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State Supplementation of Benefits Under The Supplemental Security Income (SSI) Program

by **Adele M. Blong**, Staff Attorney, Center on Social Welfare Policy and Law and **Howard Thorkelson**, National Senior Citizens Law Center

Introduction

The Social Security Amendments of 1972,[1] which were enacted on October 30, 1972, provide for the establishment of a new federally-administered income maintenance program for the aged, blind and disabled[2] effective January 1, 1974. This program, called the Supplemental Security Income Program (SSI), will be administered by the Social Security Administration (SSA) in the Department of Health, Education and Welfare. Authorization for a service program for such individuals is continued by enactment of a new Title VI of the Social Security Act, which provides federal funding for a state service program which meets the requirements set forth in that title, *i.e.*, Title VI provides for continuation of a service program in the pattern of the current federal-state cash assistance and services programs authorized under the current Titles I, X, XIV and XIX of the Social Security Act.

The new federal cash benefits program provides for a basic benefit of $130 for an individual and $195 for a couple if both members are eligible individuals, *i.e.*, aged, blind or disabled.[3] There is provision for certain income and resource disregards in determining eligibility, and a grandfather clause for individuals already receiving aid under one of the federal-state plans for the aged, blind or disabled.[4] However, the federal benefits are nonetheless below the current payment levels in many states and operation of the federal program alone would cause both a reduction of benefits for many people already on the rolls and reduce eligibility levels for new applicants. In addition, the federal program makes certain other changes, such as the omission of any provision for essential persons, the elimination of food stamp eligibility, and the assumption of income of an ineligible spouse, which further widen the gap between current payment levels under the federal-state programs and the benefits available under this program.[5]

In order to avoid reductions, Congress has authorized, but not required, a program of *state supplementation* of benefits. Accordingly, in many states the question of whether the new SSI Program represents a gain or a loss for aged, blind and disabled individuals will depend upon the action taken by the state to supplement the SSI benefits.

The following discussion is directed primarily to the question of state supplementation and describes the ways in which state-supplementation programs might operate. It is based on our own best understanding of what the law allows or does not allow as well as on the views expressed by representatives of SSA in meetings in which we have participated with other representatives of the affected individuals. It should be remembered throughout, however, that the agency's position is that it is still in the planning stages and that few, if any of its decisions are final. SSA expects to issue SSI regulations, including those for federally-administered supplementation, in proposed form in April 1973 and in final form in July 1973. Accordingly, any of the agency views reflected herein are subject to change. In addition, our own analysis of the statute and of the consistency or inconsistency therewith of any projected plans is far from complete.

However, the imminence of the new federal program argues in favor of providing as much information to the intended beneficiaries of the program as quickly as possible, even at some risk of incomplete analysis, so that they can form a judgment regarding the impact of the programs in their state, and the need for and alternatives for state action. Thus, as noted below, some state legislative action prior to January 1, 1974 will be required in almost all states in order to provide a transition to the new program.

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1. Pub. L. No. 92-603 (Oct. 30, 1972).
2. The term "aged, blind and disabled" will be used throughout to refer to those individuals who are by virtue of such condition eligible to receive benefits under the new federal program.
3. Social Security Act, Section 1611, *as amended by* Pub. L. No. 92-603 (Oct. 30, 1972). All references hereinafter, unless otherwise indicated are to sections of the Social Security Act.
4. *Id.* §1612.
5. For a brief summary of the new federal program *see* 6 CLEARINGHOUSE REV. 478 (December 1972), and the November issue of the *Newsletter of the Center on Social Welfare Policy and Law.*

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Relationship of New SSI Benefits to Current Programs

There appears to be some 35 states in which SSI's replacement of current OAA, AB, APTD and food stamp benefits, *without state supplementation*, would mean a reduction in some recipients' income:[6] *Alabama, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, Wisconsin* and *Wyoming.*

In all states the replacement of OAA, AB, APTD and AABD by SSI will release the state and local funds currently expended in those programs and make them available for reallocation. Even those states which maintain benefit levels through state supplementation may realize a savings in state and local funds compared with prior expenditures in these programs. Accordingly, some of those states may wish to consider utilizing some of this savings for other social welfare purposes such as increasing payment levels in AFDC to narrow the gap between beneficiaries of that program and those covered by the new federal program, and/or maintaining or increasing the level of social services provided within the state where the new federal ceiling would otherwise impose restrictions.

State legislative action in the current sessions may be necessary to terminate the current state OAA, AB, APTD and AABD programs by January 1, 1974 and to provide for transition into the federal program on that date. It appears probable that legislative action would be required in any state to provide state supplementation after January 1, 1974 and to authorize a state to enter into an agreement with SSA, where desired, to administer the program. Legislation would also be required to authorize the state agency to enter into an agreement with HEW providing for state participation in SSI administration during a "transitional" period, which is required in order for the state to qualify for matching funds under Titles IV, V and XIX during that period.[7] However, SSA expects that it will be able to begin direct operation of the program on January 1 and that no such transitional period will be required.

6. The calculations by which the list was derived are approximate. The list was arrived at by adding, for each state, (1) the "Largest Amount Paid" (for basic needs including shelter) in each category (for both an individual and a couple in OAA) for July *1971*, and (2) the appropriate food stamp bonus value for January 26, 1972, and comparing that sum with the amount of the appropriate SSI payment ($130 per individual; $195 per couple). The source of the "Largest Amount Paid" figures is NCSS Series D-2 (7/71), *Public Assistance Programs: Standards for Basic Needs, July 1971*, released March 20, 1972. Tables showing this calculation are available from the Center on Social Welfare Policy and Law. The NCSS Report D-2 is available from the National Center for Social Statistics, Social and Rehabilitation Service, Department of Health, Education and Welfare.

7. Pub. L. No. 92-603, §402 (Oct. 30, 1972).

General Description of State Supplementation

State supplementation is basically a system of cash grants to supplement or add-on to the federal benefits. The amount of the state supplemental benefit when added to the federal benefit would establish an overall "standard of need" or "eligibility test" in a particular state. Any aged, blind or disabled individual whose income and resources were below that level, after application of the appropriate disregards, etc., would be eligible for a benefit. Whether the individual received both a federal benefit and a state supplemental benefit or only a state benefit would depend on the "budget deficit," *i.e.*, whether his or her income was below the federal level, or above the federal level but below the overall combined level.

There are a variety of options open for a program of state supplementation. The basic options, however, are three: a state which elects to provide for state supplementation for the aged, blind and disabled will have to

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choose (1) whether to administer such a program itself; (2) whether, instead, to have it administered by SSA; and (3) whether to simply maintain benefit levels at the January 1972 level or to provide for meeting increases in cost-of-living since that time. Under either a state-administered or a federally-administered supplementation program, payments to SSI recipients are not counted as income for SSI purposes; the amount of supplementation is simply added on top of the SSI grant.

I. State-Administered Supplementation.

A state-administered supplementation program is not subject to federal statutory requirements with one exception. In order to be disregarded as income for SSI purposes, payments must be "cash payments... made... on a regular basis... as assistance based on need...."[8] Otherwise the state is free to establish and operate the program in any way it sees fit. The program would have the same legal status as a state's general assistance program now has, and indeed, for all practical purposes might be regarded as a part of such program.

II. Federally-Administered Supplementation.

A state may elect federal administration of its supplementation program by entering into an agreement for that purpose with the Secretary of HEW, if its program meets certain federal requirements.[9] There are possible substantial financial advantages to a state which elects federal administration. For example, the state will only have to bear the expense of the supplementation benefits paid out; the federal government will pay the entire administrative costs.[10] In addition, the state is guaranteed that it will be held harmless against any increase in state costs above the level of state and local expenditures in assistance payments in OAA, AB, APTD or AABD in calendar 1972.[11] As further discussed below this "hold-harmless" applies only to expenditures attributable to benefit payments which do not exceed the state's January 1972 money payment level.

State Supplementation Under Federal Administration

If a state elects federal administration the federal government becomes responsible for the entire operation of the eligibility and payment process. The state establishes the eligibility and payment standards subject to the requirements discussed below, but SSA would be responsible for the acceptance and processing of applications, eligibility determinations, issuance of payment, etc. In effect, an individual would apply for both federal and state benefits by filing an application with SSA.

The major federal requirements applicable to a federally-administered supplemental program are as follows:

Flat Grants.

SSA's view is that it is only authorized to administer a state program which provides for a system of flat grants that may be simply added on top of the federal SSI grant and that it would not be authorized to make individual special-needs payments which would require an examination of individual circumstances and factors which are not relevant to the determination of eligibility for the federal benefit.

This does not seem to necessarily rule out consideration of all individual factors, such as a state making provision for recognizing the needs of an ineligible spouse or parent in its supplementation grant to an aged, blind or disabled individual. Thus, the statute appears to leave the state free to determine for itself the method or factors which it will use to determine the extent of an individual's need for supplementation. In addition, Section

8. Social Security Act, §1616 (a), *as amended by* Pub. L. 92-603 (Oct. 30, 1972).

9. *Id.* §1616.

10. *Id.* §1616 (d).

11. Pub. L. No. 92-603, §401 (Oct. 30, 1972).

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1616 (f) provides for consideration of the income of an ineligible spouse in determining an individual's eligibility for SSI, so that SSA would have to obtain information on the presence and income of such a spouse in any case. Thus, the information required for the determination in the state program would already be available to it.

Even with regard to true "special-needs" payments there does appear to be some possibility that SSA might accept responsibility for processing the payments if the state would itself determine eligibility and designate the individuals to receive the payments. However, the benefit from use of the latter system might be outweighed by the cost of maintaining a separate state administrative process for this purpose. Assuming that the state was willing to bear the administrative cost anyway, it might be more beneficial to use these state funds to support a general increase in payment levels.

SSA is also taking the position that a state must use a single standard for all individuals in the same category in its supplementation program. This means that states which formerly had different standards or payment levels depending on whether an individual lived in a personal dwelling, a boarding house, a hotel, etc., would be required to come up with a single standard to be applied to all individuals. It might appear at firsh blush that this presents no problem since a state can simply establish supplementation at the level of the largest amount payable under any of these circumstances or at least the amount paid to the preponderance of beneficiaries, and thereby accept the right of the individuals concerned to make their own decision as to how best to budget their income and otherwise select living arrangements most suited to their fiscal and personal needs. However, as discussed below, application of the provisions of the hold-harmless could affect a state's willingness to proceed in such a manner.

The Level of State Supplementation.

There is no maximum or upper limit *qua* maximum on the amount of supplementation benefits which a state may pay. There may, however, be a very practical constraint on the state's selection of a supplemental level. A state will be "held-harmless" against increased costs, resulting, for example, from caseload increases, only with regard to the parts of the individual benefit payments that do not exceed its January 1972 payment level plus the food stamp bonus. Thus, there is a financial deterrent to establishing a supplement benefits level which exceeds the January 1972 payment level if it would increase state costs above calendar 1972 expenditures. Indeed there may be some deterrent effect even if no increased state expenditure is entailed.

A question may arise as to whether a state which does not have the combined program, AABD, and which has different payment levels for the aged, the blind and the disabled in its separate OAA, AB, and APTD programs should be allowed to maintain these differential standards in their supplementation programs. Indeed, as discussed below the application of the hold-harmless may well motivate states to attempt to retain such differentials. [12] Those states which now have the combined program and are therefore required to maintain a single payment standard will, of course, have to continue to maintain the single standard.

Individuals Covered Under the Agreement.

Pursuant to Section 1616, the agreement for federal administration of state supplementation may cover all those "who would but for their income be eligible to receive benefits" under Title XVI as well as all "individuals receiving benefits" under the federal program. [13] Of course, in the case of aged, blind or disabled individuals whose income and resources are below the standard selected by the state for determining need for supplementation but above the federal benefit level, the only benefit paid would be the amount of the state supplementation for which the individual or individuals were eligible. [14]

As pointed out in note 13, *supra*, the statute only contemplates one variance between the eligibility standards to be applied in the federal and state programs, the authorization for a durational residency requirement in the state programs. Otherwise the state must adopt the same eligibility conditions and income disregards for purpose of the state supplementation program as apply in SSI. Thus, the state cannot, for example, establish lien requirements or relatives' responsibility requirements (except for the income assumption contained in Section 1616 (f) which is referred to above). The statute also provides for the federal-state supplementation agreement to include "such other rules with respect to eligibility for or amount of the supplementary payments. . . as *the Secretary* finds necessary. . . *to achieve efficient and effective administration* of. . . State supplementation," [15] (emphasis added), and permits the state to establish income disregards *in addition* to those mandated by federal law. [16] (However, as noted below, the costs of any benefits attributable to such additional income disregards are not covered by the hold-harmless.)

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12. It is at least an open question as to whether the rationale for differential treatment relied on in Jefferson v. Hackney, 406 U.S. 535 (1972) would support differential treatment in state supplementation of individuals all covered by a unitary federal program.

13. The statute provides that a state may impose a durational residency requirement as a condition of eligibility for receipt of state supplementation and that, in such case, it need not supplement beneficiaries of the federal program who do not meet such condition. However, it seems clear that any such requirement would be invalid under the doctrine of Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* Cole v. Newport Housing Authority, 435 F.2d 807 (1st Cir. 1970).

14. While the statute on its face might appear to make coverage of this latter group optional, it seems clear that a serious equal protection issue would be raised if the state provided benefits only to individuals receiving SSI and denied aid to other similarly situated individuals whose income and resources were below the state's definition of need.

15. Social Security Act, §1616 (b) (2), *as amended by* Pub. L. No. 92-603 (Oct. 30, 1972).

16. *Id.* §1616 (c) (2).

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The new federal program does not make provision for essential persons and the provisions of Section 1616 (a) relating to the scope of a state supplemental agreement do not make specific provision for the coverage of such individuals or of any other needy individual who is not aged, blind, or disabled. However, as noted above, there is some possibility that the needs of related individuals could be dealt with in the state program under the essential person concept by defining the need of the individual as including the maintenance costs of a person whose presence is essential to the well-being of the eligible individual.

Federal Guarantee Against Increased State Costs As Result of Supplementation, Hold-Harmless.

Pursuant to Section 401 of Pub. L. 92-603, a state which enters into an agreement under which SSA will administer the supplemental program is held-harmless against the possibility of its costs for the program exceeding its calendar 1972 expenditures for assistance in the adult categories. States are held-harmless to the extent that their costs result from those parts of individual benefit payments which do not exceed the difference between the state's "adjusted payment level" for January 1972 and the benefit paid under SSI plus income which is not excluded in determining eligibility for such federal benefit, that is, countable income. In the event that a state's costs rise above its 1972 expenditures, the excess costs will be borne by the federal government.

Obviously, this provides no incentive to states to increase benefits over the January 1972 levels or to maintain benefits increased since that time, such as the September and October 1972 increases to reflect the increase in OASDI. However, it is not altogether clear whether the hold-harmless should be a real consideration in the decision as to where to set benefit levels under the state program.

Since state costs under the new program are measured against the total nonfederal share of assistance costs in the adult categories, it seems unlikely that many states would approach the level at which they would qualify for federal funds unless their state supplementation level was far in excess of the federal benefit level and/or there was a great increase in the number of aged, blind or disabled individuals who qualified for aid.

Obviously, the caseload might increase as the result of such factors as increased acceptance of the "new" program tied into OASDI, more liberal eligibility standards, wider dissemination of information by the federal agency as to the availability and benefits of the program, and better access. However, there do not appear to be any reliable estimates as to this factor at the present time. Some more definite information may be available shortly, since SSA as well as various state agencies are working on such projections. The Bureau of Social Science Research is also developing an estimate of the cost of supplementation. To some extent, however, both the development of such estimates and the resolution of many of the other questions affecting supplementation is hampered by lack of a final decision as to one critical factor—the amount of the "adjusted payment level" which will be established for each state.

Thus, if one assumes that a state's determination of its supplemental benefit level will be influenced by the availability of federal funds in case of increased costs, a state will obviously want to know its adjusted payment level before establishing its benefit level. This determination in turn affects the estimate of costs since some of the growth in caseload may depend upon the supplemental benefits level.

As defined in Section 401 (b) (1):

> . . . the term 'adjusted payment level under the appropriate approved plan of a State as in effect for January 1972' means the amount of the money payment which an individual with no other income would have received under the plan of such State approved under title I, X, XIV, or XVI of the Social Security Act, as may be appropriate, and in effect for January 1972; except that the State may. . . increase such payment level. . . by. . .
>
> (A) a payment level modification. . .
>
> (B) the bonus value of food stamps in such State for January 1972. . . .[17]

The question of how to determine "the amount of the money payment which an individual with no other income would have received" is still unresolved. SSA appears to be unwilling to accept the highest money payment standard in a category for across the board application to the category. As noted above, this could affect a state's willingness to use this figure as its supplemental benefit level. The agency, however, believes that identification of a single dollar figure is required. To those of you who have followed the sometimes painful course of Section 402 (a) (23)[18] the proposed answer should be obvious—averaging. SSA is currently considering establishing the money payment level for each state by conducting a study of January 1972 payments and arriving at some "average payment." As yet there is no clear indication of how the payment data would be collected and analyzed.

Whatever else might be said for or against averaging it is clear that it cannot begin to produce a realistic approximation of the money payment which would have been made to an individual without income unless there is a careful delineation of the items of payments to be included in the study. This is necessary to ensure that *all* payments made will be considered in the averaging and also that any case in which the payment was based on consideration of available income or an assumption of income will be eliminated.

This question of establishment of the adjusted payment level may present one of the most immediate problems for all of those concerned with securing the best possible program for the aged, the blind, and the disabled. Thus, in view of the great variation in budgeting practices among the states, it is doubtful that SSA could, within the

17. This pertains to states which paid less than 100% of need in the adult categories.

18. 42 U.S.C. §602 (a) (23) enacted in 1968 providing, *inter alia*, for the updating of AFDC standards of need.

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time constraints, fully analyze and appreciate the significance of the various ways in which payment calculations may have been based on a determination or assumption of income. Therefore, in order to ensure that SSA is fully aware of the need for careful delineation of the parameters of any averaging process and to provide a basis for identifying the particular problem areas it would be useful for concerned groups to undertake an analysis of their own state's budgeting procedure so as to identify those areas. The information could then be used not only with SSA but as a basis for any other action necessary to secure further refinement of the state's data in the event that an averaging process is eventually used. It might also be useful to compare the results of budgeting analysis with the figures for the state's money payments provided in NCSS Report D-2. Although the tables in that report purport to represent payments made for basic needs including shelter, it appears that many states are now challenging the accuracy of these figures. It is not clear whether they are asserting that the report understates or overstates the amount of the money payment. However, it would be far more efficient and far less costly, provided the figures reported were an accurate reflection of state payments, to rely on the report with appropriate adjustments for "special needs" payments, rather than undertake new studies to produce a new average.

The types of budgeting practices which should be identified in order to assume elimination of payments based on attribution of income would include cases of prorating shelter or other household costs since prorating is no more than an assumption that the extra person in the household contributes his or her income to meet part of the costs. Some states do this on a case-by-case basis; others incorporate this assumption in their standards, for example, payment for one person living alone is $162, payment for one in a household of three is $100. In addition, those cases receiving personal needs only, because board and maintenance are met out of another program or assumed to be provided, would have to be selected out. The same would have to be done with so-called companion cases—cooperative budgeting now ruled out by Pub. L. 92-603. For example, some states pay an adult in an AFDC household a per capita share of the AFDC allowance rather than his or her grant due under AABD.

Any consideration of averaging would also raise other problems such as proper allowance for geographic variations. For example, shelter is an item that is provided in a large number of states on an as-paid basis and the payment varies widely within the state not only on a case-by-case basis but also as a reflection of regional cost differences between areas. In some states this regional variation is accommodated by fixing varying amounts by areas in the plan itself. In other states, the amounts payable for shelter are fixed by each one of the local welfare districts in the state. In addition, shelter grants may vary depending on whether fuel for heating is paid separately or included. Obviously any averaging of disparate payments based on different costs does not reflect the amount that would have been paid to any individual under the state plan.

Since, as noted above, the "adjusted payment level" is the upper limit on the state expenditures which will be recognized for hold-harmless purposes, states which establish their supplementation levels at or above the adjusted payment level may reap some benefit out of the hold-harmless if the figure is a realistic reflection of 1972 payment levels and there is a substantial growth in the caseload. On the other hand, if the adjusted payment level is unrealistically low and there is a substantial growth in caseloads, states may loathe to exceed this level in establishing benefits since they would have to finance any increased state costs solely out of state funds.

This problem may be even further aggravated in those states which increased benefits during 1972, because of an anomaly in the statute for which there appears to be no answer at present. Thus the calculation of the state's nonfederal share of expenditures in 1972 will include its share of expenditures for increased benefits in that year although the adjusted payment level will be set at the January 1972 level. In such a state, the costs of maintaining benefits at the January 1972 level under the supplemental program would have to exceed the state and local cost of providing benefits above that level during 1972 before the state would become eligible for any federal relief.

Federally-Administered Supplementation Plus State-Administered Special Grants.

The narrowest option for the state is full federal administration of supplementation. This means the payment of flat grants without the possibility of any increase on the basis of special needs. In this case the recipients' advantage lies in the level of supplementation being set high enough to reflect the full amount of all special needs currently considered, *i.e.*, to assure that no individual receives less under SSI supplementation. However, a state may have the federally-administered supplementation program described above and in addition a state-administered program of special grants. The special grants would provide for particular items of need that may not be reflected, or only partially reflected, in the amount of federally-administered supplementation. Payments to SSI recipients would constitute additional supplementation since they would not be counted as income for SSI purposes. This is true whether such payments were made to others in addition to SSI-supplementation recipients or were available only to some SSI-supplementation recipients.

The state would bear the administrative expense of determining eligibility for the additional payments and of making the payments to individuals who are not SSI-supplementation recipients. However, in the case of SSI-supplementation recipients, it is still an open question as to whether SSA would handle, and bear the expense of, making these additional payments once the individual and payment amounts are designated by the state.

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Mental Commitment Cases of the 1971–72 Supreme Court Term

by **Kenneth R. Wing** and **Rod Carman**, National Health Law Program

Even in areas where legal representation has become available to the poor through the efforts of Legal Services programs, there is still one group that is almost universally denied representation: those confined under the various forms of civil commitment and patients in mental health institutions. Almost by definition in need of legal counsel and predictably indigent, they are faced with interpersonal and institutional barriers that further reduce their chances to obtain representation.

It is the position of the National Health Law Program that Legal Services programs throughout the country should focus some of their attention towards this portion of their communities, to assess the need for legal services in the field of mental health and to develop a role in providing these services. This article is intended to stimulate an interest in the mental health field and to serve as an introduction to the related law.

An analysis of a series of related cases handed down in the 1971–1972 term of the Supreme Court dealing with the power of the states to commit the mentally ill indicates that the Court is willing to make a long overdue consideration of the substantive limits on the exercise of that power and the procedural requirements that must be afforded to those that are subject to it. In *Jackson v. Indiana*,[1] in a statement destined to be often quoted, Mr. Justice Blackmun expressed both this willingness to examine commitment law and his dismay that the legal profession had not brought this issue before the Court more often. He observed: "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated."[2]

In that case, Theon Jackson, a mentally defective deaf mute who had been charged with two counts of robbery (the total value of the allegedly stolen goods was five dollars), was committed after examination by two physicians and a hearing on the matter as incompetent to stand trial on the robbery charges. Indiana law also provides for the civil commitment of insane persons and the civil commitment of feeble-minded persons. Both of these statutes differ from the commitment of persons incompetent to stand trial in a number of ways, including 1) commitment under either civil statute would have been according to a stricter standard of proof of the relevant mental defect; 2) release under the civil commitment statutes would have been easier to attain; and 3) the treatment received under either civil statute would have been different and, arguably, better for Jackson.

Jackson claimed that the procedure used violated his rights under the fourteenth amendment. The Court agreed, holding that the commitment of Jackson as incompetent to stand trial under the Indiana law denied him equal protection of the law and that the procedure used in this commitment constituted a violation of due process.

In finding Jackson's commitment a violation of equal protection, the Court was extending the principle established in *Baxtrom v. Herold*.[3] In that case the Supreme Court held that the State of New York had denied Johnnie Baxtrom equal protection of the law when, near the expiration of the term of his prison sentence, he was summarily transferred, after a brief hearing, from state prison to a hospital for the criminally insane to serve indefinitely until adjudged sane. All other persons committed civilly under New York law were granted a review *de novo* before a jury of the finding of mental illness and, before commitment to the particular facility where Baxtrom was confined, it had to be judicially determined that the individual was dangerous as well as mentally ill. The Court found that a classification based on Baxtrom's status as a confined prisoner was not a rational basis upon which to discriminate between Baxtrom and all other persons committed under New York law as mentally ill and, therefore, to do so was a violation of equal protection.

In *Jackson*, the Court, citing *Baxtrom*, used nearly identical logic: "If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally afforded to all others, the mere filing of criminal charges cannot suffice."[4] In order to satisfy the requirements of equal protection, the state must show a rational basis for any procedure that deprives the committed person of substantial rights that would be available to any other person similarly committed. The Court rejected both the contention that Jackson's pending criminal charges were sufficient basis upon which to discriminate between him and all others civilly committed and rejected the argument that the commitment was only temporary (*i.e.*, until Jackson recovered), primarily since on the facts Jackson's recovery was highly unlikely.

In holding that the procedures used to commit Jackson and his continued confinement were violations of due process, the Court did more than reapply a recognized principle of law. The Court examined the proceedings used to commit Jackson and the reasons given to justify his confinement in the light of the realities of that confinement, *i.e.*, the treatment that would be afforded Jackson and the likelihood that he would ever stand trial on the original charges. While withholding explicit statement or definition of the exact basis upon which justification for commitment could be based, the Court very bluntly stated:

1. 406 U.S. 715, 737 (1972).
2. *Id.* at 738.
3. 383 U.S. 107 (1967).
4. 406 U.S. at 724.

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We need not address these broad questions here. It is clear that Jackson's commitment rests on proceedings that did not purport to bring into play, indeed did not even consider relevant, *any* of the articulated bases for exercise of Indiana's power of indefinite commitment. The state statutes contain at least two alternative methods for invoking this power. But Jackson was not afforded any 'formal commitment proceedings addressed to [his] ability to function in society,' or to society's interest in his restraint, or to the State's ability to aid him in attaining competency through custodial or compulsory treatment, the ostensible purpose of the commitment. At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than a reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the forseeable future. (Citation omitted.)[5]

The Court further required that any continued confinement of Jackson as not competent to stand trial would have to be based on a probability that he would return to trial and could only be justified by progress towards that goal.

Thus, while it is possible that due process would not be violated—although the Court was clearly withholding judgment—by a proper procedure committing Jackson by reason of a mental disability or because he was a danger to the public or temporarily while he is recovering his ability to stand trial, even these commitments would not only have to be justified by their proper purpose, but also examined as to the appropriateness of the conditions and duration of confinement.

In a related case, *McNeil v. Director, Paxutent Institute*,[6] Edward McNeil, originally convicted on two counts of assault and sentenced to five years in prison, was sent to Paxutent Institution for observation to determine whether he should be committed indefinitely as a defective delinquent under relevant Maryland law. McNeil flatly refused at all times to talk to the Paxutent psychiatrists and, at the expiration of the five-year original sentence, no decision relating to commitment as a defective delinquent having been made, McNeil claimed that continued confinement under the observation order was no longer valid. In a unanimous opinion, the Supreme Court held that McNeil's confinement violated the fourteenth amendment and constituted a denial of due process of law. Specifically the Court held that it is a denial of due process to continue to hold a person in a mental institution on the basis of an *ex parte* order committing him solely for observation.[7] Citing its decision in *Jackson*, the Court acknowledged that if the commitment had in reality been a temporary commitment for observation the requirements of substantive and procedural due process might have been less; but since it was clearly a long-term indefinite commitment, the state must afford McNeil "required (procedural) safeguards"[8] or, if not, strictly limit the confinement so it is, in fact, for temporary observation. Only then could the nature of the process and the duration of the commitment be reasonably related to the purpose for which the individual is committed.

The state argued that McNeil could not claim a violation of his rights since it was his refusal to talk that prevented his examination, and thus prevented his hearing, comparing this situation to that of civil contempt. While leaving open the question of whether due process would be violated by such a use of the contempt power and not ruling on the applicability of McNeil's counter-argument that he had a fifth amendment right to remain silent, the Court rejected the state's argument holding that even if McNeil's action were analogous to civil contempt, procedural due process would require a hearing to determine if McNeil's acts had in fact constituted contempt.[9]

Previously in the same term the Court had confronted but not settled similar issues. In *Humphrey v. Cady*,[10] Donald Humphrey was convicted of contributing to the delinquency of a minor, but in lieu of a sentence he was committed as a sex deviate under the Wisconsin Sex Crimes Act. Pursuant to that Act, Humphrey was first committed for observation and then, after medical recommendation and a hearing before a judge (but not a jury), committed for a period equal to his sentence. At the expiration of his sentence term, the state applied under the Wisconsin procedure for a five-year renewal of the sexual deviant commitment. Humphrey claimed that both the procedure used for the original commitment and the procedure used to renew the commitment violated his fourteenth amendment rights to equal protection and due process. Specifically, he claimed that it was a violation of equal protection to deny him a jury trial, that it was a violation of due process to deny him the right to counsel incident to the original hearing and to deny him the assistance of effective counsel at the renewal hearing, and that the actual place of treatment and the actual treatment received violated both equal protection and due process.

The district court dismissed these claims without a hearing as lacking in merit and because Humphrey failed to raise these issues before the state courts.[11] The court of appeals affirmed on the ground that there was no merit in the claim. However, the Supreme Court found Humphrey's

5. *Id.* at 737-738.

6. 407 U.S. 245 (1972).

7. In a companion case, Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972), the Court refused for reasons not related to the merits to consider a more comprehensive challenge to the defective delinquent law itself.

8. The exact procedural safeguards required for a long-term commitment are not clearly defined in *Jackson* or *McNeil*. At the least, a long-term commitment of a defective delinquent would require all the safeguards afforded in any other form of civil commitment in that jurisdiction.

9. Mr. Justice Douglas in a concurring opinion found the fifth amendment violated and would have ordered the release of McNeil immediately on that basis alone.

10. 405 U.S. 504 (1972).

11. The issue of waiver by failure to raise claims in state court will not be discussed, but the Court's remand order indicated that the issue be fully heard in the district court.

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claims substantial enough to warrant an evidentiary hearing and remanded the case to the district court.

The equal protection argument again focused on the principle recognized in *Baxtrom:* the state must justify a procedure for commitment that differs substantially from procedures used by that state in other forms of commitment. In this case, the critical factor was that in Wisconsin commitment of the mentally ill requires a hearing before a jury, [12] while commitment and renewal of commitment of sexual deviants does not. Wisconsin claimed that this discrimination was justified first by the fact that the sexual deviant procedure was for persons already convicted of a crime (basically the same justification rejected in *Baxtrom)* and second by the fact that a jury trial was not appropriate for the issues to be determined during the commitment of a sex deviant. The Court acknowledged that the fact that a person was under sentence may be relevant to distinguishing the first commitment, *i.e.*, for observation, from other forms of commitment, but doubted it would be relevant as a distinguishing factor once the sentence had expired. Likewise, the Court did not rule out the possibility of justifying the lack of a jury trial on the basis of its inappropriateness to some forms of commitment, but found the argument unproven. Therefore, the equal protection issue raised by *Humphrey* was found to raise a substantial constitutional objection to the original and the renewed commitment procedures. The Court remanded the case for a full evidentiary hearing, to develop the facts relating to this and the other objections raised by *McNeil* in order that they be given full consideration.

What are the implications of these cases? First of all, the *Baxtrom* principle has been reaffirmed and extended to apply to a different type of commitment, namely the situation where the discriminatory procedure was used to commit a person found incompetent to stand trial. More importantly, the list of procedural rights that cannot be denied to one category of committed persons unless justified by a proper rationale has been expanded; at least, a civil commitment procedure denying to one category of committed persons the right to a jury determination of mental illness, or applying to that category a lesser standard of proof, or requiring stricter standards for release, is subject to constitutional challenge.

Due process has now been held to require an examination of the procedure for commitment and the conditions of confinement in light of the purported purpose of the confinement. If the procedure does not relate to the purpose, *e.g.*, the committed person is given a summary hearing but the commitment is justified as serving to protect society from a person found to be dangerous, or the actual confinement does not relate to the purpose, *e.g.*, long-term confinement where the purpose is to observe, it violates due process.

But these cases are not particularly noteworthy because of the principles they recognize. The Court has previously recognized the applicability of the due process and equal protection clauses to civil commitment. [13] What is new is not the principles but their method of application to the civil commitment process. The Court is now willing to scrutinize the justifications and purposes for civil commitment and require that they be made explicit. Whether due to a reluctance to enter this area or, as Justice Blackmun indicates, due to the lack of cases in this area, there has previously been little law on this subject that meaningfully examines these justifications. What is the state's real purpose in commitment? Is it to protect society from the individual? Or is it to fulfill the state's desire to treat him? What are the limits imposed on these purposes by the Constitution?

Similarly, the Court is now willing to look at the realities of the confinement. The Court would not allow Indiana to justify Jackson's confinement as a legitimate confinement lasting until the incompetent individual recovered, since on the facts it was unlikely that Jackson would recover and it was clear that the commitment was more custodial than rehabilitative. Nor would the Court accept Maryland's argument that McNeil was being held for observation, since the confinement had lasted over five years.

What the Court should do, and what the Court appears ready to do should the issues be properly placed before it, is develop these legal doctrines in at least three broad areas. First, it will inevitably be decided exactly what purposes are constitutionally permissible bases for civil commitment. In this regard, it must be considered that one parameter of civil commitment is its duration—for observation, temporarily, or indefinite—but another parameter that must be considered is inherent in the fact that civil commitment is really a generic term. The limits of permissible purposes for civil commitment will differ, presumably, depending on whether the commitment is of a mentally ill individual, a sexual deviant, a defective delinquent, or other category of nonpenal confinement. Second, guidelines must be established to determine the constitutionality of the various procedures used, and these guidelines must be related to the permissible purposes. Third, a

12. Subsequent to the decision of the Supreme Court in *Humphrey*, the district court in Wisconsin found that the Wisconsin civil commitment procedure is constitutionally defective insofar as it fails to require effective and timely notice of the "charges" under which a person is sought to be detained; fails to require adequate notice of all rights, including the right to jury trial; permits detention longer than 48 hours without a hearing on probable cause; permits detention longer than two weeks without a full hearing on the necessity for commitment; permits commitment based upon a hearing in which the person charged with mental illness is not represented by adversary counsel, at which hearsay evidence is admitted, and in which psychiatric evidence is presented without the patient having been given the benefit of the privilege against self-incrimination; permits commitment without proof beyond a reasonable doubt that the patient is both "mentally ill" and dangerous; and fails to require those seeking commitment to consider less restrictive alternatives to commitment. Lessard v. Schmidt, No. 71-C-602 (E.D. Wis., Oct. 18, 1972).

13. 383 U.S. 107 (1967); Specht v. Patterson, 386 U.S. 605 (1966).

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more thorough examination must be made of the relation between the purposes for and conditions of confinement, particularly in regard to the treatment actually received. Any time the length or character or place of confinement is not realistically related to the purpose of confinement, the commitment should be subject to challenge. This examination could go so far as to recognize the judically enforceable right to treatment recently recognized in some lower courts. [14] To oversimplify, the theory of a right to treatment is that due process requires that any commitment whose purpose is to provide treatment for the individual is invalid if adequate treatment is not provided. Recognition of the right to treatment would be consistent with the Court holdings in the cases cited above and, moreover, it appears that the Court has taken a first step towards explicitly accepting this doctrine. In *Jackson*, the Court held that any further commitment based on a probability that Jackson could soon stand trial "must be justified by progress towards that goal."[15]

Another area for consideration, less clearly visible within the scope of "what the Court is now willing to do," [16] but worth singling out within the context of what the Court should do because of its potential impact, is the principle of the least restrictive alternative. In a recent article, [17] David Chambers argues that certainly as a matter of good policy and possibly as a requirement of the Constitution, [18] the courts should require that in the commitment of the mentally ill the state should impose no greater restriction on freedom of the individual committed than is necessary to fulfill the purpose upon which the commitment is justified. As a specific example, commitment should not mean long-term in-patient hospital care if a less restrictive form of care such as treatment in a halfway house or a drug therapy program administered on an out-patient basis, is sufficient to satisfy the objectives of the state.

Chambers argues that, as in other areas of the law where fundamental rights are curtailed by the legitimate action of the state, [19] the Constitution requires that the least restrictive means for accomplishing that end be used. This is consistent with the approach to the constitutionality of a civil commitment as outlined in the cases cited above. The principle of the least restrictive alternative is a requirement that the purposes for commitment be made explicit and examined and that an examination be made of the realities of the confinement and the treatment received. [20] It does, however, go further than those cases. It requires the recognition that civil commitment involves interference with a fundamental constitutional right [21] and an evaluation of the purposes for the commitment and the resulting confinement in light of the seriousness of the interference with that fundamental right. The argument that civil confinement involves an interference with fundamental rights is nearly overwhelming; the weighing of treatment alternatives, however, presents a problem of justiciability that will make many courts hesitant to accept this principle.

Nonetheless, the least restrictive alternative should be a particularly appealing extension of the law of civil commitment, both to the courts and to the counsel that argue before them. In theory, it allows the courts to protect individual rights while making little or no incursion into the interests of the committing states. Moreover, in most instances, it can be the basis for an attack on the legality of a commitment that results in long-term custodial care—probably the source of the most egregious abuses within mental health systems—without doing so at the cost that many, if not all, courts are unwilling to pay, the complete release of the individual from custody.

These needs for legal development and the challenge issued by Justice Blackmun should be impetus enough to litigation; but beyond that, one need only look to the cases themselves for a far greater incentive. In addition to their contributions to legal literature, the facts of these cases, even within the context of judicial opinion, are a chronicle of the abusive results that can occur when men are allowed to control the lives of their fellowmen without the sanctions of legal and social constraints. It would not be surprising, for example, to find that the Supreme Court was swayed as much by Indiana's outrageously indifferent treatment of Theon Jackson, as it was by the legal arguments that supported his contentions. [22] It is surprising that so many others, witness to equally disturbing similar situations, remain unaffected.

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14. *See* Wyatt v. Stickney, 344 F. Supp. 387 and 344 F. Supp. 373 (M.D. Ala. 1972). *But see* Burnham v. Dep't of Public Health (N.D. Ga., Aug. 4, 1972).
15. 406 U.S. at 738.
16. Technically the Court has denied its willingness, State v. Sanchez, 80 N.M. 438, 457 P.2d 370 (1968), *appeal dismissed*, 396 U.S. 276 (1969). *But see*, Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108, 1151 (1972).
17. *See* Chambers, *supra* note 16.
18. *See* Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Dixon v. Attorney General, 325 F. Supp. 966, 971 (M.D. Pa. 1971); *but see*, State v. Sanchez, 80 N.M. 438, 457 P.2d 370 (1968), *appeal dismissed*, 396 U.S. 276 (1969).
19. *See*, Chambers, *supra* note 16, at 1145-68.
20. *See* note 12 *supra*.
21. Chambers lists as possibilities: the freedom to travel, the freedom of association, and the freedom from physical confinement.
22. *See also* Mr. Justice Douglas' restatement of the facts in his concurring opinion to McNeil v. Director, Paxutent Institute, 407 U.S. 245 (1972).

Contributors to the *Review*

Attorneys, backup center personnel, and others who wish to have material published in the *Clearinghouse Review* should be aware of our deadlines. Material must be received *before* the 10th of the month in order to be included in the next month's issue.

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Legal Assistants: The Experience of the Legal Aid Society of the City and County of St. Louis

by **David A. Lander,** Associate Director for General Services
and Community Development, St. Louis Legal Aid Society

The Plan

In June 1971, the Legal Aid Society of the City and County of St. Louis adopted a plan to help handle the ever expanding case load using a limited budget and limited attorney staff. We realized we needed more good minds, but a look at our budget forced us to find an economical solution. We decided to hire persons directly from our client community and train them to fulfill our needs. Our hopes were that they could capably handle routine cases and allow our lawyers to spend their time on more complex individual cases and to engage in law reform and urban development projects.

Selection and Training

We sought people of all ages who had high school diplomas or equivalency certificates, but little or no college. Although the starting salary was low we were besieged with applicants. Our main criteria was sincerity, an identification with our client community, and an ability to learn and use legal skills. The legal assistants we picked live where they work. They know our clients and have lived through many of their problems.

The legal assistants spent the first weeks listening to lawyers and law professors speak about the law and the legal profession. Next, discussions were held with community leaders. The goal was to impart substantive legal knowledge and an understanding of how the forces in the community operate. In addition, they took an English and Legal Technology course at a local junior college at night.

The next step was "on the job" training in each of our offices. They learned how each of our units functioned, met our personnel, and observed cases being handled. After this they were given intensive interviewing experience.

After about four months they were given semipermanent positions. Seven legal assistants were placed in the specialized units of employment, consumer, housing, welfare, and family law. We called three of the legal assistants "circuit riders" and set them up to visit health centers, settlement houses, public hospitals, welfare organizations and other gathering points throughout the metropolitan area. Each week the circuit riders follow a set schedule and interview clients who previously had found it inconvenient to visit one of our regular offices. We have also used a mobile van to set up offices where no space is available. As a result of these efforts we now have 30 additional offices with no additional overhead. We can send legal assistants to centers where we cannot afford to send a lawyer.

The legal assistants handle interviewing in most cases. After consultation, lawyer and assistant decide whether the case must be transferred to a lawyer or can be handled completely by the legal assistant with an attorney's guidance. They consult on the appropriate action to take and follow up together when problems arise. Any letters that are written by a legal assistant bear the signatures of both the legal assistant and the lawyer. Interesting cases are written up for the benefit of all legal assistants.

In addition to the great bulk of miscellaneous cases that the assistants handle completely, they have developed specialties in each of our subject areas. In consumer, they handle most utility cases to a conclusion; in housing they take care of most lockouts. We have worked out systems for handling Section 518 (b) complaints and for dealing with HUD and the mortgagees on FHA problems, and most of the work is done by the legal assistants. In welfare they do everything but present evidence at the fair hearing; in family law they take all information in divorce, adoption and name change cases and the lawyer need only meet briefly with the client and then appear at the hearing. In employment, we have worked out systems whereby nearly all aspects of wage claims, unemployment compensation and discrimination matters except hearings are handled by legal assistants.

Evaluation of the Plan

Our evaluation of our plans shows that they have not only met our original goals but have had numerous unexpected advantages. Much of the lawyers' time has been freed, allowing them to work on the more complex individual cases and to engage in law reform and community development projects. An unexpected result has been that the routine cases are being handled more thoroughly than before. The legal assistant has more time and interest in resolving the relatively small matters and does a more complete job. A second unexpected advantage is the better relationship we now enjoy with our client community. The legal assistants can communicate with poor people better than most of our lawyers. This improvement in communications inspires renewed confidence. The "circuit riding" has made it possible to reach people to whom we have never had access before. Some of the centers are in small pockets of poverty far from our regular offices; some are in areas heavily populated by senior citizens who rarely leave their neighborhoods; some are in settlement houses to which many people turn as their sole source of help. As a result of this program new individual and group clients are coming to us and, due partly to the efforts of one circuit rider who has numerous centers in one section of the city, a coalition of groups throughout that area is in the formative stages.

Of course, there were unexpected problems, but even these, for the most part, have turned out to be helpful. We soon discovered that the legal assistants work more efficiently with a more highly structured program than we had ever had. Our experience with this structure made us realize

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that a more highly structured program could help our lawyers. An example of the structure of the circuit rider program may be informative. The circuit riders visit centers five mornings and three afternoons each week. On Tuesday afternoon and Friday afternoon all the circuit riders meet with their supervising lawyers and often one other lawyer. First, all cases are entered and given case numbers; then the fact sheet for each interview is reviewed; then a determination is made, often based on the recommendation of the circuit rider, as to how the case is to be handled. Next, each active case is periodically reviewed and all letters are evaluated before they are sent. Finally, each case that is to be closed is discussed. All actions taken in every case are recorded.

In addition to this administrative structure we were also forced to examine and commit to writing the questions we normally ask clients and the steps we usually take in resolving routine problems. This process has been very educational. The manual which we have compiled contains interview guides on many problems as well as guides for handling most routine cases and has proved beneficial to our entire staff.[1]

Our concern that our clients would feel shortchanged by the use of nonlawyers has not proved to be justified. We have explained our rationale for using legal assistants to our clients through our excellent community services supervisor. She convinced them to withhold criticism until they had specific problems and complaints and when the program took final shape they were clearly and vocally on our side.

The private bar presented the problem of charges of unauthorized practice of law. We countered this in two ways. First, we structured the program so that the legal assistants work closely with lawyers and so that their actions were taken only after consultation with a supervising lawyer; second, we have been working closely with the state bar committee which is looking into the use of legal assistants. We have shared our extensive experience in this area with that committee and the president of our board has been an active member of it.

While it is still early to draw final conclusions, it is clear to us that our plan is a necessary step in trying to do everything that a Legal Services office must do to be effective.

1. The manual, PARALEGAL MANUAL, by the St. Louis Legal Aid Society, is available from the Clearinghouse, Clearinghouse No. 9696 (246 pp.), $3.00 to both Legal Services attorneys and to all others.

The Credentialing and Licensing of Paralegals and Paralegal Training

by The National Paralegal Institute, Washington, D.C.

I. The Advantages to the Legal Profession

The organized bar has three basic approaches to the practice of law-related activities by non-lawyers. The first approach is to decide (either unilaterally or by agreement with another professional group) that the activity in question is not the practice of law. The second is to define an activity as the practice of law and attempt to proscribe it by declaring it to be "unauthorized" and, if it continues, to seek legal enjoinder. Concerns have been expressed that a wide range of paralegal activities performed by non-lawyers are "unauthorized practice" and the answer thus far has uniformly been that most of these are permissible. In general, Opinion 316 of the American Bar Association (1967) and the Association's Code of Professional Responsibility, Ethical Consideration 3-6 (1970) indicate that, aside from the most clear forms of legal practice (such as going to court or giving legal advice to clients), paralegal work is proper so long as it is under the general supervision of an attorney and the attorney takes responsibility for the work product. A third method of controlling activities that cut into the legal field is to establish credentialing, licensing and other requirements so the activity can proceed only under control by attorneys. This essentially assures the legal profession that the activity will be performed firmly within the existing legal delivery system, and thus not threaten the ethical control and standards set by the bar. The result is that attorneys will not have outside competitors, but will gain by ensuring that paralegal skills are only available through lawyers.

Credentialing paralegals will also help to assure the public that only persons who fully understand the ethical limitations of their work will be "admitted to practice" as paralegals. Credentialing, in this sense, is partially a technique to enforce the Code of Professional Responsibility as it applies to paralegal activity. Credentialing can lead to paralegals operating under set modes of conduct consistent with the rules governing attorneys.

By helping to delineate job responsibilities and carving out a sharply defined subprofession, credentialing will assure attorneys of their place at the top of the legal delivery hierarchy. Rather than being one type of specialist among many, lawyers will be generalists, coordinating the activities of specialists. This unique status has been imperiled in recent years by the encroachment of other professional groups upon the lawyer's traditional claim to exclusive capacity in the law. Strictly credentialed paralegals will be unlikely to challenge lawyers' claims of being the most capable dispensers of legal service.

Another advantage to the lawyer will be the establishment of a reliable talent marketplace. Credentialing

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will reduce a hit or miss hiring and will present the attorney with several well-defined and certified types of assistants from whom he may choose. Lawyers will have more confidence in their ability to restructure their operating procedures and experiment with new delivery techniques if they are assured of a manpower pool that is guaranteed to meet a certain minimum level of knowledge and training. Lawyers will also be able to simplify their training needs by sending their employees to accredited institutions for specifically needed job skills. Once they determine what they need, attorneys will be able to save time and uncertainty by giving their employees a continuing education without losing work time. Also, the incentive will be greater for the employee to take courses when they lead to a recognized certificate or degree.

II. The Advantages to the Paralegal

Without credentialing, and its concomitant promise of specific expertise, paralegals are frequently viewed as glorified office boys, investigators, or secretaries with special capacity. Credentialing will supply the role definition that supports recognition for specific areas of competence and a distinct use and treatment by employers. From this distinction a certain degree of job security can be expected. Credentialed specialties will be looked upon as careers, rather than mere jobs. Just as a credentialed legal secretary is looked upon as being superior to an ordinary secretary who has picked up similar skills in a haphazard way, those with paralegal specialties will have a sense of worthwhile place with the legal field.

For those who have managed to meet all credentialing requirements, a large paralegal career ladder may be opened up. Upward mobility is improved because new levels of technical expertise are available. And lateral mobility is greatly improved because a credentialed paralegal is a known quantity to prospective employers.

Once a reliable supply of qualified paralegals is assured to the legal profession through credentialing, it is likely that the demand for paralegal services will greatly expand. Credentialing will serve to convince lawyers that they can reduce cost by delegating tasks to approved specialists. Once a paralegal is credentialed, he leaves a large, mostly undifferentiated, manpower pool and joins a select, though expanding, one. If the credentialing is of an exclusory nature (uncredentialed person *may not* engage in the practice) rather than of an ability certifying nature (credentialed persons are *best qualified* to practice), the paralegal's lock on a good job is even more secure.

Credentialing gives paralegals the assurance that when they want to upgrade themselves by taking courses they will probably not be wasting their money. It also makes the task of finding the desired training easier, as well as exposing new possibilities to those unsure of what they want.

III. The Advantages to the Public

Both the formal strictures placed upon a paralegal during the credentialing process and the informal training the paralegal receives while being taught the tools of the trade will tend to protect the public. Paralegals who go through a credentialed training program will be held to a high standard of care in the conduct of their jobs and will presumably be better aware of their responsibilities to the public and the best ways to discharge these obligations. Adequate credentialing assures the public that even though the attorney delegates work which has been traditionally performed by attorneys only, those to whom this work is delegated are specifically prepared and competent to do it.

Assuming, for the moment, that the average practitioner will pass on lower cost to the client in the form of lower charges for identical end products, the introduction of paralegals into the typical law office will mean cheaper legal services at no loss to lawyers. Systematization and routinized delegation will mean that more and more people will be able to afford lawyers for more of their legal needs. Volume business is more practical and less subject to abuse when paralegals are well trained.

IV. The Disadvantages of Credentialing

There are three different ways in which credentialing may be harmful. First, it may be harmful because it has come too soon, even though it might be useful at a later stage in the development of paralegalism. Second, it may be harmful because, while some credentialing could be beneficial, the level of credentialing has been set too high. And, third, it may be harmful if its effect is to exclude persons from an activity legally rather than to certify the ability to engage in the activity. An attempt is made below to show where these three problems, when they occur, are detrimental to the legal profession, to the public, and to paralegals themselves.

A. Credentialing too Soon

The development of paralegalism is in its infancy, particularly when compared to progress in other paraprofessional fields. If credentialing is imposed before the field is more fully developed, premature structuring and unnecessary rigidity may develop. The first place this may occur is in the evolution of training programs and curricula. If teaching methods, curricula, academic levels, or academic settings (to say nothing of on-the-job training) are fixed prematurely, or ruled out by simple omission from an approved list, experimentation will be stifled. Furthermore, useful specialization will be inhibited. Useful specialties may not develop because they are prematurely defined out of paralegalism and not accepted as certified paralegal activities. At present, there are potentially over 30 different paralegal specialty areas to be developed, as well as over 20 more useful only to the public sector. In such areas of office administration, trusts and estates, SEC registration, divorce, landlord-tenant, and many others, laymen are at work today in both the public and private sector. It is not yet known what paralegal promise can be made real in such areas as drug addiction, prisoners' rights, anti-trust, FCC licensing and consumer regulation.

Finally, premature credentialing may inhibit the development of new delivery systems. Programs may be

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quickly credentialed to produce people well trained in helping lawyers to serve their clients in a slightly more mechanized, but still traditional way. Thus, early credentialing, rather than hastening a law practice revolution called for by many within and without ABA, may help to perpetuate old-fashioned service techniques. Paralegalism should mean more than the production of super legal secretaries. It may even mean more than the development of new job specialties. For paralegals to be fully useful, the structure and composition of the typical law office may have to be revised. This is unlikely to happen if job roles are quickly fixed.

Paralegalism should have the chance to work out naturally the level of technical competence, degree of formal education, and amount of experience necessary to perform an adequate job at each career level. Terms such as "lay associate," "lay assistant," "advocate" or "technician" are not yet well defined although all of them are used by lawyers to describe various kinds of paralegal work. Attempts to freeze these definitions are bound to elude us until we know more of what each job ought to mean.

B. Setting Requirements too High

If legal paraprofessionals must possess high academic credentials, most of the sorts of people who now choose paraprofessional careers in other fields would be unable to become paralegals. Most paraprofessional jobs require only a high-school diploma to start and a specialized training program (rarely exceeding two years) thereafter. As yet, there is no evidence that academic credits are a valid job criterion in the paralegal field.

If it were to set certification requirements too high, the bar would risk creating two sets of legal workers. There would be a small, elite class of paraprofessionals who enter at the top, and another group of "new careerists" who enter at the bottom, frequently in antipoverty Legal Services entry level positions, and who have no way to bridge the gap to the top. If there is no well defined, graduated, and worthwhile midground between the academically trained, highly credentialed and the community workers, lay advocates, and office aides, trained largely on-the-job, the latter group will quickly reach dead-end positions. While it is realistic to assume that the qualified paralegal aspirants who enter with low academic credentials will be able to afford and master two-year specialized junior college programs while they work, it is far less realistic to assume that they can either piece together a college degree or the time to get one. The situation will be even worse if a four-year college program is the prerequisite for paralegal training (as it is now for legal training). This will close the field to all but the middle class college graduate who is not quite good enough for, or does not want to face the rigor of law school.

Excessively high credentialing requirements will virtually stop junior colleges, private training institutes, and organizations that do on-the-job training from developing paralegal programs. It is not at all certain whether four-year colleges or law schools are the best place for any, let alone all, paralegal training. Unless technically specialized programs are developed, similar to teacher or engineer training, colleges will not be sufficiently focused to do the best job. Even if such programs are set up, it is not clear whether four years of academic work before any intensive exposure to the actual practice of paralegal work is the best method of turning out a high volume of qualified paralegals who are prepared to stay in the field for several years. Junior colleges, on the other hand, are at present oriented to prepare to turn out the sorts of graduates who can immediately take productive jobs in law offices. Junior colleges already offer courses that fully qualify people to be paraprofessionals in several other fields. Further, junior colleges have the greatest flexibility with regard to part-time or interrupted studies and as to integration with on-the-job training.

Credentialing only law schools to do paralegal training would be an even greater mistake. An analogy is often made to the training of dental or medical paraprofessionals, but paraprofessionals in those fields most often perform physical tasks that require specialized equipment and a well protected person to "practice on." In both medical and dental schools, the primary task of the paraprofessional (and often the professional) is learning by doing. This is not the case of law schools. The routinization of legal tasks, for example, would be counter productive in a good law school, where analysis and academic inquiries are emphasized. If paralegal training is forced into the law school mold, the law school will turn out, not well trained paralegals, but poorly trained sub-lawyers drilled in black-letter law. And, if paralegal training is not developed on the law school model of case analysis and rational inquiry, the result will be the production of two classes of end products: an elite corps of lawyers, and a resentful group of paralegals who are not eligible for participation in the more elite training going on around them. Because they are not the primary concern of a law school, paralegals will be treated as side products. And, with most law schools' reluctance to change teaching methods in the direction of practical training, it is unlikely that paralegal training in law schools will be innovative. There is little hope, if paralegal training is restricted to law schools, that the profession will adapt to new delivery methods available.

C. Exclusory Credentialing

If credentialing is seen as a process by which the bar can fix the nature and amount of training one needs to be a paralegal, rather than determine who is best qualified to be a paralegal, several cost factors will sharply rise. The cost to attorneys will rise in two ways. The raw number of people who meet the paralegal educational requirements will be reduced. Because the supply may be far less than the demand, wage demands will be high. Also, exclusory credentialing will result in the employment of only those persons who have made a sizeable monetary investment in their careers. A sizeable return on that investment will be anticipated, especially if attorneys are not free to dip into the larger pool of experienced workers who do not meet

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the formal requirements of a credentialed program.

Exclusory credentialing will also make entrance into the paralegal field prohibitively expensive to poor people. There will be no way for the majority of people who are usually thought of as prime candidates for paralegal positions to start at the bottom of a career ladder. And there will be no incentive for them to do so, even if it is marginally possible, because the goal of being credentialed will seem too remote.

The general public may also suffer from exclusory paralegal credentialing because it raises the cost of delivery of many routinizable services. One promise of paralegalism is the eventual passing on of savings gained by modernizing legal delivery systems. This goal will not be realized if there is no way to lower appreciably the delivery costs of the paralegal component of the system. Poor people will be especially hard hit by this. If the right to be a paralegal is severely restricted, it will prove impossible to provide legal services in any appreciable quantity to the elderly poor, marginal workers, or welfare recipients.

Both the private bar and antipoverty Legal Services have been experimenting with inhouse training of a variety of paralegals. Exclusory credentialing could mean that not only would the mobility of paralegals trained inhouse be strongly curtailed, but that the right of those already trained to practice their trade might be denied.

Exclusory credentialing could severly restrict the entire concept of paralegalism. If a particular job role, such as lay advocate or community worker, is not seen as productive, it may be defined out of paralegalism by the simple expedient of failing to credentialize any programs that produce these positions. Credentialing lends itself as a back door method of imposing unauthorized practice rules when such enforcement is either legally or politically impossible to accomplish directly. Questions of unauthorized practice should be decided on their own terms rather than through the indirect method of credentialing.

If exclusory credentialing is accomplished through state regulation, the interstate mobility of paralegals will be greatly curtailed. In addition, it may prove difficult to undo the damage of idiosyncratic state legislation in every area of paralegal credentialing. The development of the field can be effectively stunted by ad hoc state regulation, and locally set limits will tend to be much more restrictive than a national code of suggested minimum standards.

V. Recommendations

Some credentialing of paralegals is probably beneficial and certainly inevitable. However, great care must be taken to avoid precipitous action that could throw the development of paralegalism off course. Specifically, credentialing should be avoided until experimentation in training and paralegal use has proceeded far enough to evaluate the effectiveness of several different types of paralegals and legal delivery systems. Allowing enough time for a wide range of paralegal activities to develop will ensure that credentialing will not stifle potentially useful types of training and work patterns. Further, credentialing should be slowed until a systematic comparison and evaluation can be made of differing approaches and techniques now at use in public and private law settings.

At least for the next few years, and perhaps permanently, credentialing should take the form of ability certification, not legal exclusion. It would be an unfortunate loss of available manpower and experimentation in learning capacity if paraprofessionals were drawn from only a limited, exclusive segment of society and used for only limited, traditional purposes. State regulation to this effect should be discouraged.

Credentialing based on general academic level should be avoided. Both entrance level qualifications and final position certification should be based on the degree of training and demonstrated ability to perform specific tasks, not the ability to amass unrelated academic credits.

Paralegal development should be encouraged in the junior colleges. Junior colleges have the potential to train paralegals for a wide variety of useful job specialties. They should be provided with technical assistance from the organized bar, public sector, and law schools in order to develop this potential more fully. Integrated law school-junior college programs should be explored.

Experimentation in the private and public sectors should be encouraged. Private firms, single practitioners, Legal Services offices, and public defenders should be encouraged and aided to develop new legal delivery systems that effectively use paralegals. The organized bar should avoid restricting such efforts and should provide facilities for the rapid interchange of information and manpower.

Thousands of poor clients throughout the country are turned away from Legal Services because the lawyers and funds are not available to serve them. Often their problems are simple and could easily be handled by well trained and supervised paralegals. The funds to serve these clients by traditional means will, by all informed estimates, not be forthcoming. To restrict the use of paralegals is to deny service to these clients and will place a heavy responsibility on those who restrict.

Lawyers throughout the country are now spending untold hours on repetitious low level work even to the point of completing routine forms or endlessly drafting simple standardized instruments. Time and scope for experimentation are needed to relieve lawyers of these burdens, so that work more suited to the profession can be pursued.

The organized bar has a responsibility to oversee legal paraprofessionalism and to ensure that the highest ethical standards are met while justice is provided. It is consistent with that responsibility for the bar to encourage experimentation and discourage excessive regulation while devoting substantial effort toward keeping fully abreast of paralegal developments through evaluations of what lawyers and paralegals are now doing.

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National Paralegal Institute Holds Nationwide Meeting of Legal Services Paralegals

On January 15 and 16, 1973, the National Paralegal Institute hosted the first nationwide meeting of Legal Services paralegals. Representatives were invited from each of the ten regions and several other participants came at their own expense. The twin purposes of the meeting were to inform the Institute of the range of paraprofessional activities in LSPs around the country and to explore the future role of paralegals within Legal Services and other sectors of public and private law.

The meeting opened with presentations on new careers and other paraprofessions; the history and development of paralegalism in public and private law; a summary of what the Institute has already found out about LSP paralegals; and a description of the work done by private law paralegals.

The bulk of the meeting's formal sessions was devoted to explorations of paralegal training and education. Panels were held on welfare training techniques; the use of videotape; an analysis of comparative curricula for use in different training settings; and a discussion of trends in credentialing and accreditation of paralegals. These panels were then summarized and their results were translated into a set of recommendations for future action.

Finally, the entire group took up the subject of the viability of paraprofessional organization. This included discussions of the definition of "paralegal" (does it include secretaries, investigators, etc); the form that paralegal organization should take (public and private combined, local or national, etc); and career development and relations within Legal Services.

Two reports will eventually be made available. The Institute plans to summarize the proceedings and make recommendations to the Office of Legal Services (OLS) on the feasibility of setting up a paralegal organization and the direction OLS should be following in the use and development of paralegals. The conference participants also plan to issue a report on some of these same subjects which will be addressed to the practicing paralegal.

Some Comments on the National Paralegal Institute's Memorandum on Credentialing and Licensing Paralegals and Paralegal Training

by **John A. Lee,** Paralegal, Legal Services Center, Seattle, Washington

Credentialing, as a general phenomenon, has three functions which were not directly discussed in the Institute's memo. First, it is used in an attempt to guarantee *predictability* in method of expression, type, and style of interaction. For the existing legal structure, this is obviously a benefit; for the active paralegal there are times when unpredictability or rather the ability to chose between differing approaches to a problem is a primary asset. As John Kenneth Galbraith said, "A bureaucracy under attack is a fortress with thick walls but fixed guns." Second, the ability to credential implies the power to bestow *legitimacy.* Paralegals already know the value of their work, and derive their legitimacy from the people they serve, not from any "superior" group or organization which has historically ignored the needs of its clients. Finally, an attribute of credentialing which is particularly relevant to the legal profession is its use as part of a *socialization* process. When used in conjunction with an extended period of training, the credential stands for this common experience as much as anything else.

The statement that credentials are necessary for the provision of quality service is, as a general statement, obviously untrue. None of the paralegals attending the National Paralegal Institute's conference, and none of those working for OEO have yet been credentialed, yet it certainly must be admitted that a great number of them have demonstrated competency in their area. The question of whether or not credentialing will work to ensure a higher general level of competency is something that should be determined in relation to a particular proposal; it cannot be *assumed* to follow from any method.

In the NPI memo on this subject, an attempt was made to outline the desirable aspects of credentialing. It seems that this section is directed to paralegals only in as much as they can be "used" by "the legal profession," which rather obviously means attorneys in the private sector. Some statements are made that appear to have no basis in fact whatsoever, such as "[credentialing] makes the task of finding the desired training easier." Other points advanced assume changes that would only occur under very specialized conditions of credentialing, and then only after a complete restructuring of legal service delivery system—"a large paralegal career ladder may be opened up."

A hope of greater prestige and increased job security are really the only things held out to paralegals as aadvantages of some credentialing system. It is suggested by some that exclusory credentialing would be the way in which these interests could best be served. The great majority of paralegal workers do not have the narrow self-serving view that would permit the imposition of widespread exclusory credentialing. To suggest it as a benefit implies that paralegals have fundamentally the same pseudo-professional, elitist orientation that has been so successfully maintained by the bar. Exclusory regulation would be much more than "an unfortunate loss of available manpower and experimentation in learning capacity"; it

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would be a denial of the paralegal role of community educator, a rejection of the hope that the law can be demystified, and an excuse for further erosion of the rights of the individual.

At present there are some areas of paralegal activity (such as welfare hearings) that are legally open to all persons. Paralegals should be trying to expand these, not aiding in the formulation of mechanisms to make the average citizen even less of a participant and more of a victim in the legal process. I agree with the stance that the Institute took on exclusory credentialing, but the language used was such as to seriously damage its credibility with workers that have any community orientation. To suggest that the training of community people to solve their own problems is an "experimentation in learning capacity" is an incredible slap in the face to those who have become knowledgeable and competent through something other than formalized academic training. The clear implication is that academically unsophisticated people are either of subnormal intelligence or incapable of acting in their own self-interest or of understanding abstract ideas such as justice. To couple that phrase with a reference to "available manpower" was again a mistake, for a rereading of the memo leaves no doubt that this manpower was to be a surplus labor pool for the benefit of profit-making attorneys.

What is inevitable is that this legal system must change and paralegals in rapidly expanding numbers are becoming aware of their role as agents in this change. The paralegal's purpose is to have a clear impact on existing legal institutions, and at this point in time that requires a much larger area of concern than was mentioned in the NPI memo. Tempered by their individual experiences with client communities, paralegals are now completely unwilling to accept superficial changes designed to increase lawyers' cost efficiency and the "productiveness" of subservient labor.

The legal structure whose inequities and inefficiencies have made paralegals, their roles and their positions inevitable, is in need of some fundamental changes, and paralegals intend to take an active part in this restructuring. Once this fundamental orientation is understood, perhaps paralegals, the NPI and the bar, can more easily engage in productive dialogue on the terms under which credentialing can be viewed as acceptable.

In the discussion of credentials and testing several questions were enumerated. For credentialing, shall there be general or specific subject area credentialing? May someone be certified as a specialist without undergoing the general exam? Who has the authority to issue these credentials? Are any educational requirements to be demanded? For testing, who creates, administers, and judges the test? Are there to be any personal, training or experience qualifications to be met before someone is allowed to take the test? Should the exam be oral or written? It was generally agreed that some form of nonexclusory certification or credentialing could be helpful. A system based on a general examination and specialty area exams was held to be the most practicable. In the workshop I attended at the NPI's conference on credentialing, the sense of the group was that the generalist exam should signify a greater knowledge of the full legal system and that a person might be certified in a specialty area without undergoing this generalist examination. A generalist could, of course, take several specialty exams in order to identify areas of expertise. Paralegals oppose any restrictions on who may take the test and believe strongly that they should have at least some input if not complete control of the process of formulation and administration of the test itself whatever that might be. A vote taken on the question of whether the test could be given orally resulted in an eight to seven vote in favor of only written exams.

I voted in the minority on this question for two reasons. First, any written examination is static, formalized and generally utilizes white, middle class English. Many effective paralegal workers are neither white nor middle class and would be penalized unjustly. Second, much paralegal work requires oral skills and what is generally termed "street knowledge"—how to hassle with landlords, negotiate with welfare workers and communicate with low-income people. I do not believe that any written test can ever measure these skills.

In addition to these particular points, there are some general areas of difficulty which need to be stated. The strength, the legitimacy and the power of the paralegal movement comes from its relation to the people. It now appears that through a combination of academic requirements, tests designed to measure institutionally approved verbal skills and an emphasis on "professionalism" and the "almost lawyer" generalist, the dynamism of the paralegal movement might be frozen into the position of being merely a buffer between the legal establishment as it now exists and the demands of the 140 million people who have been denied services by that system. All proposed credentialing plans must be appraised in light of this danger and the paralegal's commitment to return the law to the people.

Paralegals believe that the people working in the legal field, particularly in the public sector, have shared values, attitudes and beliefs concerning the provision of legal services that are of a deeper and more general nature than their concern with what their job title may be. The urge to credential has some definite drawbacks. Regardless of the success of the "career ladder" model in allowing individual advancement through an imposed hierarchy of separate function in the field of health care (most commonly used as an analogy to our field) it seems to have neither allowed unity among nondoctors nor caused any positive fundamental change in the method of health care delivery. It was merely ensured that the primary delivery institutions can be of larger, more "efficient" size, more fully systematized and more easily controlled by external decision makers. Specialization has meant that not only the patient but also the workers, paramedic and professional alike, have become tied to institutions too large and impersonal to meet the human needs of those who interact with them. The effect on the individual patient has been to make the ordeal of

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obtaining health care even more outrageously expensive and mystifying. Within the work force layered credentialing has had the effect of causing the energy of any one group to be directed toward short range objectives and questions of personal advancement or increased income. In fact, it may appear that the attempt to formally differentiate paralegal workers by certification is an action designed to lessen the impact of any value oriented paralegal statement or organization.

Credentialing would presumably exclude those persons with the least formal education or certifiable skills from the term paralegal, thus reducing our numbers and tying us more closely to the aura of lawyers and the existing power structure than with the largest number of our co-workers and our clients. I submit the following points as terms under which credentialing may truly benefit paralegals.

Concerning generalist credentialing, credentialed paralegals should be guaranteed the ability to practice without further supervision in certain areas of limited jurisdiction, including not only those administrative areas now open to laymen but areas which are now sometimes closed, such as workmen's compensation, and areas within our expertise that are now exclusively reserved for attorneys (such as bankruptcies and domestic relations). We should be guaranteed the right to collect full statutory attorney's fees where applicable. We should be given the right to supervise the work of other paralegals. Access to the examination should be made available through either education or work experience, with absolutely no personal exclusions. In conjunction with specialty area exams, these examinations should not be used as an excuse to limit any rights currently given to laymen. The certification should not be used in an exclusory sense for the purpose of hiring. There should be no prerequisites for taking an examination. Oral exams may be used for areas where technical expertise is not essential (advocacy, casefinding, interviewing, etc). Judgment in these areas is to be by paralegals.

Several times in this comment I have said "we" or "paralegals." I do not believe that my views are exactly those of all paralegals, but I do believe that I have articulated the feelings of a very large number. I rely on both personal conversations and the discussion in the recent conference.

OPEN FORUM

Affirmative Action Programs Defended

Increasingly during the past year, courts have been entering consent decrees ordering that an increased proportion of all employees hired by private industry and government agencies be minority group members. The orders usually set target dates for reaching population parity employment and require the employer to take all necessary steps to recruit minority members at a significantly quickened rate until they make up a stated percentage of the work force or in other words to adopt affirmative action programs.

Numerous critics have described such actions as amounting to the introduction of a "quota system" into hiring practices. This note is a justification for such affirmative action consent decrees.

The essential difference between quotas and goals or timetables has been stated in the following way by the United States Commission on Civil Rights. Under a "quota system" a fixed number of percentage of minorities or females is imposed upon the employer who has an absolute obligation to meet that fixed number. No excuses are accepted, nor can failure to meet the quota be justified. However, neither the federal government nor the courts are requiring the imposition of such quotas.

The courts and federal government are requiring, however, that "goals and timetables" should be implemented. These, by contrast, are procedures by which the employer determines goals and time schedules for correcting minority underutilization, and then makes every good-faith effort to achieve the self-imposed goals. Contrary to what would be true in the case of quotas, failure to meet goals and timetables is excused if the employer can show that good-faith efforts have really been made. However, an employer must demonstrate in detail why good-faith efforts failed to produce the desired results.

After generations of systematic discrimination against minorities and women, it is hardly surprising that unequal employment patterns still persist. Although intentional discriminatory practices are now indeed illegal, many practices and selection procedures still exist that limit the opportunities available to minorities and women.

Accordingly, if they are truly to get a fair trial in the job market, there is a compelling need for an effective program of affirmative action which will clearly and unmistakably assure women and minorities that meaningful equal employment opportunity—not mere tokenism—is what they can reasonably expect. To achieve such assurance employers must affirmatively demonstrate that past practices have been completely rejected by seeking out minorities and women and placing them in jobs for which they are qualified but from which they have long been excluded.

The unpleasant fact of the matter is that quotas have been consistently applied in the past for the purpose of excluding minority group members from many desirable employment opportunities. Across a wide range of employments, blacks have long lived with a quota system which, for all practical purposes, had been set at zero. One need only take a look at some of the nation's law enforcement agencies. The very small number of nonwhites on many police forces is a reflection of the fact that, for many years,

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the quota allotted to nonwhites in the hiring of policemen was not far from zero. This is why it is preferable to speak of affirmative action. In requiring that police forces take positive action to employ members of minority groups the courts are not introducing a quota system. Rather the courts are requiring that minimal steps be taken to eliminate the consequences of past quotas.

The only way to communicate a convincing message to minority groups that discriminatory practices are gone forever is to take forceful affirmative steps which will introduce them into employments from which they have been systematically excluded by discrimination in the past. There is a dynamic element involved in taking such steps which should not go unnoticed. Minority group members and women have, quite reasonably, been reluctant to acquire the necessary education and skills for employment where they have been unwelcome. As a result, they have often indeed appeared to be "unqualified" for specialized or skilled employments. Perhaps the most important effect of affirmative action programs in the long run will be the encouragement which it will provide to minority groups to make the investment of time and effort in education and the acquisition of skills which had previously seemed so senseless in a world of rampant discrimination. But, in order to persuade them to do this, we must unmistakably and affirmatively demonstrate that the bad old days are forever gone.

Rina Rosenberg, Civil Rights Compliance Officer
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The *Omaha* Decision Revisited

The following is a letter to Richard B. Collins who commented on the *Omaha* decision in the Open Forum column of the January issue on page 550.

Dear Mr. Collins:

Thank you for your letter of November 28. Your interest in and concern for the Project's activities is appreciated. Let me assure you that there was no attempt in the lead article in the November issue of the *Clearinghouse Review* to "mask" any unfortunate side effects of the *Omaha* decision.

With the advantage of hindsight, it would have been propitious if a demand for publication had taken place at the time of the negotiations. However, HUD's rule of voluntary publication post-dated the promulgation of the Circulars. While the negotiations were in progress, it was HUD's firm contention that its Circulars were exempt from the APA's publication requirements. The HUD Position was founded on Attorney-General Opinion [see Attorney General's Manual on the Administrative Procedure Act, Vol. 1 (1947)], and had not been challenged in a then recent Supreme Court decision in which the validity of a HUD Circular was directly at issue [*Thorpe v. Housing Authority*, 393 U.S. 268 (1969)]. Thus, in the midst of heated political battles on the subject of whether the Circulars would be issued at all, you are quite correct in assuming that no attention was paid to publication.

Throughout the litigation, the conflict between upholding these Circulars—which give long-overdue rights to three million public housing tenants—and the risk of even more government secrecy, was a troublesome one on its own merits; but this conflict was resolved by our clients' desire to uphold the Circulars even at the cost of a non-progressive decision with respect to the APA.

I appreciate your writing, and hope you will continue to communicate to us your observations and concerns about the activities of this Project.

Sincerely yours,

Al Hirshen, Director
Housing Law Section

AH:dg

Parents Advisory Council Involved in Title I Hearing

Hoping that our experience will be helpful to other Legal Services attorneys and paraprofessionals, we have forwarded to the Clearinghouse documents relating to a Title I hearing held in Springfield, Massachusetts on October 24, 1972. We attempted to deal directly with the state department of education rather than only through the federal government in the belief that this would be valuable in delivering power to the Parents Advisory Councils (PAC).

Parent Involvement Guidelines of Massachusetts, Clearinghouse No. 9650A (2 pp.). These were negotiated over a period of time with the help of the Harvard Law and Education Center, Legal Services attorneys, the League of Women Voters and parents. The most significant guideline is Guideline VI which provides a process of appealing local decision through the Commission of Education.

In May 1972, a letter was sent by the PAC to the local superintendent specifying complaints about the local Title I Program and the way it had been run (Clearinghouse No. 9650B (2 pp.)). This document may be valuable in that it is quite precise in defining the problems. A month later, PAC requested the Commissioner of Education to grant a hearing pursuant to Guideline VI (Clearinghouse No. 9650C (1 p.)). Despite the requirement of Guideline VI that the hearing be held within 15 days, there was substantial delay after this request was filed. An official in the state department of education sought further specifications as to the request for the appeal (Clearinghouse No. 9650D (2 pp.)), and PAC replied. In July, the local federal project director responded to an inquiry by state officials regarding PAC's charges (Clearinghouse No. 9650E (2 pp.)).

Finally, a conference was held on August 23, 1972, to decide whether or not to allow an appeal (Clearinghouse No. 9650F (56 pp.)). In our opinion this procedure, like the previous ones, was not required by the guidelines and was simply a delaying tactic.

The state held a hearing on October 24, 1972, at which the then acting Commissioner did not appear as

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OPEN FORUM

required by the guidelines. The results were a finding that the local education association had violated the state guidelines and exhibited bad faith in its dealings with the PAC and a requirement that the Springfield School Department submit a satisfactory plan outlining how it intends to involve the PAC in Title I Programs (Clearinghouse No. 9650G (8 pp.)).

We believe that this process has resulted in a stronger PAC and has channeled the energies of a frustrated group of people through the legal process.

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Supplement to Attorneys' Fees Packet Available

A compilation of cases on attorneys' fees in *pro bono* matters has been updated by the author, an attorney with the Lawyers' Committee for Civil Rights. The supplement is designed to be interfiled with the original listing, Clearinghouse No. 7813. The supplement carries Clearinghouse No. 7813C. The supplement and the original listing are available from the Clearinghouse free of charge to Legal Services attorneys. Others will be charged $5 for the original listing and $2 for the supplement.

LEGISLATIVE REPORT

Election Reform Model Statute

The National Municipal League, under a grant from the Ford Foundation, is currently engaged in a study of the administration of American elections. Although final publication of the results of their project is not expected until summer of 1973, they have produced a draft outline of a model statute for election reform. The draft statute provides for a state system of election administration and a state system of voter registration, with emphasis upon visibility and accountability by election officials and administrators in both areas.

Responsibility for registration and voting are fixed in a single officer of state government who would preside over an administrative structure with authority clearly fixed at both county and precinct levels. The League feels that such a system will encourage efficient administration and increased professionalism among election administrators while opening up the system to full public scrutiny. Copies of the draft are available from the Clearinghouse, Clearinghouse No. 9603A (17 pp.).

Massachusetts Adopts New Public Utilities Regulations

The Massachusetts Department of Public Utilities has adopted two new sets of regulations which deal with billing and termination requirements and with security deposits.

The first regulations (MDPU No. 16696) establish a prior hearing procedure to resolve billing disputes before termination of service. They also provide that service cannot be terminated in less than 48 days after a bill is rendered, nor can it be terminated if the customer questions his liability or the correctness of the bill. Furthermore, the regulations specify that every other bill must be based on an actual meter reading and require the discontinuance of the practice of estimating billings of several customers served from a single meter. The regulations on billing and termination were appealed by 15 gas and electric companies to the Massachusetts Supreme Judicial Court. A decision is pending. The regulations are available from the Clearinghouse, Clearinghouse No. 9720 (6 pp.).

The Massachusetts Law Reform Institute and the Massachusetts Welfare Rights Organization were allowed to intervene as parties respondent in the appeal. The Intervenors Brief (Clearinghouse No. 9721A (47 pp.)), and Reply Brief (Clearinghouse No. 9721B (9 pp.)) is also available from the Clearinghouse.

On September 19, 1972, the Department issued regulations abolishing security deposits for residential customers as a condition to furnishing gas and electric service. Those regulations were appealed by the Boston Edison Company. In November 1972, the Supreme Judicial Court entered an order which prohibited the collection of additional deposits by Boston Edison and stayed pending final decision the Department's order that all deposits on hand be refunded. Copies of the Deposit Regulations (Clearinghouse No. 9722A (3 pp.)) and MLRI's Motion to Intervene (Clearinghouse No. 9723A (14 pp.)), which was denied, is also available from the Clearinghouse.

Legislative Advocacy Packet Available

In fall of 1971, a meeting was held in Philadelphia of some 50 Legal Services lawyers experienced in the legislative area, in conjunction with the National Society of State Legislators' Annual Convention, to consider how legislative advocacy can be used most effectively as a tool for law reform. The Philadelphia meeting was called because it was felt that Legal Services programs could fruitfully devote more attention to legislative advocacy, and because the quality of such legislative work could be improved.

From this conference has emerged a collection of articles discussing various aspects of legislative advocacy, prepared mostly by those who attended the meeting. The collection is divided into three main parts. Part I, *Rules of*

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the Road, relates to ABA and OEO guidelines regarding policy on legislative advocacy and lobbying activities by Legal Services lawyers. It also contains a memorandum dealing with the limitations on lobbying and political activity under the Internal Revenue Code. Part II, *How to Be an Effective Legislative Advocate*, presents the thoughts of three Legal Services attorneys who have broad experience in the legislative area. They cover many of the practical areas of legislative work, such as negotiations and procedural problems. Part III, *Substantive Legal Areas*, consists of memoranda from backup centers, detailing specific matters in their respective areas of expertise where legislative action might be appropriate.

The collection of articles should prove a useful tool for Legal Services lawyers who are interested in law reform. The package is available from the Clearinghouse, Clearinghouse No. 9607 (99 pp.).

Correction

The following corrections should be made to *Prisoners' Rights in Prison Medical Experimentation Programs*, 6 CLEARINGHOUSE REV. 319 (October 1972).

1. The final citation in footnote 7 should read, '45 S. CAL. L. REV. 616 (1972).'

2. The citation within parentheses in footnote 16 should read, '*Corrections, Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. II, at 192 (1971).'

The repeated citation in footnote 23 should read, '*Corrections, supra* note 17, at 123, citing the Department of Corrections' director, Raymond Procunier, in his testimony before the House subcommittee in October, 1971.' Similarly, footnotes 24 and 26 should read, '*Corrections,*' where there are repeated citations.

3. Footnote 46 should read, '*See* note 38, *supra*, cases cited.'

4. The last sentence on p. 325, col. 2, should read, 'The *Joseph v. Rowen* court found that there had been an invasion of the plaintiff's fourteenth amendment right. . . .'

5. Footnote 52 should read, 'Conley v. Gibson, 355 U.S. 41, 45, 46 (1957). *See also* Huey v. Barloga, 277 F. Supp. 864, 872 (N.D. Ill. 1967), where though it was not advanced by plaintiffs. . . .'

6. The first sentence following the short quotation in footnote 53 should read, 'Judge Smith's dissent in U.S. *ex rel.* Hyde v. McGinnis, 429 F.2d 864, 868 (2d Cir. 1970), contains a rare instance of judicial candor. . . .'

7. In footnote 79, the docket number for Mackey v. Procurier should read 'No. S-1983.'

The first sentence of the second paragraph in footnote 79 should read, 'The *Peek* case is particularly interesting in that the drug the convict refused to take was Fluphenazine Hydrochloride, marketed under two brand names, Permitil and Prolixin, by different pharmaceutical companies.'

The following paragraph should appear at the end of footnote 79:

> One can without a great deal of effott suggest numerous parallels between life in prison and in the military; therefore, it should not come as any great surprise that compulsory medical treatment is a further feature they have in common. *See* Note, *supra* note 72, at 105 n. 34.
>
> * * *
>
> > A member of the Armed Forces who refuses medical treatment is subject to court martial if the Surgeon General and review board of medical officers decide that the treatment is necessary to enable such person to perform his military duties. (Citing Johnson, *Civil Rights of Military Personnel Regarding Medical Care and Experimental Procedures*, 117 SCIENCE 212 (1953).)
>
> *See also* Overholzer v. Treibly, 147 F.2d 705, 706 (D.C. Cir. 1945):
>
> > Civilians have the privilege of refusing medical treatment even when it is to their best interests. A serviceman does not have that privilege because the military takes not only a disciplinary interest in him, but also a paternalistic one.

8. The last paragraph of column 1, p. 331 should read:

'Therefore, since the equal protection clause not only provides case precedent with facts closely related to involuntary medical treatment but also appears to have survived recent personnel changes in our highest court, it clearly stands out as the most promising basis for asserting a persuasive constitutional claim.'

9. The first full sentence in column 1, p. 333 should read:

'The outcome will hinge on weighing such factors as the significance of determining whether a convict is mentally disordered at all, as opposed to that of the appropriateness of certain forms of intrusive treatment; whether the "individual treatment" model to the extent it distracts attention from socioeconomic causes of crime, is basically flawed in its conception as opposed to constituting an essentially desirable contribution to the rehabilitative ideal, which requires only that limitations be placed on its more detrimental manifestations; and finally. . . .'

10. The sentence beginning at the bottom of column 1, p. 333 should read:

'Perhaps the most appropriate function for attorneys to perform is to pose such questions to be answered by those in whose name they purport to act.'

It will be of great assistance to the Clearinghouse if copies of documents sent to us from Legal Services programs for our library (and, hence, for distribution throughout the country) are in *legible condition* so that copies can be reproduced on our Xerox machine. Badly photostated copies and very faint carbon copies (especially those on onion skin) will not reproduce on our machine.

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Copies of documents abstracted below are available from the National Clearinghouse, except those reprinted in full text in the CCH POVERTY LAW REPORTER. All documents requested must be identified by use of the Clearinghouse Library number appearing at the beginning of each abstract. Requests from attorneys practicing in OEO-funded Legal Services projects will be filled free of charge, not to exceed one copy of each document per project. Other requests must be accompanied by a remittance of five cents per page to cover duplicating costs plus a postage and handling charge of 75 cents for the first 30 pages and an additional 25 cents for each additional 30 pages or fraction thereof. All requests should be addressed to the National Clearinghouse for Legal Services, Northwestern University School of Law, 710 North Lake Shore Drive, Chicago, Illinois 60611.

ALIENS

Alien Contends Court Properly Allowed Withdrawal of Guilty Plea Leading to Deportation

9525. California v. Giron, No. 1/Crim. 11029 (Cal. Ct. App., filed Dec. 5, 1972). Respondent represented by Armando M. Menocal III, Robert Gonzales and Alex Saldamando, San Francisco Neighborhood Legal Assistance Foundation, 2701 Folsom St., San Francisco, Cal. 94110, (415) 648-7580. [Here reported: 9525A Respondent's Opening Brief (13 pp.).]

Respondent, an alien who pleaded guilty to marijuana possession, seeks to affirm a trial court's decision vacating the judgment against him and permitting him to withdraw his guilty plea. Respondent asserts that neither he nor the court knew until after sentencing that his guilty plea subjected him to automatic deportation. In light of his ignorance when he offered his plea, respondent argues that the trial court properly found his plea to be involuntary. Citing *United States v. Briscoe*, 432 F.2d 1351 (D.C. Cir. 1970), the alien contends that the court may consider the likelihood of deportation in determining the voluntariness of a plea. The fact that his mistake related to matters extrinsic to his case rather than to the case itself is, respondent argues, inconsequential.

The alien asserts that a trial court should exercise its broad discretion liberally in granting a motion to vacate a judgment and permitting a defendant to withdraw a guilty plea. Because the court concluded that an injustice had been committed by an extrinsic fact which overruled the free will of the respondent and deprived him of a trial on the merits, the alien contends that the court did not abuse its discretion.

AUTOMOBILES

Revocation of License Plates and Registration Without Prior Hearing Alleged to Violate Due Process

9594. Brumfield v. Tofany, No. 71-3253 (N.Y. Ct. App., Dec. 1, 1972). Petitioner represented by C. Samuel Beardsley and Richard V. Hunt, Onondaga Neighborhood Legal Services, 633 South Warren St., Syracuse, N.Y. 13202, (315) 475-3127. [Here reported: 9594A Brief (14 pp.).]

An appeal has been taken challenging a New York traffic and vehicle law which allows an individual to be deprived of his vehicle registration and license plates for not being insured without a prior hearing to determine whether the lapse of car insurance was the fault of the insured or the insurer.

Appellant, due to an insurance agent's error in forwarding her check, received a police department notice that her license plates and registration had to be surrendered due to a lapse in her insurance. Appellant at all times believed her car was insured, and prior to the date of suspension said vehicle was in fact insured.

Appellant contends that the denial of a hearing prior to suspending her registration and plates violates due process. It is argued that the registration and plates are property rights protected by due process. Further, appellant asserts that the state's interest in public safety is not advanced by an unnecessary suspension of the registration of an insured automobile, where the state has not accorded fair procedures.

BANKRUPTCY

Ninth Circuit Upholds Exemption of Income Tax Refund as Property Subject to Seizure by Trustee

5501. ***In re* Cedor,** No. 72-1483 (9th Cir. Dec. 22, 1972). Plaintiffs represented by Peter H. Reed, Ralph L. Jacobson and Thomas R. Adams, Legal Aid Society of San Mateo County, 6836 Mission St., Daly City, Cal. 94014, (415) 994-1065. [Here reported: 5501E Opinion (1 p.). Previously reported: 5501A Motion for Order to Return Exempt Property (2 pp.); 5501B Points & Authorities in Support of Motion (4 pp.), 5 CLEARINGHOUSE REV. 156 (July 1971); 5501D Dist. Ct. Opinion (12 pp.), 6 CLEARINGHOUSE REV. 82 (June 1972).]

The Ninth Circuit has affirmed a district court opinion which determined that, to the extent a bankrupt did not engage in the practice of overwithholding by claiming fewer exemptions than he was entitled to, a tax refund check is not property that passes to the trustee within the meaning of the Bankruptcy Act. In addition, the 75% exemption of the Federal Consumer Credit Protection Act (15 U.S.C. §1671) is applicable to whatever portion of the tax refund check that is attributable to overwithholding.

Divorced Husband's Obligation Under Divorce Decree to Pay Debts Held Not Dischargeable in Bankruptcy

9550. ***In re* Laflin,** No. BK 72-L-377 (D. Neb., December 1972). Creditor-wife represented by David L. Piester, Legal Aid Society of Lincoln, Inc., 800 Anderson Bldg., 12th and "O" Sts., Lincoln, Neb. 68508, (402) 435-2161. [Here

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reported: 9550A Applications for Determinations of Dischargeability in Bankruptcy (4 pp.); 9550B Bankrupt's Answer (1 p.); 9550C Plaintiff's Points & Authorities (23 pp.); 9550D Findings of Fact & Order (4 pp.).]

The district court determined that a husband's obligation to pay debts incurred during marriage and imposed by a divorce decree are not discharged in bankruptcy. The court found the obligation nondischargeable as alimony, maintenance and support of plaintiff and the minor child of the marriage.

The debts were incurred jointly during marriage and the wife would have been liable for payment upon defendant husband's discharge in bankruptcy. The referee found the obligation to be nondischargeable even though the debts were not secured by property in the wife's possession, since any payments she would make would reduce the amount of maintenance and support monies available to herself and the minor child. The wife's present income was found inadequate to meet her needs.

CIVIL RIGHTS

Court Enjoins State Tax Exemption of Fraternal Organization With Racially Discriminatory Membership Selection

9560. Falkenstein v. Oregon Revenue Department, No. 71-816 (D. Ore., Nov. 20, 1972). [Here reported: 9560A Order (6 pp.).]

The court has enjoined the state revenue department from granting state property and corporate excise tax exemptions as allowed under statute to the Benevolent and Protective Order of Elks, an organization which practices racial discrimination in its membership selection. The court held that the state grants tax exemptions to encourage private support of activities in which it has a vital interest and to support services that would otherwise in all likelihood be performed by the state. The court concluded that public services provided by the Elks that would otherwise require expenditures of state funds constituted a degree of state involvement in discriminatory activity that the fourteenth amendment prohibits.

The court held that unlike *Moose Lodge v. Irvis*, 407 U.S. 163 (1972), tax exemptions for fraternal organizations provide a "symbiotic relationship" as there is benefit both to the state and to the organization. In the instant case the court reasoned that Oregon relieves fraternal organizations from the burden of property and corporate excise taxes in return for the public benefits from the benevolent and charitable activities of these organizations.

CONSUMER

Supreme Court Vacates and Remands Appellate Court's Dismissal of Consumer Action

5113. Givens v. W.T. Grant Co., No. 72-5256 (U.S. Sup. Ct., Nov. 13, 1972). Petitioners represented by William H. Clendenen, Jr., David M. Lesser, and Stuart Bear, New Haven Legal Assistance Ass'n, Inc., 265 Church St., New Haven, Conn. 06510, (203) 787-5861; Frank Cochran, 795 Grand Ave., New Haven, Conn. 06511, (203) 777-5428. [Here reported: 5113R Petition for Certiorari (32 pp.); 5113S Order (1 p.). Previously reported: 5113A Complaint (11 pp.), 5 CLEARINGHOUSE REV. 157 (July 1971); 5113C Decision (8 pp.), 5 CLEARINGHOUSE REV. 313 (October 1971).]

The Court has granted a petition for writ of certiorari and has remanded petitioners' class action to the Second Circuit, where the case had been dismissed for failure to satisfy the jurisdictional amount. The Second Circuit had held that the $10,000 federal jurisdictional requirement had not been met in the action to enjoin a multimillion dollar coupon credit plan because the consumers' claims to compensatory damages alone had not met the threshold amount.

In seeking certiorari, petitioners claimed that the Second Circuit had erred in excluding recoverable costs of litigation and attorney's fees from the amount simply because the indigents' services were provided by a nonprofit organization which would not hold them responsible for a fee, that the court had erred by refusing to evaluate the total detriment of the injunction to the defendant, and that the court had erred in prohibiting aggregation of the consumers' compensatory claims. Petitioners also argued that the Second Circuit's decision undermined the principle that inadequacy of a claim must be a legal certainty in order to justify dismissal for want of the jurisdictional amount. (See CCH POV. L. REP. ¶ 16,349.)

Allege Counterclaim in the Nature of Recoupment Not Barred by Limitation Period of 15 U.S.C. §1640 (e)

9631. Kilgore v. Kennesaw Finance Co. of Douglasville, No. 47586 (Ga. Ct. App., filed January 1973). Plaintiffs represented by M. David Harrison, H. Winthrop Pettigrew, John L. Cromartie, Jr., and Bettye H. Kehrer, Georgia Indigents Legal Services, Inc., 15 Peachtree St., NE, Atlanta, Ga. 30303, (404) 522-3553. [Here reported: 9631A Brief (83 pp.); 9631B Supplemental Brief (10 pp.).]

The appellant credit purchaser is appealing from the lower court's granting of a summary judgment to the respondent finance company against the appellant's counterclaim based on alleged truth-in-lending violations. The court based its decision on the running of the one year statutory period of limitation found in 15 U.S.C. §1640 (e). The appellant argues that a claim contained in a compulsory counterclaim asserted in a defensive manner by way of recoupment is not barred by the statute as long as the plaintiff's claim exists.

Appellant discusses the purposes of limitation periods and the historical development of recoupment and set-off arguing that the ancient doctrine of recoupment is implicit in the doctrine of compulsory counterclaim as found in Rule 13 (a) of the Federal and Georgia Rules of Civil Procedure and that a claim in the nature of recoupment is never barred by limitation periods as long as plaintiff's claim exists. Moreover, appellant discusses similar limitation periods in other federal statutes and demonstrates that the

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courts have consistently ruled that these limitation periods do not run against defenses.

The major truth-in-lending violation alleged in this controversy over the respondent's financing of the appellant's motor vehicle purchase is the respondent's failure to include a $62.40 premium for credit life insurance in the finance charge. The appellant contends that the court below erred in granting summary judgment, since it is not clear that the appellant would not be entitled to relief should his alleged state of facts be proved. He argues that such state of facts would require that the premium charge remain in the finance charge, resulting in the violation of rules prohibiting usurious interest rates and constituting failure to disclose the required information on the actual amount of the financing charge.

Massachusetts Supreme Court Ascribes to Bailee Burden of Proof of Non-Negligence in Destruction of Bailed Goods

7923. Knowles v. Gilchrist Co., No. S-15,063 (Mass. Sup. Jud. Ct., November 1972). Plaintiff represented by Paula W. Gold and James J. Cotter III, Boston Legal Assistance Project, 1486 Dorchester Ave., Dorchester, Mass. 02122, (617) 436-6292. [Here reported: 7923C Opinion (16 pp.).]

Certain of the plaintiff's furniture was destroyed by fire while in the possession of the defendant-bailee for reupholstering. Judgment for the plaintiff-bailor was reversed by the appellate court on the basis of previous Massachusetts decisions which held that the bailee had only a weak burden of production of evidence as to cause of loss, whereupon the burden of proof of negligence was shifted to the bailor.

In accordance with what it saw to be the trend of law in this area and because of the inequity of placing the burden of proof of negligence on the bailor while property was in the exclusive control and possession of the bailee, the Supreme Judicial Court of Massachusetts has overruled previous case law, shifting the burden of proof to the bailee. Hereafter, as to property in the exclusive possession of a bailee who has not been contractually released from his duty of due care, once the bailor proves delivery of property to the bailee in good condition and the failure to redeliver upon timely demand, the bailee will have the burden to prove that he has exercised due care to prevent the property's loss or destruction.

Court Allows State to Intervene as Plaintiff in Class Action Challenging Pennsylvania Vehicle Repossession Statute

9253. Gibbs v. Titelman, No. 72-2165 (E.D. Pa., Jan. 9, 1973). Plaintiffs represented by David A. Scholl, Jonathan M. Stein and Laurence M. Lavin, Community Legal Services, Inc., 313 South Juniper St., Philadelphia, Pa. 19107, (215) 735-6101; and James R. Adams, Office of the Attorney General, Harrisburg, Pa. 17120, (717) 787-4099. [Here reported: 9253G Opinion & Order (12 pp.). Also available: 9253A Complaint (14 pp.); 9253D Memo in Support of TRO (26 pp.); 9253E Opinion (11 pp.); 9253F Plaintiffs' Memo in Opposition to Certification for Interlocutory Appeal (11 pp.).]

In an action challenging the constitutionality of Pennsylvania's motor vehicle repossession statute, the court has permitted the state to intervene as a plaintiff in the capacity of *parens patriae*, has allowed the plaintiffs to add individually named plaintiffs and defendants, and has determined that the suit be heard as a class action on the part of both plaintiffs and defendants. The plaintiff class includes all installment buyers whose motor vehicles have been repossessed extrajudicially under the color of state law without their voluntary consent at the time of repossession. The defendant class encompasses all individuals or corporations who are licensed as installment sellers, sales finance companies, or collector-repossessors, and who either have ordered or carried out repossession of motor vehicles without consent of the owners or who may do so in the future under color of state law.

The court reasoned that a variety of factual situations dealing with different types and stages of repossession made it proper to bring in additional representatives of the classes in order to ensure an adequate record. Responding to the state's contention that the statute impaired the welfare of the citizens by allowing deprivation of a property interest without providing for notice and hearing, the court agreed that the state had standing under the doctrine of *parens patriae* and further noted that the state's access to discoverable data necessary to identify all class members would expedite the trial.

Erroneous Calculation of Annual Percentage Rate Held in Violation of Truth-in-Lending

9459. Owens v. Modern Loan Co., No. 7298-A (W.D. Ky., Nov. 6, 1972). Plaintiff represented by Kurt Berggren, Thomas P. McCarthy and Martin R. Glenn, Legal Aid Society of Louisville, 422 West Liberty St., Louisville, Ky. 40202, (502) 584-1254. [Here reported: 9459A Complaint (3 pp.); 9459B Amended Complaint (3 pp.); 9459C Order (1 p.); 9459D Memorandum Opinion (6 pp.); 9459E Order (1 p.).]

The federal district court has granted partial summary judgment in favor of the plaintiff. His complaint for money damages under the Truth-in-Lending Act against an automobile dealer and finance company alleged, in part, understatement of the annual interest percentage rate by more than the statutory limit of one-quarter percent. The court first concluded that the annual percentage rate had been understated because the loan company had calculated from a principal amount erroneously augmented with certain nonfinance charges, including insurance and filing fees. The court then held that the loan company's lack of scienter and wrongful intent did not constitute a defense, since it was an error of law and not within the class of clerical errors exonerated by the Act.

Summary judgment was not granted against the defendant automobile dealer, whose liability was held to depend on certain questions of fact. If the dealer had been compensated for referring the plaintiff to the defendant loan company for financing, the dealer might be liable as an "extender of credit" under Regulation Z, 12 C.F.R.

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§226.2 (f); if the dealer had knowledge of the terms of the plaintiff's financing, he might be liable for nondisclosure under Regulation Z, 12 C.F.R. §226.6 (d).

The court declined to award attorneys' fees since the plaintiff was represented by Legal Services attorneys. The court concluded that the Act's intent was only to recompense prevailing plaintiffs for actual expenses in retaining counsel, of which there were none in this case.

Damages Awarded to Class in Truth-in-Lending Suit: Attorney's Fees Awarded LSP

9682. Settle v. Mallicott Auto Sales, Inc., No. 71-238 (D. Ore., Nov. 1, 1972). Plaintiffs represented by Robert J. Altman, Legal Aid Service, 2005 SE Hawthorne Blvd., Portland, Ore. 97214, (503) 234-8461. Of counsel, Eric S. Busch. [Here reported: 9682A Amended Complaint (3 pp.); 9682B Memorandum in Support of Motion to Compel Answers to Interrogatories (2 pp.); 9682C Statement in Support of Attorney Fees (3 pp.); 9682D Judgment (1 p.).]

This suit was a civil class action for damages brought on behalf of the named plaintiff and all others similarly situated for violation of the Truth-in-Lending Act. The complaint alleged that the defendant, a seller of used cars, had consistently failed to disclose the annual percentage rate in credit sales of used cars in which a finance charge was imposed. The trial court awarded damages of $100, the minimum under the statute, to each of the 96 class members, for a total judgment in favor of plaintiffs in the amount of $9,600. The court also awarded the Legal Aid Service the sum of $1,250 as reasonable attorneys fees.

The case is of significance because it is the first truth-in-lending case brought in the District of Oregon and, one of the first in the United States to proceed to a final judgment for damages.

Class Action Seeks to End Finance Company Avoidance of Challenges to Wage Assignments Law

9210. Albert v. Household Finance Corp., No. 72 Civ. 4651 (S.D. N.Y.). Plaintiff represented by Philip G. Schrag, 435 West 116th St., New York, N.Y. 10027, (212) 280-2622; Lisa L. Barrett and Steven M. Tullberg, Monroe County Legal Assistance Corp., Mid-Hudson Valley Legal Services Project, 31 South Main St., Liberty, N.Y. 12754, (914) 292-6800. [Here reported: 9210B Memo in Support of Motion for Determination as a Class Action (12 pp.).]

Plaintiff seeks a determination of class status in this action to enjoin defendant from enforcing wage assignments that it has obtained over a period of approximately four years under New York's Personal Property Law which allows up to 10% of a worker's monthly income to be subject to assignment and does not provide for a prior hearing.

Plaintiff contends that the fact that the statute could be determined unconstitutional and therefore inapplicable does not make a class action unnecessary. First, plaintiff is seeking as ancillary relief an order requiring refund of money unlawfully seized, and denial of class status would prevent the entry of such an order. Second, plaintiff contends that finance companies in New York have made a practice of avoiding constitutional test case litigation by systematically dissolving the wage assignment of the challenging litigant and thereby mooting the case.

Plaintiff alleges that all the other requirements for a class have been met and that a class action in a federal court is the best method of avoiding the systematic mooting of state court constitutional challenges.

Truth-in-Lending Statute of Limitations Interpreted

9632. Eady v. General Finance Corp. of Augusta, No. 1726 (S.D. Ga., Sept. 25, 1972). Plaintiffs represented by Fred Raskin, Georgia Indigents Legal Services, Inc., 501 Greene St., Augusta, Ga. 30902, and John L. Cromartie, Georgia Indigents Legal Services, Inc., 15 Peachtree St., NE, Atlanta, Ga. 30303, (404) 522-3553. [Here reported: 9632A Complaint (2 pp.); 9632B Plaintiff's Brief (5 pp.); 9632C Defendant's Brief (2 pp.); 9632D Order (3 pp.).]

A federal district court has held that federal law controls statute of limitation questions concerning truth-in-lending violations. The violations alleged in the instant case occurred on June 11, 1971. The complaint was lodged with the clerk on June 6, 1972, and an order granting leave to proceed in forma pauperis was signed June 7, 1972, and mailed to the clerk who filed the complaint on June 12, 1972. The court denied the defendant's motion to dismiss based on the one year limitation in Section 1640 (e) stating that filing occurs when the complaint is deposited with the clerk and that the fact that the court considers the application to file in forma pauperis after the statute runs does not affect the filing status of the case.

Incarceration for Inability to Pay Consumer Deficiency Judgment Alleged to Constitute Imprisonment for Debt

9436. Heatley v. Tulsa County District Court (Okla. Sup. Ct., filed Nov. 2, 1972). Petitioner represented by Ben G. Price and Betty R. Outhier, Tulsa County Legal Aid Society, Inc., 2521 East 1st St., Tulsa, Okla. 74104, (918) 936-1966. [Here reported: 9436A Petition for Writ of Prohibition (5 pp.); 9436C Brief Supporting Application to Assume Original Jurisdiction (16 pp).]

Petitioner, who is without funds to pay on a default deficiency judgment issued against him, has initiated this action for a writ of prohibition. Found guilty of and facing probable imprisonment for indirect contempt for failure to make payment, plaintiff asks the state supreme court to command the lower court to refrain from further proceedings to sentence plaintiff for indirect contempt.

Arguing that incarceration under this contempt order constitutes imprisonment for debt, plaintiff contends that such a sentence violates both state and Federal Constitutions. Plaintiff alleges that under state law a debtor can be imprisoned only for willful refusal to pay a judgment when he is financially able to do so. Plaintiff bases his federal argument on the thirteenth and fourteenth amendments. Applying the holding in *Illinois v. Williams*, 399 U.S. 325 (1971), that statutes authorizing imprisonment for

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failure to pay fines violate the equal protection clause when the failure to pay results from financial inability, plaintiff argues that the statute under which he can be imprisoned for contempt is similarly unconstitutional in that the court made no finding that he was financially able to comply with the judgment order.

Plaintiff also argues that his imprisonment constitutes involuntary servitude in violation of the thirteenth amendment in that although the debtor owes nothing to the state, the state benefits from jailing the debtor either through his labor or through his serving as an example. Finally, plaintiff contends that the writ of prohibition should issue because the creditor has not sought the sentencing of plaintiff for contempt but rather has used the continuous threat of imprisonment to force plaintiff to pay the debt. This postponement of sentencing constitutes an abuse of the judicial process and unwarranted harassment.

For want of another remedy, plaintiff asks the state supreme court to assert original jurisdiction under its supervisory power over the other courts in the state.

Plaintiff Consumers Attack Retail Store's Coupon Credit Scheme

8372. Ives v. W.T. Grant Co., No. 15,125 (D. Conn., filed November 1972). Plaintiffs represented by Stuart Bear, William H. Clendenen, Jr., and David M. Lesser, 265 Church St., New Haven, Conn. 06510, (203) 787-5861; Frank Cochran, 795 Grand Ave., New Haven, Conn. 06511, (203) 777-5428. [Here reported: 8372B Memo in Support of Motion for Class Certification (5 pp.); 8372C Memo in Support of Motion for Discovery Order (7 pp.); 8372D Memo in Opposition to Motion to Dismiss (25 pp.); 8372E Defendant's Memo in Support of Motion to Dismiss (13 pp.). Also available: 8372A Complaint (24 pp.).]

Plaintiffs, the class of all persons in Connecticut who have signed defendant retail store's installment contracts for coupon credit book purchase, have brought an action seeking declaratory and injunctive relief and damages in an effort to enjoin the allegedly illegal credit scheme. Plaintiffs argue that defendants have violated state and federal statutory and constitutional regulation of consumer disclosures, the use of punitive attorney's fees clauses, credit card liability, unfair and deceptive practices, mail fraud, unconscionable acts, usury, illegal loans, and illegal security agreements. Defendant has refused to answer a number of interrogatories, alleging that they are unrelated to the action and that compliance would impose an undue burden upon them. Defendant, in a motion to dismiss, has argued that Connecticut statutes designed to protect consumer goods do not apply to coupon books, that no controversy concerning the illegal issuance of credit cards exists, that private rights of action do not exist under federal statutes relied upon by plaintiffs, and that the court lacks subject matter jurisdiction over claims arising under state law.

Plaintiffs argue that the defendant did not make the specific and detailed objections to the questioned interrogatories, as required by FED. R. CIV. P. 33, and that the interrogatories are relevant to the subject matter under FED. R. CIV. P. 26 (b). In response to defendant's motion to dismiss, plaintiffs argue, first, that the Connecticut statutes apply to a security agreement entered into to assure installment payments to a retail seller of consumer goods. Second, plaintiffs allege that a Connecticut statute which authorizes defendant to impose the burden of its attorney's fees upon the class amounts to state action encouraging the imposition of a financial charge as a condition of access to the courts, in violation of the due process clause, and the infliction of unequal litigation burdens upon the debtor class, in violation of the equal protection clause. Third, plaintiffs argue that the court has jurisdiction under 15 U.S.C. §1643 to hear the claim for declaratory and injunctive relief on the issue of liability and notice of liability for lost or stolen coupons. Fourth, plaintiffs allege that under the doctrine of implication, a consumer has a private right of action to sue for unfair and deceptive acts and practices under the Federal Trade Commission Act, 15 U.S.C. §45, and for mail fraud under 39 U.S.C. §3005. Finally, plaintiffs assert that the district court has jurisdiction over the state claims under the doctrine of pendent jurisdiction. Plaintiffs argue both that the federal claims are substantial and that state and federal claims derive from a common nucleus of operative fact.

Nevada Supreme Court Upholds Damages in Attachment Case

9448. Nevada Credit Rating Bureau Inc. v. Williams, No. 917136 (Nev. Sup. Ct., Nov. 17, 1972). Respondent represented by Daniel R. Walsh, Carson City, Nev. [Here reported: 9448A Opinion (11 pp.).]

The Nevada Supreme Court has upheld an award of compensatory and punitive damages against a credit bureau and its agent for abuse of process in authorizing an attachment of the respondent's property far in excess of that required and with the intent of pressuring payment of an alleged debt.

The respondent had become indebted to the agent-appellant and agreed to repay him by doing excavating work. However, the appellant offered no work for the respondent to perform, and contacted a credit bureau about collecting the amount owed him by the respondent. The credit bureau accepted the alleged debt on assignment, authorized attachment of respondent's equipment, and brought suit on the alleged debt. The trial court found for the respondent, holding that there was no account stated but merely an agreement whereby the respondent would repay the appellant by performing work for him. The respondent then brought an action for wrongful attachment and malicious prosecution. The trial court found in the respondent's favor, holding that the tort of abuse of process was satisfied by the ulterior purpose of attempting to force payment of the claim rather than obtaining security for the debt and by the willful act of attaching all of the respondent's equipment and refusing to release any of it.

The supreme court agreed that an attachment of property valued at over $30,000 to secure an alleged debt of less than $5,000 was a willful disregard of the respon-

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dent's right to use his property. Compensatory damages were based on the value of the rental the respondent would have received from his equipment, deducted by the estimated time the equipment would be idle due to weather and lack of demand, the estimated breakdown time, and the estimated time repairs would be made unnecessary due to the fact that the equipment was idle. Damages were further allowed for the costs due to vandalism and exposure to the elements during the attachment. The court held that the punitive damage award was proper where evidence existed showing that the appellant's wrongful conduct was willful, intentional, and done in reckless disregard of its possible results.

Minnesota Consumer Class Action Ordered

6691. Rathbun v. W.T. Grant Co., No. 380957 (Minn. Dist. Ct., Ramsey County, Nov. 27, 1972). Plaintiffs represented by Mark Reinhardt and Roger Haydock, Legal Assistance of Ramsey County, Inc., 20 West Sixth St., St. Paul, Minn. 55102, (612) 227-7858. [Here reported: 6691A Complaint (5 pp.); 6691B Amended Complaint (5 pp.); 6691C Class Action Memo and Sample Supporting Affidavit (22 pp.); 6691D Outline of Reply to Defendant's Memo on Class Action Motion (9 pp.); 6691E Plaintiffs' Supplemental Memo on Class Action (3 pp.); 6691F Reply to Defendant's Memo Opposing Class Action (3 pp.); 6691G Order and Memorandum (5 pp.); 6691H Memo on Summary Judgment (18 pp.); 6691–I Plaintiffs' Proposed Notice to Class (3 pp.); 6691J Objections to Defendant's Proposed Notice (5 pp.); 6691K Order (5 pp.).]

In an action by retail customers alleging that the defendant retail store's coupon book plan is usurious under Minnesota statute, the court has granted consumer class status, has rejected defendant's proposed notice which would have required class members to make an affirmative response in order to be included in the class, and has ordered plaintiffs' proposed notice with the typical "opt-out" provision to be sent to the 5,500 class members at plaintiffs' expense. The plaintiff class consists of retail customers who have participated in the defendant's coupon book plans since the date that the interest charged exceeded Minnesota's legal maximum of eight percent. In the plan, the customer agrees to pay back the total value of the coupon book plus an interest charge in a series of monthly installments. If the customer already has an outstanding coupon plan balance, the interest commences when the contract is executed; if the customer owes no outstanding balance, the interest commences on the date the first coupon is used. Most members of the class have finished paying the monthly installments, but have not yet exchanged all of their coupons.

Plaintiffs contend that the defendant's coupon plan is equivalent to a loan of money, that the plan involves a forbearance of a debt, and that the agreements for the extension of credit are entered into separately from the actual sale of goods and are therefore not time-price sales within the exemption provision of the usury statute. Plaintiffs seek to have the plan declared unlawful and to recover finance charges paid under the plan. Plaintiffs had opposed the defendant's proposed "opt-in" class notice as contrary to the applicable Minnesota statutory provisions modeled after Federal Rule 23. Plaintiffs had also claimed that defendant's proposed notice would have made unreasonable requirements of potential class members and would have tended to intimidate them by adding counterclaims to all notices even though the counterclaim would not have been applicable to most of the proposed members. The court implicitly rejected plaintiffs' proposal that the defendant, because of its superior financial position, absorb the mailing costs.

Seek to Prevent Unconscionable Trade Practices by Pawnbrokers

9513. Roanhorse v. Eoff, No. 14,529 (N.M. Dist. Ct., McKinley County, Dec. 20, 1972). Plaintiffs represented by Paul Biderman, Richard B. Collins, Marion Davidson, and Alan R. Taradash, P.O. Box 206, Window Rock, Ariz. 86515, (602) 871-4151; Richard Hughes and Richard Fahey, P.O. Box 967, Shiprock, N.M. 87420, (505) 368-4377; James Wechsler, P.O. Box 116, Crownpoint, N.M. 87313, (505) 786-5277. [Here reported: 9513A Complaint (24 pp.); 9513B Amendments to Complaint (10 pp.); 9513C Brief in Support of Class Action (11 pp.); 9513D Order (2 pp.).]

Plaintiffs in this class action seek individual relief against defendant pawnbrokers under the truth-in-lending law, the Uniform Commercial Code, and the New Mexico Indian Trader Act, which sets interest rates and a holding period. An additional claim, brought on behalf of all persons similarly situated to plaintiffs and against all pawnbrokers in the judicial district, seeks declaratory and injunctive relief pursuant to the state unfair practices law. Plaintiffs seek to compel all pawnbrokers to cease resales without notice or an accounting for surplus and use of pawn tickets lacking truth-in-lending law disclosures, or face contempt citations. The court has ordered that the claim on behalf of the plaintiff class be maintained as a class v. class action, that it be severed from the individual claims, and that counsel for both sides come up with a workable set of guidelines drawn from applicable laws and regulations, to be entered in the form of a consent decree. The court also, on its own motion, extended the defendant class to include all pawnbrokers in the state.

Secured Party Seeking Deficiency Has Burden of Proof of Complaince with UCC

9636. Tauber v. Johnson, No. 55633 (Ill. Ct. App., Nov. 22, 1972). Appellants represented by Ron Fritsch, Legal Aid Bureau, 64 East Jackson Blvd., Chicago, Ill. 60604, (312) 922-5625. [Here reported: 9636A Brief (24 pp.); 9636B Opinion (7 pp.).]

The court has held that a retail installment seller who seeks to recover a deficiency has the burden of proving compliance with Section 9-504 (3) of the Uniform Commercial Code concerning disposition after repossession. The court further held that no deficiency may be had in the absence of proof that proper notice was sent and that the subsequent sale was commercially reasonable.

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Defendants, purchasers who had entered into a retail installment contract for a used car, had fallen behind in their payments when they returned the car to plaintiff's place of business for repairs. Shortly thereafter, plaintiff allegedly mailed a notice of resale to defendants. The car was sold, and judgment by confession was subsequently entered against defendants for the amount still owed.

Defendants successfully argued that plaintiff has the burden of proving compliance with UCC requirements and that absent such proof, the deficiency could not be had. It was also argued that the entire retail installment contract was illegal and unenforceable because an excessive time price differential was charged. The court held, however, that absent a showing of legislative intent to void a contract, the amount still owed, less the amount on resale and denying recovery of any interest, would be the proper measure of recovery.

Trade School May Recover Only Actual Damages Proved in Suit Against Student on Installment Contract

9635. Vogue Models, Inc. v. Reina, 6 Ill. App. 3d 206, 285 NE.2d 258 (1972). Defendant represented by Ron Fritsch, Legal Aid Bureau, 64 East Jackson Blvd., Chicago, Ill. 60604, (312) 922-5625. [Here reported: 9635A Brief (20 pp.); 9635B Opinion (3 pp.).]

The Illinois Court of Appeals has held that certain trade schools may recover only actual damages proved in actions against students under installment contracts.

Defendant appealed from a judgment entered against her on a retail installment contract for charm and modeling instruction from the plaintiff. The defendant never attended any classes and made no payments to the plaintiff and judgment was confessed in favor of the plaintiff for the entire cash price of the contract plus attorney's fees. In this appeal, the defendant did not contest her liability on the contract, but instead argued that the amount of damages awarded was excessive since the seller should not be allowed to recover a judgment on the contract without offering specific proof of damages. The court noted that there is an exception to the general rule of proving actual damages where one party to the contract is a school, based upon the premise that the failure of a student to complete a term would have no substantial effect on the operating expense of a school which offered extensive facilities to its students. However, the court reversed the judgment of the trial court and held this exception to the general rule of damages to be inapplicable here since the plaintiff school did not have the necessary level of services traditionally associated with a school to be within the exception. The court held Vogue Models to be a "service" rather than a "school." The case was remanded for a hearing in which the plaintiff will be required to present evidence as to the actual damages sustained.

Prejudgment Attachment by Trustee Process Without Notice Held Unconstitutional

8999. Schneider v. Margossian, No. 72-1421-G (D. Mass., Sept. 22, 1972). [Here reported: 8999A Declaratory Judgment and Injunction (2 pp.); 8999B Memorandum of Decision (9 pp.).]

A Massachusetts three-judge federal district court, basing its decision on *Sniadach v. Family Finance Corp.*, and *Fuentes v. Shevin*, has permanently enjoined enforcement of statutes permitting prejudgment attachment of civil defendants' property by way of trustee process. The petitioner's bank accounts had been so attached and could be released before judgment only upon his posting of a satisfactory bond. The court held that such attachment without prior notice and hearing violates the due process clause of the fourteenth amendment. The court did not decree, however, the precise kind of hearing required in order to pass constitutional muster.

National Bank Denied Permission to Leave Changing Neighborhood

9627. *In re* South Shore National Bank of Chicago (Comptroller of the Currency, Dec. 5, 1972). Protestant South Shore Commission represented by Kenneth K. Howell, Gordon C. Waldron, and Eric Kemmler, Senior Law Student, Legal Aid Society of Chicago, 64 East Jackson Blvd., Chicago, Ill. 60604, (312) 922-5625. [Here reported: 9627A Post-Hearing Brief on Behalf of Protestant South Shore Commission (24 pp.); 9627B Opinion of the Comptroller of the Currency (2 pp.).]

A recent order of the Comptroller of the Currency has denied the South Shore National Bank of Chicago permission to relocate. The bank is located in a racially changing neighborhood that had also declined economically. The owners of the bank applied to the Comptroller of the Currency to relocate the bank in the central financial district of Chicago. A number of community organizations objected to the relocation, arguing that the loss of the community's third largest institution would be disasterous to the community. In a departure from previous decisions, the Comptroller of the Currency considered the needs of the existing community and denied permission to relocate. The denial was also based on the failure of the bank to demonstrate that the proposed area was in need of additional banking services.

Consent Decree Vacates Past Default Judgment and Prescribes Procedures to Eliminate Sewer Service

4346. United States v. Brand Jewelers, No. 70 Civ. 179 (S.D. N.Y., Nov. 20, 1972). Plaintiffs represented by David Paget and David M. Brodsky, Assistant United States Attorneys, United States Courthouse, Foley Sq., New York, N.Y. 10007. [Here reported: 4346B Consent Decree (22 pp.). Previously reported: 4346A Oponion (23 pp.), 4 CLEARINGHOUSE REV. 379 (December 1970).]

In an action directed at the long-standing, systematic practice of "sewer service" in collection suits by the defendant retailer, the United States has secured a consent decree which affords retail customers of the defendant the opportunity to vacate past default judgments and which also prescribes certain procedures which are designed to eliminate the possibility of bad service in the future. Even

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though no federal statute authorized such a suit, the court had upheld the government's standing to sue on the basis of its inherent power to protect against large-scale burdens on interstate commerce and to end widespread deprivation of property without due process of law.

Under terms of the decree, the defendant will furnish the names of all persons from whom it obtained default judgments during the period of 1969-1971. Those consumers, over 15,000 in number, will be advised by letter from the United States Attorney's Office that the default judgments can be vacated by signing the short form attached to the letter. The form, when returned, will constitute a general denial of any claim for money owing. Pending subsequent court decisions or settlements, consumers returning the form will not have to make further payments to the company and will have existing garnishments suspended. The defendant has consented to detailed procedures and record-keeping requirements for the prevention and detection of sewer service, has agreed not to recover the attorney's fees when it does obtain judgments on these consumers, and has promised to pay the government $5,000 for the costs of the investigation.

Merchant Enters Into Consent Decree Agreeing to Adopt Trade Practices Conforming to the Federal Trade Commission and Truth-in-Lending Acts

9410. McFall v. Helton Enterprises of Jackson, Inc., No. 72J-120 (C) (S.D. Miss., Nov. 30, 1972). Plaintiffs represented by John L. Maxey II, Barry H. Powell, and Bryan B. Harper, Jr., Community Legal Services, P.O. Box 22571, Jackson, Miss. 39205, (601) 355-0671. [Here reported: 9410A Amended Complaint (9 pp.); 9410B Final Judgment (5 pp.).]

In what may be the first successful action brought by a consumer under the Federal Trade Commission Act, a retail merchant has entered into a consent decree to cease using allegedly deceptive trade practices and to adopt new procedures that conform to the Federal Trade Commission Act and the Truth-in-Lending Act.

Under the agreement, the defendant merchant stipulates that whenever it communicates with a potential customer in the course of soliciting business it will identify itself as a merchant engaged in the sale of goods. If the retailer offers a customer a free gift, it agrees to inform the customer that he is entitled to receive the gift immediately after entering the store and need not listen to a sales presentation before receiving the gift. The merchant further agrees not to use documents which purport to be testimonial certificates but which contain words creating a contract for purchase. To conform to the Truth-in-Lending Act, the defendant consents to amend its retail sales contract by adding a space for the customer's signature if he does not desire the insurance coverage for which the contract provides and by appending a notice that the contract is negotiable and can be assigned at the seller's option. Finally, the defendant agrees not to misrepresent the value of any gift offered to a potential customer.

Representing the class of persons who will be customers or potential customers of the defendant, plaintiffs alleged that upon going to the defendant's store to receive a free gift defendants had offered them, plaintiffs were subjected to blandishments, high pressure sales tactics, and fake games and contests to persuade them to purchase unwanted merchandise at unconscionable prices. Plaintiffs argued that defendants used deceptive tactics in obtaining plaintiffs' obligation to purchase, failed to inform plaintiffs that the credit agreements did not require the customer to purchase insurance from the defendant, and misled the plaintiffs into believing that the defendants would handle the financing.

CRIMINAL

Suspended Sentence Held Insufficient Basis for Habeas Corpus Jurisdiction

9122. Walker v. Dillard, No. 72-C-22-R (W.D. Va., Dec. 6, 1972). Petitioner represented by David G. Karro, The Legal Aid Society of Roanoke Valley, 702 Shenandoah Ave., NW, Roanoke, Va. 24016. [Here reported: 9122G Opinion (9 pp.).]

Following her conviction in the Roanoke Municipal Court for the misdemeanor of "use of profane, threatening or indecent language over telephone," the petitioner was sentenced to serve 30 days in jail, which sentence was suspended for six months, and required to pay a $25 fine and costs. Her petition for a writ of habeas corpus to the Supreme Court of Virginia was denied and the instant habeas corpus petition to the federal district court was filed alleging denial of her constitutional right to trial by jury and conviction under a vague and overbroad statute, in violation of the first, fifth and fourteenth amendments.

Her petition was dismissed on the grounds of lack of jurisdiction. The seminal case of *Fay v. Noia*, 372 U.S. 391 (1963), stated that the jurisdictional prerequisite is not the judgment of a state court, but detention simpliciter. This requirement of detention has been construed expansively, as in *Carafas v. LaVallee*, 391 U.S. 234 (1968), where habeas corpus jurisdiction was found as to a petitioner whose sentence had expired, since the petition had been filed before the expiration. Nevertheless, although the instant petition was filed before the expiration of the petitioner's suspended sentence, this situation was distinguished from *Carafas* on the rationale that here there had at no time been actual detention.

Equal Protection and Due Process Allegedly Violated by Nonattorney Police Judge

9150. Allen v. Blackburn, No. 9186 (Ky. Cir. Ct., Floyd County, filed Oct. 5, 1972). Plaintiff represented by Cassie J. Allen and John M. Rosenberg, Appalachian Research and Defense Fund, 661 University Rd., Prestonburg, Ky. 41653, (606) 886-3876. [Here reported: 9150A Amended Complaint (4 pp.); 9150B Memorandum (15 pp.).]

Plaintiff, charged with intoxicated driving, and subject to imprisonment or the automatic revocation of his

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license, seeks to enjoin defendant, a police judge, from proceeding with any criminal trial on the ground that defendant is not a licensed attorney.

Plaintiff alleges that defendant's inability to analyze and determine factual and legal issues denies him a fair trial. He asserts that due process requires police judges, who are authorized to render judgments, set bail, and issue warrants, be licensed and qualified attorneys.

Plaintiff further maintains that as a citizen of a fourth class city, his right to equal protection is violated by a Kentucky law which only requires that citizens of first or second class Kentucky cities be brought to trial before police judges who are licensed attorneys.

DOMESTIC RELATIONS

Court Waives Requirement of Service of Process by Publication in Divorce Cases

9548. Gaines v. Gaines, No. D-0425-72 (D.C. Super. Ct., Nov. 9, 1972). Plaintiff represented by Martin J. Snider and Donald R. Rogers, Lawcor Project, The American University, Washington College of Law, Washington, D.C. 20016, (202) 686-2630. [Here reported: 9548A Plaintiffs' Memorandum of Points & Authorities (25 pp.); 9548B Order (3 pp.).]

The superior court issued an order permitting service of process in actions for divorce by posting a copy of the order of publication at the courthouse for three successive weeks together with service by mail to defendant and/or closest living relative, if known. The requirement of service by newspaper publication was waived.

Petitioners are indigent plaintiffs who are proceeding in forma pauperis in actions for divorce. Efforts to locate and serve process on defendants were unsuccessful. Plaintiffs contended successfully that the expense of publication would create an undue hardship. Also they argued that their inability to pay the cost of the service by publication would foreclose them from further proceedings in their divorce actions in denial of fifth and fourteenth amendment rights.

DRIVERS' LICENSES

Posting of Security Bond Alleged Not to Revive a Claim Discharged in Bankruptcy

9595. Blue v. Loxton, No. 44106 (Minn. Sup. Ct., filed January 1973). Defendants represented by Bernard P. Becker and Stephen D. Swanson, Legal Aid Society, Inc., 501 Park Ave., Minneapolis, Minn. 55415, (612) 332-8984. [Here reported: 9595A Appellants' Brief (74 pp.).]

This appeal to the Minnesota Supreme Court by defendants, involved in an automobile accident, raises the issue of the effect of a motor vehicle safety responsibility act bond on a revival after a discharge in bankruptcy.

As a result of the accident, plaintiff brought suit and recovered a judgment in the amount of $945. When served with the summons and complaint, defendants thereupon filed petitions in bankruptcy in federal district court. On the petitions plaintiff was scheduled as an unsecured creditor and his claim against defendants was listed as a tort claim. Defendants were discharged in bankruptcy seven months later. On the same day as their discharge, defendants executed a motor vehicle safety responsibility bond in the sum of $500, and three months later executed another bond for $445. Both bonds were posted pursuant to the requirements of the Minnesota Safety Responsibility Act.

Defendants amended their answer to affirmatively allege their discharges in bankruptcy, contending that the discharges constituted a complete defense to plaintiff's claim. Defendants' motion for summary judgment was denied.

On appeal defendants contend that the posting of motor vehicle safety responsibility bonds subsequent to their discharges in bankruptcy did not revive the claim of plaintiff discharged in bankruptcy. They further contend that their discharges in bankruptcy constitute a complete defense to plaintiff's claim and that their motion for summary judgment should have been granted.

In addition, defendants contend that to interpret compliance with the provisions of the Minnesota Safety Responsibility Act requiring the deposit of security in order to avoid driver's license suspension as a revival of an unliquidated tort claim discharged in bankruptcy wrongfully denies to them rights guaranteed by the Federal Bankruptcy Act. Further, enforcement of the state safety act creates an irreconcilable conflict between the state law and the fundamental purpose of the Bankruptcy Act, to give bankrupts a fresh start in life, and therefore violates the supremacy clause of the Constitution.

EDUCATION

District Court Upholds Constitutionality of Academic High School

6583. Berkelman v. San Francisco Unified School District, No. C-71-1875 LHB (N.D. Cal., Dec. 19, 1972). Plaintiffs represented by Suzanne Martinez and Kenneth Hecht, Youth Law Center, 795 Turk St., San Francisco, Cal. 94102, (415) 474-5865. [Here reported: 6583D Memo Opinion and Order (15 pp.). Previously reported: 6583A Complaint (14 pp.), 5 CLEARINGHOUSE REV. 469 (December 1971); 6583B Amended Complaint (29 pp.); 6583C Plaintiffs' Memo in Support of Preliminary Injunction and Partial Summary Judgment (72 pp.), 6 CLEARINGHOUSE REV. 162 (July 1972).]

A federal district court has granted the defendants' motion for a summary judgment and dismissed a complaint challenging the maintenance of a special academic high school in San Francisco.

The plaintiffs had alleged that maintenance of the school was unconstitutional because its admission standards, although neutral on their face and based on past academic performance, effectively discriminated on a racial and economic basis, and also because the school's policy of admitting equal numbers of males and females discriminated against females in that males with academic records inferior to those of excluded females were admitted. The

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plaintiffs also contended that the operation of the academic high school without reference to the racial mix was unlawful per se because its curriculum was different from that of other area high schools and because it caused intellectual and emotional harm to excluded students. Finally the plaintiffs contended that the defendants had unconstitutionally favored the school in the allocation of educational resources.

The court found that even if these allegations were true, the actions were within the discretion of the school district.

Title I Parents Advisory Council Entitled to List of Program Participants

9554. Lopez v. Luginbill, No. 9508 (D. N.M., filed Dec. 12, 1972). Plaintiffs represented by Richard C. Bosson, Legal Aid Society of Albuquerque, Inc., 1015 Tijeras, NW, Albuquerque, N.M. 87101, (505) 243-5461. [Here reported: 9554A Complaint (11 pp.); 9554B Memorandum (10 pp.); 9554C Memorandum Opinion (3 pp.); 9554D Memorandum in Support of Motion for Summary Judgment (10 pp.); 9554E Memorandum on Standing (9 pp.); 9554F Memorandum on Ripeness (6 pp.); 9554G Findings of Fact and Conclusions of Law (5 pp.); 9554H Judgment (2 pp.); 9554I Memorandum in Response to Defendant's Motion for Stay of Injunction Pending Appeal (11 pp.).]

The court held that the plaintiff members of the Roswell Independent School District Title I Parents Advisory Council were entitled to have the names of all those parents whose children are participating in Title I programs within their district, except those parents who specifically request that their names remain confidential. The court enjoined the defendant state and local school officials from refusing to make these names available to the plaintiffs.

The court ruled that the defendants, so long as they operated a program funded with federal Title I money, were obligated to follow pertinent federal statutes and regulations lawfully promulgated thereunder. Therefore, the defendants were held to be bound by HEW's interpretation of its own regulation governing effective parental involvement which required the release of the names.

The defendants have moved for a stay of injunction pending appeal.

Aliens Challenge Residency Requirements for In-State Tuition Rates

9507. Wong v. California State University Board of Trustees, No. 652-035 (Cal. Super. Ct., San Francisco County, filed Dec. 21, 1972). Plaintiffs represented by Jack Seidman, San Francisco Neighborhood Legal Assistance Foundation, 250 Columbus Ave., San Francisco, Cal. 94133, (415) 362-5630. Of counsel, Eric Wong. [Here reported: 9507A Complaint (5 pp.); 9507B Memo of Points and Authorities (7 pp.).]

Plaintiffs in this class action, aliens who have obtained permanent resident status and who have resided in California for at least one year prior to registering at California State University or at a state college, seek declaratory and injunctive relief against the enforcement of a statutory provision which requires them to reside in the state for at least one year subsequent to obtaining permanent resident alien status before they are entitled to lower resident tuition rates, regardless of their residence prior to obtaining this status.

Plaintiffs allege that the statute violates equal protection because of the discriminatory treatment of aliens and that the manner in which it is implemented by the board of trustees constitutes an abuse of discretion. It is argued that aliens are entitled to equal protection and that such a classification based on alienage is inherently suspect and must be justified by a compelling state interest, and requires close judicial scrutiny.

Students Urge Supreme Court to Deny Certiorari to Suspension Decision

9497. Hayakawa v. Wong, No. 72-699 (U.S. Sup. Ct., filed Dec. 6, 1972). Respondents represented by Armando M. Menocal III and Michael S. Sorgen, San Francisco Neighborhood Legal Assistance Foundation, 2701 Folsom St., San Francisco, Cal. 94110, (415) 648-7580. [Here reported: 9497A Brief in Opposition to Petition for Certiorari (9 pp.).]

Respondents, college students, urge the Supreme Court to deny certiorari to review a district court holding that suspicion of disorderly conduct does not alone justify expuslion from a public institution of higher education. The sole evidence relied upon by petitioning school officials in a college disciplinary hearing was a police report listing names of students arrested at a prohibited assembly. Respondents contend that the police report is admissible but is not the substantial evidence which fairness requires because it does not indicate the conduct of any of the particular students involved.

Petitioners contend that disorderly conduct can be adduced by evidence of mere "presence," as opposed to "participation," at a prohibited assembly on campus.

Religious Exemption From Compulsory Inoculation Does Not Require Membership in Organized Church

9661. Maier v. Besser (N.Y. Sup. Ct., Onondaga County, Dec. 29, 1972). Plaintiffs represented by Richard A. Ellison, Syracuse University College of Law—Law Clinic, 125 Stadium Pl., Syracuse, N.Y. 13210, (315) 472-7344. [Here reported: 9661A Complaint (4 pp.); 9661B Decision (7 pp.).]

The court held that if the plaintiff father, suing on behalf of his children, could prove at trial that he had a genuine and sincere religious belief which he actively practiced and followed and which was substantially similar to the Christian Scientist faith as he argued, he would qualify for an exemption from an otherwise compulsory program for inoculation of school children under the New York statute which provides for exemptions for children whose parents are bona fide members of a recognized religious organization whose teachings are contrary to the inoculation practices provided for by the statute. The court

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granted a preliminary injunction pending the outcome of the trial enjoining the defendant school principal from keeping the plaintiff's children out of school because of their refusal to be inoculated.

The court chose to interpret the challenged statute as being constitutional rather than accept the plaintiff's view that the provision violated the equal protection clause of the fourteenth amendment and the establishment and free exercise clauses of the first amendment by providing religious exemptions for only those children whose parents belonged to organized churches.

Exclusion of "Exceptional Children" From Public Schools Challenged

9642. Wilcox v. Carter, No. 73-41-Civ.-J-T (M.D. Fla., filed Jan. 12, 1973). Plaintiffs represented by Alan A. Alop, Paul C. Doyle and Steven M. Goldberg, Duval County Legal Aid Ass'n, 205 East Church St., Jacksonville, Fla. 32202, (904) 356-8375. [Here reported: 9642A Complaint (8 pp.).]

The named plaintiff, a mentally retarded child, brings this class action seeking declaratory and injunctive relief against a school board which excludes from public school those children whom the board terms "exceptional." The class of "exceptional children" includes the mentally retarded, the speech impaired, the deaf and hard of hearing, the blind and partially sighted, the crippled and other health impaired and the emotionally disturbed and those with specific learning disabilities. Plaintiffs allege that denial of access to public supported education violates equal protection and that the procedure of exclusion without hearing, written notice and provision for alternative education violates due process.

Students Lose Challenge to Constitutionality of College Regulations

9608. Young Socialists for Jenness & Pulley v. Brady, No. C-72-267 SC (N.D. Cal.). Plaintiffs represented by Christopher N. May, Michael S. Sorgen, and Armando M. Menocal III, San Francisco Neighborhood Legal Assistance Foundation, 2701 Folsom St., San Francisco, Cal. 94110, (415) 648-7580. [Here reported: 9608A Complaint (19 pp.); 9608B Memo in Support of Motion for TRO (10 pp.); 9608C Order (2 pp.); 9608D Memo in Support of Motion for Summary Judgment (18 pp.).]

The defendant, the City College of San Francisco, has won a summary judgment in this class action challenging the constitutionality of certain of the college's regulations. Plaintiffs are four students at the college who were disciplined for having posted a banner advertising their political party during college-wide elections for student council held in January 1972. Seeking declaratory and injunctive relief, plaintiffs challenged four sets of regulations and a statutory provision, including a regulation authorizing summary expulsion prior to notice and a hearing; a regulation requiring prior approval by school officials of all posters and other election materials to be posted; a regulation defining general categories of conduct for which students may be disciplined; and Section 10602 of the California Education Code setting forth good cause for suspension or expulsion from school.

Plaintiffs did not obtain a temporary restraining order in this case and were denied their motion for summary judgment. Attorneys for the plaintiffs anticipate an appeal to the Ninth Circuit Court of Appeals.

EMPLOYMENT

Lower Court Denial of Preliminary Injunction Against Job Lottery Reversed

6747. Bowman v. Los Angeles County Civil Service Commission, No. 2 Civ. 39888 (Cal. Ct. App., Nov. 21, 1972). Plaintiffs represented by Philip L. Goar, Community Legal Assistance Center, 1709 West 8th St., Los Angeles, Cal. 90017, (213) 483-1491. [Here reported: 6747H Order (16 pp.). Previously reported: 6747A Complaint (9 pp.); 6747B Points and Authorities (14 pp.), 5 CLEARINGHOUSE REV. 753 (April 1972). Also available: 6747C Petition for Writ of Supersedeas (18 pp.); 6747D Petition for Temporary Stay Pending Determination of Writ (6 pp.); 6747E Stay Order (2 pp.); 6747F Writ (2 pp.); 6747G Brief (32 pp.).]

The California Court of Appeals reversed the trial court's denial of a preliminary injunction against the conducting of a lottery by the defendant Civil Service Commission to choose which of the plaintiff-applicants for county firemen jobs would be examined. Under the defendant's lottery scheme, the names of five hundred of the approximately 2,400 yearly applicants would be drawn from a drum. Only those drawn would be allowed to take the examination and be eligible for hiring.

The court held that the trial court had abused its discretion in denying the preliminary injunction, since there was a reasonable probability that the lottery was illegal, and unless the lottery was enjoined it would be extremely difficult to afford plaintiffs meaningful relief if they were ultimately successful.

The lottery had been stayed by the court of appeal pending its decision.

Use of Arrest Records as Bar to Employment Challenged on Ground of Racial Discrimination

9496. Chandler v. Goodyear Tire & Rubber Co., No. 72-2472 (E.D. Pa., filed Dec. 26, 1972). Plaintiff represented by Bruce E. Endy, Andrew S. Price, Harold I. Goodman, Jonathan M. Stein, and Laurence M. Lavin, Community Legal Services, Inc., 313 South Juniper St., Philadelphia, Pa. 19107, (215) 735-6101. [Here reported: 9496A Complaint (17 pp.); 9496B Memo in Support of Motion for Preliminary Injunction (14 pp.); 9496C Interrogatories (10 pp.); 9496D Interrogatories (12 pp.).]

Plaintiff brings a class civil rights action representing all black persons whose employment opportunities at Goodyear Tire and/or Amstar Corporation have been, or will in the future be, adversely affected by the fact that they have one or more arrests, but no convictions. This action challenges racial discrimination in employment by

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the two named defendant employers as a result of their reliance on and utilization of criminal arrest records as a bar to employment. Plaintiff seeks declaratory and injunctive relief, as well as money damages to remedy the defendants' unlawful and unconstitutional employment practices.

Plaintiff avers that the defendants use arrest record information to deny black job applicants employment or to discontinue employment solely because of the fact of an applicant's arrest record, although he has no convictions. Plaintiff further avers that the defendants entered into a conspiracy to exchange information concerning plaintiff's arrest record. Plaintiff contends that the employment practices of the defendants are neither related to the business needs of the defendants nor are they reasonably calculated to predict whether an applicant will be successful on the job. They constitute an artificial, arbitrary and unnecessary barrier to employment and operate to discriminate against the plaintiff class on the basis of racial classification in violation of the thirteenth and fourteenth amendments and 42 U.S.C. §1981.

Plaintiff asks that a declaratory judgment issue declaring the acts of the defendants to be unlawful and unconstitutional. Plaintiff also asks that the court preliminarily and permanently enjoin each of the defendants from continuing their discriminatory practices of utilizing any arrest record which did not result in conviction as a factor in determining any condition of employment, including hiring, promotion, and termination. Plaintiff further seeks an injunction ordering defendants to reinstate him in his former employment, and to reinstate all members of the class whose employment was adversely affected. Finally, plaintiff seeks punitive and compensatory money damages.

Attack Railroad Policy of Not Hiring Anyone With a Criminal Record

9322. Green v. Missouri Pacific Railroad Co., No. 72 C 702 (3) (E.D. Mo., filed Nov. 7, 1972). Plaintiffs represented by Walter Heiser, Phillip F. Fishman, and Francis Kennedy, Legal Aid Society of the City and County of St. Louis, 4030 Chouteau Ave., St. Louis, Mo. 63110, (314) 652-9581. [Here reported: 9322A Complaint (10 pp.).]

The named plaintiff in this class action is a black resident of Missouri who was denied employment with the defendant company because of its policy of not hiring any person who has been convicted of a criminal offense other than a minor traffic violation. At the time of his application for employment with the defendant, plaintiff disclosed that he had been arrested and convicted in 1967 for failure to report for military induction after he had been denied conscientious objector status. The plaintiff asserts that this policy of denying employment to members of his class is a violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, because a disproportionately greater percentage of blacks are arrested and convicted of a criminal offense than are whites.

Previously, the plaintiff filed a formal charge of discrimination with the Equal Employment Opportunity Commission, which determined that there was reasonable cause to believe that the defendant was in violation of Title VII. After conciliation efforts proved unsuccessful, the plaintiff brought this action. In addition to the disputed hiring policy, the plaintiff also asserts that the defendant continues to maintain a racially segregated work-force and racially segregated job classifications, limiting and denying employment opportunities of blacks in its general office, and totally excluding them from certain job classifications. The plaintiff seeks relief through a request for a court order requiring the defendant to take all necessary steps to rectify the continuing effect of its racially discriminatory acts and practices, and providing for hiring the plaintiff and the members of the class he represents with back pay, or payment of lost wages.

Consent Decree Gains Affirmative Action Program in Grand Rapids Fire Department

9657. Martinez v. Grand Rapids Civil Service Board, No. G-178-72 (W.D. Mich., Jan. 22, 1973). Plaintiffs represented by H. Rhett Pinsky, Robert Relph, and Stephen F. Idema, Grand Rapids & Kent County Legal Aid Society, 1208 McKay Tower, Grand Rapids, Mich. 49502, (616) 451-2504. [Here reported: 9657A Complaint (9 pp.); 9657B Preliminary Brief (13 pp.); 9657C Answer (10 pp.); 9657D Order for Preliminary Injunction (2 pp.); 9657E Consent Decree (5 pp.).]

This action, which was filed on behalf of one black and one Latin, sought to challenge hiring practices of the Grand Rapids Fire Department, as administered by the Civil Service Board. The hiring practices had the effect of placing only two minority firemen on a team of 228 in a city with a minority population of approximately 15%. The consent decree contains agreement on some far-reaching prohibitions against discriminatory recruiting, testing, and hiring, and an aggressive affirmative action program. The tests used are to be validated within six months, if necessary by court order, and no tests will be given prior to validation. Whenever hiring is done a specified percentage of minorities will be hired. Arrest records cannot be considered and felony convictions can bar employment only under very specific circumstances. Applicants are given an opportunity to rebut unfavorable past employment records. Rejected applicants have a right to a due process hearing and the court requires progress reports on the implementation of its order.

The affirmative action program must be established within two months and must include pretest tutoring and maximum use of communications media likely to reach minorities, and promotional material must refer to the court's order requiring minority hiring. The program must be designed by consultation with community agencies and groups which have direct contact with the minority community.

Municipal Employment Extended to Aliens

9522. Mohamed v. Parks, No. 72-3578-T (D. Mass., Dec. 11, 1972). Plaintiff represented by Gene R. Shreve, Boston

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Legal Assistance Project, 474 Blue Hill Ave., Roxbury, Mass. 02121, (617) 442-0211. Of counsel, Robert James, same address. [Here reported: 9522A Plaintiff's Memo in Support of Application for Preliminary Injunction (16 pp.); 9522B Agreed Statement of Facts (5 pp.); 9522C Order (2 pp.).]

The district court issued a preliminary injunction ordering defendant city officials to pass upon plaintiff's application for employment without consideration of municipal statutory provisions prohibiting the employment of aliens. The Boston City Council subsequently repealed provisions of the Revised Boston City Ordinances of 1961 which excluded plaintiff and others from city employment solely on the grounds of alienage.

Plaintiff argued that the challenged ordinances subjected him to an injurious and suspect classification in violation of the equal protection clause of the fourteenth amendment. He also contended that the ordinances contravened the immigration and naturalization scheme established by Congress and is thus in violation of the supremacy clause of the Constitution as well as the 42 U.S.C. §1981 right to "make and enforce contracts" and have "full and equal benefit of the laws."

Dismissal of Employees by State-Regulated Company Because of Long Hair Preliminarily Enjoined

9312. Boelts v. United Parcel Service, Inc., No. 76174 (Iowa Dist. Ct., Polk County, November 1972). Plaintiffs represented by Robert C. Oberbillig, Legal Aid Society of Polk County, 507 Shops Bldg., 8th & Walnut, Des Moines, Iowa 50309, (515) 282-8375. [Here reported: 9321A Ruling on Motion for Preliminary Injunction (7 pp.).]

A preliminary injunction has been issued to prevent defendant United Parcel Service, Inc. (UPS) from refusing the plaintiffs further employment because their hair and sideburns exceeded (by one-quarter inch) the company-designated maximum lengths. The court first held that the right to govern one's personal appearance is guaranteed by the fourteenth amendment's due process clause. Although the defendant is a private corporation, the court concluded from the extensiveness of regulation by the Iowa Commerce Commission and from UPS's holding of "a partial monopoly granted by the State" that the defendant's actions are subject to the fourteenth amendment as "state action."

Job Discrimination Charged Against Civil Service for Lack of Promotional Opportunity

9592. Gunter v. Laird, No. C-73-50 (E.D. Pa., filed Jan. 8, 1973). Plaintiffs represented by Michael Cox and Edwin D. Wolf, Employment Discrimination Referral Project, One North 13th St., Philadelphia, Pa. 19107. [Here reported: 9592A Complaint (14 pp.).]

This class action suit for racial discrimination in employment, brought primarily under the Civil Rights Act of 1964, seeks declaratory and injunctive relief and back pay. Plaintiffs are black persons, employed by defendant Army Electronics Command in Philadelphia, who have been denied a specific employment promotional opportunity, allegedly due to defendant's discriminatory practices.

Plaintiffs allege that defendant maintains various discriminatory practices, including administration and use of the Federal Service Entrance Exam which plaintiffs contend is culturally and racially discriminatory and serves systematically to exclude qualified blacks from obtaining managerial, administrative, supervisory, and professional level positions within defendant's organization; failure to provide developmental and other training programs to black employees as they are provided to white employees; and assignment of black employees to noncareer, dead-end job classifications. The asserted effect of these practices is to deny plaintiffs equal employment opportunities because of plaintiffs' race.

Two of the five named plaintiffs pursued appropriate administrative remedies and received adverse decisions. Consequently plaintiffs charge that they have no adequate remedy at law and seek injunctive relief. Specifically plaintiffs seek to enjoin defendant from engaging in the alleged discriminatory practices, an award of back pay to members of the class, and such further relief as necessary, including promotions.

Discrimination in New York Sanitation Department Alleged

9672. Luna v. Bronstein (S.D. N.Y., filed Jan. 4, 1973). Plaintiffs represented by Cesar A. Perales, Herbert Teitelbaum and Kenneth Kimerling, Puerto Rican Legal Defense & Education Fund, Inc., 815 Second Ave., New York, N.Y. 10017, (212) 687-6644; Jack Greenberg, Jeffry A. Mintz and Deborah Greenberg, NAACP Legal Defense Fund, 10 Columbus Circle, Suite 2030, New York, N.Y. 10019, (212) 586-8397; and Elizabeth B. DuBois, 30 East 39th St., New York, N.Y. 10016, (212) 986-5380. [Here reported: 9672A Complaint (20 pp.).]

Plaintiffs sue individually and in behalf of all other Puerto Ricans and other Hispanic persons who are being discriminated against with respect to obtaining positions as sanitation men in the New York City Department of Sanitation. Plaintiffs charge that certain requirements for appointment as sanitation men, including a written examination, as well as a 5 feet 4 inch height minimum, are not job related and have a discriminatory impact on Puerto Ricans and other Hispanic persons. Plaintiffs further charge that these requirements discourage Puerto Ricans and other Hispanic persons from applying for the position of sanitation man. As a result, less than two percent of the New York City sanitation men are of Puerto Rican or other Hispanic extraction contrasted with a city-wide population consisting of 16% Puerto Rican and other Hispanic persons.

Plaintiffs request that the defendants be enjoined from promulgating and using examinations or other criteria for appointment to the Sanitation Department which are not job related and which have a discriminatory impact upon Puerto Ricans and other Hispanic persons. In addition, plaintiffs request that defendants be required to take affirmative steps to increase the number of Puerto Ricans

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and other Hispanic persons employed by the New York City Department of Sanitation.

ENVIRONMENT

Parties to Highway Relocation Suit Agree to Form Committee to Study Problem of Replacement Housing

8554. West Oakland Planning Committee v. Volpe, No. C-72-1323-RFP (N.D. Cal., Sept. 27, 1972). Plaintiffs represented by Stephen P. Berzon, Carolyn E. Jones, and Miriam Morse, Legal Aid Society of Alameda County, 2357 San Pablo Ave., Oakland, Cal. 94612, (415) 465-4376. [Here reported: 8554C Stipulation for Continuance of Plaintiffs' Motion for a Preliminary Injunction (4 pp.).]

The parties in this highway relocation suit have entered into a letter of understanding, agreeing to cooperate in the formation of a housing advisory committee which will formulate recommendations concerning the number of replacement housing units and how such units could best be implemented. Plaintiffs, citizens' groups, are seeking to enjoin federal and state highway authorities from further acquisition, displacement, and construction activity on a portion of the Grove-Shafter Freeway in west Oakland, California, until defendants comply with federal relocation, environment and hearing requirements.

Among the terms of the agreement are provisions that the state defendants will not commence negotiations on any previously unnegotiated parcels and that negotiations already commenced will be suspended pending relocation housing studies; that relocation assistance services will not be unilaterally offered but will be provided only on request of occupants within the project's right of way; that aside from parcels on which demolition contracts have previously been let there will be no demolition on any improvement within the corridor unless required for public health or safety; and that the state will not evict any tenant otherwise in compliance with his legal duties as a tenant.

The agreement is to remain in effect indefinitely or until one of the parties cancels it. The purpose of the agreement is to give the parties sufficient time in which to assemble and study the facts pertaining to settlement of the issues raised in the suit. The parties anticipate that if such a settlement can be reached, the lawsuit will be dismissed and the freeway project may proceed.

FOOD PROGRAMS

School Lunch Program Ordered Extended to All Needy Children

9392. Justice v. Mount Vernon Board of Education, No. 72 Civ. 2339 (S.D. N.Y., Nov. 9, 1972). Plaintiffs represented by Mark A. Chertok, Dana H. Freyer, and Norman B. Lichtenstein, Legal Aid Society of Westchester County, Roosevelt Sq., Mount Vernon, N.Y. 10550, (914) 668-4045. [Here reported: 9392A Preliminary Statement (77 pp.); 9392B Opinion (37 pp.); 9392C Verified Complaint (23 pp.).]

The federal district court has held that defendant Mount Vernon School Board must begin providing free lunches to plaintiffs, under the National School Lunch Act.

According to federal criteria and standards promulgated by defendant, plaintiffs are eligible for, and should be receiving, free mid-day meals. Defendant provided such assistance at only four of its 14 schools, although needy children are found in all of its schools. Plaintiffs alleged that defendant is obligated to provide free lunches on a priority basis to its neediest children. The choice of the four schools was based on physical facilities for serving food, with no regard to the relative need of the students. The district's neediest children are not situated at these schools.

The court ordered defendant to comply with the National School Lunch Program, citing the legislative history and purposes of the Act and concluding that defendant was bound by its terms. The court found defendant's arguments based on the respective physical facilities of its schools totally unpersuasive and unsupportable, and ordered compliance district-wide.

For those few students to whom lunches were previously provided, defendant employed a system of monthly tickets which served to identify recipients as needy. Under this court order defendant must provide alternative payment systems which do not discriminatingly identify assistance recipients from the general student population.

The court ordered a further hearing to determine the appropriate decrees, but admonished defendant that the extension of a school lunch program to all needy children shall begin "promptly and go forward speedily," noting that "the era of deliberateness in such matters seems to have passed." (See CCH POV. L. REP. ¶16,410.)

HEALTH

Access to Nursing Homes Sought as First Amendment Right

9505. Citizens for Better Care v. Alden Care Enterprises, No. 214876R (Mich. Cir. Ct., Wayne County, filed Nov. 21, 1972). Plaintiffs represented by Jeanne F. Franklin and Sally W. Stabler, Michigan Legal Services Assistance Program, Wayne State Law School, Detroit, Mich. 48202, (313) 577-4822. [Here reported: 9505A Complaint (9 pp.); 9505B Brief for Plaintiffs (37 pp.); 9505C Brief in Support of Summary Judgment (9 pp.).]

In this class action for declaratory judgment and injunctive relief, a public interest group, organized by the City of Detroit Health Department to represent the interests of patients and their families concerning the quality of care in nursing homes, claims that the defendant corporation, the owner and operator of eight nursing homes in the Detroit area and the recipient of substantial federal and state subsidies through the Medicaid program, has violated plaintiffs' first amendment rights to discuss information with the patients about statutory benefits, to organize and act collectively, and to petition for redress of

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grievances. Plaintiffs claim that the nursing home's refusal to let the plaintiffs speak with the patients in their room and in privacy unless their family has put in a written request deprives the plaintiffs of the only means of exercising their first amendment rights to communicate with the patients. Plaintiffs maintain that many patients do not have any family and meeting in person is the only effective means of reaching nursing home patients who do not have bedside phones and who often cannot read or write because of old age and illness.

Because the nursing home facilities are operated in part from the federal and state Medicaid programs and subject to strict federal and state regulations, plaintiffs allege that the actions of the defendant constitute state action and that the defendant's deprivation of the plaintiffs' first amendment rights is illegal state action under the fourteenth amendment.

Finally plaintiffs maintain that in a competition of interests, the plaintiffs' and patients' first and fourteenth amendment rights to organize, associate, and disseminate information regarding statutory rights and to petition for redress of grievances outweigh the defendants' assertion of the right of private ownership to keep persons off their premises. Where an area has a sufficiently public character and the activity is related to that public use, private ownership rights cannot prevail over constitutionally protected activity where there is no other way for a person to exercise his constitutional or statutory rights.

State Ordered to Reinstate Medi-Cal Benefits

9407. Dils v. Geduldig, No. C-44371 (Cal. Super. Ct., Los Angeles County, Dec. 27, 1972). Plaintiffs represented by Peter Coppelman, Phil Neumark, Elaine Climpson, and Ruben Lopez, National Senior Citizens Law Center, 942 Market St., San Francisco, Cal. 94102, (415) 989-3966; Patricia Butler and L. Michael Messina, National Health & Environmental Law Program, 2477 Law Bldg., 405 Hilgard Ave., Los Angeles, Cal. 90024, (213) 825-7601. [Here reported: 9407A Petition for Writ of Mandate (13 pp.); 9407B Points and Authorities (8 pp.); 9407C Findings of Fact and Conclusions of Law (12 pp.); 9407D Judgment Granting Peremptory Writ of Mandate (3 pp.); 9407E Peremptory Writ of Mandate (3 pp.); 9407F Letter (2 pp.).]

In this class action, petitioners, California social security recipients, successfully sought a writ of mandamus to compel respondent state health and welfare officials to comply with federal law concerning eligibility for California's state Medicaid program, Medi-Cal.

Because of an increase in social security benefits, approximately 10,000 social security recipients were declared by California to be ineligible for Medi-Cal benefits and were transferred to the Medically Needy Only Program. Medi-Cal provides comprehensive health care without liability whereas the Medically Needy Only Program provides substantially less assistance.

As of October 30, 1972, congressional legislation required all states, including California, to restore Medicaid benefits immediately to persons who had lost eligibility solely because of the increase in social security benefits. Respondent state officials had refused to comply, despite an HEW interpretative memorandum specifically extending continued Medi-Cal benefits to the categorically needy.

Petitioners alleged that as a result of respondents' refusal to comply with the federal mandate, they are forced to choose between necessities and medical care.

Although petitioners received increased quarterly allotments due to the overall increase in social security benefits, such additional monies, according to California policy, rendered them ineligible for Medi-Cal benefits. The operational effect of transferring petitioners to the Medically Needy Only Program was to require each of them to pay a certain amount of their own medical expenses before the state would assume the remainder. This initial medical payment requirement consumed a substantial portion of petitioners' fixed incomes, leaving them with money sufficient to purchase necessities such as food, clothing, and shelter, or medical care—but not both.

By the terms of the writ, California must restore benefits to petitioners by January 19, 1973. The state decided not to appeal and assistance will be reinstated as ordered. Pursuant to the writ, the California Department of Health Services issued a letter to all counties ordering compliance. This letter provides that county departments must identify these individuals and restore Medi-Cal benefits with no liability retroactively to the effective day of discontinuance of cash grant status.

Citizens Seek Improvement in Hosptial Standard of Treatment

9321. Copes v. The Ira Davenport Memorial Hospital, No. 1972-564 (W.D. N.Y., filed Oct. 26, 1972). Plaintiffs represented by John F. Soja, Monroe County Legal Assistance Corp., 106 Tremont St., Rochester, N.Y. 14608, (716) 454-6500. Of counsel, John J. Kelly, same address. [Here reported: 9321A Complaint (50 pp.).]

This class action has been brought by residents of the territorial area served by the defendant hospital, against the hospital and the New York Health Department and its commissioner, for relief from allegedly inadequate and substandard medical care. Factual allegations include that the hospital is understaffed, with inadequate facilities and personnel, and fails to keep a staff physician on the premises 24 hours daily.

Six counts of the plaintiffs' complaint allege that the in-patient and emergency treatment provided by the hospital are in violation of the common law standards of accepted medical practice in the community and ordinary due care, the hospital's own rules and regulations, the New York hospital licensing statute, and federal standards for hospitals participating in Medicare and Medicaid. Four counts allege that the defendant commissioner and Department of Health are in dereliction of their duty to enforce the requisite state and federal standards of hosptial care and treatment and that their non-uniform enforcement of these standards discriminates against plaintiffs' right to adequate

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hospital care, in denial of equal protection. The final three counts allege that the hospital has failed to provide a reasonable amount of services to those unable to pay, in violation of its duty under the Hill-Burton Act.

Hearing Requested Before Termination of Medicare Benefits

9552. Fuller v. Richardson, No. 72-972M (D. Md., filed Dec. 15, 1972). Plaintiffs represented by Thomas J. Miller and Dennis M. Sweeney, Legal Aid Bureau, Inc., 341 North Calvert St., Baltimore, Md. 21202, (301) 539-5340. [Here reported: 9552A Amended Complaint (14 pp.).]

Plaintiff contends in this class action that the Secretary of HEW may not terminate Medicare benefits without first giving adequate notice and a full and fair hearing on all issues of dispute, as required by the due process clause of the fifth amendment. He seeks an order declaring invalid and enjoining the termination procedure.

Plaintiff contends that he relied on certifications made by his attending physician and by the Utilization Review Committee that he was covered under the Hospital Insurance Benefits Program. He argues that the decision of the Utilization Review Committee as to the type of care rendered is a final decision and should not be overruled.

Texas Statutes Prohibiting Nonmedical Associations From Rendering Health Care Challenged

9521. Garcia v. Texas Board of Medical Examiners, No. SA 72CA375 (W.D. Tex., filed Dec. 13, 1972). Plaintiffs represented by Mario Obledo, Alan Exelrod and Michael Mendelson, Mexican American Legal Defense and Education Fund, 145 Ninth St., San Francisco, Cal. 94103, (415) 626-6196. [Here reported: 9521A Complaint (10 pp.).]

This class action seeks injunctive and declaratory relief on behalf of all persons who desire to incorporate the San Antonio Community Health Maintenance Association (SACHMA) and similar organization and who are precluded from doing so by Texas law. This action is also brought on behalf of corporations similarly situated to SACHMA that wish to hire members of the medical profession but are precluded by Texas law. Finally, this action is brought on behalf of individuals medically indigent and middle income who wish to join nonprofit health and medical care corporations whose boards of directors and incorporators are not members of the medical profession.

Plaintiffs contend that their rights to freedom of association under the first amendment and due process and equal protection under the fourteenth amendment have been violated. They seek to have the court declare unconstitutional a series of interlocking Texas statutes which allegedly arbitrarily and irrationally prevent non-medical personnel from associating in order to provide essential health services to the community. Plaintiffs assert that the special interest laws at issue in this suit effectively deny to the medically indigent services vitally necessary to their health. The immediate effect of these laws, they contend, is to deny to a group of citizens the right to form a nonprofit corporation for delivery of health services to the poor and further to deny to a group of lay persons the right to hire doctors licensed by the medical profession.

Plaintiffs contend that the challenged Texas statutes reach beyond the borders of the state as they preclude laymen from applying for and/or receiving funds under 42 U.S.C. §246, since Texas law requires that if the purpose of one organization is to deliver health or medical care, then its board of directors must be doctor controlled. It is contended that the Texas laws make the right of an individual to benefit from federal statutes subservient to the Texas medical profession's principles of doctor control and doctor economic self-interest.

On August 2, 1972, SACHMA was formed for the purpose of obtaining medical services, providing a hospitalization program, and rendering health care to all sectors, with special emphasis on the medically indigent of Bexar County, Texas. It intended to have on staff salaried personnel, Texas-state-licensed members of the medical profession to administer health and medical care services. Its initial incorporators consisted of three individuals who in no way are related to the medical profession. In October 1972, plaintiff SACHMA was informed that it would not receive a corporate charter because none of the proposed incorporators are licensed to practice medicine in Texas, and the proposed corporation was deemed organized for the practice of medicine for which a license is required.

Plaintiffs ask that a three-judge district court be convened to hear this action. They further seek to have the court issue a declaratory judgment holding various provisions of the Texas health code violative of the first and fourteenth amendments, and enjoin their enforcement insofar as they deny plaintiffs the rights of association, due process, and equal protection of the law. Finally they ask that the Texas Secretary of State be mandatorily enjoined to issue the corporate charter to SACHMA.

Resist Motion to Dismiss in Suit to Enforce HEW Medicaid Fee Guidelines

9447. Yanez v. Jones, No. NC 38-72 (D. Utah, filed Jan. 10, 1973). Plaintiffs represented by Jerry L. Bean, L.G. Bingham, Paul D. Vernieu, David J. Knowlton and William F. Daines, Weber County Legal Aid Services, 453 24th St., Ogden, Utah 84401, (801) 394-9431. Of counsel, Patricia A. Butler, National Legal Program on Health Problems of the Poor, 405 Hilgard Ave., Los Angeles, Cal. 90024, (213) 825-7601. [Here reported: 9447A Complaint (7 pp.); 9447B Memorandum in Support of Motion for Preliminary Injunction (6 pp.); 9447C Brief in Support of Class Action (20 pp.); 9447D Supplemental Memorandum of Points & Authorities (14 pp.); 9447E Memorandum of Points & Authorities (9 pp.); 9447F Memorandum in Response to Motion to Dismiss (6 pp.).]

Plaintiffs in this class action are welfare recipients who seek damages and an injunction compelling defendant welfare officials and individual doctors to comply with federal law which prohibits states from permitting physicians to charge Medicaid recipients amounts above the fee level prescribed in the state Medicaid plan. Plaintiffs also

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seek to recover the excess amounts paid to the named physicians as damages and demand disclosure relating to all funds improperly collected and the identity of all persons from whom such sums were received.

Plaintiffs' position is that although there is no requirement that particular health-care providers agree to treat Medicaid recipients, federal regulations do require of those who assume the burden that the established fee structures shall constitute payment in full. Since health providers agree and certify to the Utah Division of Family Services that they will make no further claim for payment of the services, the plaintiffs assert that the state must enforce these contracts. Additionally, plaintiffs believe that they are being charged the unlawful amounts which exceed the state fee level solely because of their status as welfare recipients in violation of the equal protection clause of the fourteenth amendment.

The defendants have filed a motion to dismiss arguing: that HEW has jurisdiction over the matter; that the health providers are not proper defendants; that the Medicaid recipients have no standing; that aggregation of claims to reach the jurisdictional amount is not allowable; and that the personal liberty-property right distinction is a barrier to such actions. In response to the defendants' argument that HEW's rejection of the state agency's plan is the only remedy, the plaintiffs assert that the United States Supreme Court has rejected this postion and held that welfare litigants may not be barred from federal courts merely because HEW may consider the issue raised in the complaint. The plaintiffs counter the contention that only welfare administrators are proper defendants for the reason that the federal regulation refers to the state agency, by arguing that precedent overrules this point and also that the health providers are agents of the state. The plaintiffs also reject the contention that they lack standing to sue as third party beneficiaries, arguing that previous decisons support the idea that there is a cause of action and that poor people have standing to sue health service providers. In response to the defendants' arguments that the Court lacks subject-matter jurisdiction, and that the personal liberty-property right distinction is a barrier, the plaintiffs argue exceptions to the general rule that individual claims should not be aggregated to obtain jurisdiction, and that the United States Supreme Court has expressly rejected the distinction between personal liberty and property rights.

HOUSING

Tenants Challenge HUD Methods of Approving Rent Increases

9404. Harlib v. Romney, No. 72 C 2550 (D. Ill., filed 1972). Intervening plaintiffs represented by John H. Schlegel, Seymour J. Mansfield and C. Daniel Hershenson, Legal Aid Society of Chicago, 64 East Jackson Blvd., Chicago, Ill. 60604, (312) 922-5625. [Here reported: 9404A Intervening Complaint (27 pp.).]

Intervening plaintiffs bring this class action for declaratory and injunctive relief and restitution on behalf of themselves and all other residents of a 277-unit, Section 221 (d) (3) apartment building. Plaintiffs seek to have the court delcare that defendants' approval of a requested rental increase without giving plaintiff class prior notice of the request and a full and fair hearing denies them their rights under the due process clause of the fifth amendment, Section 221 (d) (3) of the National Housing Act, 12 U.S.C. §17151 (d) (3), portions of the Administrative Procedure Act, and certain leases and regulatory agreements. The apartment building in which plaintiffs are tenants was financed and constructed under the program of insurance for mortgages on housing for low and moderate income persons established by Section 221 (d) (3) of the National Housing Act.

In July 1972, the defendant owner and manager applied to HUD for permission to increase rents. Plaintiffs were at no time afforded notice of this application or given any opportunity to present their objections to its approval and to rebut the presentations made by the defendant owner and manager. Subsequently the requested rental increase was approved. Plaintiffs contend that had they received timely notice of the request they could have presented information relevant under the applicable rules and regulations to the approval of a rent increase. They assert that this information would or might have resulted in a denial of the rent increase or a reduction in its amount.

Plaintiffs further seek judicial review of the administrative decision authorizing the rental increase. They assert that the agency action was arbitrary, capricious, an abuse of discretion, taken without giving due consideration to the purpose of the Section 221 (d) (3) project, and without conformity with the economic stabilization regulation for HUD programs. Plaintiffs also contend that the defendants failed to make a concerted effort to assure that they were each provided with all possible rental assistance.

Plaintiffs ask that the approved rental increase be declared unlawful. They seek to invalidate specific computation errors and ask that the defendants be enjoined from granting any application for a rent increase without first making every concerted effort to assure that members of the plaintiff class are provided all possible rental assistance prior to or contemporaneous with such increase. They further ask that restitution be granted in the amount of the increment unlawfully approved.

Allege Tenants in Federally Subsidized Housing Have Right to Notice and Hearing Prior to Rent Increases

9357. Paulsen v. Coachlight Apartments Co., No. 6354-72CA (W.D. Mich., filed January 1973). Plaintiffs represented by Robertamarie Kiley and Carl Kaplan, Greater Lansing Legal Aid Bureau, Inc., Box 1071, Lansing, Mich. 48933, (517) 489-4576. On the brief, Robert L. Reed, Michigan Legal Services Assistance Program, Wayne State University Law School, Detroit, Mich. 48202, (313) 577-4822. [Here reported: 9357A Complaint (10 pp.); 9357B Memo of Points & Authorities in Support of Motion for a Preliminary Injunction (8 pp.); 9357C Supp. Memo in

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Support of Motion for a Preliminary Injunction (24 pp.); 9357D Supp. Memo in Support of Plaintiffs' Motion for Partial Summary Judgment (31 pp.).]

Plaintiffs, tenants in a housing unit subsidized under Section 236 of the National Housing Act, bring this class action against their landlord, the Secretary of HUD and the local director of HUD and FHA alleging that FHA authorization of rent increases in federally subsidized housing based solely on information derived from landlords' applications is invalid. They allege such procedure violates the National Housing Act and regulations promulgated thereunder, the Administrative Procedure Act and their fifth amendment right to due process.

Plaintiffs seek declaratory and injunctive relief as well as court costs and restitution of rent payments made since the increase. In particular, plaintiffs assert that minimal due process requires that prior to any rent increase they must be furnished with notice of the application for such increase and the facts supporting such application.

Plaintiffs further assert that due process requires that they be allowed to produce evidence, examine and cross-examine witnesses at an informal administrative hearing concerning the proposed increase, that a record be made of the proceedings, and that the FHA furnish them with a written decision including reasons for its approval of any rent increases.

Challenge Retaliatory Eviction for Report of Rent Freeze Violation

9611. Robbins v. Dunn, No. G-72-800 (N.D. Cal., May 4, 1972). Defendant represented by Harvey M. Freed, Armando M. Menocal and Michael H. Marcus, San Francisco Neighborhood Legal Assistance Foundation, 2701 Folsom St., San Francisco, Cal. 94110, (415) 648-7580. [Here reported: 9611A Complaint (3 pp.); 9611B Answer (4 pp.); 9611C Cross Complaint (2 pp.); 9611D Request for IRS Interpretive Ruling & Complaint Regarding Economic Stabilization Program Violation (7 pp.); 9611E Petition for Removal (3 pp.); 9611F Request for Leave to File In Forma Pauperis (3 pp.); 9611G Order (1 p.).]

9612. Bischoff v. Imhoff, No. C-72-799 (N.D. Cal., May 4, 1972). Plaintiffs represented by the foregoing attorneys. [Here reported: 9612A Complaint (8 pp.); 9612B Memo in Support of TRO (8 pp.); 9612C Petition for Removal (3 pp.); 9612D Request for Leave to File In Forma Pauperis (3 pp.); 9612E Order (1 p.).]

Both of these actions involve retaliatory eviction for complaints by lessees of rent freeze violations.

In *Robbins v. Dunn*, plaintiff-owner commenced eviction proceedings against defendant renter. In her answer defendant asserted violations by plaintiff of the Economic Stabilization Program and cross-claimed for damages for the resulting emotional distress and anxiety suffered. Defendant is a 76-year-old woman in poor health, dependent upon social security benefits. For purposes of economic stabilization, defendant's apartment had a base rent of $80 per month, which plaintiff raised to $125 per month. Plaintiff commenced this action when defendant asserted that she had a right to continue her rent at $80 per month and refused to pay the increase. Concurrent with the filing of the answer, defendant sought an interpretive ruling from IRS seeking a determination that the rent increase was, in fact, a violation of the program, stressing the need for protection from retaliatory evictions. Such ruling is still pending. Meanwhile defendant has successfully petitioned for removal to federal district court and obtained an order waiving all prepayment costs and the necessity for posting bond.

Bischoff v. Imhoff is an action commenced by plaintiff lessees against defendant lessor seeking to enjoin defendant from filing and prosecuting an eviction action pending administrative action on plaintiff's contention that the eviction threatened by defendants is violative of the Economic Stabilization Act Amendments of 1971. In addition, plaintiff seeks a permanent injunction against such an eviction, and damages both under the Act and for emotional distress under California law.

Plaintiffs suffer from physical ailments and are dependent upon social security for their subsistence. Defendant attempted to raise the rent, which plaintiffs resisted. Defendant asserts that he wishes to occupy plaintiffs' apartment himself and for that reason brought eviction proceedings. Plaintiffs believe his action is retaliatory and seek protection from the court.

As in the above case, plaintiffs seek an interpretive ruling from IRS and have removed the action to federal court, with permission to proceed in forma pauperis.

Tenant Seeks Damages for Intentional Infliction of Mental Distress From Slum Landlord

9490. Soria v. Fieberling, No. 32102 (Cal. Ct. App., filed Nov. 29, 1972). Appellant represented by Rosalyn M. Chapman, Western Center on Law and Poverty, P.O. Box 24795, Los Angeles, Cal. 90024, (213) 825-5706; Allan D. Heskin, National Housing & Economic Development Law Project, 2313 Warring St., Berkeley, Cal. 94704, (415) 642-2826; and Richard McAdams, Legal Aid Society of Santa Cruz County, 109 East Lake Ave., Watsonville, Cal. 95076, (408) 688-6535. [Here reported: Appellant's Brief (61 pp.).]

Appellant, a former tenant, seeks damages for intentional infliction of emotional distress suffered from her landlord's allegedly deliberate renting of defective premises at excessive rent. Appellant and her family are welfare recipients and contend they moved into the landlord's property and were forced to remain there because of economic compulsions.

Appealing from the sustaining of a general demurrer, appellant contends that the landlord rented a seriously defective cottage and refused to repair it with full knowledge that such conduct would proximately cause her to suffer severe emotional distress. Appellant alleges that the demurrer to this cause of action should have been overruled, since California permits recovery for this tort, since California courts have applied the doctrine of intentional infliction of emotional distress in landlord-tenant relations,

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and since the landlord's conduct in refusing to repair violations of state housing law was outrageous. Other causes of action also relied on include implied covenant of quiet enjoyment, implied warranty of habitability, rescission of an illegal contract, wanton and reckless conduct, nuisance and retaliatory eviction.

Order Requiring Due Process Protections for Public Housing Tenants Affirmed on Appeal

7295. Brown v. Milwaukee Housing Authority, No. 72-1259 (7th Cir., Dec. 8, 1972). Appellees represented by Patricia D. McMahon, Freedom Through Equality, Inc., 152 West Wisconsin Ave., Milwaukee, Wis. 53203, (414) 271-7772. [Here reported: 7295G Decision (10 pp.). Previously reported: 7295A Complaint (9 pp.); 7295B Answer (6 pp.); 7295C Plaintiffs' Brief re Motion for Judgment on Pleadings (18 pp.); 7295D Defendants' Brief re Motion to Dismiss (9 pp.); 7295E Decision (7 pp.); 7295F Judgment (1 p.), 6 CLEARINGHOUSE REV. 166 (July 1972).]

The court has affirmed the district court order requiring the defendant public housing authority to provide plaintiff public housing tenants with written statements outlining the reasons for a proposed termination and an impartial pretermination hearing replete with due process protections. The class of all tenants in federally-assisted low-rent public housing projects owned and operated by the defendant had brought an action for declaratory and injunctive relief. The district court held that the authority's failure to provide notice and a prior hearing violated both the due process clause of the fourteenth amendment and HUD regulations promulgated pursuant to the United States Housing Act of 1937.

The court of appeal held that the eviction procedure violated the HUD regulation but did not decide the due process of law issue. The court found, first, that the regulation promoted the Housing Act's policy of assuring adequate housing for low-income families and operated to protect HUD's financial contribution to the project. Second, the court found that promulgation of the regulation in compliance with notice provisions of the Administrative Procedure Act was specifically excepted by statute. Finally, the court held that a state judicial action for unlawful detainer does not comply with the grievance procedure mandated by the regulation.

Eviction Proceeding and Denial of Access to Leased Housing Program Alleged to Violate Due Process and HUD Circulars

9495. Caliri v. Donato, No. 34000 (Mass. Super. Ct., Middlesex County, filed Aug. 30, 1972). Petitioners represented by Donald K. Stern and Donald L. Becker, Boston College Legal Assistance Bureau, 21 Lexington St., Waltham, Mass. 02154, (617) 893-4793. [Here reported: 9495A Amended Complaint (10 pp.); 9495B Memo of Law (6 pp.).]

Petitioners, tenants in the Leased Housing Program seek injunctive and declaratory relief to enjoin eviction proceedings and to compel the defendant Newton Housing Authority to accord them a grievance hearing and notice of good cause prior to eviction as provided in HUD circulars.

Petitioners allege that their leased housing arrangement was improperly terminated and that the eviction proceedings are therefore void, and also that the Newton Housing Authority improperly justified the eviction and denial of access to leased housing programs on the basis of anonymously received correspondence which impugned petitioners' character. Petitioners argue that they have a right to a grievance hearing before an impartial individual, the right not to be evicted solely on the basis of police records or other social reasons, and the right to be told promptly in writing of the reasons for their eviction. Petitioners have now received a letter from the authority asking them to select a date for "a hearing before an impartial officer."

Notice and Hearing Required in Foreclosure Under Deed of Trust

9358. Great Western Savings & Loan Association v. Jackson, No. 676 242 (San Francisco Mun. Ct., Oct. 16, 1972). Defendant represented by James Pachl, 721 Webster St., San Francisco, Cal. 94117, (415) 567-2804. [Here reported: 9358A Answer (2 pp.); 9358B Stipulated Facts (5 pp.); 9358C Defendant's Memo (9 pp.); 9358D Informal Opinion (2 pp.); Judgment 9358E (1 p.).]

In a case marked by the lack of a formal written opinion, the San Francisco Municipal Court sustained the defendant's contention that the plaintiff's claim of title in defendant's property and subsequent sale under a deed of trust did not meet the requirements of procedural due process. Although defendant assumed full responsibility for payment under the deed of trust, she believed that she had been given an oral moratorium on her obligations to the plaintiff by using the moneys that would constitute payments on the deed of trust to make necessary repairs on the property. Although the plaintiff complied with all of the applicable requirements of the California Civil Code in regaining control of the property, the defendant was not advised that it was necessary for her to record a request for notice of any default or of the trustee's sale in order to receive information on the status of her title. Consequently, the defendant was not sent notice of the recordation of default and had no hearing prior to the exercise of the power of sale by the plaintiff. The informal opinion of the court sustained the defendant's claim that both federal and state decisions make such a procedure invalid, holding that a person cannot be deprived of any property interest without prior notice and judicial hearing on the merits of the creditor's alleged claim against the debtor.

Partial Agreement in Indianapolis Workable Program Case

7847. Near East Side Community Organization v. Indianapolis (Ind. Metro. Dev. Comm'n, Marion County, filed Oct. 18, 1972). Plaintiffs represented by Nelson A. Soltman, Julius E. Smith, and Solomon L. Lowenstein, Jr., Legal Services Organization of Indianapolis, Inc., 1955

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Central Ave., Indianapolis, Ind. 46202, (317) 926-2374. Of counsel, Richard T. LeGates and Alvin Hirshen, National Housing & Economic Development Law Project, Earl Warren Legal Institute, 2313 Warring St., Berkeley, Cal. 94704, (415) 642-2826. [Here reported: 7847C Letter From HUD to NESCO (4 pp.); 7847D Letter From HUD to Indianapolis Department of Metropolitan Development (8 pp.); 7847E Memo Agreement (4 pp.); 7847F Agreement Contract (21 pp.). Previously reported: 7847A Administrative Complaint to the City (76 pp.); 7847B Administrative Complaint to HUD (25 pp.), 6 CLEARINGHOUSE REV. 168 (July 1972).]

The parties in this case have agreed to resolve some of their disagreements. In particular, the parties have agreed to the establishment of a Project Area Committee (PAC) to work in cooperation with local residents, to identify their changing attitudes, desires and priorities and transmit them to the Department of Metropolitan Development (DMD), to provide them with information about its activities, and to serve as the decision-making body for the area. The PAC has authority to hire, direct, and fire its staff and employees.

The parties further agreed that the DMD would permit the PAC maximum feasible authority, would collaborate with the PAC in developing proposals for the area and would submit all programs to PAC for review and evaluation. The DMD also agreed to maintain all dwellings owned by it in a habitable condition and to submit copies of all NDP applications for the area to the plaintiff more than 45 days before official action if possible.

This agreement supplements an earlier one whereby the DMD and the plaintiff assured the plaintiff's participation in the Workable Program by providing it with technical assistance upon request and with copies of all drafts of the Workable Program and all relevant correspondence between the DMD and HUD. Negotiations on all unresolved issues are continuing.

Tenants Allege Mismanagement of Section 236 Housing

9437. Perez v. Lancaster Garden Court, Inc., (U.S. Dep't of Hs'g & Urban Dev., filed 1972). Complainants represented by James Kearney, Alan N. Linder, and J. Richard Gray, Tri-County Legal Services, 53 North Duke St., Lancaster, Pa. 17602, (717) 397-4237. [Here reported: 9437A Complaint (15 pp.).]

Low-income residents of a Section 236 apartment complex have filed a complaint requesting the Secretary of HUD to terminate the management contract between the owner-mortgagor of the project and its resident manager. The plaintiffs contend that since the apartments had been financed under Section 236 of the National Housing Act the owners are required to provide for socially-oriented management and related human services needed in low and moderate income projects.

The complaint charges the current manager with racial prejudice, abusive rent collection tactics, arbitrary eviction of tenants, failure to repair, lack of proper social orientation and a disrespectful attitude towards all low-income tenants. Since this conduct violates HUD standards, as outlined in provisions of supplementary agreements and management plans, and constitutes serious mismanagement, complainants request an investigation and urge the Secretary to declare the mortgagee in default as a result of the bank's failure to properly supervise the mortgagor, to require the owner-mortgagor to provide the project with proper management satisfactory to the tenants, and to bar retaliatory management action against the complainants.

Statute Requiring City to Transport and Store Evictees' Goods Held Constitutional

9694. Property Owners Association of Baltimore, Inc. v. Butler, No. 1972A/466/A-52753 (Md. Cir. Ct., Dec. 14, 1972). Defendants represented by Thomas Miller and H. Maxwell Hersch, Legal Aid Bureau, Inc., 341 North Calvert St., Baltimore, Md. 21202, (301) 539-5340. [Here reported: 9694A Memorandum and Order (4 pp.).]

The Circuit Court of the City of Baltimore has upheld the constitutionality of a 1972 Maryland statute which required that the City of Baltimore provide transportation and necessary storage facilities for furniture and goods put into the street as a result of evictions. (This law was passed through efforts by legal aid bureau representatives.) Plaintiff property owners sought to have the statute declared unconstitutional under a provision of the Maryland Constitution which strips the legislature of power to pass local laws on any subject covered by previously-granted express powers of the city. The court concluded that Baltimore had no express, as opposed to implied, power to pass such a law; that even if the city did have power to pass such a law, express within the meaning of the constitutional provision, any conflict between the city's power and the local law was clearly de minimis and not of constitutional dimension; that the state legislature properly exercised its residual sovereign power, in light of the strong presumption in favor of constitutionality; that the intervention of a community organization was appropriate; and that the complaint be dismissed with costs to the property owners.

The landlords association sought to have this law declared unconstitutional because it provided for significant delay in regard to evicting a tenant and placing his goods on the street. Since there are limited vehicles available from the City of Baltimore, it was not possible to evict a tenant with the same speed as had been possible in the past, where a tenant's goods were simply placed on the street without any requirement that a vehicle be provided to transport these goods to adequate storage facilities.

Low-Income Persons Seek to Intervene in Proceedings Contesting Municipality's Refusal to Allow Low-Cost Housing Construction

9494. Waltham Housing Authority v. Waltham Zoning Board of Appeals, No. 1972-6 (Mass. Dep't of Community Affairs, Housing App. Committee). Intervenors, Waltham Tenants Organization, represented by Donald K. Stern and Donald L. Becker, Boston College Legal Assistance Bureau, 21 Lexington St., Waltham, Mass. 02154, (617) 893-4793.

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[Here reported: 9494A Brief in Support of Application for Intervention (17 pp.).]

Low-income residents, individually and as members of an unincorporated tenants association, seek to intervene in state administrative proceedings contesting a local zoning board's refusal to issue a permit for the construction of low-cost housing to a municipal housing authority.

Arguing that they have been forced to endure substandard living conditions because of a lack of decent low-cost housing, applicants contend that they have a personal stake in the outcome of this controversy, thus meeting the test for standing set forth in *Baker v. Carr*, 369 U.S. 186 (1962). Applicants assert that the concept of standing is expanding to include all affected persons and groups and find specifically that potential residents have standing to challenge administrative decisions regarding public housing citing *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967). Referring to the language in the Massachusetts statute empowering the housing authority to provide housing for low-income persons, applicants insist that their interest in having additional housing is within the zone of interests protected by the statute and thus that they have standing under the test of *Association of Data Processing Service, Inc. v. Camp*, 397 U.S. 150 (1969).

Applicants observe that those with property abutting the site of the proposed low-cost housing project have already been admitted as intervenors and contend that their interest in obtaining decent and safe housing is at least as great as the purely economic interest of the abuttors.

Finally, the applicants argue that they should be permitted to intervene because they can make a positive contribution in the conduct of the proceedings. Willing to testify that they were on the housing authority's waiting lists for years, applicants assert that they are in a unique position to speak of the critical demand for low-cost housing and to show that defendant's decision was inconsistent with local needs. Because the housing authority has no duty to represent the interests of low-income persons, applicants fear that if they do not intervene, their personal hardships will not be aired during the proceedings.

HUD Stipulation Agrees to Reinstate Philadelphia Neighborhood Renewal Program

8350. Pugh v. HUD, No. 72-1173 (E.D. Pa., October 1972). Plaintiffs represented by George D. Gould and Jonathan M. Stein, Community Legal Services, 313 South Juniper St., Philadelphia, Pa. 19107, (215) 735-6101. [Here reported: 8350C Stipulation (4 pp.). Previously reported: 8350A Complaint (35 pp.); 9350B Memorandum in Support of TRO (7 pp.), 6 CLEARINGHOUSE REV. 356 (October 1972).]

By stipulation, defendant HUD reinstated the Philadelphia Neighborhood Renewal Program and the parties agreed to further procedures to alleviate problems created by the temporary termination of the program.

The program provides grants up to $3,500 to low-income homeowners to correct or prevent health and building code violations in their dwellings. The program had been dropped after the publication of a news article questioning its administration. Plaintiffs filed a class action seeking to enjoin the termination of the program.

By the terms of the stipulation HUD agreed to reinstate the program and to provide immediate benefits to the homeowners whose applications had been previously approved, but who did not receive their grants prior to the date of termination. In addition, HUD recognized that an unknown number of applicants have financially altered their position prior to the termination in reliance upon the possibility of a grant. Under this stipulation the parties agreed to procedures to locate such persons who detrimentally relied and provide them the opportunity to process their applications in light of present circumstances.

Zoning Authority's Zoning Amendment Practice Challenged as a Violation of Equal Protection

9545. Southwest Florida Self-Help Housing v. Whisnant, No. 72-1631-Civ-PF (S.D. Fla., filed Dec. 7, 1972). Plaintiffs represented by Joseph C. Segor, Migrant Services Foundation, 395 NW 1st St., Miami, Fla. 33128, (305) 374-6193. Of counsel, Neil W. McMillan, Florida Rural Legal Services, P.O. Box 1109, Immokalee, Fla. 33934. [Here reported: 9545A First Amended Complaint (13 pp.).]

Plaintiff, a housing organization serving low-income minority racial and ethnic group members, seeks injunctive and declaratory relief against defendant county commissioners for allegedly forcing plaintiffs to live in substandard housing or segregated neighborhoods because of their failure to act, concerted actions and conspiracy. Plaintiff contends that the commissioners' approval of an amendatory zoning ordinance increasing minimum floor area requirements violates the supremacy clause of the Constitution and 42 U.S.C. §2701 in that defendants violated the policy of self-help expressed in the Economic Opportunity Act and illegally prevented plaintiff from effectuating that policy by unlawfully interfering with its efforts to carry on its activities in accordance with the terms of its grant from the Office of Economic Opportunity.

Moreover, plaintiffs contend the amendatory zoning ordinance is contrary to and in violation of the Constitution and Florida state law as "spot zoning" since defendants' actions are unreasonable, arbitrary, and contrary to public health, safety, welfare, and community morals.

Plaintiff seeks to enjoin defendants from enforcing the amendatory zoning ordinance or taking any other action which will discriminate against or otherwise interfere with the pursuit of standard housing and an integrated community, and from acting pursuant to state enabling legislation until it is revised to establish standards insuring that the power delegated by the statute is used lawfully.

Plaintiff seeks a declaration that the ordinance and the state enabling legislation are unconstitutionally vague, and an order that 1) defendants produce an affirmative plan for residential integration; 2) that it be delivered to the

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court within a reasonable time; 3) that defendants permit and encourage participation of plaintiff and its counsel in the development and completion of the plans; and 4) that defendants reconstitute the Area Planning Commission to reasonably conform to the social, ethnic, and economic composition of the population in the area or, in the alternative, enjoin the further operation of the planning commission. Finally, plaintiff seeks $5,000 each for three individually-named plaintiffs.

IN FORMA PAUPERIS

Decision Prohibiting AFDC Recipient From Proceeding for Divorce In Forma Pauperis Appealed

9626. Kirk v. Kirk, No. M. 1034-71 (N.Y. Sup. Ct., App. Div., Dec. 5, 1972). Appellant represented by C. Samuel Beardsley and Richard V. Hunt, Onondaga Neighborhood Legal Services, 633 South Warren St., Syracuse, N.Y. 13202, (315) 475-3127. [Here reported: 9626A Brief (14 pp.).]

Plaintiff, an AFDC recipient, challenges a lower court decision holding that because of her receipt of AFDC funds, bringing her above the poor person statute requirements, she may not proceed in forma pauperis in her action for divorce.

Plaintiff contends that her inability to pay costs and expenses has been demonstrated and that the money received for support is needed to provide for the necessities of life. It is argued that due process requires the state to defray costs in such a case, and that as a recipient of public assistance, with no available property to draw upon, plaintiff should be deemed to be indigent per se for purposes of the poor persons statute.

Payment of Alleged Rent Arrears to Landlord as Condition for Proceeding In Forma Pauperis Reversed

9573. Margarito v. Ortiz, No. L&T 24800/72 (N.Y. Sup. Ct., App. Term, Nov. 9, 1972). Appellants represented by John C. Gray and Allen R. Bentley, Brooklyn Legal Services Corporation B, 152 Court St., Brooklyn, N.Y. 11201, (212) 855-8003. [Here reported: 9573A Appellant's Brief (15 pp.); 9573B Order and Opinion (2 pp.).]

In this suit for alleged nonpayment of rent, the court has modified a lower court order which would have required the tenant to pay the rent at issue to the landlord prior to the trial, and ordered the tenant-appellant to deposit all past due rent into court pending a final determination of the case. The tenant, a welfare recipient withholding rent because of defective and hazardous building conditions, had moved to proceed as a poor person and had requested a jury trial without payment of jury fees. The lower court had ruled that all arrears of rent had to be paid to the landlord before it would grant the tenant's motions.

The tenant-appellant's brief argued that the lower court had no authority to place such a condition on granting leave to proceed as a poor person and that the order deprived the tenant of due process of law by requiring her to pay all rents at issue to the landlord before allowing the tenant an opportunity to present evidence of affirmative defenses which would either entitle her to pay the rent into court or qualify her for abatement of the rent. The appellate court ruled that the lower court could, however, require payment of all rents at issue into court as a condition of granting such pre-trial motions.

United States Supreme Court Asked to Grant Right of Equal Access for Indigent Civil Appellants

9462. Johnson v. Dade County Board of Public Instruction (U.S. Sup. Ct., filed October term 1972). Petitioner represented by Bruce S. Rogow and Daniel S. Pearson, 25 West Flagler St., Miami, Fla. 33130, (305) 377-8155; William D. Townsend and Sally Weintraub, Legal Services of Greater Miami, 17430 South Dixie Highway, Perrine, Fla. 33157, (305) 379-0822. [Here reported: 9462A Petition for Certiorari (14 pp.); 9462B Appendix (12 pp.).]

Petitioner initially filed a complaint in the United States District Court for the Southern District of Florida for declaratory relief and a permanent injunction seeking to enjoin the Dade County School Board from suspending him for a 40-day period without providing for a hearing consonant with the principles of due process. The district court denied relief after a hearing and also denied the petitioner's application for leave to appeal in forma pauperis. The district court stated that any appeal by the petitioner would be frivolous and that the Legal Services agency representing the petitioner should be able to finance the cost of an appeal as a tax-supported government organization. Thereafter, petitioner sought leave from the Fifth Circuit to appeal in forma pauperis and was summarily denied by a single judge of the Fifth Circuit, and later by a three-judge panel. Both orders by the court of appeals failed to provide any reasons for the denial of the application.

The petition for certiorari relies on *Coppedge v. United States*, 369 U.S. 438 (1962), which granted indigent criminal appellants equal access to the courts, in reaching the conclusion that the disparate treatment of in forma pauperis civil appeals violates the Constitution. The petition asserts that analysis of the Fifth Circuit statistics for 1972 revealed that the court does not, in form or substance, screen the paid civil cases for frivolity with the same strict standard that it applies to the in forma pauperis cases, thereby creating a classification based solely upon wealth which is suspect under both the equal protection and due process clauses. The petitioner also asserts that the denial of his in forma pauperis appeal because his counsel is a federally funded Legal Services office is a violation of congressional intent to give Legal Services attorneys the same rights and privileges as the private bar.

Indigent Litigant Seeks Right to Free Transcript for Civil Appeal

3746. Almarez v. Carpenter, No. 72-1828 (10th Cir., filed Dec. 27, 1972). Appellants represented by Donald Juneau

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and Jonathon B. Chase, Colorado Rural Legal Services, 1375 Delaware St., Denver, Colo. 80204, (303) 573-1641. [Here reported: 3746D Appellants' Brief (29 pp.). Previously reported: 3746A Plaintiffs' Brief (33 pp.), 4 CLEARINGHOUSE REV. 221 (August-September 1970); 3746B Colorado Supreme Court Opinion (11 pp.), 4 CLEARINGHOUSE REV. 554 (March 1971); 3746C Appellants' Brief (35 pp.), 5 CLEARINGHOUSE REV. 608 (February 1972).]

Indigent appellants have filed an appeal urging a reversal of the federal district court's denial of a motion for a new trial and seeking an order directing the district court to issue an injunction against the defendant state trial judge in the original action to furnish the appellants with a transcript of the state trial free of charge. Appellants originally sought a free transcript in order to appeal from an adverse civil judgment in a state court in which they had been allowed to appear in forma pauperis. After the judgment the trial judge found that the applicable state statute did not authorize a trial transcript without cost. The appellants then brought a Section 1983 action in the federal district court arguing that the state statute was in violation of the due process and equal protection clauses of the fourteenth amendment, insofar as it did not provide for a trial transcript without cost for indigent litigants. The district court certified questions of state law to the Colorado Supreme Court who determined that there was no right to a free transcript and that the state constitution was not violated because there were alternative methods of making a trial court record available to the indigent litigant. The district court then entered a judgment against the appellants which was later reversed and remanded by the Tenth Circuit. The appellants now appeal the dismissal of their action by the district court on remand.

On appeal they reassert their previous due process and equal protection arguments in light of recent decisions supporting an indigent's right to a free transcript. They especially stress *Mayer v. Chicago*, 404 U.S. 189 (1971), which recognizes the right of an indigent misdemeanant to a free trial transcript. Additionally, they cite federal and state decisions which have read *Boddie v. Connecticut* to be an adequate basis for allowing indigents to participate more fully in the judicial process.

Finally, the appellants argue that when indigent civil litigants make out a prima facie case for a government paid full transcript the burden shifts to the government to show a full transcript unnecessary or an alternative record adequate. They claim that the lower courts had erroneously placed the burden on the poor person contrary to *Mayer v. Chicago* which specifically placed the burden on the state.

Supreme Court Upholds Filing Fees for Discharge in Bankruptcy

6537. United States v. Kras, No. 71-749 (U.S. Sup. Ct., Jan. 10, 1973). Appellee represented by Kalman Finkel, The Legal Aid Society, 267 West 17th St., New York, N.Y. 10011, (212) 691-8320. On the brief, John E. Kirklin and Leon Polsky, same address. [Here reported: 6537C Opinion (32 pp.). Previously reported: 6537A Memo in Support of Petition in Bankruptcy (24 pp.); 6537B District Court Opinion (21 pp.), 5 CLEARINGHOUSE REV. 464 (December 1971).]

Declining to extend the scope of *Boddie v. Connecticut*, the Supreme Court has held that the required payment of the $50 filing fee as a condition to a discharge in bankruptcy does not violate the rights of due process and equal protection of those unable to pay the fees. In reversing the district court holding that a discharge in bankruptcy is a fundamental right that can be denied only upon the showing of a compelling state interest, the Court in effect held that some persons are too poor even to go bankrupt.

The Court distinguished *Boddie* by drawing a distinction between the right to a divorce, held to be a fundamental right in *Boddie*, and the right to a discharge in bankruptcy, which the Court held not to be a fundamental right. The Court further found that while the state's exclusive control over the establishment and dissolution of marriage requires access to the courts regardless of indigency since no alternative means of resolving the dispute and dissolving the marital relationship exists, access to the courts is not the only conceivable relief available to bankrupts. Suggesting that other means of settling with creditors and thus escaping the cloud of debt can be pursued, the Court found no constitutional right to a discharge in bankruptcy.

In holding that the filing fee requirement does not deny indigents equal protection, the Court applied the rational justification test rather than the compelling governmental interest test to support the different treatment afforded to indigents as opposed to those able to pay a filing fee. The Court found such a rational basis to exist in the need and congressional purpose for making bankruptcy proceedings self-sustaining, with the payment of referees by those who use the system rather than by general tax revenues. (See CCH POV. L. REP. ¶16,567.)

INSURANCE

Suit Challenges Longer Statute of Limitations on Accident Claims for Insurance Companies

9609. Liberty Mutual Insurance Co. v. Fales, No. 1 Civ. 30913 (Cal. Sup. Ct., filed Apr. 28, 1972). Defendant represented by Harvey M. Freed and Armando M. Menocal III, San Francisco Neighborhood Legal Assistance Foundation, 2701 Folsom St., San Francisco, Cal. 94110, (415) 648-7580. [Here reported: 9609A Defendant's Opening Brief (26 pp.); 9609B Points and Authorities in Opposition to Motion to Dismiss (7 pp.); 9609C Petition for Hearing (31 pp.).]

The California Supreme Court has heard arguments in this case challenging the the constitutionality of a section of the state insurance code which gives insurance companies three years from the date on which they become subrogated to an insurance claim in which to file suit. Uninsured motorists have only one year in which to file suit on a

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personal injury claim. Thus, an insurer may legally delay action until more than one year after the accident so that counter suit by the insured motorist is foreclosed.

In this case, plaintiff insurance company filed suit after the defendant could no longer counterclaim and obtained a judgment against defendant in the superior court for over $5,000. Defendant appealed and, after filing his opening brief challenging the constitutionality of Insurance Code Section 11580.2, the insurance company filed an accord and satisfaction with the court of appeal, accompanied by a motion to dismiss the appeal on the ground that it was moot. Defendant accepted the satisfaction of the judgment but opposed the motion to dismiss and, after it was granted by the court of appeal, filed a petition for hearing in the California Supreme Court.

Before the supreme court, defendant argued that there is sufficient continuing public interest in resolving the constitutional issues to overcome mootness. Additionally, defendant presented attorneys' declarations to the effect that insurance companies throughout the state have tried to avoid a judicial determination of the statute's constitutionality by dismissing an action whenever the constitutionality of Insurance Code Section 11580.2 is attacked.

JUVENILE

Supreme Court Upholds Right of Illegitimate Children to Support Payments

9655. Gomez v. Perez, No. 71-575 (U.S. Sup. Ct., Jan. 17, 1973). [Here reported: 9655A Opinion (4 pp.).]

The Supreme Court has held that a Texas statute which provides a judicially enforceable right of support from a natural father to legitimate children and denies that right to illegitimate children is a denial of equal protection.

Under Texas common law and statutes, the natural father has a continuing obligation to support his legitimate children. In this case, although appellant had shown that appellee was the natural father of her child and that the child was in need of the support, the trial and appellate courts agreed that Texas common law and statutes imposed no legal obligation of support on the child's father.

In reversing and remanding the decision of the state court, the Supreme Court relied on two previous decisions, *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), which established the principle that a state may not discriminate against illegitimate children by denying them substantial benefits accorded to children generally. (See CCH POV. L. REP. ¶16,584.)

Seek Substantial Evidence Standard and Individualized Treatment Before Court May Order Removal of Minor From Parental Home

9440. ***In re*** **Ivan R.M.,** No. 21129 (Cal. Ct. App., filed November 1972). Appellant represented by Ernest L. Aubry and Paul F. Cohen, Western Center on Law & Poverty, 1709 West Eighth St., Los Angeles, Cal. 90017, (213) 483-1491. [Here reported: 9440A Appellant's Brief (40 pp.); 9440C Appellant's Reply Brief (44 pp.).]

Appellant, a minor, appeals from the judgment of the juvenile court, committing him to the California Youth Authority, detaining him after adjudication pending disposition, and detaining him after disposition pending appeal. The court of appeal temporarily stayed the order of commitment and detention pending appeal and the minor was released to his parents.

The appellant was originally charged with and convicted of maliciously destroying another's personal property and of disturbing the peace, both charges arising out of the overturning of an automobile. Appellant does not challenge the sufficiency of the evidence sustaining the court's finding that he was involved in the acts in question, but argues that no statutory basis exists for the three orders of commitment appealed from. Appellant asserts that the United States Constitution and state statutes require substantial evidence of misconduct and necessity to support the removal of a minor from the parental home after a criminal conviction. Appellant argues that this standard of substantial evidence and necessity was not met in this case because: the nature of the charged offense cannot in itself constitute the basis for detention since each juvenile must be treated as an individual; the court's order here ignored this right to individualized treatment by failing to consider the appellant's minor role in the disturbances and his exemplary record; the interim order detaining the minor after the adjudication hearing was void since the court heard no evidence and made no finding of fact concerning the propriety of detention; and there was no evidence at the disposition hearing showing the necessity of removing the appellant from the custody of his parents.

Commitment of Juvenile Upheld: No Manifest Abuse of Discretion

9428. Randall v. Washington, No. 1363-I (Wash. Ct. App.). Petitioner represented by Larry V. Lund, Seattle-King County Public Defender, 1511 East Alder, Seattle, Wash. 98122. [Here reported: 9428A Brief (33 pp.); 9428B Opinion (6 pp.).]

The Washington Court of Appeals has affirmed a lower court decision committing a 15-year-old juvenile to the Washington Division of Institutions, rejecting petitioner's arguments that because of the nature of juvenile cases, especially those involving commitment and a resulting curtailment of liberty, the scope of review should be broad and a standard less than manifest abuse of discretion should warrant reversal.

The appellate court concentrated on petitioner's alternative contention that even under a strict standard of review, the facts and circumstances of this case indicated a manifest abuse of discretion by the trial judge. The court held that the trial judge had adequately considered the social reports on petitioner within the meaning of the statute despite the fact that the judge stated at the hearing that he had not looked the reports over carefully. Although there was conflicting evidence presented, the court found

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that the trial judge's conclusions were supported by substantial evidence and thus could not be overturned.

Petitioner alleged that the trial court had not considered her welfare in ordering commitment but the court dismissed this argument on the ground that, although the court had not explicitly disclosed how petitioner's welfare would be served by commitment, a presumption attaches that the trial judge has made the child's interests paramount. Finally, the court rejected petitioner's contention that the trial judge's failure to give explicit reasons for ordering commitment is a denial of due process and abuse of discretion, since there is no statutory or constitutional requirement for such findings.

LEGAL SERVICES

Community Education Programs Conducted by Legal Services Held to be Proper Within the Canons of Ethics

9578. *In re* Professional Ethics, No. 12356 (Mont. Sup. Ct., Nov. 28, 1972). Petitioners represented by Barney Reagan, and Gary G. Doran, Montana Legal Services, 601 Power Block, Helena, Mont. 59601. Amicus curiae, Henry Loble, Helena, Mont. [Here reported: 9578A Opinion (7 pp.).]

The Montana Supreme Court has held that community education programs conducted by Legal Services offices do not constitute unprofessional conduct so long as they are dignified in tone, do not promote or advertise individual attorneys and do not in and of themselves stir up or promote litigation either in individual cases or to promote a cause. The matter was before the court as a result of an application for guidance and counsel, brought by the director of the Montana Legal Services Association, on matters concerning the Canons of Professional Ethics. The court granted a hearing under its power to regulate the practice of law in Montana.

OEO rules and regulations require that all Legal Services programs engage in "community education." Petitioners asked for guidance from the court that they might accomplish the required community education without violating Canon 27 (advertising, direct or indirect) and Canon 28 (stirring up litigation, directly or through agents).

The court stated that the indigent need education as to their legal rights to ensure equal protection of the law. The court further stated that the purpose of the community education program ought to be confined to making the poor aware of their legal rights and the availability of legal services without regard to their ability to pay, so as to bring them under the equal protection of the law.

The court set forth the following guides to aid the Montana Legal Services Association in conducting its education program. It may advertise the existence, location, telephone numbers and services of its offices. Any recognized advertising medium may be used to reach desired recipients. Materials used should relate to general legal problems and not attempt to advise specific persons concerning individual legal problems in the absence of any attorney-client relationship. Materials used should be accurate, practical and understandable to those to whom directed. Materials should scrupulously avoid naming individual attorneys. The court does not approve the use of community education programs to foster political reforms allegedly designed to make the legal system more responsive to the needs of the poor. The court finally stated that these guidelines should be supplemented by study of the opinions of the Committee on Professional Ethics of the ABA as applied to individual problems.

MENTAL HEALTH

Challenge Constitutionality of the California Mentally Disordered Sex Offender Act

9366. California v. Knapp, No. 2 Crim. 22418 (Cal. Ct. App., filed Nov. 9, 1972). Appellant represented by Richard S. Buckley, John J. Gibbons, Richard Burton and Laurance S. Smith, Office of the Public Defender, 1601 Eastlake Ave., Los Angeles, Cal. 90033, (213) 233-2171. [Here reported: 9366A Appellant's Brief (62 pp.).]

After the appellant was convicted for "molesting a child under age 18," he was additionally adjudicated a mentally disordered sex offender (MDSO) under the (civil) California MDSO Act and committed to a state mental hospital. One year later, the superintendent of the state hospital certified to the court that the appellant was still a MDSO, had not recovered, and should be recommitted to the state department of corrections. Appellant's motion for a jury trial was denied, he was found to remain an MDSO, and he was recommitted to the department of mental hygiene for an indeterminate period. From this recommitment proceeding he has appealed.

The appellant first alleges unconstitutional discrimination against an arbitrary class of persons—the MDSO. Unlike other mentally ill persons, the MDSO can be confined in penal institutions and does not have the option of submitting to voluntary treatment as an alternative to commitment. Unlike other convicted criminals, the MDSO has no opportunity for probation or parole and may be confined beyond the maximum term for the underlying crime. The appellant alleges the nonexistence of any rational reason for so discriminating against the MDSO—who, under statute, need not actually have committed any crime to be so classified so long as the threat of crime exists—as opposed to other mental patients, other misdemeanants, and even felons, in violation of the fourteenth amendment equal protection.

The appellant next alleges that his confinement for the status of being a MDSO, without appropriate treatment, constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments. He alleges that his sexual deviation is curable with appropriate therapy; that in harmony with established medical practice the appropriate therapy is intensive, individual psychotherapy; and that his confinement in a loosely supervised ward with a group of other homosexuals, receiving "treatment" only from "ward teams" whose formal education consisted solely of a high school diploma, and without the possibility of submitting

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to voluntary, private treatment are not conducive to his recovery.

The MDSO Act specifies that whenever the superintendent of the state hospital concludes that an MDSO is still dangerous but not amenable to further treatment, the criminal court may either impose sentence or recertify the MDSO to the superior court. As construed by the superior court, the appellant-MDSO was not entitled to argue in defense that he was actually still amenable to treatment. The appellant alleges that his construction by the superior court was correct and that the Act as construed is unconstitutional as denying him due process and constituting an unconstitutional delegation of power to the superintendent of the state hospital, since his decision as to the MDSO's further amenability to treatment is effectively nonreviewable.

North Carolina Summary Commitment Statutes and Treatment Accorded Alleged Unconstitutional

9314. Hayes v. Knight, No. C-305-D-72 (M.D. N.C., filed November 1972). Plaintiffs represented by William Webb and Paul Raby, Legal Aid Society of Durham County, 353 West Main St., Durham, N.C. 27701, (919) 688-6396. [Here reported: 9314A Complaint (10 pp.); 9314B Brief in Support of Motions for Class Action, Three-Judge Court, and Injunctive and Declaratory Relief (84 pp.).]

Plaintiffs, representatives of the class of patients involuntarily confined to mental hospitals under North Carolina statutes, bring this action seeking to have the statutes declared unconstitutional for failure to afford commitment procedures consistent with due process and equal protection of the laws, and requesting a declaratory judgment delineating and enforcing constitutionally required minimum standards of treatment for patients involuntarily confined to mental hospitals. Defendants are hospital and state mental health officials and clerks of the local courts responsible for the enforcement of the statutes.

Plaintiffs comprehensively attack the statutes' failure to provide adequate notice of the proceedings, right to counsel and appointed counsel for indigents, adequate discovery procedures, adequate confrontation of witnesses, proof beyond a reasonable doubt of the need for commitment, exclusion of hearsay evidence, exclusion of self-incriminatory statements, a verbatim record with free transcripts to indigents, disinterested psychiatric evaluations, judicial hearings within reasonable time periods, and periodic review of commitment. Plaintiffs argue that, because the statutes fail to require proof that there is no less drastic alternative to hospitalization, there is cruel and unusual punishment. Second, plaintiffs allege that the constant surveillance, the absence of notification that actions may be self-incriminatory, the use of mind-dulling drugs before judicial commitment, and involuntary submission to examination without fundamental procedural protections are all denials of the right to privacy guaranteed by the ninth amendment. Plaintiffs argue that the statutory provisions which lack standards and provision of fair notice are void for vagueness and overbreadth. Finally, plaintiffs allege that they have a constitutionally protected right to treatment and that the hospital has denied that right by failing to provide a humane psychological and physical environment with a sufficient number of qualified staff and individualized treatment plans.

Voting Rights of Voluntarily Committed Mental Patient Secured

9374. Letti v. Trembley, No. 34150 (Mass. Super. Ct., filed Oct. 6, 1972). Plaintiffs represented by Barbara J. Rouse and Donald K. Stern, Boston College Legal Assistance Bureau, 21 Lexington St., Waltham, Mass. 02154, (617) 893-4793. [Here reported: 9374A Complaint (9 pp.); 9374B Plaintiff's Brief (16 pp.).]

The plaintiff in this class action is a voluntarily committed mental patient who sought to have the court declare invalid and enjoin defendant's refusal to register and enroll plaintiff and his class as qualified and eligible voters in state and federal elections. The defendant board of registrars of voters contended that the mental hospital was the guardian of all persons confined therein, regardless of voluntary or involuntary status, and that any person under such guardianship is not eligible to vote. In response, the plaintiff asserted that the refusal of the defendants to register and enroll the plaintiff as an eligible voter was both a denial of due process and an invidious discrimination against mental patients as a class in violation of the equal protection clause.

The court retained jurisdiction of the case and remanded it to the board of registrars of voters, which accepted the named plaintiff as an eligible voter and proceeded to register him. However, the court would not enter judgment as to the named plaintiff or the class, so the case was dismissed as moot.

Attack Missouri Criminal Commitment Statute

9509. Missouri v. Kite, No. 58077 (Mo. Sup. Ct., filed Dec. 11, 1972). Appellant represented by Richard Boardman, The Legal Aid Society of the City and County of St. Louis, 4030 Chouteau Ave., St. Louis, Mo. 63110, (314) 652-9581. [Here reported: 9509A Brief (16 pp.).]

The appellant alleges that the respondent Missouri state officials violated his rights to equal protection and due process under the fourteenth amendment by committing him to a state hospital without a hearing after he was adjudged innocent of arson by reason of a mental disease or defect excluding responsibility for the act. The appellant urges that the Missouri statute under which he was committed is an unconstitutional deprivation of his due process rights in that it provides for commitment upon such acquittal on criminal charges without a hearing and a finding of fact as to his present mental condition at the time of the commitment. He argues that at such required hearing the court would be foreclosed from inquiring into his mental condition at the time of the alleged criminal act by the previous judgment of acquittal.

The appellant also alleges that the statutory provision under which commitment took place violates his right to

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equal protection since it imposes an unreasonable and arbitrary distinction between civil and criminal cases. Those who are acquitted of criminal charges on the basis of mental defect or disease are automatically committed, while for civil commitment a person has to be adjudged mentally ill and in need of custody, care or treatment at the time of the commitment proceedings.

MIGRANTS

Michigan Supreme Court Holds Migrants Unconstitutionally Excluded From Workmen's Compensation Coverage

6561. Guiterrez v. Glaser Crandell Co., No. 53541 (Mich. Sup. Ct., Dec. 21, 1972). Amicus curiae represented by Alan W. Houseman, Michigan Legal Services Assistance Program, Wayne State University Law School, Detroit, Mich. 48202, (313) 577-4822. [Here reported: 6561D Opinion (18 pp.). Also available: 6561B Amicus Brief (49 pp.).]

In three separate opinions the Michigan Supreme Court has held that the state's exclusion of seasonal farmworkers from workmen's compensation coverage is constitutionally impermissible. The majority opinion based its decision on the premise that singling out agricultural employers as exceptions to the workmen's compensation scheme was discriminatory, while another opinion founded its rationale on a denial of equal protection between agricultural workers paid on a piecework basis (not covered) and those paid hourly wages (covered). Both found these distinctions impermissible, discriminatory and without rational basis.

POLICE

Consent Required Prior to Removal of a Person for Police Investigation

3415. Alexander v. Rizzo, No. 70-992 (E.D. Pa., Dec. 18, 1972). Plaintiffs represented by David L. Hill, Community Legal Services, Inc., 1528 North Broad St., Philadelphia, Pa. 19121, (215) 235-8617. [Here reported: 3415H Final Decree (4 pp.). Previously reported: 3415A Complaint (24 pp.); 2415B Memo in Support of Discovery (4 pp.), 4 CLEARINGHOUSE REV. 105 (June 1970).]

A federal district court has decreed that the defendants, the Philadelphia Police Department, shall not remove a person from where he is initially contacted for investigative purposes unless the removal is either voluntarily and knowingly consented to by the person or is accompanied by probable cause to believe that such person committed the investigated crime. Where a person has voluntarily and knowingly consented, the removal shall be made only during hours reasonable under the circumstances and after the person has been informed of the place to which he is being taken, the nature of the investigated crime, the right to choose not to be removed, and that he may leave the place he is being held at any time. Where a person is removed from the place where he is initially contacted in the belief that such person committed the investigated crime, the removal shall be made only with probable cause, and if the crime is a misdemeanor committed out of the police department's view, only pursuant to an arrest warrant. The court ordered that a printed card in compliance with this decree be delivered to all members of the police department.

Seek Remedy Against Alleged Police Brutality and Lack of Effective Internal Police Discipline

9503. Calvin v. Conlisk, No. 72 C 3230 (N.D. Ill., filed Dec. 22, 1972). Plaintiffs represented by Robert C. Howard, Marshall Patner, and Alexander Polikoff, 109 North Dearborn St., Chicago, Ill. 60602, (312) 641-5570; Robert W. Bennett, 357 East Chicago Ave., Chicago, Ill. 60611, (312) 649-8430; Kermit C. Coleman, 19 South LaSalle St., Chicago, Ill. 60603, (312) 263-2267; Clare E. Benford, 118 West Randolph St., Chicago, Ill. 60601, (312) 236-5277; Martha Jenkins, 231 South LaSalle St., Chicago, Ill. 60604, (312) 236-4500; Lawrence E. Kennon, 2600 South Michigan Ave., Chicago, Ill. 60616, (312) 326-1440. [Here reported: 9053A Complaint (64 pp.).]

The individual plaintiffs in this class action have allegedly been subjected to abusive and arbitrary police misconduct, particularly the excessive use of physical force, which has deprived them of their constitutional rights. This civil action, seeks damages for the injuries sustained by the named plaintiffs and declaratory and injunctive relief to redress the alleged deprivations of constitutional rights of the class by police misconduct.

In addition to the individual police officers who allegedly abused the individual plaintiffs, the defendants include the superintendent of police, the police board and the City of Chicago. These defendants, it is alleged, have the duty to prevent such misconduct and to discipline police officers who engage in it. The plaintiffs maintain that these defendants have failed to fulfill this duty, and have instead followed a course of conduct that condones, and in effect encourages, such abusive misconduct. The plaintiffs assert that this course of conduct is particularly evident in the operation of a police discipline system by defendants which does not make thorough investigations of such abusive misconduct and does not take appropriate disciplinary action against police officers who engage in it.

The plaintiffs ask for equitable relief to assure the effective functioning of the police discipline system and to protect plaintiffs and other persons against future occurrences of unconstitutional misconduct by policemen. Specifically, in addition to damages for the named plaintiffs, the complaint requests the following relief: an order compelling the defendants to take all appropriate steps within their power to prevent police officers from engaging in unconstitutional misconduct and to discipline appropriately all officers who engage in such misconduct; to adopt and implement an effective police discipline system for the receipt, investigation and disposition of complaints of unconstitutional misconduct by policemen; to provide the opportunity for each complainant to be fully informed

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concerning the procedures of the police discipline system in the handling of his complaint; and public access to information concerning the procedures and performance of the police discipline system.

Police Department Ordered to Hire Minority Applicants

9103. Shield Club v. Cleveland, No. C72-1088 (N.D. Ohio, Dec. 21, 1972). Plaintiffs represented by Edward R. Stege, Jr., and Isabelle Katz Pinzler, Legal Aid Society of Cleveland, 2108 Payne Ave., Cleveland, Ohio 44114, (216) 861-6242; Jack Greenberg, William Robinson and Jeffry A. Mintz, 10 Columbus Circle, New York, N.Y. 10019; James Hardiman and Edward Becker, 1375 Hayden Ave., East Cleveland, Ohio 44112; Russell Adrine and Leodis Harris, Superior Bldg., Cleveland, Ohio 44112; Almeta Johnson, Citizens Bldg., Cleveland, Ohio. [Here reported: 9103B Memorandum & Order (8 pp.). Previously reported: 9103A Complaint (10 pp.), 6 CLEARINGHOUSE REV. 577 (January 1973).]

A federal district court has concluded that the City of Cleveland and other public defendants failed to overcome the prima facie showing that tests used by the police department for determining the employment of new policemen have a racially discriminatory impact. The court granted injunctive relief primarily to obtain the appointment of qualified black and Hispanic testees who, but for the possible discriminatory impact of the examination on their test scores, would have merited appointment. The court concluded that the appointments will be accomplished best by insuring that a minimum percentage of those black and Hispanic testees who passed the examination are appointed. The court stated that with allowance of plus or minus one percent, the minimum number of appointments should be fixed at a percentage (fraction), the numerator of which is the total number of blacks and Hispanics who passed the examination and the denominator of which is the total number of all persons who passed the examination. The result here is 18%, which is intended, to apply to black and Hispanic appointments, both male and female.

This class action sought injunctive and declaratory relief on behalf of all black and Hispanic persons who had applied for but were denied employment as patrolmen or women in the Cleveland Police Department, or who as present officers were subject to racially discriminatory practices in assignments, promotions, discipline and general treatment by their superior and fellow officers.

Plaintiffs alleged that the defendants discriminated on the basis of race, color, and national origin against applicants for employment with the Cleveland Police Department and against black and Hispanic police persons within the police department. Plaintiffs alleged that the means used by the police department for recruitment of new applicants, the written examination, medical and psychological examination, polygraph test, and background investigation which were required for securing employment with the department, were discriminatory. Plaintiffs further alleged that a disproportionately high number of black and Hispanic officers traditionally were assigned to particular patrol duties and that promotions within the department were made on a discriminatory basis.

The court has ordered that the blacks and Hispanics who passed the test be appointed from names certified by the Civil Service Commission and properly screened in the order in which they appeared on the eligibility list, and in sufficient numbers that at least 18% (plus or minus one percent) of the 188 police persons appointed are black or Hispanic. The court further ordered that once the 188 new police are appointed, the defendant Civil Service Commission and the safety director are enjoined from making any further use of the eligibility list until an appropriate job validation study has been conducted and it is found that the tests are job related. The court retained jurisdiction to determine whether in light of the validation study the eligibility list may again be used. In the alternative the Civil Service Commission may determine that it should cancel the eligibility list, once the 188 police are hired from the list. The Commission may then proceed to establish a new eligibility list, employing tests and procedures that conform to the fourteenth amendment and other applicable law.

Petition to Perpetuate Evidence Granted in Police Brutality Case: Counsel Fees to Defend Dismissed Appeal Awarded

9643. Souza v. Sharkey, No. 72-1184 (1st Cir., July 21, 1972). Plaintiff represented by Gary Yesser, John M. Roney, Cary J. Coen and Kenneth F. MacIver, Rhode Island Legal Services, Inc., 56 Pine St., Providence, R.I. 02903, (401) 274-2652. [Here reported: 9643A Petition to Perpetuate Evidence (3 pp.); 9643B Order (2 pp.); 9643C Memorandum to Dismiss Appeal (8 pp.); 9643D Order (1 p.); 9643E Memorandum in Opposition (5 pp.); 9643F Order (1 p.).]

The First Circuit has upheld a district court's ruling allowing a petition to perpetuate evidence under Fed. R. Civ. P. 27 in regard to a police brutality complaint lodged by an inmate in the adult correctional institutions (ACI) in

Early Screening Packet Available

National Welfare Rights Organization, assisted by the Health Law Project and the National Health Law Program, has prepared a packet of materials on the struggle for good screening programs. Besides all the basic materials such as the law and guidelines, this packet contains a good analysis of the forces affecting the health system and a plan of action for welfare rights and other local consumer groups.

The packet is available from either the Health Law Project, 133 South 36th St., Philadelphia, Pa. 19104, or from the National Health Law Program, 2477 Law Bldg., 405 Hilgard Ave., Los Angeles, Cal. 90024. Although the packet itself is free, a $1 donation to cover postage and handling costs is urgently requested.

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Rhode Island. The plaintiff alleged that he was the victim of numerous assaults while in the custody of the Cranston, Rhode Island Police Department that resulted in his immediate placement in the hospital of the ACI when he was subsequently incarcerated. The plaintiff moved under Rule 27 to perpetuate evidence of his physical condition and requested that the district court order the admission of a physician and photographer to the ACI. Over the objection of counsel for the prison officials, the court granted the petition to perpetuate evidence. The defendant did not move either the district or appellate court for a stay of the court's decision and the plaintiff was examined and photographed. When the defendants subsequently appealed, the plaintiff asserted that the appeal was not timely filed and that the case was moot. The court of appeals dismissed the case as moot and awarded the Legal Services project $250 counsel fees to defend the dismissed appeal.

PRISONS

Class Action Alleges Inhumane Conditions at State Prison

9446. Farnsworth v. Frost, No. MC 32-72 (D. Utah, filed Nov. 24, 1972). Plaintiffs represented by Weber County Legal Aid Services, 453 24th St., Ogden, Utah 84401, (801) 394-9431. Of counsel, Stanley A. Bass, NAACP Legal Defense & Education Fund, 10 Columbus Circle, New York, N.Y. 10019. [Here reported: 9446A Complaint (15 pp.).]

Plaintiffs in this class action allege that they and all other inmates of the Weber County Jail are subject to cruel and unusual conditions which amount to a deprivation of their constitutional rights under color of state law. The defendants are sued individually and in their respective capacities as officials of Weber County and the State of Utah who are responsible for the administration of the jail and the care and custody of its inmates, or who have the power to alleviate conditions there but have not exercised that power.

The complaint seeks declaratory and injunctive relief, and asserts that the conditions alleged deprive the plaintiffs and their class of the right to be treated with decency and dignity under the ninth and fourteenth amendments, the right of privacy under the fourth, ninth, and fourteenth amendments, and the right of freedom of religion guaranteed by the first amendment. The jail was constructed over 75 years ago and designed to house not more than 50 prisoners, resulting in overcrowding which denies the inmates privacy and freedom of movement. There are also numerous specifications of unsanitary conditions, such as lack of clean bedding and clean clothes, lack of personal hygiene supplies, unwholesome food served under unhygienic conditions, and uncovered toilets. There are no lights in the individual cells and the only artificial lighting is provided by a few light bulbs in some of the halls, rendering reading at night impossible. Inmates are assigned to particular cells at random without the benefit of an effective classification system, and accused and convicted prisoners are often combined. The complaint also alleges that there is inadequate guard control and supervision, often resulting in the administration of unauthorized disciplinary measures to prisoners.

Other allegations of inhumane treatment include: the denial of access to physicians when inmates are sick and a general lack of provision for the treatment of special medical problems; that inmates of the jail who are not trustees receive no physical exercise indoors or outside since there is no area for recreation; that there is no library where an inmate can obtain law books or other reading material; that there is a lack of communication since all letters sent out of the prison are censored by jail authorities, and that visitation privileges are grossly inadequate and arbitrary.

The plaintiffs seek a declaratory judgment under 42 U.S.C. § 1983 that the alleged conditions are in violation of their constitutional rights and also an injunction requiring the defendants to provide an affirmative remedy for all the deprivations resulting from the unlawful operation of the facility.

Temporary Restraining Order Against Use of Mace on Prisoners Denied

8419. Aikens v. Lash, No. 72-S-129 (N.D. Ind., filed Aug. 10, 1972). Plaintiffs represented by Harold R. Berk, Legal Services Organization of Indianapolis, Inc., 15 East Washington St., Indianapolis, Ind. 46204, (317) 639-4151. [Here reported: 8419D Memo in Support of Motion for TRO (4 pp.); 8419E Supp. Memo in Support of Motion for TRO (4 pp.); 8419F Second Supp. Memo in Support of Motion for TRO (2 pp.); 8419H Memo in Support of Motion for Reconsideration of Application for TRO (8 pp.); 8419-I Supp. Memo in Support of Motion for Reconsideration of Application for TRO (6 pp.). Also available: 8419A Complaint (29 pp.); 8419G Amendments to Complaint (4 pp.).]

Plaintiffs, prisoners at the Indiana State Prison, have brought this suit to enjoin the alleged prison practice of spraying Mace at prisoners in locked detention cells as a form of punishment. This practice coupled with the denial of medical care for a time ranging from several hours to several days is challenged as constituting cruel and unusual punishment in violation of the eighth amendment. Plaintiffs' motion for a temporary restraining order against the use of liquid or gaseous chemical irritants has been denied, pending motion for rehearing.

State Statute Prohibiting Assertion of Workmen's Compensation Claim by Convicted Felon Held Unconstitutional

9658. Delorme v. Pierce Freightlines Co., No. 72-644 (D. Ore., Jan. 18, 1973). Plaintiffs represented by Laird Kirkpatrick, Charles Williamson and Allen G. Drescher, Multnomah Bar Association, Inc., 732 SW Third Ave., Portland, Ore. 97204, (503) 224-4086. [Here reported: 9658A Complaint (6 pp.); 9658B Plaintiff's Brief (18 pp.); 9658C Defendant's Brief (6 pp.); 9658D Plaintiff's Reply Brief (5 pp.); 9658E Opinion and Order (5 pp.).]

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A three-judge court has ruled an Oregon statute unconstitutional insofar as it prevents a person convicted of a felony from prosecuting his workmen's compensation claim either before state administrative agencies or the courts. Plaintiff, a convicted felon in the Oregon State Penitentiary, brought this class action for declaratory judgment and an injunction against enforcement of Oregon's "civil death" statute, ORS 137.240, which provides that the conviction of a felony suspends all the civil and political rights of the person so convicted. The court declared the statute unconstitutional, as applied in this case, on the grounds of denial of equal protection, and ordered the workmen's compensation board to direct the hearing officer to accept jurisdiction over the plaintiff's claim.

In 1968, during the course of his employment with defendant trucking company, plaintiff suffered a severe and permanently disabling back injury while lifting some freight. Plaintiff ultimately received an award from the workmen's compensation board for permanent partial disability, in addition to an earlier, smaller award. In 1971, after plaintiff had been notified of his final award, he was convicted of a felony and sentenced to a ten-year prison term. Shortly after his conviction, plaintiff requested a hearing upon the adequacy of his workmen's compensation award which was denied on the ground that plaintiff lacked legal capacity under ORS 137.240.

Plaintiff alleged that ORS 137.240 irrationally discriminated against him and denied him equal protection in violation of the fourteenth amendment. Plaintiff also alleged that ORS 137.240, in denying any right to a hearing or review of the adequacy of a workmen's compensation award, deprived plaintiffs of property without due process of law. In addition, plaintiff contended that ORS 137.240 violated the first and fourteenth amendments in that it denied him the right to petition for redress of grievances. Finally, plaintiff alleged that ORS 137.240, in depriving him of all civil rights, constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.

The court stated that the defendants had failed to show that the goals of preventing pointless litigation and rehabilitating prisoners were rationally related to the action taken by the state, that the means used to accomplish the state's purposes were impermissibly broad and that the state statute violated equal protection.

Prisoners Challenge Michigan Parole Release Procedures

9506. Scherwin v. Michigan Department of Corrections (E.D. Mich., filed 1972). Plaintiffs represented by Alan W. Houseman, Michigan Legal Services Assistance Program, Wayne State University Law School, Detroit, Mich. 48202, (313) 577-4822; William H. Goodman, 3200 Cadillac Tower, Detroit, Mich. 48226. Of counsel, Alvin J. Bronstein and Barbara Millstein, The National Prison Project, 1414 Sixteenth St., NW, Washington, D.C. 20036, (202) 234-9345. [Here reported: 9506A Amended Complaint (12 pp.).]

Plaintiff, an inmate in the State Prison of Southern Michigan, brings this class action for declaratory and injunctive relief representing all inmates residing in Michigan who are or will be subject to the jurisdiction of the parole board and who have been, are, or will be brought before the parole board for a parole release proceeding. Plaintiff seeks to have the court declare invalid and enjoin practices of the defendant which are in violation of due process as guaranteed by the fourteenth amendment. Plaintiff asserts that the interviews or meetings held by the defendant parole board were not in accord with the requirements of procedural due process and that he was not accorded a due process hearing to determine whether he would be granted parole. He also asserts that the decision-making processes of the parole board violate the mandates of the Michigan Administrative Procedure Act.

Plaintiff became eligible for parole consideration in February 1972, and again in August 1972. On both occasions he was not granted parole. In February 1972, plaintiff attended a hearing or interview. He was not informed prior to or at the interview held with the parole board as to what matters would be considered by the board in order to afford him an opportunity to prepare a presentation for the board's consideration, nor was he given access to the board's file on him. The plaintiff was afforded no opportunity to present evidence on his behalf at the interview or at any meeting with the parole board. In August 1972, plaintiff was not present during any consideration of his parole.

Plaintiff alleges that at no time was he offered an opportunity to be represented in any manner when his parole was considered by the parole board, to obtain records or transcripts of the board meetings or to challenge, cross-examine, or interpret any evidence used in the decision to deny parole. He was never advised as to what rules, standards or criteria would be used in determining his eligibility for parole, nor was he informed of which members of the parole board participated in the decision or reviewed his file prior to or after the decision. Plaintiff finally alleges that he never received any oral or written statements from the parole board detailing the factual basis supporting the decision, the rules, standards or criteria used in making the decision, nor the specific recommendations necessary to meet the standard or criteria for release.

Plaintiff contends that there is no organized way in which information is excluded, included or organized in the prisoner's file, or tested for relevancy, accuracy, bias or prejudice. Plaintiff further contends that the operation and decision-making by the board give a presumption in favor of evidence negative to the prisoner, and the final decisions are based on unpublished standards or criteria. There is no right to appeal from the decision of the parole board.

Prisoner Alleges Transfer to Out-of-State Institution Violates Eighth Amendment

7216. Heald v. Robbins, No. 13-23 (D. Me., filed July 28, 1972). Plaintiff represented by Thomas P. Kapantais and Charles R. Peck, Pine Tree Legal Assistance, Inc., P.O. Box

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1207, Presque Isle, Me. 04769, (207) 764-4349; Stanley A. Bass, NAACP Legal Defense Fund, 10 Columbus Circle, New York, N.Y. 10019; Herman Schwartz, 732 Prudential Bldg., Buffalo, N.Y. and Neville Woodruff, Pine Tree Legal Assistance, Inc., 565 Congress St., Portland, Me. 04101, (207) 772-3711. [Here reported: 7216D Brief (26 pp.). Previously reported: 7216A Complaint (6 pp.), 6 CLEARINGHOUSE REV. 57 (May 1972).]

Plaintiff, a prison inmate, is suing state and federal officials alleging that he was transferred without his consent and without a hearing or other procedural safeguards from the Maine State Prison to the United States Penitentiary at Marion, Illinois in violation of the fourteenth amendment.

Defendants do not deny that they have allowed such nonconsensual transfers from state to federal prisons, but contend that the practice does not involve the deprivation of any constitutional rights.

A significant portion of plaintiff's thorough brief documents the history of such transfers and finds that the right to be secure against forced removal from the state is well established in Anglo-American law and tradition and that transfer as a method of treating convicted criminals is a practice long since abandoned in the western world. On the basis of these findings, plaintiff contends that his removal from Maine while serving a Maine sentence is cruel and unusual punishment.

Plaintiff also makes the following arguments: that because of the adverse effects transfer may have on a prisoner, he has a due process right to be heard prior to any transfer; that a nonconsensual interstate transfer violates the right of access to counsel and to courts since it puts a great distance between the prisoner and his attorney and the courts where his case may be pending; and that his transfer was in violation of federal law which authorizes federal-state contracts only when proper and adequate treatment facilities are available.

Prisoners Challenge Prison Regulation Prohibiting Confidential Communication With Social Scientists

9419. Louie v. Carlson (D. Ill., filed 1972). Plaintiffs represented by Eddie D. Cox, Anthony Anastasia, and George Sing Louie, Prisoners' Law Commune, P.O. Box 1000, Marion, Ill. 62959, (618) 993-8183; Larry E. Stead, Egyptian Jaycees Legal Rights & Assistance Committee, same address; Edward A. Mea, National Federal Prisoners' Legal Reform Institute, P.O. Box 1000, Leavenworth, Kan. 66048. [Here reported: 9419A Complaint (10 pp.).]

Petitioners bring this class action against the Director of the United States Bureau of Prisons and the Warden of the United States Penitentiary in Marion, Illinois seeking injunctive and declaratory relief on behalf of all prisoners confined in the United States Penitentiary in Marion, Illinois against a policy prohibiting confidential correspondence and visits with social scientists.

Petitioners allege that at various times from 1971 through 1972 they expressed the desire to defendants to carry on correspondence by means of sealed, confidential and uncensored letters. Uncensored correspondence was desired because the subject matter concerned possible legal action against the defendants, personal grievances, and support for congressional legislation. Requests to mail such sealed letters were denied. Petitioners contend that the policy prohibiting uncensored communication deprives them of "access to the courts" in violation of their rights under the due process clause of the fifth amendment, and in violation of freedom of speech and the right to petition for redress of grievances. Petitioners assert that the problem is particularly acute where charges of cruel and unusual punishment or arbitrary conduct on the part of defendants are involved.

Petitioners further contend that the policy of opening and reading correspondence between prisoners and social scientists is inconsistent with rights to effective expert assistance under the sixth amendment. Finally, petitioners assert that defendants' policy violates the cruel and unusual punishment clause of the eighth amendment.

Petitioners seek an order declaring defendants' policy with respect to social scientists' correspondence to be unconstitutional, and ask that its continued enforcement be enjoined. Petitioners further seek an order permitting members of their class to write to professional scientists in sealed, confidential letters and that they be permitted to receive unread letters from social scientists subject to examination for tangible contraband.

Prison Officials Prohibited From Mail Interference

9304. Merritt v. Johnson, No. 38401 (E.D. Mich., Nov. 30, 1972). Plaintiff represented by Corey Y.S. Park, Legal Aid & Defender Association, 600 Woodward Ave., Detroit, Mich. 48226, (313) 964-5310, and Alan W. Houseman, Michigan Legal Services Assistance Program, Wayne State University Law School, Detroit, Mich. 48202, (313) 577-4822. [Here reported: 9304A Complaint (9 pp.); 9304B Plaintiff's Brief (64 pp.); 9304C Memorandum and Order (6 pp.); 9304D Order (4 pp.).]

A district court has enjoined prison officials from undue interference with mail to and from inmates' attorneys, federal and state courts and public officials. Such "special correspondence" sent out by any inmate shall be in sealed envelopes and cannot be interfered with in any way, even for disciplinary reasons. Special correspondence addressed to an inmate may be examined without being opened to check for contraband. Where contraband is reasonably suspected after such examination, the prison official shall summon the inmate to open and shake out the letter to expose any contraband. Even if contraband is discovered, the inmate shall be allowed to retain any letters.

The court maintained that the provision allowing examination for contraband without opening the mail adequately protects the prison's interest in security. It stated that the inconvenience is necessary to protect fundamental rights to counsel, free expression, and the privilege against self-incrimination. The court also decreed that this action should be maintained as a class action, the class consisting of all persons subject to any mail regu-

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lations who are or will be incarcerated in the state prison of southern Michigan.

PUBLIC UTILITIES

Late Payment Charge Attacked as Unconscionable and Unreasonable

9547. Louisville Legal Aid Society v. Louisville Gas & Electric Co. (Ky. Pub. Serv. Comm'n). Complainants represented by Kurt Berggren, The Legal Aid Society of Louisville, Inc., 307 South Fifth St., Louisville, Ky. 40202, (502) 584-1254. [Here reported: 9547A Complaint (25 pp.).]

Complainants, subscribers of gas and electricity of the Louisville Gas & Electric Co., filed a complaint requesting an investigation of billing procedures used by public utilities which allow them to charge a gross amount of five to ten percent of the net amount for late payments.

It is alleged that the charges which are applied ten days from the date the bill is sent out and which amount to an annual percentage rate of 1,825% to 3,650%, if the bill is paid on the 11th day, are unconscionable, unreasonable and unjustifiably discriminatory.

Complainants place heavy reliance on an analysis of utility payment charges done by Professor Warren Samuels of Michigan State University. Professor Samuels' analysis discloses that there are various classes of late payers such as those who will pay shortly after the date required for payment and those who will try to avoid payment for as long as they can get away with it. He also finds that although late payment charges do encourage the dilatory payers to be more prompt, its effect on those who try to avoid payment for as long as possible is negligible.

Samuels, among others, also considers the cost of working capital that the utility must pay in order to cover late payments. He concludes that due to their ability to attract working capital at favorable rates, that late payment charges can not be justified on this ground alone.

As a result of his various findings, Samuels argues that a flat rate is not necessary as a collection device if a one month billing date is used rather than one of 10-15 days. He maintains that such a policy would avoid undue hardship especially among those on fixed incomes. He also proposes a one percent flat rate for the first month, and the publication of rate charges.

Challenge Termination for Unpaid Arrearages as Attachment of Household Necessities

9596. LeBeau v. Green Mountain Power Company (Vt. Public Service Board, filed Nov. 9, 1972). Petitioner represented by Stephen R. Elias and Mary J. Skinner, Vermont Legal Aid, Box 658, Montpelier, Vt. 05602. [Here reported: 9596A Complaint (7 pp.); 9596B Memo in Support of Claim (11 pp.).]

Petitioner, a consumer of electricity furnished by defendant Green Mountain Power Company, brings this action before the Vermont Public Service Board seeking to enjoin termination of service and to provide for a system of continued service to patrons with unpaid balances.

Petitioner fell behind in her payments and defendant warned that it would terminate service for nonpayment. Subsequently defendant, in November, did discontinue service. Although a member of the Public Service Board intervened at that time and service was temporarily restored, defendant continued to threaten to cut off service. When plaintiff sought immediate relief in the form of a temporary restraining order, the Board assumed jurisdiction of the matter and ordered defendant to maintain service to petitioner so long as she paid for current monthly service, pending a final determination by the Board.

Plaintiff argues that the state granted defendant an exclusive franchise, and that under Vermont law defendant must sell and distribute electricity to all persons requesting it. Since at no time did plaintiff withdraw her request for service, she argues that under the law defendant has the duty of providing her with service.

Second, plaintiff asserts that Vermont law exempts household necessities from attachment, and argues that defendant's denial of services for past arrearages constitutes attachment of household articles powered by electricity which are necessary for the maintenance of life.

Low-Income Coalition Intervenes in Public Utility Rate Case

9598. New England Telephone & Telegraph v. New Hampshire, No. 6518 (N.H. Sup. Ct., filed Dec. 29, 1972). Intervenors represented by Richard Cotton, New Hampshire Legal Assistance, 136 North Main St., Concord, N.H. 03301. Of counsel, George Charles Bruno, New Hampshire Legal Assistance, 88 Hanover St., Manchester, N.H. 03101, (603) 668-2900. [Here reported: 9598A Brief for Intervenor (21 pp.).]

A statewide coalition of low-income persons has intervened against a public utility's appeal from a decision of the New Hampshire Public Utilities Commission, which

HMO Model Contracts Available

The National Health Law Program has prepared three model HMO contracts which are now available for distribution. The contracts include one between the HMO Plan and the subscriber; another between the HMO Plan and the physician group; and a third between the HMO Plan and the hospital. Due to the expense of printing and mailing, the Program is charging Legal Services attorneys two dollars per contract and all others five dollars per contract. The contracts may be ordered from:

National Health Law Program
2477 Law Building
405 Hilgard Avenue
Los Angeles, California 90024
(213) 825-7601

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denied the public utility an allowance for attrition and set a rate of return deemed to be reasonable. The public utility attacks the propriety of both the Commission's denial of an allowance for attrition and its determination of what constitutes a reasonable rate of return.

The intervenors maintain that the New England Telephone and Telegraph Company failed to meet its burden of proving that it will suffer attrition in the near term future, and therefore, the Commission was correct in denying an allowance for attrition which, if granted, would have the effect of violating the Economic Stabilization Act of 1970 in that it would reflect future inflationary expectation. Intervenors also contend that the Commission granted a more than adequate rate increase and a greater increase should not be keyed upon a historically abnormal period of high interest rates. Intervenors say that this period is now past and should not be the basis for setting future rates.

SOCIAL SECURITY

Supreme Court Affirms District Court Order Holding Social Security Act Which Discriminated Against Illegitimate Children Unconstitutional

7041. Richardson v. Griffin, No. 72-655 (U.S. Sup. Ct., Dec. 18, 1972). Plaintiffs represented by C. Christopher Brown and Richard Rosen, Legal Aid Bureau, Inc., 341 North Calvert St., Baltimore, Md. 21202, (301) 685-1112; Gerald L. Hockstein, Legal Aid West, 1333 West North Ave., Baltimore, Md. 21215, (301) 669-5695. [Here reported: 7041C Decision (1 p.). Previously reported: 7041A Complaint (8 pp.), 5 CLEARINGHOUSE REV. 770 (April 1972); 7041B D. Ct. Opinion (20 pp.), 6 CLEARINGHOUSE REV. 450 (November 1972).]

The Supreme Court has summarily affirmed a three-judge district court decision which had held provisions of the Social Security Act placing illegitimate children into special categories for allotment of benefits to be unconstitutional, and which had ordered full shares of the social security benefits paid on the policy of deceased natural fathers to be given to illegitimate children. Section 203 (a) of the Social Security Act had been held to violate due process of law in that it entitled illegitimate children to monthly benefit payments only to the extent that payments to the widow and other children of the wage earner did not exhaust the "maximum family benefits" allowed by statute.

The district court had also ordered the payment of all back benefits denied such children since the regulations went into effect in 1968. The case affects 29,000 children across the nation with an estimated cost of $50 million in retroactive benefits.

Challenge Termination of Social Security Disability Benefits Without Prior Hearing

9515. Booker v. Richardson, No. 6801 (M.D. Tenn., filed Dec. 19, 1972). Plaintiff represented by Walter C. Kurtz and Ashley T. Wiltshire, Jr., Legal Services of Nashville, 607 Sudekum Bldg., Nashville, Tenn. 37219, (615) 244-6317. Student assistant, Douglas Felchlin, Jr., above address. [Here reported: 9515A Complaint (12 pp.); 9515B Brief in Support of Motion for TRO (6 pp.); 9515C TRO (1 p.); 9515D Memo in Support of Motion to Amend (2 pp.); 9515E Memo in Opposition to Motion to Amend (9 pp.).]

Seeking to extend the holding in *Goldberg v. Kelly*, 397 U.S. 254 (1970), to Social Security benefits, plaintiff filed this class action seeking to declare invalid and to enjoin the enforcement of 42 U.S.C. §425, which along with *Disability Insurance State Manual* Section 353.6A, permits the termination of payments of benefits without notice of the reasons and a hearing prior to the termination. Plaintiff was granted a temporary restraining order requiring resumption of all his social security benefits denied since the termination pending further determination of the case by the court.

The government moved to amend the temporary restraining order alleging that it was granted upon evidence of nonconformance with regulations requiring that the beneficiary of social security disability benefits be given adequate notice and an opportunity to respond. It claims that sufficient temporary relief could have been provided by an order requiring compliance with those regulations, and that the question of additional requirements and constitutionality should have been left to a hearing on the merits.

Class Action Challenges Retroactive Termination of Medicare Benefits Without Prior Notice or Hearing

9435. Himmler v. Richardson, No. 39294 (E.D. Mich., filed Nov. 30, 1972). Plaintiffs represented by Jeanne F. Franklin, Sally W. Stæbler, and Alan W. Houseman, Michigan Legal Services Assistance Program, Wayne State University Law School Annex, Detroit, Mich. 48202, (313) 577-4822. [Here reported: 9435A Complaint (21 pp.).]

Medicare beneficiaries who were denied payment for nursing home expenses judged to be medically necessary by their doctors have filed suit challenging the retroactive termination of their Medicare eligibility without prior notice or a hearing. Defendant is Michigan Blue Cross who, as the local fiscal intermediary for the processing of Medicare hospital insurance claims, determined the plaintiffs' ineligibility for Medicare and the Secretary of HEW who established the policies under which Michigan Blue Cross acted.

In this case, plaintiffs entered extended care facilities upon their doctors' recommendations after being released from in-patient hospital care. When plaintiffs submitted the nursing home bills to Michigan Blue Cross for payment, defendant retroactively overruled plaintiffs' doctors and decided that plaintiffs ceased to need the treatment at some point during the care. Refusing to pay for the allegedly unnecessary treatment, defendant has left the plaintiffs with large and unanticipated medical bills.

Representing all those who have been or are threatened to be similarly treated, plaintiffs contest defendant's actions on two grounds. First, they argue that

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Michigan Blue Cross did not have the authority to review their eligibility for Medicare benefits retroactively. Interpreting the Social Security Act, plaintiffs contend that the benefits due each Medicare beneficiary are primarily based upon a factual finding as to the level of medical care that the beneficiary needs. The statute vests this decision in the patient's doctors or in a committee of physicians at the facility where the patient is treated. The Act does not provide for the intermediary's right to overrule the doctors' decisions or to make its own determinations of a patient's medical necessity. Second, plaintiffs contend that the Social Security Act and the due process clause of the fifth amendment require the defendant to give plaintiffs reasonable notice of an opportunity to contest the decision to terminate benefits prior to the termination.

UNEMPLOYMENT COMPENSATION

Federal Employee Who Quits Work Rather Than Violate Hatch Act Held Eligible for Unemployment Compensation

9559. *In re* Levold, No. 72-7556-F (Wash. Employment Security Dep't App. Tribunal, Oct. 3, 1972). Claimant represented by Stephen Randalls and Phillip Katzen, Legal Services Center, 3230 Ranier Ave., South, Seattle, Wash. 98144, (206) 725-2600. [Here reported: 9559A Decision (4 pp.); 9559B Decision (3 pp.); 9559C Proposed Findings of Fact and Conclusions of Law (3 pp.).]

An Appeals Tribunal of the Washington Employment Security Department has held that a federal employee who quits work in order to engage in partisan political activity prohibited by the Hatch Act cannot be denied unemployment benefits.

The claimant was an employee of the Treasury Department who, after 2½ years of employment felt "as a matter of personal commitment and urgency, that it was his duty to become involved in partisan political campaigning." Since that type of activity is prohibited by the Hatch Act, he felt forced to resign. His subsequent claim for unemployment compensation was denied on the grounds that he voluntarily quit work without good cause and was unavailable due to his political involvement.

In reversing, the Appeals Tribunal found that the claimant left work voluntarily, but for reasons that could not be disqualifying. Two rationales were suggested. First, the choice of earning a living by working for the federal government or exercising a constitutionally protected right to engage in participatory democracy were found to be "mutually exclusive" in this type of case. Thus the reason for leaving employment, while personal, was sufficiently compelling to provide the claimant with good cause. Second, the examiner suggested that the above conflict may provide a well founded claim that the claimant's work was "personally unsuitable" under RCW 50.20.100 and 50.20.110 (b).

The examiner also took note of the decision by a three-judge district court which held the Hatch Act to be unconstitutional. *National Association of Letter Carriers (AFL-CIO) v. United States,* U.S.L.W. 1021 (D. D.C., July 31, 1972). He commented that "judicial nullification of the Act suggests that any person working under its onus is submitting to unsuitable conditions."

Finally, the examiner held that the political activity in question was only a part-time endeavor and would accomodate full-time employment. Claimant was therefore found available for work and eligible for unemployment benefits.

VOTING

Statutory Invalidation of Voter Registration Because of Name Change Upon Marriage Held Unconstitutional

9427. Gallop v. Shanahan, No. 120,456 (Kan. Dist. Ct., Shawnee County, Nov. 2, 1972). Plaintiffs represented by Michael J. Davis and Louise A. Wheeler, 2111 Kasold Dr., Lawrence, Kan. 66044. [Here reported: 9427A Memorandum of Points and Authorities (14 pp.); 9427B Opinion (4 pp.).]

Under a Kansas statute, voter registrations became invalid upon change of name, including change due to marriage. This class action for declaratory and injunctive relief was brought on behalf of women disenfranchised because they married during the interval between the closing of the registration books before elections and election day, so that they could not re-register in time for the coming election. The court concluded that this disenfranchisement was not supported by any compelling state interest and therefore constituted a denial of equal protection in violation of the fourteenth amendment and the Kansas Constitution and an abridgment of the right to vote on account of sex in violation of the nineteenth amendment.

WELFARE

Eligible Strikers Have Right to Assistance

6829. Lascaris v. Wyman, No. 170 (N.Y. Ct. App., Dec. 28, 1972). Intervenors—defendants represented by Bernard T. King, 500 Chamber Bldg., 351 South Warren St., Syracuse, N.Y. 13202, (315) 422-7111. [Here reported: 6829E Opinion (9 pp.). Previously reported: 6829A Decision (5 pp.), 5 CLEARINGHOSUE REV. 617 (February 1972); 6829D Opinion (7 pp.), 6 CLEARINGHOUSE REV. 111 (June 1972).]

The Court of Appeals of New York has unanimously affirmed the right of strikers to receive welfare assistance. The state commissioner of social services' long-standing administrative policy of making welfare payments to eligible strikers was challenged by a county commissioner after a 1971 amendment to the statutory definition of an "employable person." In the trial court the county commissioner successfully argued that a striking employee renders himself ineligible for assistance because the nature of the strike makes him not available for full time employment elsewhere and thus limits his availability on the employment market. The appellate division later unanimously reversed, finding (1) that prior to the 1971 amendment

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strikers were eligible for assistance if they registered with the state employment office and did not refuse any new employment opportunities and (2) that the 1971 amendment did not affect strikers' rights to receive welfare. The court of appeals agreed with that conclusion.

The court found that the state commissioner properly ruled that a person on strike does not, simply because he is on strike, refuse to accept employment. The amendment did not affect the rights of persons on strike but was found only to list those who were deemed unemployable and therefore beyond the statute's reach. The court also found that the payment of welfare benefits to needy strikers did not violate the state's policy of neutrality in labor-management disputes.

AFDC Requirement of Divorce, Separation or Parent's Absence Held Invalid

3182. Carter v. Stanton, No. IP 70-C-124 (S.D. Ind., Dec. 4, 1972). Plaintiffs represented by David F. Shadel, Legal Services Organization of Indianapolis, Inc., 1107 Prospect St., Indianapolis, Ind. 46203, (317) 632-8433. [Here reported: 3182F Order and Judgment (3 pp.).]

In this class action, a three-judge federal district court has granted a declaratory judgment that the policy of a county department of public welfare requiring a divorce or legal separation as a condition of receiving or applying for aid to dependent children is inconsistent with the Social Security Act Section 402 (c), and 42 U.S.C. §602 (a), and may no longer be practiced. The county rules and regulations and the state public assistance manual are invalid to the extent that they require "exceptional circumstances of need" as a condition for receiving assistance to dependent children, to the extent that they require either "exceptional circumstances of need" or an "actual and bona fide" absence of a parent as a condition of a person's filing an application for assistance to dependent children, and to the extent that they require, as a condition for receiving or applying for assistance, proof of a continued absence or an absence of at least six months of a parent or spouse prior to the date of applying for assistance to dependent children. The issue of retroactive payment has been taken under advisement.

State Child Support Law Challenged as Violating Due Process and Equal Protection

9564. Dixon v. Smith, No. 817-72 C2 (W.D. Wash., filed Dec. 15, 1972). Plaintiffs represented by Allan B. Ament, Seattle Legal Services, 3230 Rainier Ave., South, Seattle, Wash. 98144, (206) 725-2600; Robert M. Reynolds, Pierce County Legal Assistance Foundation, 1501 South "M" St., Tacoma, Wash. 98405, (206) 383-4804; Ruth N. Barnes and Lar Halpern, Seattle Legal Services, 5308 Ballard Ave., NW, Seattle, Wash. 98107, (206) 789-2450; Owen Wales, 700 Central Bldg., Seattle, Wash. 98104, (206) 622-1264. [Here reported: 9564A Complaint (11 pp.).]

A class action has been brought seeking declaratory and injunctive relief declaring null and void a Washington state law which administratively imposes child support obligations upon plaintiffs which are greater than that which would be imposed by a court and which allows for the garnishment of 50% of their wages and/or execution on property without a prior judicial hearing.

Plaintiffs, responsible parents whose children receive public aid and who have not been ordered by a court to pay specific amounts for child support, are allegedly made liable to the Department of Health and Social Services of Washington for the full amount of the public assistance grant received by their children irrespective of their ability to pay.

Plaintiffs contend that the statute violates equal protection by imposing different standards for child support between plaintiffs and those who have had their support obligation fixed by a court. Due process is also said to be violated by allowing the defendant Department of Health and Social Services to fix payment and to take property without a prior hearing. Further, plaintiffs allege that the statute is coercive in that they are forced to file for divorce to obtain a court judgment of their support obligation.

California Standard Work Expense Allowance Upheld

6588. Conover v. Hall, No. 13289 (Cal. Ct. App., Nov. 13, 1972). Respondents represented by Daniel S. Brunner and Valerie Vanaman, Legal Aid Foundation of Long Beach, 236 East 3rd St., Long Beach, Cal. 90812, (213) 437-0901; Philip Goar, Community Legal Assistance Center, 1709 West Eighth St., Los Angeles, Cal. 90017, (213) 483-1491; Clifford Sweet and F. Hayden Curry, Legal Aid Society of Alameda County, 4600 East Fourteenth St., Oakland, Cal. 94601, (415) 532-5963; Ralph S. Abascal, San Francisco Neighborhood Legal Assistance Foundation, 1095 Market St., San Francisco, Cal. 94103, (415) 626-3811. [Here reported: 6588-I Appellate Opinion (10 pp.). Previously reported: 6588A Points and Authorities in Support of TRO and Preliminary Injunction (15 pp.); 6588B Temporary Stay Order (1 p.); 6588C Points and Authorities in Opposition to Petition for Writ of Supersedeas (26 pp.); 6588D Order Denying Writ of Supersedeas and Vacating Temporary Stay Order (1 p.); 6588E Preliminary Injunction (2 pp.); 6588F Opinion of Issuance of Preliminary Injunction (4 pp.); 5 CLEARINGHOUSE REV. 618 (February 1972).]

The California Court of Appeals has reversed the granting of a preliminary injunction against enforcement of a statutory $50 standard work expense allowance, exclusive of child care, for recipients of categorical aid. Previously all provable work-related expenses, with certain exceptions, were deducted from income in determining financial need. The trial court concluded that the imposition of a $50 maximum on work expense allowances violated federal law, 42 U.S.C. §602 (a) (7), which requires that consideration be given to any expense reasonably related to the earning of income.

The appellate court reversed, concluding that "consideration" of all work expenses does not require allowance thereof. Noting that the propriety of the $50

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amount had not been raised as an issue in this case, the court concluded that a standard work expense allowance comports with federal law. Relying heavily on a HEW advisory opinion, and despite case law in other jurisdictions to the contrary, the court distinguished a standard allowance from a maximum allowance, concluding that only the former may be justified as a proper administrative convenience. (See CCH POV. L. REP. ¶16, 537.)

Welfare Recipients Seek Priority in Obtaining Subprofessional Jobs With State Welfare Department

9575. Moore v. Betit (D. Vt., filed Jan. 2, 1973). Plaintiffs represented by Douglas L. Molde and Edward Arbuiso, Vermont Legal Aid, Inc., 54 Lake St., St. Albans, Vt. 05478, (802) 524-6707 [Here reported: 9575A Complaint (6 pp.).]

Plaintiffs, as members of the class of low-income persons and welfare recipients who would be eligible for employment as subprofessionals with the Vermont Department of Social Welfare, have requested preliminary and permanent injunctions prohibiting state officials from hiring subprofessional employees who are not members of the class. The named plaintiffs had each applied for subprofessional positions through the state's department of personnel but were each informed that the state was not recruiting for those positions because they already had enough qualified applicants.

Plaintiffs allege that sections of the Social Security Act require the defendants, as representatives of the Vermont Department of Social Welfare, to employ low-income persons in certain subprofessional positions which are within and outside of the present structure of the department. Plaintiffs further allege that no priority has been given to the employment of class members, that the subprofessional staff vacancies are being filled by people who are neither welfare recipients nor low-income persons, and that they will be irreparably injured by virtue of the defendants' refusal to give them jobs.

Supreme Court Holds Retroactive Social Security Disability Benefits Protected from Legal Process

1522. Philpott v. Essex County Welfare Board, No. 71-5656 (U.S. Sup. Ct., Jan. 10, 1973). Petitioner represented by George Charles Bruno, New Hampshire Legal Assistance, 88 Hanover St., Manchester, N.H. 03101, (603) 668-2900; Robert Curtis, Newark Legal Services Project, 449 Central Ave., Newark, N.J. 07107, (201) 484-4010. [Here reported: 1522H Opinion (5 pp.). Previously reported: 1522A Complaint (2 pp.); 1522B Answer (3 pp.); 1522C Defendants' Memorandum of Law (41 pp.); 1522D Trial Court Opinion (9 pp.); 1522E New Jersey Supreme Court Opinion (14 pp.); 1522F Petition for Writ of Certiorari (11 pp.); 1522G Memorandum on Writ of Certiorari (22 pp.), 6 CLEARINGHOUSE REV. 454 (November 1972).]

The Supreme Court has held that Section 407 of the Social Security Act prohibits respondent county welfare board from recovering state disability assistance paid to petitioner, despite a reimbursement agreement executed by him, where the recovery seeks to reach a retroactive award for disability benefits under the Social Security Act. In reversing the New Jersey Supreme Court, the Court found no exception to the strict Section 407 prohibition of subjecting benefits paid under the Act to execution, attachment, or any other legal process.

In 1966, petitioner applied to respondent for disability assistance, and as a condition for receiving such aid signed an agreement, required under New Jersey law, to reimburse the state for all payments received. On respondent's advice, petitioner then applied for federal disability benefits under the Social Security Act, and in 1968 was awarded retroactive benefits under the Act for the two-year period, a total of $1,864.20.

Under the agreement to reimburse, which under New Jersey law has the force of a judgment for the amount of benefits received, respondent sued to reach the bank account in which the retroactive award was deposited. The trial court held that Section 407 barred such recovery, and the appellate court affirmed. The state supreme court reversed, finding that equity dictated an exception to the clear language of Section 407, allowing respondent to recover that part of the state disability assistance which would not have been paid had petitioner been receiving the federal assistance contemporaneously on a monthly basis, rather than retroactively in a lump sum.

The Court rejected this holding, finding no implied exemption from the strict and inclusive terms of Section 407 which would place the state in a preferred position compared with any other creditor. (See CCH POV. L. REP. ¶16,569.)

***Goldberg v. Kelly* Pretermination Procedures Extended to General Assistance Recipients Dismissed From Work Project**

9501. Salandich v. Milwaukee County, No. 71-C-92 (E.D. Wis., Dec. 26, 1972). Plaintiff represented by Steven M. Steinglass and Richard M. Klein, Freedom Through Equality, 152 West Wisconsin Ave., Milwaukee, Wis. 53203, (414) 271-7772. [Here reported: 9501A Verified Complaint (13 pp.); 9501B Memo in Support of Motion for Preliminary Injunction (8 pp.); 9501C Agreed Statement of Uncontested Facts (12 pp.); 9501D Opinion and Order (9 pp.).]

This decision requires the Milwaukee County Department of Public Welfare to provide all persons who are terminated from the local work project with the general relief for which they were originally eligible unless and until *Goldberg v. Kelly* pretermination procedures are followed.

Plaintiff brought this class action alleging that defendant Milwaukee County terminated plaintiff's participation in the work project in violation of procedural due process. Plaintiff had qualified for general relief and was referred for participation in the Milwaukee County Work Experience and Training Projects Division of the welfare department. Approximately eight months thereafter, defendant terminated plaintiff because of his "attitude."

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Neither written statements nor pretermination evidentiary hearings were afforded plaintiff. At no time was plaintiff able to contest whether his termination was for good cause.

The case is significant in that persons referred to the work project have their general relief cases closed. When such persons are terminated from the work project, they are forced to reapply for general relief and suffer delay. Under this decision, their general relief case may no longer be closed, and the terminated employee must receive general relief immediately, pending a hearing to determine eligibility.

Prohibition on Receipt of Public Assistance as a Condition of Probation Held Unconstitutional

9551. Wisconsin *ex rel.* Casarez v. Seraphim, No. 402-319 (Wis. Cir. Ct., Milwaukee County, Aug. 7, 1972). Plaintiff represented by Brian A. Jeffrey, Freedom Through Equality, Inc., 152 West Wisconsin Ave., Milwaukee, Wis. 53203, (414) 271-7772. [Here reported: 9551A Petition (4 pp.); 9551B Transcript of Oral Decision (4 pp.); 9551C Order (2 pp.).]

Plaintiff successfully challenged the constitutionality of a condition of probation imposed by defendant circuit court judge that she not apply for public assistance. The court held that the order was outside the scope of a state statute concerning sentencing discretion and violated the fourteenth amendment equal protection clause. The court reasoned that the denial of what appears to be a right under the law to receive welfare benefits suggests that public assistance recipients are inferior to others or that being a recipient is degrading and it is necessary for rehabilitation to be off public assistance. Accordingly, the court granted plaintiff's request for a writ of habeas corpus.

The court denied plaintiff's challenge to the restraint that she live in her parents' home as a probation condition. It found this latter restraint within the scope of the state statute and the fourteenth amendment, since it directed a particular regimen or program which is contemplated by the statutes and the standards and since it prescribed a condition, namely residence at a particular address, which was consistent with a constitutionally valid program as long as the facilities were available and the circumstances were not shown to be unbearable.

Second Circuit Sustains Experimental Work Programs: Appeal to Supreme Court

8604. Aguayo v. Richardson, Nos. 479 and 508 (2nd Cir., Jan. 18, 1973). Plaintiffs represented by Adele M. Blong, Steven J. Cole and Henry A. Freedman, Center on Social Welfare Policy & Law, 25 West 43rd St., 12th Flr., New York, N.Y. 10036, (212) 354-7670; Norman Redlich and Paula Omansky, Municipal Bldg., New York, N.Y. 10007, (212) 566-2505. [Here reported: 8604L Second Circuit Opinion (29 pp.); 8604M Application for Stay (38 pp.). Previously reported: 8604A Complaint (35 pp.); 8604B Preliminary Injunction (5 pp.); 9604D Federal Defendants' Memo in Opposition to Preliminary Injunction (44 pp.); 8604E Brief of Amici Curiae (26 pp.); 8604F Memo of State Defendants (49 pp.); 8604G Opinion (19 pp.), 6 CLEARINGHOUSE REV. 519 (December 1972).]

Pending their application for a writ of certiorari, plaintiffs have filed with Justice Thurgood Marshall an application for stay of a court of appeals decision denying them a temporary injunction in this suit to enjoin the New York Department of Social Services from carrying out two experimental work projects and to set aside the approval of the programs by the Secretary of HEW.

The plaintiffs are six AFDC recipients who might be required to take employment under the project suing individually and as a class, the City of New York and its commissioner of social services who would have to help administer the projects, and seven welfare rights organizations.

Plaintiffs allege a denial of equal protection because the two projects will be imposed on only a portion of those eligible for AFDC benefits and lack of due process through the operation of New York statutes governing hearings for the suitability of the projects and the failure of the proposals to develop specific standards and procedures applicable to participants. The most important statutory claims are that the projects are so basically inconsistent with the Social Security Act as to lie beyond the power of approval of demonstration projects vested in the Secretary of HEW by 42 U.S.C. §1315; that the record before the Secretary was inadequate to warrant approval under the standards laid down in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); and that the approval was inadequate because of its failure to waive compliance with the work incentive (WIN) provisions of the Social Security Act, 42 U.S.C. §602 (a) (19).

The district court denied plaintiffs' motion for a preliminary injunction and plaintiffs appealed to the Court of Appeals for the Second Circuit. The court of appeals reversed the district court which held that the welfare organizations lacked standing, holding that at least some of the organizations did have standing under the general federal question statute, 28 U.S.C. §1331, since their complaints alleged that members are potential subjects of the projects and will suffer from a worsening of the overall welfare administrative situation if the projects are implemented. The organizations did not have standing, however, to sue for the violation of the civil rights of members under 42 U.S.C. §1983.

The court agreed with the district court's holding that the city had standing to assert the statutory claims against the federal defendants and that it lacked standing to assert constitutional claims. This did not bar the commissioner of the department of social services for the city from asserting constitutional claims, however, since he was faced with a conflict between his oath to support the Constitution and his duty under state law to carry out the New York projects.

On the question of jurisdiction, the court said it was unwilling to follow the district court and avoid the jurisdictional amount problem in regard to the statutory claims by reliance on Section 10 of the Administrative

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Procedure Act. The question whether the Act is an independent jurisdictional grant has not been settled by the Second Circuit and the court avoided facing that question by finding that combining those claims in which it had found jurisdiction with a liberal application of pendent jurisdiction sustained jurisdiction over both sets of defendants since all the claims had a common nucleus of law and fact.

On the statutory claims, the court found no merit in plaintiffs' arguments that the New York programs were contrary to the objects of AFDC and that the Secretary could not waive certain requirements of the Social Security Act. The court determined that the Secretary had a rational basis for his determination that the programs could be adopted, that he had before him adequate information to make that determination, and that he could legitimately set a lower threshold for persuasion for programs that are experimental and limited in duration than for programs that are irreversible. As to the claims of the local welfare and employment agencies that they were incapable of taking on the additional task of administering the experimental programs, the court decided that the Secretary's decision would be reversible as arbitrary and capricious only if the materials before him negated any appreciable possibility of success.

The court met plaintiffs' claim that the Secretary's action is ineffective because it did not expressly waive compliance with 42 U.S.C. §602 (a) (19), which requires every state plan to provide for the prompt referral of certain welfare recipients to the Secretary of Labor for participation in the WIN Program, by deciding that the Secretary had only to go through the formality of adding that section to the list of those waived. It thus avoided the question of whether the language of the section demands such a program or outlaws any other state work program, the question now on appeal to the Supreme Court in *Dublino v. New York State Department of Social Service.*

On the constitutional claims, the court decided that there was no equal protection problem since the classification of AFDC recipients is reasonably related to a legitimate state purpose. It did not consider appellants' contention that the standards for determining eligibility and good cause are too vague for fair enforcement, but was greatly concerned with the adequacy of the opportunity for a hearing. The plans for the experimental projects called for a fair hearing under 18 N.Y.C. R.R. §385 before assistance to an AFDC recipient can be suspended for unjustified failure to accept a job opportunity or to continue to work thereon. Appellants argued that their right to a fair hearing was unconstitutionally burdened by the provisions of that section since, if the result of the hearing is adverse, the recipient is disqualified from receiving assistance for 30 days thereafter.

This 30-day suspension provision is one of general application, not part of the two projects sought to be enjoined, and neither the complaint nor the motion for interlocutory relief sought an injunction against the enforcement of it. The state claimed that the 30-day suspension would not be enforced as long as the *Dublino* injunction remains in effect, but the court thought that protection was necessary should that injunction be dissolved. For this reason it directed that the district court's denial of the temporary injunction be modified so as to enjoin the state defendants from enforcing the 30-day suspension until its validity has been finally determined. The order denying the preliminary injunction was affirmed as so modified.

An interesting aspect of the case is that although the district court had assumed that plaintiffs sought a three-judge court, they actually had not, although, had they sought to enjoin the 30-day suspension provision on due process grounds, a three-judge court might have been required. Plaintiffs have now appealed to the Supreme Court.

Oklahoma Regulation Denying AFDC Benefits to Individuals Living in Homes Valued at More Than $10,000 Enjoined

9599. Green v. Barnes, No. Civ. 720849 (W.D. Okla., Dec. 26, 1972). Complainants represented by Stan L. Foster, Diane Horn and Arthur Lory Rakestraw, Legal Aid Society of Oklahoma County, Inc., 601 Mercantile Bldg., Oklahoma City, Okla. 73102, (405) 272-9461. [Here reported: 9599A Complaint (7 pp.); 9599B Memo in Support of TRO, Three-Judge Panel and Class Action (12 pp.); 9599C Complainant's Supp. Memo (3 pp.); 9599D Memo in Opposition to Motions for TRO and Class Action (8 pp.); 9599E Respondents' Supp. Memo (3 pp.); 9599F Memo in Support of Motion to Dismiss (2 pp.); 9599G Order (1 p.); 9599H Injunction (2 pp.).]

Declaring the challenged provision unconstitutional, the court has permanently enjoined enforcement of an Oklahoma welfare regulation which denies AFDC benefits to all applicants who have purchased houses with market values in excess of $10,000 without taking into consideration the indebtedness on each house. Through the use of FHA Section 235 loans, plaintiffs had each purchased houses with market values exceeding $10,000. Although neither plaintiff had more than one percent equity in her house, both had been refused AFDC despite being otherwise eligible for the assistance. The defendants were members of the state welfare commission and the director of the Welfare Department of Oklahoma.

Plaintiffs had alleged that the regulation failed to distinguish between persons who have little or no equity and those who have full equity, that it arbitrarily imposed an additional condition on eligibility without any state justification, that it was unrelated to need, income or resources, and that it was inconsistent with 42 U.S.C. §602, HEW guidelines, and United States Supreme Court decisions which allow currently available income and resources to be considered by welfare administrators. Defendants had replied that the Social Security Act allows states to establish their own standards of need, that giving exemptions to houses with certain market values did not require exemptions for all houses, and that the classifi-

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cation was neither discriminatory nor in violation of the Social Security Act.

The court, after denying the motion for a three-judge panel, invalidated the regulation as to the individual plaintiffs, but denied plaintiffs' request for determination of a class action of all present and future recipients or applicants for AFDC who would be affected detrimentally by the regulation. The court ruled that the regulation's attribution to applicants of income or resources not shown to be available to them violated the supremacy clause and equal protection and due process of the law.

Challenge State Limitation on AFDC when Male Friend of Recipient Present

9641. Hurley v. Van Lare, No. 72 CIV. 3423 (S.D. N.Y., filed Jan. 17, 1973). Plaintiff represented by Jerold S. Slate, Martin A. Schwartz, Legal Aid Society of Westchester County, 138 South Broadway, Yonkers, N.Y. 10701, (914) 423-0700. On the memorandum, Lawrence S. Kahn. [Here reported: 9641A Memo of Points & Authorities (37 pp.).]

In this class action, plaintiff an AFDC recipient, seeks restitution and injunctive and declaratory relief against a state regulation which limits the amount of public assistance otherwise available to a female recipient when she is living with a man to whom she is not married.

The challenged state regulations provide that when a female recipient is living with a man to whom she is not married and who is unwilling to assume responsibility for the woman or her children and does not contribute at least $15 a month, he shall be deemed a lodger and not included in the budget, and the family's shelter allowance shall become a pro rata share of the regular shelter allowance. As a result, the plaintiff, a woman with three minor dependent children, who has been living apart from her husband for five years and providing residence for a nonsupporting male friend, has had her public assistance grant reduced by $30 per month.

Plaintiff maintains that the regulations are unconstitutional under the supremacy clause in that they conflict with the purpose of the Social Security Act of 1935 and its subsequent regulations aimed at aiding families with dependent children, in that they incorrectly presume that a lodger has made financial contributions to the assistance recipient. Plaintiff also maintains that the presumption has no rational connection to fact, and that to arbitrarily enforce the presumption denies due process guaranteed by the fourteenth amendment. Plaintiff further maintains that the regulations questioned violate the equal protection clause because they arbitrarily treat differently two classes of needy families simply because one family has a lodger, a fact wholly unrelated to the objectives of the AFDC program. Finally, the plaintiff contends that the regulations work to deny first, ninth and fourteenth amendment rights to freedom of association and privacy by effectively prohibiting and chilling the rights of poor people to associate with other people in the privacy of their home.

Plaintiff argues that a summary judgment should be granted, that a three-judge court need not be convened because this case can be decided on the basis of statutory claims, and that a class action is properly maintainable.

Immediate Reissuance of Lost or Stolen Checks Sought

9665. Jackson v. Friend, No. C-72-426 (W.D. Tenn., Dec. 7, 1972). Plaintiffs represented by David C. Howard, David Seth Michaels and Leopold Freudberg, Memphis and Shelby County Legal Services Association, 1063 North Watkins St., Memphis, Tenn. 38107, (901) 276-2741. [Here reported: 9665A Complaint (9 pp.); 9665B Memorandum (17 pp.); 9665C Answer (3 pp.); 9665D Proposed Agreed Order (3 pp.).]

Plaintiffs in this class action allege the unconstitutionality of Tennessee Department of Public Welfare regulations pertaining to checks reported lost or stolen. The named plaintiff reported her check lost or stolen in August 1972, but she had not received a replacement check prior to the filing of this action in December 1972. This delay was permitted by regulations that required the state to wait for the check to be paid before making a duplicate check to the recipient. Plaintiffs allege that this delay violates the equal protection and due process clauses of the fourteenth amendment, Section 402 (a) (10) of the Social Security Act, and the supremacy clause. They seek to enjoin the operation of the present regulations and to require that the department issue a new check immediately after notification that a recipient's check has not been received.

Seventh Circuit Upholds Award of Retroactive AABD Payments

5000. Jordan v. Weaver, *formerly Jordan v. Swank*, No. 72-1380 (7th Cir., Jan. 18, 1973.). Appellants represented by Sheldon H. Roodman and Marilyn Katz, Legal Aid Society of Chicago, 64 East Jackson Blvd., Chicago, Ill. 60604, (312) 922-5625. Of counsel, Kenneth K. Howell, same address. [Here reported: 5000G Appellants' Reply Brief (43 pp.); 5000H Opinion (11 pp.). Previously reported: 5000A Temporary Restraining Order (6 pp.); 5000B Amended Complaint (12 pp.); 5000C Memo in Support of TRO (7 pp.), 5 CLEARINGHOUSE REV. 52 (May 1971); 5000D Preliminary Injunction (6 pp.); 5 CLEARINGHOUSE REV. 335 (October 1971); 5000E District Court Opinion & Order (4 pp.); 5000F Judgment (8 pp.), 6 CLEARINGHOUSE REV. 62 (May 1972).]

The Seventh Circuit has affirmed a district court judgment ordering defendant Illinois welfare officials to release retroactive benefit payments to persons whose applications for Aid to the Aged, Blind, and Disabled (AABD) had not been processed within the time limits prescribed by federal regulations. The court also affirmed the lower court's decision that federal regulations do not require that eligible applicants are entitled to receive benefits from the date of their applications, rather than within the prescribed time limits for processing applications, and that punitive damages should not be awarded for the defendants' failure to make the payments on time.

In addition to its retroactive payment order, the district court had granted a permanent injunction requiring

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compliance with federal regulations requiring that eligibility determinations and payments on applications for assistance for the aged and blind under AABD be made within 30 days, and for the disabled within 60 days.

On appeal, the court rejected defendants' principal argument, drawn directly from the holding in *Rothstein v. Wyman*, 467 F.2d 226 (2nd Cir. 1972), that the eleventh amendment bars an action in federal court against state welfare officials for retroactive benefits. In reaching a decision clearly contrary to *Rothstein*, the court held that the eleventh amendment permits such relief where appropriate to deal with defiance of federal law, and characterized the remedy afforded here as restitution rather than damages. In addition, the court found that even if the eleventh amendment or sovereign immunity doctrine did bar a suit to recover welfare benefits wrongfully withheld, the state has constructively consented to such an action by choosing to participate in the AABD program and receive federal funds thereunder.

Allege General Assistance Cannot Be Denied Solely on Basis That Applicant Has Been Offered A Home With His Parents in Another State

9633. Metcalf v. Born, No. 655-310 (Cal. Super. Ct., San Francisco County, filed Jan. 16, 1973). Petitioners represented by Thomas W. Pulliam Jr., San Francisco Neighborhood Legal Assistance Foundation, 721 Webster St., San Francisco, Cal. 94117, (415) 567-2804. [Here reported: 9633A Petition for Writ of Mandate & Declaratory Relief (6 pp.); 9633B Memo of Points & Authorities in Support of Application for Temporary Stay Order & Petition for Writ of Mandate & Declaratory Relief (11 pp.).]

Petitioner brings this action on behalf of himself and all other persons who have been or may be denied general assistance benefits solely because parents or other relatives are willing to provide a home for such persons at their places of residence outside San Francisco. The class representative is 23 years old and had been living in San Francisco for over a year when he was denied general assistance on the basis that his father had offered him a home in Tennessee.

Petitioner alleges that this denial is an abuse of administrative discretion in that it violates his statutory right to general assistance under CAL. WELF. & INST'NS CODE §17000. Petitioner further alleges violation of his constitutional rights to travel, to due process and to equal protection.

Georgia Denial of AFDC Benefits to Unborn Children Upheld

9491. Parks v. Harden, No. 17504 (N.D. Ga., Jan. 4, 1973). Plaintiffs represented by Stephen Gottlieb and Alfred C. Kammer II, Atlanta Legal Aid Society, Inc., 153 Pryor St., SW, Atlanta, Ga. 30303, (404) 524-5811. [Here reported: 9491C Opinion (13 pp.); Also available: 9491A Complaint (7 pp.); 9491B Brief (9 pp.).]

The court held that the Social Security Act did not require the Georgia welfare assistance plan to give the plaintiff, a pregnant AFDC mother and her class, AFDC benefits for their unborn children. The court found that the state scheme did not conflict with federal regulations or the statute because there was no basis in the Social Security Act itself or in its legislative history to conclude that an unborn child is included in the definition of "dependent child" in the statute. Thus the state's requirement that AFDC be furnished with reasonable promptness to all eligible individuals did not mandate including unborn children.

Challenge Denial of Aid to Persons Who Transfer Property for Less Than Fair Consideration

9614. Portner v. Wohlgemuth, No. CA-72-2428 (E.D. Pa., filed Dec. 8, 1972). Plaintiffs represented by Louis Shucker, Eugene F. Zenobi, Alan N. Linder and J. Richard Gray, Tri-County Legal Services, 524 Washington St., Reading, Pa. 19601, (215) 376-8656. [Here reported: 9614A Complaint (6 pp.); 9614B Memo in Support of Motion for TRO (11 pp.).]

Plaintiff, a recipient of Aid to the Disabled, attacks the constitutionality of a Pennsylvania Department of Public Welfare regulation which provides that a person is ineligible for public assistance if he has transferred property for less than fair consideration within two years prior to his application for assistance. Defendant, the Secretary of the Department of Welfare, has voluntarily reinstated plaintiff pending final disposition of the case.

Plaintiff was granted assistance in June 1972. Defendant terminated this assistance in November pursuant to the above regulation. Plaintiff admits that he transferred his real property to his son in April for a nominal consideration and defendant admits that plaintiff is eligible for assistance except for the regulation. Plaintiff is presently without any source of income and his disability precludes him from employment.

Plaintiff first argues that the regulation imposes an impermissible additional eligibility requirement in contravention of Title XVI of the Social Security Act and that it operates to subvert the "standard of need" to which the public assistance program is dedicated.

Second, plaintiff asserts that the regulation denies him both due process and equal protection because it arbitrarily creates two classes receiving different treatment and because the regulation does not bear a reasonable relation to the aims of the program. Additionally plaintiff alleges that the regulation is against expressed legislative intent.

Court Denies Motion to Stay Order for Retroactive Payment of AFDC Benefits

2958. Roberson v. White, No. 14,003 (D. Conn., Jan. 7, 1973), *consolidated with 3996. Campagnuolo v. White.* Plaintiffs represented by William H. Clendenen and David Lesser, 152 Temple St., New Haven, Conn. 06510, (203) 787-1183; Kenneth Kreiling and Stuart Bear, New Haven Legal Assistance Association, 265 Church St., New Haven, Conn. 06510, (203) 777-7601. [Here reported: 2958K

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Ruling on Defendant's Motion to Amend Judgment (4 pp.). Previously reported: 2958A Complaint (11 pp.); 2958B Brief (44 pp.); 2958C Complaint (11 pp.); 2958D Memorandum (42 pp.), 4 CLEARINGHOUSE REV. 339 (November 1970); 2958F Brief (44 pp.), 4 CLEARINGHOUSE REV. 612 (April 1971); 2958G 2nd Cir. Opinion (3 pp.), 5 CLEARINGHOUSE REV. 115 (June 1971); 2958J Ruling on Motion for Contempt (5 pp.), 5 CLEARINGHOUSE REV. 699 (March 1972); 3996D Ruling on Motion to Convene Three-Judge Court (9 pp.), 4 CLEARINGHOUSE REV. 561 (March 1971); 3996F 2nd Cir. Opinion (3 pp.), 5 CLEARINGHOUSE REV. 115 (June 1971); 3996G Ruling on Motion for Contempt & Other Relief (6 pp.), 5 CLEARINGHOUSE REV. 559 (January 1972).]

The court has denied defendant Connecticut Welfare Commissioner's motion to stay the operation of the injunction issued in these cases by the court in October 1971, which ordered defendant to make retroactive AFDC payments to persons denied such aid due to improper computation of income for determining eligibility. To date over $1.6 million in retroactive payments have been made to the plaintiff class pursuant to the order.

Under the order, defendant was instructed to notify all AFDC recipients and applicants who had income from employment and who would have been eligible for AFDC but for defendant's erroneous application of earned income disregard provisions of the Social Security Act, of their entitlement to a recomputation of income and retroactive payment of benefits for the period after July 1, 1969. Defendant had improperly computed earned income disregards and failed to deduct work expenses from gross income in determining eligibility, in violation of the Act and HEW regulations.

Defendant argued that the order was invalid under the decision in *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), which held that the eleventh amendment deprives a federal court of jurisdiction to order retroactive welfare benefits wrongfully denied by state authorities. The court rejected this argument, holding that the October 1971 order was not a judgment against the state as in *Rothstein*, and that the order only calls for compliance with applicable HEW regulations. The court further found that the rule in *Rothstein* should not be retroactively applied to modify judgments previously entered.

Florida AFDC Requirement of Support Suit Against Putative Father Held Unconstitutional; Retroactive Benefits Awarded

8883. Story v. Roberts, No. 72-641-Civ-J-M (W.D. Fla., Dec. 20, 1972). Plaintiffs represented by William J. Gibbons and Paul C. Doyle, Duval County Legal Aid Association, 5566 Avenue "B", Jacksonville, Fla. 32209, (904) 764-5671. [Here reported: 8883D Opinion & Order (16 pp.). Also available: 8883A Complaint (12 pp.); 8883B Plaintiffs' Memorandum of Law (3 pp.); 8883C Temporary Restraining Order (3 pp.).]

This class action was brought on behalf of AFDC recipients and their children, challenging the imminent termination of their AFDC grants for failure to comply with the Florida statutory requirement that the applicant institute and in good faith prosecute a civil support action against those persons legally responsible for the support of her dependent children. A three-judge federal district court was convened to hear plaintiffs' allegations that the statute and regulations thereunder violated the due process and equal protection clauses of the fourteenth amendment. In exercise of its pendent jurisdiction, the court concluded that the Florida statute and regulations constituted an eligibility standard "clearly inconsistent" with the Social Security Act of 1935 and therefore invalid under the supremacy clause.

In addition to a declaratory judgment and an injunction, the court ordered payment of retroactive benefits to those plaintiffs denied benefits solely on account of the unconstitutional statute. The defendants' contention that the requirement of substantial payments of state funds made this a suit against the state in violation of the eleventh amendment was rejected. The court concluded that retroactive benefits would accord with federal policy without unnecessarily exacerbating federal-state relations, and since HEW and the United States Supreme Court had declared a requirement such as Florida's invalid more than one year before institution of this suit, and since plaintiffs' ofjections were timely, the retroactive award will be "remedial and not compensatory."

Attorney Sues for Release of General Assistance Manuals

9634. Pulliam v. Born, No. 650-259 (Cal. Super. Ct., San Francisco County, filed Aug. 31, 1972). Plaintiff represented by San Francisco Neighborhood Legal Assistance Foundation, 721 Webster St., San Francisco, Cal. 94117, (415) 567-2804. [Here reported: 9634A Complaint (3 pp.).]

This class action, brought by a staff attorney of the San Francisco Neighborhood Assistance Foundation, seeks to obtain a copy of the GENERAL ASSISTANCE MANUAL, which contains standards pursuant to which the general assistance program is administered and eligibility for general assistance benefits is determined. Plaintiff alleges that neither he nor any other member of the plaintiff class have a copy of the *Manuel* and pertinent updating materials, which are public records within the definition of CAL. GOV'T CODE §6252. Plaintiff alleges that he has made several requests to receive such material, but has received no response whatsoever. Plaintiff further alleges that pursuant to CAL. GOV'T CODE §§6252 *et seq.*, he is entitled to receive copies of these public records and to continue to receive such copies as and when they are printed and disseminated to the San Francisco Department of Social Services. Plaintiff asks that these materials be provided free of charge or that he be allowed to make copies of these materials. Plaintiff finally asks that the court declare that every San Francisco Legal Assistance attorney has a right to receive copies of all such materials in the future without having to make separate or additional requests for each additional writing.

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Since the complaint was filed, both sides have filed motions for pretrial discovery, interrogatories, and various answers.

Welfare Recipients Attack Conveyance of Second Mortgages to Welfare Department in Certain Circumstances

9648. Akins v. Lavine (N.D. N.Y., filed January 1973). Plaintiffs represented by Douglas A. Eldridge and Steven U. Mullens, Onondaga Neighborhood Legal Services, Inc., 633 South Warren St., Syracuse, N.Y. 13202, (315) 475-3127. [Here reported: 9648A Complaint (16 pp.); 9648B Plaintiffs' Memorandum of Law (25 pp.).]

This action attacks the department of social service's policy of requiring welfare recipients to convey second mortgages on their residences as a condition of eligibility. Defendants are the commissioners of the Department of Social Services for New York State and Onondaga County. Plaintiffs in this class action, recipients or former recipients of welfare, do not attack the general right of the department to require them to grant such mortgages. Rather, they challenge the legality of the requirement in three specific circumstances, and seek declaratory and injunctive relief.

Plaintiffs first contend that where the recipient has purchased his home under the Section 235 Program of the National Housing Act, the requirement of a second mortgage is void under the supremacy clause and the preemption doctrine. They argue that the conveyance requirement conflicts with the congressional purpose of making home ownership available to low and moderate income families so as to enhance the pride and dignity of the family and stabilize and improve the community.

Second, plaintiffs contend that the policy of termination of aid to an entire family where the parents refused to convey second mortgages deprives the children of equal protection in a situation where they have no control over their parents' actions. They rely on the rule of *King v. Smith*, 392 U.S. 309 (1968), that children are not to be denied AFDC for the improper acts of their parents.

Third, plaintiffs charge that the requirement of second mortgages violate their rights to substantive due process of law because the department fails to consider criteria set forth in New York social services law in determining whether the mortgages should be taken. A regulation provides the relevant factors such as recipient's age, health, and social situation must be examined before a determination to require a second mortgage is made. Plaintiffs contend that the welfare officials' invariable failure to consider these factors is an abuse of discretion.

Court of Appeals Prohibits Texas' Regulatory Assumption That All of an AFDC Dependent Child's Income Defrays the Child's Own Needs

8361. Rodriguez v. Vowell, No. 72-1663 (5th Cir., Jan. 24, 1973). Appellants represented by Nancy Duff Levy, Steven J. Cole and Henry A. Freedman, Center on Social Welfare Policy & Law25 West 43rd St., New York, N.Y. 10036, (212) 354-7570; Melvin N. Eichelbaum and Frederick J. Deyeso, 203 West Nueva St., San Antonio, Tex. 78207; J. L. Covington, 1205 East Monroe, Brownsville, Tex. 78520. Of counsel, Michael B. Trister, Washington Research Project, 1823 Jefferson Pl., NW, Washington, D.C., (202) 483-1470. [Here reported: 8361B Opinion (11 pp.). Previously reported: 8361A Reply Brief (14 pp.), 6 CLEARINGHOUSE REV. 455 (November 1972).]

The Fifth Circuit has reversed and remanded a district court decision which upheld the validity of two regulations of the Texas Department of Public Welfare. The challenged regulations denied AFDC payments to families in which the child had income "accruing in his own right" greater than his state-defined recognizable needs, even where such income was less than the recognizable needs of both the child and his caretaker relative, on the ground that the child was therefore not dependent.

Basing its opinion on the Social Security Act, HEW regulations and Supreme Court decisions thereunder, the court held: 1) the AFDC eligibility requirements outlined in the Social Security Act and HEW regulations are mandatory and not precatory upon participating states; 2) since AFDC payments represent assistance to "needy families" the state's procedure for measuring the needs of an AFDC family must take into account the group needs of the family as a whole including the needs of the caretaker relative; and 3) the Texas regulations are invalid insofar as they automatically assume that all of the income accruing to a child is available to meet the child's needs, whereas, in fact the child may share his income with other members of his AFDC family.

California Hearing Regulations Enjoined; Aid Continues Pending Hearing

6875. Yee-Litt v. Richardson, No. C-71-2286-OJC (N.D. Cal., Jan. 17, 1973). Plaintiffs represented by Armando M. Menocal III and Christopher N. May, San Francisco Neighborhood Legal Assistance Foundation, 2701 Folsom St., San Francisco, Cal. 94110, (415) 648-7580. Of counsel, Donald R. Prigo. [Here reported: 6875-I Memorandum and

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Order (10 pp.). Previously reported: 6875A Complaint (18 pp.); 6875B Memorandum of Points and Authorities in Support of Motion for TRO and for Three-Judge Court (24 pp.); 6875C Supplemental Memorandum (32 pp.); 6875D Temporary Restraining Order (1 p.); 6875E Amendment to TRO (2 pp.), 6 CLEARINGHOUSE REV. 112 (June 1972).]

California welfare recipients who file a timely fair hearing request cannot have their benefits reduced or terminated until a decision pursuant to the hearing is reached. A three-judge court specifically barred the state from continuing its practice of denying aid pending the hearing to recipients whose fair hearing requests failed to state an issue of fact or judgment. The court noted that its previous injunction had been lifted to allow the state to experiment with new regulations but that there were many erroneous prehearing terminations which arose, in part, "from what appears to be the State's misuse of these regulations." The court concluded that the "fact-policy distinction is not viable in the welfare context for making the critical determination of whether aid will be paid pending a hearing."

WOMEN'S RIGHTS

Female Students Seek Admission to Auto Mechanics Vocational Courses

9308. Casa v. Gaffney, No. 171-673 (Cal. Super. Ct., San Mateo County, filed Nov. 8, 1972). Plaintiffs represented by Susanne Martinez, Youth Law Center, 795 Turk St., San Francisco, Cal. 94102, (415) 474-5865; Kenneth Hecht, Employment Law Center, 795 Turk St., San Francisco, Cal. 94102, (415) 474-5865; Dolores A. Donovan, Charles C. Marson, and Peter E. Sheehan, American Civil Liberties Union Foundation of Northern California, Inc., 593 Market St., San Francisco, Cal. 94105, (415) 433-2750. [Here reported: 9308A Complaint (10 pp.).]

Female public high school students have brought this class action for declaratory and injunctive relief to gain the opportunity to enroll in auto mechanics vocational courses equally with male students. They allege denial of such opportunity solely on the basis of sex, in violation of their fundamental right to an education, the equal protection clauses of the federal and state constitutions, the employment provision of the California Constitution against sex discrimination, and various provisions of the state Education and Administrative Code.

WORKMEN'S COMPENSATION

Challenge Employer's Right of Automatic Suspension of Benefit Payments Without Notice and Hearing

9528. Farina v. Smith, No. 72-1983 (E.D. Pa., filed Nov. 27, 1972). Plaintiffs represented by Andrew S. Price, Harold I. Goodman, and Bruce E. Endy, Community Legal Services, Inc., 313 South Juniper St., Philadelphia, Pa. 19107, (215) 735-6101. [Here reported: 9528A Complaint (11 pp.); 9528B Memorandum (15 pp.).]

The named plaintiff in this class action represents all of those who have been found eligible for workmen's compensation benefits, but whose benefits have been automatically suspended by the employer without notice or a prior evidentiary hearing. The plaintiff asks the court to declare unconstitutional and enjoin the operation of the section of the Pennsylvania Workmen's Compensation Act which allows this procedure, and also to recover all lost income resulting from this ex parte termination of benefits. The plaintiff asserts that the employers are granted immediate relief in contested cases by this ex parte termination until the issue is subsequently ruled on at a hearing, while the employees who petition for reinstatement of benefits must wait without compensation during the delay between the date of their petition and the date of the hearing.

The defendant has moved to dismiss for want of a case and controversy, and on the basis of mootness, predicated upon its reinstatement of the named plaintiff's workmen's compensation benefits. The plaintiffs argue that this temporary reinstatement of the named plaintiff's benefits does not eliminate the controversy since the contested section of the Pennsylvania Act continues to deprive the other members in the class of their constitutional and civil rights. The plaintiffs contend that dismissal is not appropriate when the named individual purports to represent a class, and that the defendant cannot meet the challenge to a constitutionally deficient practice by such a temporary voluntary cessation. Even if the plaintiffs had not brought this action as class litigation, the plaintiffs assert that there still remains an actual controversy, because the acts complained of may conceivably be repeated, and the issues are of such public importance that judicial relief is appropriate.

BOOK REVIEW

Prisoners of Psychiatry: Mental Patients, Psychiatrists, and the Law, by Bruce Ennis, Harcourt Brace Jovanovich, Inc., 1973. Pp. xix, 232. Price: $6.95

The book describes the author's experiences and strategies as an ACLU attorney defending past and presently institutionalized mental patients from the deprivation of their legal rights by established legal, medical and social structures. Perhaps the most disturbing revelation from a lawyer's point of view is that mental patients are often denied the procedural and due process rights that would be given as a matter of course to defendants in criminal cases. This is so despite the fact that commitment for "psychiatric care" can easily result in confinement for time periods far exceeding the norm for serious criminal cases, and subject the committed mental patient to conditions just as brutal as those endured by inmates who have been convicted of crimes.

Ennis does not believe that public custodial institutions are effective. He documents that institutionalization is antitherapeutic, and cites with favor England's

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plan to close all of its large public mental institutions within 20 years. Besides supporting the proposal to put all mental health services on an out-patient basis, he has a suggestion that is of particular interest to lawyers, namely that the courts should assign every practicing attorney in the nation the defense of four mental commitment cases a year, thus hopefully making sure that all the subjects of mental commitment procedures will receive some measure of their procedural and substantive rights. This procedure would also have the beneficial effect of alerting the general attorney population to the abuses of involuntary psychiatry.

Geoffrey Groshong
Associate Student Editor

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POSITIONS AVAILABLE IN LEGAL SERVICES

Applications and inquiries concerning the positions listed below should be submitted directly to the organizations announcing the positions.

Charlottesville—Albemarle Legal Aid Society, 230 Court Square, Charlottesville, Va. 22901, (703) 293-5131.

The Charlottesville—Albemarle Legal Aid Society has an immediate opening for a staff attorney. Applicants for this position must be aggressive and sincere in their desire to serve the needs of the poor. Applicants must be admitted to the Virginia Bar or expect to be admitted in the near future. Preference will be given to minority attorneys. The Legal Aid Society consists of two attorneys at this time and serves a population of approximately 77,000. Salary information is available on request. Interested persons should send resumes to the above address.

Cumberland County Legal Services Association, Inc., Kronenberg Bldg., Carlisle, Pa. 17013. (Attn: Charlotte Neagle, Director.)

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Cumberland County Legal Services Association, Inc., has an opening for a staff attorney. Normal caseload responsibilities are handled by Dickinson School of Law students. The attorney will be in charge of our out-reach offices and supervise students' work at these locations. It is expected that the attorney will be involved primarily in test case litigation. Applicants should have at least one year's experience in poverty law. Spring graduates with extensive clinical experience will be considered. Pennsylvania bar membership not required. The salary is commensurate with experience to a maximum of $12,000. Equal opportunity employer. Interested persons should send a resume to the above address.

ECCO, Inc., East Central Committee for Opportunity, Inc., Central Administration Bldg., Mayfield, Ga. 31059, (404) 465-3201. (Attn: Jordan D. Luttrell, General Counsel.)

ECCO, Inc., a predominantly black organization in a rural Georgia county with 80% black population and black-controlled county government, seeks house counsel to advise on legal, financial and business aspects of small and medium size business and housing investments. Present financial resources of organization (including conservative estimate of institutional financing available) between $5 and $10 million.

Experience desired: two to five years corporate or business practice. Present admission to Georgia Bar not essential. Salary open. Please contact the above.

Fresno County Legal Services, Inc., 1221 Fulton Mall, Rm. 505, Fresno, Cal. 93721, (209) 485-9880. (Attn: Brett Dorian, Director.)

Fresno County Legal Services, Inc., which operates a federally-funded program of civil legal services to the low-income community of Fresno County has an opening for a staff attorney. Salary minimum $10,800 annually. Membership in the California Bar is a prerequisite to employment. Minority and female attorneys are especially encouraged to apply. Applications must be submitted immediately to the above.

Georgia Legal Services Program, Inc.—Georgia Indigents Legal Services, Inc., 15 Peachtree St., Rm. 909, Atlanta, Ga. 30303, (404) 522-3553. (Attn: John L. Cromartie, Jr., Associate Director.)

Georgia Legal Services Program, Georgia Indigents Legal Services, funded by OEO, United Givers, the State of Georgia, and HEW serve the State of Georgia outside the five county metropolitan Atlanta area. The program has 40 staff attorneys, two VISTA lawyers, eight VISTA generalists and four Reginald Heber Smith Fellows working in its nine branch offices located throughout the state and in the administrative and backup office located in Atlanta, Georgia.

The program is seeking managing attorneys for the Savannah and Augusta branch offices. The Savannah office is funded for five attorneys with one Reginald Heber Smith Fellow and two VISTA generalists and serves Chatham County, along with the seven surrounding counties. There is unlimited potential for litigation in the areas of consumer law, housing law, and equalization of municipal services. Much work is being done in economic development. The Augusta office services Richmond County and the surrounding counties, is funded for three attorneys with one Reginald Heber Smith Fellow and the addition of VISTA generalists in March. Augusta is the "home improvement capital of the world" and much of the work of the office has been directed toward this problem with substantial TIL litigation.

Experience in poverty law, commitment to quality legal services for the poor, and ability and willingness to lead and direct staff attorneys are prerequisites for both positions. Applicants need not be members of the Georgia bar but they would be expected to take the Georgia bar exam at the first opportunity. Salary up to $15,000 based on ability and experience. Other staff attorney positions develop from time to time throughout the state. Beginning salary in the program is $10,200.

Greater Lansing Legal Aid Bureau, Inc., P.O. Box 1071, 300 North Washington Ave., Rm. 302, Lansing, Mich. 48933. (Attn: Richard Guilford, Chairman, Personnel Committee.)

The Bureau is seeking an executive director as of March 1, 1973, to direct this OEO, Model Cities, United Way funded, nine-lawyer Legal Services program centered in Lansing and serving the mid-Michigan area. The director is responsible for overall project administration, including supervision of litigation.

The program is committed to concepts of innovative law reform litigation and quality service to the client community. Applicants should have a minimum of two years of Legal Services experience as well as some administrative background. Salary commensurate with experience to $17,000 maximum. Interested applicants should submit inquiries, resumes and applications to the above address.

Health Law Project, 133 South 36th St., Philadelphia, Pa. 19104, (215) 594-6951. (Attn: Richard K. Barlow, Staff Director.)

A health professional is being sought for the Health Law Project of the University of Pennsylvania Law School. The project is funded by OEO to work on health delivery systems issues affecting the poor and the near-poor. The project is looking for a health professional who has a reasonable amount of knowledge of both medical technology (*i.e.*, diagnosis and treatment criteria and processes) and health delivery systems (*e.g.*, Medicare, Medicaid, HMOs, etc.). Salary is negotiable up to approximately $15,500. Please send all inquiries and resumes to the above.

Indianapolis Law School, 735 West New York St., Indianapolis, Ind. 46202. (Attn: Professor Jeremy S. Williams.)

The Indianapolis Law School invites applications for a full-time clinical legal education instructor. Any appoint-

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ment will be made at a rank and salary commensurate with the qualifications of the applicant selected. Selection will be made without regard to race, color, creed or national origin. Applicants should write, enclosing a full resume, to the above.

Land of Lincoln Legal Assistance Foundation, Inc., 234 Collinsville Ave., East St. Louis, Ill. 66201. (Attn: Martin Mendelsohn, Executive Director.)

The Land of Lincoln Legal Assistance Foundation, Inc., a regional Legal Services program serving downstate Illinois with a staff of 24 attorneys and seven area offices (Champaign, East St. Louis, Alton, Cairo, Danville, Centralia, and Carbondale), is seeking several aggressive and imaginative attorneys for the positions of directing attorney and staff attorney. The directing attorney should have two or three years experience, preferably with a background of poverty law. Salary is commensurate with ability and experience. Inquiries and resumes should be forwarded immediately to the above.

The Legal Aid Bureau of New Britain, Inc., 111 Franklin Square, New Britain, Conn. 06051, (203) 225-8678. (Attn: Robert G. Fracasso, Executive Director.)

An opening for executive director exists in this project. The program serves an area having a population of 90,000 with a staff comprised of one staff attorney, one paralegal and two office personnel. Minimum of three years legal experience is required; poverty law background is highly desirable. Salary depends upon qualifications and experience. Resumes should be sent to the above address.

Legal Referral Bureau of Lake County, Inc., 11 South County St., Waukegan, Ill. 60085, (312) 662-6925. (Attn: Gary L. Schlesinger, Staff Attorney.)

This office is currently in need of two staff attorneys exhibiting a special interest in the field of poverty law and, preferably, having one to two years experience in the general practice of law. Admission to the Illnois bar is a necessity as our need is immediate. The salary range is negotiable, commensurate with experience and background. All inquires should be made by letter, to the above, enclosing a resume and an annual salary requirement.

Legal Services for Laramie County, Inc., 1810 Pioneer Ave., Cheyenne, Wyo. 82001, (307) 634-1566.

Laramie County Legal Services is currently seeking applicants for directing attorney and staff attorney. Beginning salaries negotiable based on experience ($12,000 to $14,000 director) and ($9,500 to $10,500 staff attorney). Attorneys should be a member of the Wyoming bar or in a position to become a member. Litigation and administrative experience is desired for the position of directing attorney. Interested persons should immediately direct all inquiries and applications to the above.

MFY Legal Services, Inc., 214 East Second St., New York, N.Y. 10009, (212) 777-5250. (Attn: George C. Stewart, Director.)

MFY Legal Services seeks a managing attorney for its neighborhood office in Manhattan. Duties include supervision of three to six lawyers; administration of the office; and some personal caseload. Only applicants admitted to practice in New York with four or more years experience, including some poverty law work, will be considered. Salary is approximately $18,000. Send resumes to the above.

Micronesian Legal Services Corporation, P.O. Box 826, Saipan, Mariana Islands 96950. Cable: MICROLEX (Attn: Theodore Mitchell, Executive Director).

MLSC has a few openings for staff attorneys in its district offices. The program maintains offices on Saipan in the Mariana Islands as well as district offices to serve the Yap Islands, Palau Islands, Truk Islands, Ponape Islands, and Marshall Islands. Micronesia is presently governed by the United States Government under a trusteeship agreement with the United Nations.

MLSC commenced operations about two years ago, and has a thriving caseload ranging from local problems which involve Micronesian customary law to major litigation against the Department of Defense or Interior.

Salaries range upwards from $11,000 per year. MLSC has a total staff of about 50 people, including 15 attorneys and 12 Micronesian counselors.

Contrary to the popular American myth, adjusting to life on a tropical island has many stresses. But once the adjustment is made, living and working in Micronesia can be a most important experience. We are looking for topnotch attorneys who, together with their wives or husbands, are not utterly dependent upon urban amenities for their well being. An absolute minimum commitment of two years is mandatory. We prefer applicants with two or more years experience in a neighborhood office and in the federal court. Admission to at least one state bar is required. Interested applicants should apply immediately by sending a resume and example of written work. Interviews will be arranged in the United States in the near future.

National Association of Attorneys General, 320 West Jones St., Raleigh, N.C. 27603, (919) 834-3386. (Attn: Patton G. Wheeler, Executive Director.)

NAAG has received a one-year LEAA grant which will fund a member of our staff to work on consumer protection matters. The position would be in Raleigh, and the salary depends on qualifications and experience. The person must be an attorney, but need not be a member of the North Carolina bar. He would serve as coordinator for the NAAG Consumer Protection Committee and publish a periodic newsletter, which would be distributed to state attorneys general's offices.

Ohio Migrant Legal Action Program, One Stranahan Square, Toledo, Ohio. (Attn: Earl Staelin.)

The Ohio Migrant Legal Action Program is accepting applications for the positions of executive director and staff attorney. The director will supervise approximately ten

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employees including staff attorneys, administrative and clerical personnel. He will be responsible for the overall administration, operation, and supervision of the program. In conjunction with the program board and advisory committees, he will establish policy and guidelines for conduct of the program; develop strategies and plans for the representation of migrant farmworkers; develop and administer personnel policies, funding proposals, hiring, and staff training.

The director will also supervise and participate in the litigation of affirmative actions on behalf of the client community. Candidates for the position should have significant experience in the general practice of law, including experience in the trial and appeal of complex legal issues. The candidate's previous experience should evidence an ability to provide effective leadership in terms of client advocacy. Salary is negotiable, conditioned upon experience.

Positions are also available for two staff attorneys. Resumes and inquiries should be directed to the above.

Pennsylvania Legal Services Center, 130 Walnut St., Harrisburg, Pa. 17101, (717) 236-9487. (Attn: Gerald Kaufman, Executive Director.)

Pennsylvania Legal Services Center, a recently created statewide backup center located in the state capital is seeking applicants for staff attorney positions who demonstrate initiative and sensitivity to the problems of the poor. The Center, primarily funded by HEW, provides backup services to 20 separate Legal Services programs; conducts an active administrative and legislative advocacy program; funds existing local Legal Services programs within the state; develops new local programs primarily in rural areas; and provides technical assistance and training services to local programs. There are vacancies for staff attorneys to perform all of the above functions.

Requirements include a minimum of two years Legal Services experience. Preference will be given to applicants interested in providing backup service who are aggressive and demonstrate an ability to develop and pursue law reform issues by working with existing local Legal Services programs. Admission to the bar of any state allows practice in Pennsylvania for 2½ years prior to admission to Pennsylvania courts. Salary is negotiable based on experience. Inquiries and resumes should be forwarded to the above address.

Pikes Peak Legal Services, 104 South Tejon, Suite 300, Colorado Springs, Colo. 80902, (303) 471-0380. (Attn: Phillip Kendall.)

Pikes Peak Legal Services is looking for a director. The program serves a two county area which includes Colorado Springs, the fastest growing city in the United States. The director is in charge of supervising three staff attorneys, two VISTA attorneys and one Smith Fellow as well as handling a limited caseload. Legal experience is a prerequisite and admission to the Colorado bar is highly desirable. The position is available for persons interested in aggressive law reform and total commitment to Legal Services program. Salary range from $12,000 to $15,000 annually. Please forward resumes to the above.

Rock Hill Legal Aid Office, P.O. Box 2891 CRS, Rock Hill, S.C. 29730. (Attn: Legal Aid Committee.)

Attorney wanted as director of Rock Hill Legal Aid Office, Rock Hill, S.C. Approximately two years general law experience is required. Salary is approximately $14,000. Interested persons please send resumes to the above.

Southeast Legal Aid Center, 1331 East Compton Blvd., Compton, Cal. 90221, (213) 638-6194.

This project is seeking an executive director who will have complete administrative responsibility for the program according to the policies determined by the Board of Directors. Broad administrative and professional experience, with a special interest in the problems of poverty, is required along with a minimum of five years experience and membership in the California bar. Resumes should be submitted immediately to the above. Applicants must be available for interview in Compton on 48 hours notice.

LEGAL SERVICES NATIONAL RESEARCH AND TECHNICAL ASSISTANCE CENTERS

Center on Social Welfare Policy & Law
25 West 43rd Street, 12th Floor
New York, New York 10036
(212) 354-7670

Harvard Center for Law & Education
61 Kirkland Street
Cambridge, Massachusetts 02138
(617) 495-4666

Legal Action Support Project
Bureau of Social Science Research
1990 "M" Street, NW
Washington, D.C. 20036
(202) 223-4300

Legal Services for the Elderly Poor
2095 Broadway
New York, New York 10023
(212) 595-1340

Legal Services Training Program
Columbus School of Law, Catholic University of America
Washington, D.C. 20017
(202) 832-3900

Migrant Legal Action Program
1820 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 785-2475

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National Clearinghouse for Legal Services
Northwestern University School of Law
710 North Lake Shore Drive-Mezzanine Floor
Chicago, Illinois 60611
(312) 943-2866

National Consumer Law Center, Inc.
One Court Street
Boston, Massachusetts 02108
(617) 523-8010

National Employment Law Project
423 West 118th Street
New York, New York 10027
(212) 866-8591

National Health Law Program
University of California
2477 Law Building, 405 Hilgard Avenue
Los Angeles, California 90024
(213) 825-7601

National Housing & Economic Development Law Project
Earl Warren Legal Institute
University of California
Berkeley, California 94720
(415) 642-2826

National Juvenile Law Center*
St. Louis University School of Law
3642 Lindell Boulevard
St. Louis, Missouri 63108
(314) 533-8868

National Paralegal Institute
2000 "P" Street, NW, Suite 600
Washington D.C. 20036
(202) 872-0655

National Resource Center on Correctional Law and Legal Services
1705 DeSales St., NW
Washington, D.C. 20036
(202) 293-1712

National Senior Citizens Law Center
1709 West 8th Street
Los Angeles, California 90017
(213) 483-1491

Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Technical Assistance Project
National Legal Aid & Defender Association
1601 Connecticut Avenue, NW, Suite 777
Washington, D.C. 20009
(202) 462-4254

Youth Law Center*
Western States Project
795 Turk Street
San Francisco, California 94102
(415) 474-5865

*Juvenile matters for Alaska, Arizona, California, Hawaii, Idaho, Nevada, New Mexico, Oklahoma, Oregon, Texas, Utah and Washington are handled by the Youth Law Center. The National Juvenile Law Center serves the remaining states.

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