within Title VII protections based upon recent decisions concerning disproportionate impact of facially neutral criteria.[13] Under

8548 (1975). (remarks of Mr. Koch). *See* Voyles v. Ralph K. Davies Med. Center, 403 F. Supp. 456, 457 (N.D. Cal. 1975); Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495, 502-03 (1976).

9. 608 F.2d at 331-32.

10. The court rejected plaintiff's contention that being fired due to an effeminate appearance violated Title VII. *Id.* at 332. Relying upon the *Holloway* finding of protection only for gender-based discrimination, the *DeSantis* panel agreed with the Fifth Circuit holding that discrimination because of effeminacy is not protected by Title VII. *Id.*, *citing* Smith v. Liberty Mutual Ins. Co., 569 F.2d 325 (5th Cir. 1978).

11. Plaintiffs sought to draw an analogy to holdings of the EEOC that discrimination due to the race of employees' friends may constitute a violation of Title VII. *See* EEOC Dec. No. 71-1902, [1973] EMPL. PRAC. GUIDE (CCH) ¶6281; EEOC Dec. No. 71-969, [1972] EMPL. PRAC. GUIDE (CCH) ¶6193. The allegation was rejected due to the holding that homosexual relationships are not protected under Title VII.

12. 400 U.S. 542 (1971).

13. Facially neutral actions (actions not discriminatory in form) may produce effects that adversely and disproportionately weigh upon members of particular protected groups of individuals. Such actions will require explanation in terms of non-invidious purposes. This theory of facially neutral discrimination has been developed by the United States

cases such as *Griggs v. Duke Power Co.*,[14] discrimination against homosexuals could be proven in trial to have a disproportionate effect upon men, thus making it an impermissible classification affecting one sex more than the other.[15] Plaintiffs claimed this disproportionate impact upon men results from the greater incidence of homosexuality amongst men and the greater likelihood of discovering a male's homosexuality as compared to a female's homosexuality.

A majority of the court rejected this extension of Title VII through a disproportionate impact analysis.[16] The *DeSantis* majority contended that the Supreme Court in *Griggs* sought to effectuate the major congressional purpose of Title VII of protecting blacks from employment discrimination. Since Congress repeatedly refused to adopt legislation to extend such protection to sexual orientation, the majority refused "to 'bootstrap' Title VII protection to homosexuals under the guise of protecting men generally."[17]

Supreme Court in Washington v. Davis, 426 U.S. 229 (1976) and Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1976). *See* Note, *Discrimination: Facially Neutral Action, Ninth Circuit Survey*, 10 Golden Gate U.L. Rev. 60 (1980).

14. 401 U.S. 424 (1971). *See also* Dothard v. Rawlinson, 433 U.S. 321 (1977); Lau v. Nichols, 414 U.S. 563 (1974).

15. Plaintiffs quoted from *Griggs:* "What is required by Congress (under Title VII) is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." 401 U.S. at 431.

16. *But see* Blake v. Los Angeles, 595 F.2d 1367 (9th Cir. 1979) where the Ninth Circuit found that Title VII could be utilized under a *Griggs* impact analysis to show a violation of sex discrimination in employment by a public employer in a case involving alleged discrimination against women by the Los Angeles Police Department. The court held that Congress expressly provided that Title VII was to apply to state and local governments and intended that the *Griggs* impact standard would apply through a mere showing of disproportionate impact on a protected group. Invidious intent need not be shown. The disproportionate impact of different height and weight requirements on women was found to be sufficient to make a prima facie showing of sex discrimination, as was the total exclusion of women from regular patrol work. Once this showing is made, the employer must meet a burden of justifying the employment practice. The defendant failed to show sufficient business necessity in following its discriminatory policies. The case was remanded to the district court for trial, overturning the lower court decision of summary judgment for defendants.

17. 608 F.2d at 331. The dissent differed on the matter of *Griggs* disproportionate impact theory. Although the dissent agreed that Title VII does not extend protection from employment discrimination to homosexuals, the dissent would have allowed plaintiffs to try their case on the merits and not dismiss this issue on the pleadings.

The dissent interpreted the issue raised to be that homosexuality represents a facially neutral criterion that may impact disproportionately on males due to the greater visibility of male homosexuals and higher incidence of male homosexuality. The use of such a claim is not just an attempt to "bootstrap" Title VII protection to homosexuals, but rather, is

C. The Section 1985 Claim

Plaintiffs claimed that defendants engaged in a conspiracy in violation of section 1985(c)[18] to deny them equal protection of the law through concerted actions by various agents of their employers to effectuate discriminatory policies against homosexuals. The court, however, in support of its holding that section 1985(c) is inapplicable to homosexual discrimination claims, relied upon *Griffin v. Breckenridge,*[19] which held that there must be "some racial or perhaps otherwise class-based invidiously discriminatory animus behind conspirator's action."[20] Since homosexuality is not a "suspect" or "quasi-suspect" classification, terms which have been applied to race and gender to require more exacting scrutiny, the court reasoned that homosexuals are not within the ambit of section 1985(c).

D. Possible Alternatives to Title VII Protection

It is clear that protections from employment discrimination due to sexual preference will not be extended by the Ninth Circuit based on congressional intent in enacting Title VII. Although *DeSantis* and *Holloway* were not unanimous decisions, all members of the respective panels agreed that the intent of Title VII was to limit protection from sex-based employment discrimination to gender. Support for this holding exists in one other circuit at this time.[21] Additionally, commentators have also noted the lack of intent by Congress to ban employment discrimination based on homosexuality through Title VII.[22]

This holding is essentially the only interpretation possible of

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a claim that may be shown to protect men in general. *Id.* at 333.

18. For the relevant statutory language of 42 U.S.C. § 1985(c), *see* note 3 *supra.*

19. 403 U.S. 88 (1971).

20. *Id.* at 102.

21. The Fifth Circuit has also held in Smith v. Liberty Mutual Ins. Co., 569 F.2d 325 (5th Cir. 1978) that Title VII does not protect homosexuals, thus refusing, as the Ninth Circuit has in *DeSantis,* to extend the prohibition of sexual discrimination without Congressional mandate.

22. As noted in Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation,* 64 Iowa L. Rev. 527 (1979), Congress, in discussing the Title VII provision relating to sex, religion and national origin discrimination did not entertain the notion that the statute might be raised in subsequent sexual preference discrimination cases. The author comments: "[A]ny forthright analysis must recognize that most of the alternative approaches are simply efforts at ascertaining what Congress would, or should, have said with respect to sexual preference classifications had it confronted that subject." *Id.* at 564. *See also* Siniscalco, *supra* note 8.

Congressional intent in enacting Title VII. It is clear that Title VII was intended to be limited in application to discrimination due to "sex" in its traditional meaning, that is, to gender-based discrimination. To extend protections from Title VII, as plaintiffs suggest, would be clearly an exercise in judicial legislation. The proper forum for such attempts to produce statutory protections is with Congress and not the judiciary.

The dissent[23] recognized a possible means for protecting against sexual preference employment discrimination. Under a theory of disproportionate impact against men as a class, a facially neutral criterion might result in a violation of the equal protection clause of the fourteenth amendment.[24] The court may have been too hasty in dismissing, out of hand, the issue of facially neutral discrimination. Plaintiffs should, as the dissent suggested, be allowed to show discrimination against men as a class as a result of homosexual discrimination. In this developing area of equal protection law, by deciding this case on the merits upon a disproportionate impact theory, the Ninth Circuit would have taken a step in determining the extent to which remedies exist for discrimination against a gender-class from discrimination which stems from *characteristics* of individuals within that class.

Another means of establishing such protection in private employment would be to extend those protections now existing within the public sector[25] by establishing the employer as "quasi-governmental."[26] Also, one might attempt to classify the activity

23. *See* note 17 *supra.*

24. To prevail on a cause of action based on disproportionate impact requires a showing that males are discriminated against to the benefit of females due to the facially neutral criterion of homosexuality. Just as *Griggs* effectuated the congressional purpose of Title VII in protecting blacks from employment discrimination, the intent of protecting men as a class may be extended here. In this way it would be necessary to satisfy at least the intermediate level of scrutiny afforded to gender which would require meeting a substantial relationship test. Although it may be difficult to show, plaintiffs could point to factors such as greater statistical incidence of male homosexuality, greater likelihood of discovering a male's homosexual preference due to official documentation in military and arrest records, and the greater stigma associated with male as compared to female homosexuality.

25. See Friedman, *supra* note 22.

26. The California Supreme Court, in a four to three decision, granted equal protection guarantees of freedom from employment discrimination to homosexuals employed by public utilities. Gay Law Students Ass'n. v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979). The California court drew an analogy between public utilities and governmental entities because of their exclusive monopolistic franchises

of the employer as "state action"[27] under the fourteenth amendment where a relationship exists between the private employer and government through funding, government contracts, or similar ties. In this way, where a substantial relationship between a private employer and the government is shown, the discriminatory action would have to survive rational basis scrutiny or be found unconstitutional. Although this level of scrutiny is relatively easy to satisfy, in the event that intermediate or strict level of scrutiny would be found to apply to homosexuals, this means of analysis may partially extend public sector protections into the private sector.

E. CONCLUSION

The establishment of protection from employment discrimination for homosexuals will necessarily come from furtherance of constitutional protections or legislation which explicitly covers discrimination against homosexuals. *DeSantis* foreclosed any attempts to extend these protections from Title VII.

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granted and protected by the state. There is no "state action" requirement in the California Constitution, which reads in pertinent part: "A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws." CAL. CONST., Art. 1, Sec. 7, sub. (a). Thus, the California court could extend to public utilities the obligation not to employ arbitrary employment discrimination against any class of individuals. Since the state may not exclude homosexuals as a class from employment opportunities without a showing that a person's homosexuality renders that person unfit for the job, Morrison v. Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969), this decision places public utilities under this obligation as well.

The California Supreme Court held that protection from homosexual employment discrimination was afforded by statutes also. CAL. PUB. UTIL. CODE § 453 (West Supp. 1979) was found to ban arbitrary employment discrimination against homosexuals by a public utility and CAL. LAB. CODE §§ 1101 and 1102 (West Supp. 1979) were held to protect homosexuals from employment discrimination due to their "political activity." 24 Cal. 3d 458, 475-89, 595 P.2d 592, 602-11, 156 Cal. Rptr. 14, 24-33.

27. Such state action may be alleged through a) assumption of state functions or powers by a private party, b) state aid to privately initiated activity, c) a partnership or agency relationship between private parties and state, and d) private party action subject to state regulatory schemes. *See generally,* McCoy, *Current State Action Theories, the* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions,* 31 VAND. L. REV. 785 (1978); Nevin, *State Action: The Significant State Involvement Doctrine after* Moose Lodge *and* Jackson, 14 IDAHO L. REV. 647 (1978); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity,* 74 COLUM. L. REV. 656 (1974).

IV. DISCRIMINATION: FACIALLY NEUTRAL ACTION

A. INTRODUCTION

In a potentially far-reaching decision, the Ninth Circuit in *De La Cruz v. Tormey,*[1] reversed a dismissal upon the complaint of an action concerning the lack of campus child care facilities in a community college district. The plaintiffs, young women with low incomes, faced with burdens of child rearing, alleged that the continued denial of child care facilities by the community college district deprived them of equal educational opportunity.[2] The district court dismissed the entire complaint on the ground that it failed to state any claim upon which relief could be granted on a motion by the defendants: the Board of Trustees, the Chancellor, and the Presidents of the three colleges comprising the San Mateo Community College District. The question before the Ninth Circuit was the sufficiency of the pleadings for a trial upon the merits.[3]

The Ninth Circuit found that the plaintiffs had stated a claim of discrimination entitling them to an opportunity to demonstrate proof of their allegations. In remanding the case to the district court, the Ninth Circuit expressed no views concerning the merits of the claims made, deciding only that the case could not be resolved upon construction of the pleadings.

De La Cruz presented the Ninth Circuit with two significant issues: the legal sufficiency of plaintiffs' complaint under both Title IX and the fourteenth amendment, and their standing to sue. The plaintiffs' claimed a violation under Title IX of the

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1. 582 F.2d 45 (9th Cir. Sept. 1978) (per Palmieri, D.J., sitting by designation; Wallace, J., dissenting; the other panel member was Kilkenny, J.), *cert. denied*, 441 U.S. 965 (1979).

2. Plaintiffs sought declaratory judgment that defendants acted illegally and unconstitutionally, and temporary and permanent injunctions restraining defendants from maintaining their allegedly discriminatory "anti-child-care" policy and requiring them to take affirmative steps to develop child care centers in the Community College District.

3. In stating the issue and outlining the task before it, the court stated:

> The issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims. . . . We must determine whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of plaintiffs claims.

582 F.2d at 48.

Education Act Amendments of 1972.[4] They alleged an infringement of their rights to be free from sexual discrimination in educational programs receiving federal funds. Plaintiffs also claimed that the defendants' actions constituted intentional, invidious gender-based discrimination which was arbitrary and totally unrelated to the legitimate goal of providing education, thus violating their rights under the due process clause of the fourteenth amendment.

In their complaint, plaintiffs alleged that the Community College District arbitrarily maintained a policy of refusing to allow the establishment of child care centers, refusing to expend District funds or accept or apply for funds to establish or maintain child care facilities on any of its' three campuses. Despite studies and surveys clearly reflecting the need for such facilities, the Community College District refused to take any action.[5]

B. Fourteenth Amendment Claim

There are two fundamentally different ways in which governmental actions may constitute invidious discrimination in violation of the equal protection clause of the fourteenth amendment. The first, often termed "facially discriminatory" action, occurs when there is an explicit classification of persons by reference to criteria such as race, sex, religion or ancestry. Such improper bases for differentiation, when legitimate governmental objectives are not substantially furthered, are unlawful.

Facially Neutral Action

The second way in which a violation may occur is more subtle, as it focuses upon the results of the action rather than the form of the action. Such actions, while not discriminatory in form (facially neutral), may produce effects that adversely and disproportionately weigh upon members of particular protected groups of individuals and will require explanation in terms of non-invidious purposes.

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4. 20 U.S.C. § 1681 (1976) (hereinafter Title IX). Title IX provides, in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any educational program or activity receiving Federal financing assistance."

5. Plaintiffs further alleged: "The District would not have been required to spend any of its own funds, nor to donate any of its own facilities as private sources could have provided the required matching funds and locations for the centers." 582 F.2d at 49.

This theory of facially neutral discrimination, as developed by the United States Supreme Court in *Washington v. Davis*[6] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[7] requires proof of two essential elements: discriminatory effect and invidious discriminatory intent or purpose.[8] Unless disproportionate impact is shown to be the product of intentional discrimination by an official, the government action will not be subject to strict scrutiny and the government will not be required to show compelling state interest. The requirement of proof of these two elements severely restricts the ability of a court to find a suspect classification and therefore find unacceptable discrimination. It greatly decreases the likelihood of invalidating such facially neutral government action.[9]

The De La Cruz *Holding*

De La Cruz is noteworthy in that the Ninth Circuit found sufficient allegations in the pleadings for both discriminatory impact or effect and discriminatory purpose requirements. The Ninth Circuit analyzed a series of cases decided by the Supreme Court[10] and determined that the cases demonstrate that the term

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6. 426 U.S. 229 (1976).

7. 429 U.S. 252 (1976).

8. In discussing and reaffirming their holding in *Washington v. Davis*, the United States Supreme Court in *Arlington Heights* stated it was

> clear that official action will not be held unconstitutional solely because it results in racially disproportionate impact. Disproportionate impact is not irrelevant, but it is not the whole touchstone of an invidious racial discrimination. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.

429 U.S. at 264-65. *See also*, Schwemm, *From* Washington *to* Arlington Heights *and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961; Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause:* Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburg, 12 HARV. C.R.-C.L.L. REV. 725 (1977).

9. For a discussion of the *Washington* test versus a pure impact test and a suggested "causation principle," see Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication.* 52 N.Y.U.L. REV. 36 (1977). In this article the author argues that the *Washington* impact test, as formulated by the United States Supreme Court is too narrow, allowing heightened scrutiny of government acts only where there is a showing of intentional discrimination. The author proposes that equal protection should require special scrutiny wherever such disproportionate impact is reasonably attributable to race or other suspect classifications regardless of motive.

10. Dothard v. Rawlinson, 433 U.S. 321 (1977) (complainants established a prima facie case of gender-based discrimination through the use of facially neutral height and weight employment standards resulting in disproportionate impact upon women applicants); Washington v. Davis, 426 U.S. 229 (exclusion of black applicants from employ-

discriminatory impact only serves to describe disproportionate consequences of official action, and as such "operate[s] only to signal the beginning of analysis—an analysis which must ultimately answer the question whether the effected discrimination is invidious and thus unlawful."[11]

Majority/Dissent Conflict Concerning Equal Protection

Plaintiffs alleged in this case that the lack of child care facilities deprived them of access to equal educational opportunities in the district in a way which almost exclusively burdens women. The majority found such allegations to be legally indistinguishable from the disproportionate impact and discriminatory effect of *Lau v. Nichols*[12] and *Arlington Heights* in that access to benefits was alleged to have been denied in a manner overwhelmingly burdensome to a particular protected group.

The dissent, however, distinguished *Lau* since the benefits sought there were part of a mandatory, imposed system of primary and secondary education. In this case, the college education sought by plaintiffs is not mandatory, nor as critical, so that the discriminatory burden alleged here was not imposed upon plaintiffs as it was in *Lau*. The majority conceded that although this must be a consideration in viewing the totality of defendants' conduct, it cannot form the basis of dismissal on the pleadings.

Principally, the dissent would find no sufficient allegation of discriminatory effects in this case based upon the holdings of the United State Supreme Court in *Geduldig v. Aiello,*[13] *General Electric Co. v. Gilbert,*[14] and *Nashville Gas Co. v. Satty.*[15]

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ment in the District of Columbia police department caused by the use of a qualifying test found discriminatory); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (denial of housing and resulting employment opportunities through refusals to rezone for low and moderate income housing found discriminatory); Lau v. Nichols, 414 U.S. 563 (1974) (failure to provide supplemental courses in English to non-English speaking students, having the effect of depriving such students of an equal educational opportunity found discriminatory); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (established claim of discrimination due to disqualification of disproportionate numbers of blacks from employment or job transfer through requirements not shown to be related to successful job performance or legitimate business need).

11. 582 F.2d at 52.
12. 414 U.S. 563; *see* note 9, *supra.*
13. 417 U.S. 484 (1974).
14. 429 U.S. 125 (1976).
15. 434 U.S. 136 (1977).

Geduldig is interpreted by the dissent to hold that invidious discrimination is not evident where actions do "not single out any person or group for inferior treatment, but is merely less inclusive of benefits than some might desire."[16] Moreover, the dissent would apply the holding of *Gilbert:* that no discriminatory effect may be found where no proof is shown that the package of benefits is more valuable to men than to women. Discrimination, the dissent argues, is found only where the action imposes a burden upon one group not suffered by another group, as held in *Satty.* The dissent would find that no discriminatory effect exists where the relative value of included benefits offered to men are not shown to be greater than that offered to women. Therefore, the mere refusal to extend the additional benefits of child care facilities to women would not be sufficient to show discriminatory effect in this case, reasons the dissent.[17]

This analysis by the dissent reflects a conservative, constructionist view of equal protection. Under such a view, particularly with facially neutral action, one is less likely to find discriminatory effect. In contrast, the majority holding of this case is much more liberal in its interpretation of discriminatory effect and disproportionate impact.

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16. 582 F.2d at 66 (Wallace, J., dissenting).

17. The dissent would also rely upon Palmer v. Thompson, 403 U.S. 217 (1971), as controlling, to support a contention that the inactivity of the Community College District, in declining to extend an additional benefit of disproportionate value to a group, is not actionable. The dissent finds the situation in *Palmer* analagous, in that the refusal to operate a swimming pool by the City of Jackson, Mississippi did not constitute a denial of equal protection. The dissent states:

> Although the decision of a government body not to initiate or support a particular social or economic program can certainly be said to have an effect or impact upon those who would be its beneficiaries, to say that such an effect or impact is discriminatory merely because a certain group would have benefitted from it more than others is a quantum jump from the traditional understanding of discrimination.

582 F.2d at 69 (Wallace, J., dissenting).

The majority on the other hand sees *Palmer* as not controlling the resolution of this case. *Id.* at 55-56 n.7. The primary question decided upon was whether illicit motivation alone could render otherwise valid official action constitutionally invalid. The majority notes that at no point in its opinion did the Supreme Court expressly confront or resolve the question whether refusal to extend benefits can be said to have a discriminatory effect. The majority would narrowly interpret *Palmer* to hold that invidious motivation alone will not suffice to establish a constitutional violation and that no showing was made in that case concerning what state action would be considered discriminatory. *Id.* Therefore, *Palmer* is not seen as controlling in this case.

The majority, in rebutting the analysis by the dissent, distinguishes *Geduldig* and *Gilbert* from *De La Cruz* in that these cases did not proceed upon a theory of discriminatory effect, but rather, upon a theory of facial discrimination. This is due to the fact that disabilities resulting from pregnancy in *Geduldig* and *Gilbert* were so gender-specific as to make such distinctions discriminatory on their face. The majority would read the holdings of these decisions in this limited context.

Continuing with an analysis of *Gilbert,* the majority points out that although no attempt was made by respondents in *Gilbert* to meet the burden of demonstrating gender-based discriminatory effect, the Court in *Gilbert,* in analyzing what would be sufficient to show discriminatory effect, stated that where "there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect simply because women disabled as a result of pregnancy do not receive benefits, or simply because an employer's disability plan is less than all-inclusive."[18] The majority interprets this analysis to show "that a finding of discriminatory effect could be sustained where sufficient proof establishes that 'the package is in fact worth more to men than to women,' notwithstanding its facial neutrality and notwithstanding the circumstance that the challenged action took the form of a mere refusal to confer additional benefits."[19]

Additionally, the majority finds that *Satty* is not inconsistent with its' analysis of *Geduldig* and *Gilbert.* In *Satty,* the determination that respondents' failure to prove discriminatory effect of an action legally indistinguishable from that in *Gilbert* lends further credence to the analysis made here by the majority. If the facially neutral action were immune to such proof, the determination made in *Satty* would be surplusage.

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18. 429 U.S. at 138-39. Congress has since specifically included disparate treatment due to pregnancy into the protections afforded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1976) through its amendment, the Pregnancy Discrimination Act, Pub. L. 95-555, §1, 92 Stat. 2076 (1978), thus abrogating the specific holding of *Gilbert* that exclusion of pregnancy from coverage of a disability benefits plan did not violate Title VII. This amendment prohibits all discriminatory treatment due to pregnancy but does not require employers to treat pregnant women in any particular manner in employment.

The statute does not affect the analysis as used in *Gilbert, Geduldig, Satty* or the present case.

19. 582 F.2d at 55 n.6.

In light of the preceding analysis, the majority distinguishes these cases from the present facts:

> The benefits not granted or programs not offered in each of the above cases were not alleged to have been essential or even related to the enjoyment of benefits already conferred or programs already in existence. . . . [The actions] did not impair the value of the included coverages. Here, by contrast, the essence of plaintiff's grievance is that the absence of child care facilities renders the included benefits less valuable and less available to women; in other words, that the effect of the District's child care policy is to render the entire "package" of its educational programs of lesser worth to women than to men.[20]

By broadening the scope of the overall value of benefits to be considered in discriminatory effects analysis the majority is liberally allowing proof of invidious discrimination beyond what was previously possible. This may be a step towards great liberalization of equal protection attacks upon facially neutral actions resulting in greater protection of constitutional rights.

Full Evidentiary Record vs. Pleadings

Aside from issues of discriminatory effects or invidious purpose, the majority places great emphasis upon the fact that the dissent relied upon cases whose holdings are based upon relatively full evidentiary records rather than upon mere construction of the pleadings as is the case here. As stated in *Davis:* "[A]n invidious discriminatory purpose may often be inferred from the totality of the facts."[21] It is necessary to determine whether invidious discriminatory purpose was a motivating factor through "sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[22] The majority, therefore, finds it too early to dismiss this litigation based upon allegations of intentional thwarting of all attempts to provide child care facilities by the defendants. This denial of child care facilities allegedly results in the effect of depriving substantial numbers of women from equal access to educational opportunities in violation of equal protection. Although no determination of the level of scru-

20. *Id.* at 56.
21. Washington v. Davis, 426 U.S. at 242.
22. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. at 266.

tiny required is made, the court does indicate that upon a threshold showing of discriminatory purpose on remand it would "be necessary to determine whether the injuries they claim may fairly be attributed to its improper consideration."[23]

C. The Title IX Claim

The Title IX issue raised by the plaintiffs' pleadings involves the question of whether the Act provides plaintiffs with any private right of action. The Ninth Circuit held a private right was available to the plaintiffs in *De La Cruz.*

At the time *De La Cruz* was tried, the Court of Appeals for the Seventh Circuit had concluded, in *Cannon v. University of Chicago,*[24] that no private right of action existed. *Cannon* has since been overruled by the United States Supreme Court[25] which held that a private right of action does exist under Title IX despite the absence of any authorization in the statute.

The Ninth Circuit distinguished the Seventh Circuit holding in *Cannon,* which held that the requisite state action ingredient was absent, defendants being a private university, from the facts in this case because of the clearly constituted state action alleged to have been taken by the Community College District.

The Ninth Circuit came to this holding through the drawing of an analogy between Title IX and Title VI of the Civil Rights Act of 1964[26] and the United States Supreme Court's decision in

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23. 582 F.2d at 59. This is to be determined through a test of "causation":

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. at 270-71 n.21.

24. 559 F.2d 1063 (7th Cir. 1976).

25. Cannon v. University of Chicago, 441 U.S. 677 (1979).

26. 42 U.S.C. § 2000d (1976), reading in part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

Lau v. Nichols.[27] Although the question of whether an implied right of action exists was not directly presented in *Lau,* the court noted that: "Given the close relationship between Title VI and Title IX and the Supreme Court's decision in *Lau,* we conclude it would be anomalous to deny plaintiffs here the right to raise asserted violations of Title IX."[28] Therefore, "[t]he abstract similarities between the claims successfully urged in *Lau* and other cases and those alleged here are too striking to allow the dismissal of these claims to stand."[29]

D. Standing to Sue

The defendants challenged the four plaintiffs' standing to sue asserting that since three of the plaintiffs were presently students in the District and the fourth a prospective high school graduate, no causal relationship existed between any action or policy of the District and the alleged lack of educational opportunities for the plaintiffs. The court, however, found that plaintiffs did have standing to sue as the plaintiffs' grievances had not become any less palpable or distinct to them because they were attending college or expected to go to college, nor did the fact that several had made temporary arrangements for the care of their children eliminate from the case the alleged burdens and uncertainties they claimed to suffer as a result of the challenged policy. Plaintiffs had alleged a particularized injury, namely, the denial of their access to higher education which was asserted to have concretely and demonstrably resulted from defendants' actions, seeking redress by the remedy sought, thus meeting the require-

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receiving Federal financial assistance."

27. 414 U.S. 563.

28. 582 F.2d at 60. In contrast, the Supreme Court in *Cannon*, 441 U.S. 677, based its holding upon an analysis of four factors in Cort v. Ash, 422 U.S. 66 (1975):

> (1) Whether the statute was enacted for the benefit of a special class of which plaintiff is a member;
> (2) whether there is any indication of legislative intent to create a private remedy;
> (3) whether implication of such a remedy is consistent with the underlying purpose of the legislative scheme;
> (4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States.

441 U.S. 688-89 n.9. *See also* Comment, *Private Rights of Action Under Title IX*, 13 Harv. C.R.-C.L.L. Rev. 425 (1978).

29. 582 F.2d at 61.

ments of the Ninth Circuit for standing to sue as set forth in *Bowkes v. Morton.*[30]

E. Conclusion

The *De La Cruz* holding is a narrow one concerning the sufficiency of the pleadings. The court continually stressed that it was making no comment on the merits of the case. It may ultimately be shown that the dissent is correct concerning the final disposition of the litigation, but at this stage of the proceedings, plaintiffs must at least be allowed a trial on the merits. The significance of the allegations involved would seem to indicate that the better view is to allow further proceedings, thus resulting in a fair disposition of the case upon a full consideration of the facts.

The majority has taken a bold step in distinguishing *Geduldig, Gilbert* and *Satty.* The dissent would hold no discriminatory effect due to an equality of value of existing benefits, but the majority significantly broadens the valuation of benefits by also considering the effect of the further burden of child rearing imposed due to the refusal to allow the establishment of child care centers. It is the overall value of the "package" of benefits that the majority focuses upon. Albeit, upon the surface the value of benefits to both men and women are equal, deeper analysis will demonstrate that the value of benefits to women is illusory due to the fact that these benefits are effectively excluded through the denial of child care facilities.

If followed by other courts, this concept could greatly affect the entire area of equal protection. The liberal approach used in the analysis by the Ninth Circuit in the majority opinion is reasonable since to follow the more conservative approach advocated by the dissent would only blind one's self to the realities of the actual opportunity of women to enjoy the benefits available. The majority would simply recognize the overall, effective value of the benefits in light of ancillary burdens and recognize any resultant discriminatory effect. The dissenting view would not; simply stops its analysis at the surface benefits conferred.

Both the majority and the dissent discuss the role of the judiciary in reviewing such actions as alleged here.[31] The views of

30. 541 F.2d 1347 (9th Cir. 1976).

31. As stated by the majority, they have fulfilled "the proper role of the federal

both are reconcilable although their results differ in this case. The dissent would not intervene where only discriminatory intent is alleged, assuming, as developed in the dissenting opinion, that discriminatory effects have not been adequately alleged.[32] But the dissent also states: "[O]nly after discriminatory effects are shown . . . intent becomes relevant to the validity of a legislative or administrative act."[33] The majority would also normally "show great deference to local democratic processes and refrain in most instances from interfering with decisions of school authorities."[34] But as the court recites from *Arlington Heights,*[35] there are times

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judiciary in overseeing the decisions of local administrative bodies in the field of public education." 582 F.2d at 47.

The Ninth Circuit took this same role in Guadalupe Organization, Inc. v. Tempe Elementary School Dist., 587 F.2d 1022 (9th Cir. 1978). Here the Ninth Circuit held that failure to provide bi-lingual education to elementary school students of Mexican-American and Yaqui Indian origin did not violate equal protection.

As the Ninth Circuit points out, the United States Supreme Court has held that education is not a fundamental right guaranteed by the Constitution. San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1978). The state action of defendants to cure these language deficiencies was held to be rationally related to legitimate state interests since it did not fail "to provide each child with an opportunity to acquire basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." 582 F.2d at 37.

The court held that the equal protection clause of the fourteenth amendment does not impose a duty to provide bilingual-bicultural education as sought by the plaintiffs. The programs initiated by the school district to cure existing language deficiencies of these non-English speaking students was held to have fulfilled defendant's equal protection duty.

Additionally, the court held that bilingual-bicultural education is not required by the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), as the remedial education provided already complies with making available meaningful education and equality of educational opportunities. The Equal Education Opportunity Act of the Education Amendments of 1974, Section 204, 20 U.S.C. § 1703 (1976), also would not require such programs as plaintiffs desire as they were held not to be mandatory as "appropriate action to overcome language barriers that impede equal participation by its students." 587 F.2d at 1030.

32. Upon elaborating on the inappropriateness of judicial interference the dissent states:

> Insisting that a plaintiff surmount that threshold [showing of discriminatory effect] is precisely what safeguards against the judicial excess. . . . Should the judiciary intervene before the threshold of unequal treatment is crossed, however, and extend its power of judicial review to cases where treatment is not unequal, but motive may be impure, then the courts are, in effect passing judgement on the character and qualifications of the officers themselves and the government bodies through which they act rather than upon their official acts.

582 F.2d at 72 (Wallace, J., dissenting).

33. *Id.* at 71 (Wallace, J., dissenting).

34. *Id.* at 62.

35. 429 U.S. 125 (1976).

when judicial deference cannot be justified as when both discriminatory effect and purpose are shown. Therefore, where both discriminatory effect and discriminatory intent or purpose are both present the majority and dissent would agree that judicial review is appropriate.

As recognized by the court, *De La Cruz* reflects a problem of national importance: the disadvantage created by the burden of child rearing. The court found this burden "comparable to a wide spectrum of conditions afflicting many other members of the student population; such as acute impediments to sight, hearing, or mobility and a narrow margin of economic self-sufficiency requiring students to be wage earners while attending college."[36] Although it is not the prerogative of the judiciary to resolve these problems, the Ninth Circuit held that this case could not be resolved upon a construction of the pleadings.

The impact of this decision is significant because it broadens the areas and issues of discrimination encumbering equal educational opportunities that may be alleged for remedy through the judicial process. The real impact of this decision will not be known until the ultimate disposition of the litigation. Should a denial of equal educational opportunity in fact be found in this case through the fourteenth amendment or Title IX, a tremendous impact upon the educational system in the United States will result. *De La Cruz* is an important decision in having shown that on the pleadings, invidious discrimination may be alleged upon a showing of discriminatory effect through the decreasing the value of included benefits otherwise equal in value among classes through an action which, on its face, is neutral.

Wayne B. Chew

V. OTHER DEVELOPMENTS IN CONSTITUTIONAL LAW

United States v. Pinkus, 579 F.2d 1174 (9th Cir. Aug., 1978). In a prosecution for obscenity, the defendant must meet a two-pronged test to establish the admissibility of comparable materials. The test includes a showing that the proffered materials bear a reasonable resemblance to the allegedly obscene materials which are the subject of the prosecution. In addition, the defen-

36. *Id.* at 64.

dant must establish "a reasonable degree of community acceptance of the proffered comparables." The court also found that the decision on whether or not to admit the comparables, and if so, how much of such evidence shall be admitted, is within the sound discretion of the trial court. The decision should be made by the trial judge after a hearing out of the presence of the jury.

In *United States v. Quijada,* 588 F.2d 1253 (9th Cir. Nov., 1978), the Ninth Circuit ruled that a conviction for attempt to distribute cocaine cannot be attacked on the basis of impossibility if the jury believed, beyond a reasonable doubt, that defendant intended to distribute cocaine. The case was one of first impression in the Ninth Circuit. Defendant distributed the substance, which was discovered to be lidocaine hydrochloride—not a controlled substance, to an undercover agent. He was arrested and charged with distribution of cocaine, after a field test so identified the substance. In later laboratory tests, the substance was identified as lidocaine. Two jury trials resulted in mistrials and he was convicted at a third trial.

The court refused to distinguish between factual and legal impossibility. The jury was correctly charged with the necessary elements for a conviction of an attempt to commit a crime, including a specific intent to commit a crime and the commission of an overt act. Based on the evidence submitted, the court determined it was not unreasonable for the jury to find beyond a reasonable doubt that defendant believed he was distributing cocaine, thus meeting the required illegal intent to withstand an attempt conviction.

In *Guyton v. Phillips,* 606 F.2d 248 (9th Cir. Aug., 1979), the Ninth Circuit ruled that the term "person" does not include a deceased for purposes of the Ku Klux Klan Act. The estate of decedent sued various public officials for an alleged conspiracy to cover up the wrongful death of decedent by three police officers. The complaint also stated a cause of action against the police officers for decedent's wrongful death under the Ku Klux Klan Act, which cause of action was not part of the instant appeal.

The actions complained of, allegedly committed by the defendants other than the police officers, all occurred subsequent to the death of decedent. The court held that a person's civil rights terminate upon death, so that acts committed after the victim's death may not be the subject of a conspiracy to deprive

decedent of his civil rights. The court distinguished cases which allow a wrongful death action under 42 U.S.C. §§ 1983 and 1985 (1976), such as the case involving the three police officers who shot decedent, to survive where state law permits such actions.

In *United States v. Mattson,* 600 F.2d 1295 (9th Cir. July, 1979), the Attorney General, representing the United States, filed suit in the District Court of Montana, seeking injunctive relief based on the deprivation of constitutional rights of mentally retarded patients confined in unsanitary and unsafe conditions in facilities of the state of Montana. The Ninth Circuit, avoiding any opinion on the merits of the case, determined that the only remedy available to the United States by the Developmentally Disabled Assistance and Bill of Rights Act is the withholding of federal funds for failure to comply with procedural requirements of the Act.

The court held that the doctrine of separation of powers requires that the United States have specific statutory authority or "some interest that can be construed to warrant an implicit grant of authority" in order to have standing to sue. Such an implicit grant of authority has been found in cases involving national security, obstruction of interstate commerce, and some pecuniary interest on the part of the United States. The Developmentally Disabled Assistance and Bill of Rights Act, in addition, contains state advocacy provisions which provide ample protection for the rights of the patients. The court relied on the doctrine of federalism as well as the traditional requirement that the complainant suffer some injury in fact, within the zone of interests to be protected by the statute. Reluctantly, the court agreed that the United States is not entitled to relief.