ARTICLES DIGEST

Freeman, Legitimizing Racial Discrimination Through Anti-discrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978).

In this article the author discusses nearly twenty-five years of Supreme Court decisions dealing with federal constitutional and statutory anti-discrimination law. He focuses on the legal doctrine developed in these decisions and emphasizes the maleability of this doctrine. The Court's manipulation is further shown to legitimize existing social structure and class relationships.

The author asserts that the concept of racial discrimination can be approached from the perspective of either its perpetrator or its victim. The "perpetrator perspective" depicts racial discrimination as actions, or series of actions, taken by the perpetrator against the victim. Thus, this perspective provides for a remedy that simply neutralizes the specific effects of the violation.

On the other hand, the "victim perspective" identifies racial discrimination by looking at the objective conditions (e.g., lack of jobs, money or housing) that exist and at the consciousness associated with these conditions (e.g., lack of choice or lack of human individuality). Because racial discrimination is not solved until the conditions associated with it are eliminated, the victim perspective dictates remedies necessitating affirmative efforts to change these conditions.

The author develops a timeline of Supreme Court decisions to illustrate the development of modern anti-discrimination law. He identifies the years, 1954-1965, as "the era of uncertainty or the jurisprudence of violations," and presents *Brown v. Board of Education*[1] as its representative Supreme Court case. His analysis of *Brown* shows how the Court chose to utilize the "perpetrator perspective" while applying various "meanings" of the equal protection clause. This approach by the Supreme Court reveals the fact that they were concerned more with identifying violations rather than imposing affirmative actions to remedy them.

The years, 1965-1974, are described by the author as "the era of contradiction or the jurisprudence of remedy." He discusses Supreme Court decisions dealing with discrimination in voting, education, and employment. He shows how they are representa-

1. 347 U.S. 483 (1954).

tive of judicial activism leading to newly created expectations associated with the "victim perspective." Stressing "results" rather than "violations," the Court's decisions helped to effectuate change in the conditions endured by those affected by discriminatory practices.

Another shift in judicial philosophy is seen in the years, 1974 to the present. The author entitles these years "the era of rationalization or the jurisprudence of care." The decisions of this era illustrate how the Supreme Court has abandoned the use of affirmative remedies in dealing with discrimination. The court fails to identify poverty, powerlessness or unemployment as the by-products of racial discrimination and does not provide for the mitigation of these conditions. As a result, these Supreme Court decisions serve to systematically defeat the expectations of equality gained in the preceding years.

In conclusion, the author says that advancements made in "the era of contradiction" were subsequently frustrated by the Burger Court during "the era of rationalization." Also, the author is quick to point out that the Supreme Court cannot be autonomous from a dynamic society, so one should not regard the Burger Court as the sole villain of the afflicted classes.

Hollander, Defending the Criminal Alien in New Mexico: Tactics and Strategy to Avoid Deportation, 9 N.M.L. REV. 45 (1979).

The purpose of this article is to acquaint criminal defense attorneys with a sufficient amount of immigration law, thereby enabling them to protect the rights of aliens coming into contact with the criminal justice system. In addition to being subject to the sanctions of the criminal justice system, an alien may be subject to deportation from the United States if charged or convicted of certain crimes. This factor is critical since there is no statute of limitations on deportation.

The article delineates the types of crimes which are grounds for deportation under immigration law.[1] The three categories are: (1) crimes involving moral turpitude, (2) crimes involving narcotics, and (3) several miscellaneous crimes including prostitution, the smuggling of aliens into the United States, and certain weapons violations. Each category is treated separately, analyzing the conditions which may result in deportation and identifying the strategies and remedies to avoid deportation.

The author notes that of the three categories, crimes involving moral turpitude are by far the most common ground for de-

1. 8 U.S.C. § 1251(a) (1976).

portation; they are also the most easily remedied.[2] Offenses relating to narcotics and those in the third category are dealt with the most severely and irrationally by the immigration laws. Additionally, the remedies available in these situations are extremely limited or in some cases nonexistent.

The author suggests that in formulating a strategy the practitioner needs to keep in mind the interplay between state and federal law. Immigration matters are the subject of federal law, and whether an alien is subject to deportation is determined according to federal standards. In some cases, federal courts may look to state procedure to determine if a conviction is final; however, they are not bound by state determinations.

The reader should keep in mind that the remedies and strategies outlined in the article are tailored to fit the interplay between New Mexico and federal law. While the basic principles set forth here are applicable in all jurisdictions, the reader should investigate how his state's criminal laws affect the immigration laws. In addition, the availability of certain remedies may vary from one federal circuit or immigration district to the next.

Note, Medical Benefits Awarded to an Alien: Perez v. Health and Social Services, 9 N.M.L. REV. 89 (1979).

This note analyzes the holding and impact of the New Mexico Court of Appeals' decisions in *Perez v. Health and Social Services.*[1] In *Perez* the court reversed the Health and Social Services Department's decision that Perez was not eligible for benefits under the Special Medical Needs Act[2] because he was not a United States citizen or a lawfully admitted alien. The *Perez* court held that an illegal alien is a person and resident within the meaning of the Act and New Mexico common law since residency is defined as requiring only physical presence in the state and the intent to remain. The court additionally held that where a program is entirely state established, funded and administered without federal assistance, federal law does not preempt providing benefits to undocumented persons.

The note asserts that the impact of *Perez* is not as far reaching as the Court of Appeals suggests. Under *Perez* only those persons qualifying for the Act can receive medical benefits—a minute percentage of the undocumented alien population. Additionally,

2. *See, e.g.*, 8 U.S.C. §§ 1251(b)(1) and 1251(b)(2) (1976).

1. 91 N.M. 334, 573 P.2d 689 (1977); cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

2. N.M. Stat. Ann. 27-4-1 to 5 (1978).

under the *Perez* rationale only those persons qualifying for entirely state funded and administered programs can receive medical assistance. Because most programs are federally funded and thereby closed to undocumented persons, the impact of *Perez* in terms of providing for the health care needs of undocumented aliens in the state of New Mexico will be minimal.

The note suggests that because of their great numbers, undocumented aliens present a potentially explosive health hazard. Accordingly, both for public health and humanitarian reasons, some governmental body should accept responsibility for financing their health care. The note also points out that two bills are currently before the United States Congress which would help alleviate the problem,[3] but unfortunately both are insufficient. The author also predicts that a bill will be introduced in the 1979 New Mexico Legislature[4] to overrule *Perez*, thus possibly placing the major burden of financing health care on those least likely to afford the cost—the counties.

Note, Race as an Employment Qualification to Meet Police Department Operational Needs, 54 N.Y.U. L. REV. 413 (1979).

Many cities face a problem of minority hostility towards law enforcement agencies which in many cases hampers effective police work. This note addresses the challenges cities will face if they try to adopt a system of race-conscious hiring in an attempt to alleviate this hostility and improve police effectiveness.

The major problem with race-conscious hiring, as the note points out, is that it could evoke a response by white applicants who could claim that such a program: (1) violates the equal protection clause of the Constitution by discriminating on the basis of race in the distribution of government jobs, or (2) that it violates Title VII of the Civil Rights Act of 1964,[1] which expressly prohibits employment decisions based on race.

The note analyzes various Supreme Court opinions dealing with the equal protection clause and concludes that although the government interest in effective law enforcement may not be sufficient to justify race-conscious hiring, such a program could withstand an equal protection objection. Race-conscious hiring is constitutional, the note argues, if it can be established as a "necessary means to remedy past discrimination" if (1) the city invoking

3. H.R. 2400, H.R. 3697, H.R. 5031, H.R. 5977, H.R. 6440 (identical bills), 95th Cong., 1st Sess. (1977) reproduced in *Hearings on H.R. 2400*.

4. H.R. 8713, 94th Cong., 1st Sess. (1975).

1. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

the program has discriminated against minorities in the distribution of government services, and (2) such discrimination has led to a condition of racial hostility that cannot be alleviated by merely halting the discriminatory treatment.

The author feels, however, that race-conscious hiring cannot withstand challenges based on Title VII of the Civil Rights Act. Therefore, the author proposes an amendment to Title VII. This amendment would allow race-conscious hiring, but only in order to improve essential police functions when law enforcement ineffectiveness is a product of past discrimination by the city adopting this solution.

Simson, Abortion, Poverty, and Equal Protection of the Law, 13 GA. L. REV. 505 (1979).

This Comment compares the United States Supreme Court decision in *Roe v. Wade*,[1] with the rationale in *Maher v. Roe*.[2] The Court in *Roe v. Wade* invalidated Texas' criminal abortion statute and held that state laws which prohibit abortions before the fetus becomes viable violated the due process clause of the fourteenth amendment. In *Maher v. Roe*, the Court confirmed the constitutionality of the Connecticut Welfare regulations[3] that fund childbirth, but do not pay for abortions unless certified "medically necessary" by a physician. The author argues that the two decisions are inconsistent and concludes that the issue in *Maher v. Roe* had already been decided in *Roe v. Wade* such that the welfare scheme upheld in *Maher v. Roe*, as well as similar state and federal laws, violate the equal protection clause of the fourteenth amendment.

The Comment first characterizes the fundamental interest recognized in *Roe v. Wade* as the choice between abortion or childbirth without state interference. The Comment then notes that when the state funds childbirth, but not abortion, indigents are forced to opt for childbirth. It cites Supreme Court cases which have held that states burden fundamental interests involving freedom of choice by threatening to withhold or withdraw discretionary benefits unless a person exercises a constitutionally protected option in a certain way.

The second part of the article focuses on the "two tier" equal protection analysis of the constitutionality of laws which treat

1. 410 U.S. 113 (1973).
2. 432 U.S. 464 (1977).
3. *See* Conn. Welfare Dep't, Public Assistance Program Manual vol. 3, ch. III, 275 (1975).

people differently with regard to a fundamental interest. The author maintains that an analysis of the Burger Court's equal protection cases reveals that the Court has, in fact, used a less rigid methodology. He contends that the "two tier" test is insensitive to the differences between the types of discriminatory effects as opposed to the types of justification offered by the state for treating some persons differently. The author proposes a more flexible balancing test which balances the nature of the state's particular interest with the magnitude of the disadvantage suffered and the relationship between these two interests. The greater the disadvantage, the stronger the relationship must be to the more compelling state interest.

The final section uses this analysis to re-evaluate *Maher v. Roe.* First, the interest of indigent women in being able to choose an abortion is characterized as significant. The author states, "[E]ven if one assumes that the states' uncompelling interest in protecting potential life is significant, the relationship between the means and the ends must be necessary for the state's justification to offset the significant disadvantage experienced as to a fundamental interest." The author maintains that in this situation, the relationship between the means and the ends is not necessary. He outlines alternatives which better serve that interest (*e.g.*, education, birth control, etc.). Thus, he maintains that *Maher v. Roe* was incorrectly decided.

The author concludes that if his analysis of *Maher v. Roe* is correct, the issue of non-discriminatory funding of abortions had already been decided in *Roe v. Wade*, four years earlier.[4]

4. Simson, *supra* at 513.