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JUDGE KENNEDY'S RECORD

The Supreme Court Watch Project's
Analysis of the Judicial Opinions of
Judge Anthony M. Kennedy

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JUDGE KENNEDY'S RECORD

INTRODUCTION

The record of Supreme Court nominee Anthony M. Kennedy fails to demonstrate a forceful commitment to civil liberties and civil rights. The Nation Institute, a foundation dedicated to protecting constitutional rights, is deeply concerned by certain aspects of Judge Kennedy's record, particularly in the area of discrimination, where his decisions reveal insensitivity to women and minorities.

We have studied Judge Kennedy's decisions in eight areas: (1) employment discrimination; (2) discrimination in education, housing, voting rights and criminal law; (3) the right to privacy; (4) criminal procedure; (5) capital punishment; (6) freedom of speech, freedom of the press, and the Freedom of Information Act; (7) freedom of religion; and (8) prisoners' rights.

The record in each of these areas leaves uncertain Judge Kennedy's willingness to protect constitutional rights and freedoms. While Judge Kennedy at times decides in favor of protecting constitutional rights, he does not do so consistently. Based on our study, Judge Kennedy's record in civil rights and civil liberties appears undistinguished at best.

Judge Kennedy does not bring a comprehensive philosophy to his decision-making, but rather employs a

case-by-case method. In his usually short opinions, he reveals little of his thinking or general approach to the area of law at issue. Perhaps Judge Kennedy writes in this manner because he feels constrained by his role as an appellate judge. As a Supreme Court Justice, however, Judge Kennedy may not feel similarly constrained.

For all these reasons, it is imperative that the Senate Judiciary Committee carefully explore the nominee's judicial philosophy and those cases where he has limited constitutional protections. To this end, a list of suggested questions is annexed to this Introduction.

Depending on what is learned, the Senate may have to decide whether an undistinguished record in the areas of civil liberties and civil rights qualifies a nominee to serve on the Supreme Court, the guardian of those liberties and rights.

A summary of Judge Kennedy's views and highlights of some of his more disturbing decisions in the eight areas studied follows:

A. Employment Discrimination

Judge Kennedy's worst record is in the discrimination area. Judge Kennedy's opinions indicate little

sensitivity to the victims of employment discrimination, and even less understanding of the serious consequences of such discrimination in lost wages, benefits, and opportunities.

Judge Kennedy drastically weakens enforcement of the discrimination laws by unduly narrow interpretations and by denying access to the courts based on overly strict application of procedural rules.

One example: Judge Kennedy joined a dissent that would excuse an employer's gender discrimination based on customers' preferences.[1/] Such a rule would open up a loophole that would eviscerate the discrimination laws. In this case, the dissent stated that airline passengers' perceived preferences for slender stewardesses might permit the airline to impose strict weight requirements on women but not on men. The majority of the court rejected this view.

In addition, Judge Kennedy has considered two issues in the forefront of discrimination law -- comparable worth[2/] and homosexual rights[3/] -- and soundly rejected claims in both areas.

1/ Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983).

2/ AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985).

(Continued)

Moreover, Judge Kennedy failed to resign from the exclusive Olympic Club in San Francisco until his name was floated as a Supreme Court nominee. The Club bars membership by women and previously barred non-whites. Judge Kennedy also recently resigned from the Del Paso Country Club of Sacramento, which has no non-white members out of 670 members.

Judge Kennedy retained his membership in the Olympic Club despite a 1984 ABA Code of Judicial Conduct canon stating that it is inappropriate for judges to hold memberships in private clubs that practice invidious discrimination. Judge Kennedy's club membership indicates a lack of understanding for those whose opportunities, in a land of opportunity, are limited by discrimination.

B. Discrimination in Education, Housing, Voting Rights and Criminal Law

Outside the employment context, Judge Kennedy continues to resist rigorous enforcement of the discrimination laws. His record indicates a lack of zeal in remedying the profound inequalities between the races and sexes in our society.

(Continued)

3/ Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 454 U.S. 855 and 452 U.S. 905 (1981).

Judge Kennedy too readily applies very narrow interpretations of procedural rules to deny discrimination claimants access to the courts. In one case, Judge Kennedy denied access to the courts to an organization working to eliminate race discrimination in housing.[4/] The organization sued real estate brokers for racial steering -- directing prospective home buyers only to neighborhoods of their own race. That practice was uncovered by members of the organization posing as home buyers. Judge Kennedy held that the organization had no standing to sue despite their allegations of deprivation "of the important social and professional benefits of living in an integrated community."[5/] This unduly narrow construction of the standing requirements was rejected by the United States Supreme Court in an opinion by Justice Powell.[6/] Hence Judge Kennedy interpreted the discrimination laws more narrowly than Justice Powell who he has been named to replace.

In addition to narrow procedural rulings, Judge Kennedy has exhibited insensitivity to the victims of

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4/ TOPIC v. Circle Realty, 532 F.2d 1273, 1274 (9th Cir.), cert. denied, 429 U.S. 859 (1976).

5/ Id. at 1274.

6/ Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

discrimination when denying relief on the merits of discrimination claims.

For example, Judge Kennedy affirmed a grant of summary judgment against Mexican-Americans who alleged that their city's at-large election system for the city council violated their constitutional right to vote.[7/] The Mexican-Americans claimed: that no polling places were located in the private homes of Mexican-Americans, but were often in homes of white people; that Mexican-American poll watchers were harassed; and that despite Mexican-Americans' comprising over fifty percent of the population, very few Mexican-Americans ever were elected. Despite these allegations, Judge Kennedy's concurrence denied the Mexican-Americans the opportunity to present their complaint at a trial.

In the same case, the lower court had ruled against the Mexican-Americans. Among the insulting statements from the lower court was the conclusion that, "[t]he failure of Mexican-American voters to elect Mexican-American candidates . . . is attributable, largely, to apathy of the Mexican-American voters."[8/] While Judge Kennedy's

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7/ Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980).

8/ Id. at 1273.

concurrence stated that certain of the lower court's conclusions "remain troubling", he affirmed this decision of the lower court.

Indeed, Judge Kennedy has shown little enthusiasm for enforcing the discrimination laws. While he often gives the benefit of the doubt to the person accused of engaging in discrimination, he is not similarly generous to the victims of discrimination. For example, in a school desegregation case, where the school board had previously been found to have practiced intentional race discrimination, Judge Kennedy decided to relinquish court oversight of the schools.[9/] Judge Kennedy accepted the school board's resolution that it would pursue affirmative action, and rejected evidence indicating that the school board would reinstate neighborhood school policies that would worsen segregation.

Judge Kennedy's acceptance of the resolution adopted by the school board previously found liable for intentional discrimination indicates a lack of conviction in enforcing the discrimination laws as a remedy for the discrimination that is entrenched in parts of our society.

9/ Spangler v. Pasadena City Board of Education, 611 F.2d 1239 (9th Cir. 1979).

Moreover, Judge Kennedy refused to depart from gender stereotypes by imposing a harsher sentence for forcible sodomy on a man than for rape of a woman.[10/] Judge Kennedy denied an equal protection challenge to the forcible sodomy sentence. He stated that the two crimes could be distinguished based on "traditions and community values that have prevailed for centuries," without recognizing that the equal protection clause prohibits gender discrimination despite contrary community values.

In all, Judge Kennedy exhibits a lack of commitment to enforcing the discrimination laws. He interprets the laws unduly narrowly, limiting their ability to remedy discrimination.

C. Privacy

Judge Kennedy's view on the right to privacy is difficult to discern.

On the one hand he recognizes a generation of Supreme Court privacy decisions as precedents, including Roe

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10/ United States v. Smith, 574 F.2d 988, (9th Cir.), cert. denied, 439 U.S. 852, (1978).

v. Wade and Griswold v. Connecticut. However, he does not comment on these precedents.[11/]

On the other hand, in the same case in which he cites these Supreme Court precedents, he denied the plaintiffs' privacy claims through a distorted method of reasoning under privacy law. In that case, Judge Kennedy upheld the Navy's discharge of personnel who engaged in homosexual activity. This holding was later supported by the Supreme Court in an unrelated case. But Judge Kennedy's method of reasoning ducked the threshold question of whether there existed a fundamental right to privacy that encompassed homosexual activity. Generally, this would be the first step in any privacy analysis. In Beller, Judge Kennedy relies heavily on the military context of the case. Therefore, whether his refusal to consider the threshold question of a right to privacy portends a negative view of privacy rights is difficult to predict.

Judge Kennedy was similarly cryptic about his views on privacy in a speech he gave at Stanford University in 1986. There, he noted that certain "fundamental rights"

11/ Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 454 U.S. 855 and 452 U.S. 905 (1981).

including privacy "should exist in any just society."[12/] But he also said that not all of these rights are enforceable under the Constitution. Once again, Judge Kennedy simply casts doubt on his willingness to recognize a right to privacy without clearly stating his views.

D. Criminal Procedure

There are serious questions regarding Judge Kennedy's record in criminal procedure. For example, Judge Kennedy has occasionally expanded exceptions to the exclusion rule. This rule excludes from criminal trials illegally obtained evidence. He has generally respected the principles of Miranda that require that a criminal suspect be informed of his constitutional rights but only to strictly enforce the literal warnings that the Supreme Court requires. He has also rejected some meaningful claims based on the double jeopardy rule, the right to counsel, and the right to face one's accusors.

In the searches and seizures area, Judge Kennedy has expanded the Supreme Court's recent decision[13/] that

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12/ Speech by Anthony M. Kennedy to the Canadian Institute for Advanced Legal Studies, The Stanford Lectures, "Unenumerated Rights and the Dictates of Judicial Restraint" (Unpublished, Stanford University, 1986).

13/ United States v. Leon, 468 U.S. 897 (1984).

created a narrow "good faith" exception to the exclusionary rule.[14/] He held that the government may use evidence that it accepted on the representation of a foreign government the evidence was untainted when in fact it had been obtained illegally. He has also expressed frustration with what he terms the "rigidities of the exclusionary rule"[15/] and its "iron logic."[16/] On the other hand, when Judge Kennedy believes the police conduct has been egregious, as in one case where a policeman paid a child $5 to reveal where his parent kept illegal drugs, Judge Kennedy has forcefully argued application of the exclusionary rule.[17/]

Whether Judge Kennedy will continue to carve out exceptions to the exclusionary rule should be asked of him before any confirmation vote.

14/ United States v. Peterson, 812 F.2d 486 (9th Cir. 1987).

15/ United States v. Penn, 647 F.2d 876, 888 (9th Cir.) (en banc) (Kennedy, J., dissenting), cert. denied, 449 U.S. 903 (1980).

16/ Satchell v. Cardwell, 653 F.2d 408, 414 (9th Cir. 1981) (Kennedy, J., concurring), cert. denied, 454 U.S. 1154 (1982).

17/ Penn, 647 F.2d at 888 (Kennedy, J., dissenting).

E. Freedom of Speech, Freedom of the Press and FOIA (The Freedom of Information Act)

In the First Amendment area, including freedom of speech and press, Judge Kennedy has a mixed record. At times he has supported First Amendment freedoms with strong and emotional language. At other times he inexplicably denies First Amendment rights placing undue restrictions on the rights. No overriding philosophy seems to reconcile these conflicting viewpoints.

As an example of the dichotomy, in one case Judge Kennedy upheld the broadcasting on television of a film about a person convicted of securities fraud without prior judicial review.[18/] The convict had argued that the film would jeopardize his release on parole. Judge Kennedy overturned the district court's prior restraint on the film stating: "A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech."[19/]

On the other side, Judge Kennedy joined in an opinion, now vacated by the Supreme Court, upholding the firing of a homosexual for being active in the Seattle Gay Alliance, displaying homosexual advertisements in his auto-

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18/ Goldblum v. National Broadcasting Corp., 584 F.2d 904 (9th Cir. 1978).

19/ Id. at 907.

mobile window and publicly indicating his homosexuality.[20/] Judge Kennedy declined to protect the employee's claimed rights of association and expression.

F. Freedom of Religion

Judge Kennedy has participated in very few cases addressing issues arising under the religion clauses of the First Amendment. In deciding these cases, he has relied heavily on Supreme Court precedents. What he will do if confirmed as a Supreme Court Justice cannot be determined.

G. Prisoners' Rights

Similarly, Judge Kennedy has decided few cases involving prisoners' rights. He has supported prisoners' claims when presented with facts clearly indicating official misconduct, but appears unwilling to expand legal doctrines to allow prisoners greater rights than those previously established.

* * *

We have highlighted some of the more troubling aspects of Judge Kennedy's record. While we have deep con-

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20/ Singer v. United States Civil Service Commission, 429 F.2d 247, vacated at request of Solicitor General, 429 U.S. 1034 (1976).

cerns about his opinions in several areas, particularly discrimination, in many ways he is still a question mark. For this reason, it is particularly important that the Senate take the opportunity of the hearings to carefully question Judge Kennedy.

Suggested questions follow.

Twenty Questions the Senate Should Ask

Discrimination in Employment

1. Do customers' gender preferences excuse employment discrimination?

In Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983), Judge Kennedy joined a dissent stating that airline passengers' perceived preferences for slender flight attendants might permit the airline to impose strict weight requirements on women but not on men. A majority of the Ninth Circuit rejected this view.

2. Under what circumstances, if ever, is affirmative action, including hiring goals, a proper remedy for discrimination in employment?

3. Are the courts powerless to remedy wage disparities between men and women in government jobs requiring comparable education, skills, and effort?

In AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), Judge Kennedy denied relief to women employees with low wages compared to men, based on both the controversial comparable worth theory and traditional disparate impact analysis.

Discrimination in Housing

4. Should access to the courts be granted freely to those with complaints of discrimination?

In TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir.), cert. denied, 429 U.S. 859 (1976), Judge Kennedy decided that investigators who uncovered real estate brokers engaging in racial steering practices -- steering prospective home buyers to communities of their own race -- did not have standing to sue. This narrow interpretation was expressly rejected by the Supreme Court in another case in an opinion written by Justice Powell. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

Discrimination by Private Clubs

5. Why did Judge Kennedy resign from the Olympic Club in San Francisco, which bars women and which previously barred blacks, only after his name was floated as a possible Supreme Court nominee?

The ABA Code of Judicial Conduct, Canon 2 commentary (1984) states that it is inappropriate for a judge to belong to a private club that practices invidious discrimination. Does Judge Kennedy think that the Olympic Club practices invidious discrimination?

Discrimination in Education

6. When racially segregated neighborhood schools are caused by racially segregated neighborhoods, are the courts powerless to intervene?

In Spangler v. Pasadena City Board of Education, 611 F.2d 1239 (9th Cir. 1979), Judge Kennedy concurred in the termination of court supervision of a school board that had been found liable for intentional race discrimination. Judge Kennedy said that neutral school assignment systems in already racially segregated neighborhoods may not represent illegal discrimination by the school board.

7. Under what circumstances, if ever, is school busing a proper remedy for racially segregated schools?

Discrimination in Criminal Law

8. Is the crime of rape of a woman less reprehensible than the crime of forcible sodomy of a man?

In United States v. Smith, 574 F.2d 988 (9th Cir.), cert. denied sub nom. Williams v. United States, 439 U.S. 852 (1978), Judge Kennedy stated that a harsher sentence could be imposed for forcible sodomy than for rape based on traditions and community attitudes. He found no equal protection violation for the different sentences.

Right of Privacy

9. Is there a constitutional right of privacy that protects marriage, contraception, and procreation? What are the boundaries of any such right?

In a 1986 speech titled "Unenumerated Rights and the Dictates of Judicial Restraint," Judge Kennedy noted that certain "fundamental rights" such as privacy "should exist in any just society," but he said that not all of these rights are enforceable. What does this mean for privacy rights?

Criminal Law

10. Should the exclusionary rule, that excludes from criminal trials evidence obtained through police misconduct, be limited further?

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court created an exception to the exclusionary rule when police officers relied in good faith on a facially deficient warrant. In United States v. Peterson, 812 F.2d 486 (9th Cir. 1987), a case that had nothing to do with a deficient warrant, Judge Kennedy expanded the "good faith" exception to include situations where American officials incorrectly relied on the assertion by foreign officials that their overseas search was not illegal. How broadly does Judge Kennedy interpret the "good faith" exception? In what

additional circumstances other than a facially deficient warrant would he apply this exception?

11. Does Judge Kennedy agree with the Supreme Court's pronouncements that because death is different in its severity and finality from all other sentences, the imposition of capital punishment must be attended by procedural safeguards that might not be guaranteed by the Constitution in other contexts?

12. Should the police ever be required to supply additions to the standard Miranda warnings if a suspect's special circumstances suggest he may unknowingly waive his constitutional rights?

In United States v. Contreras, 755 F.2d 733 (9th Cir.), cert. denied, 476 U.S. 832 (1985), Judge Kennedy affirmed convictions of defendants who mistakenly thought their statements were taken under a grant of immunity.

13. What sorts of errors by criminal defense counsel suggest that he is providing less than the constitutionally required "effective assistance" of counsel?

In United States v. Medina-Verdugo, 637 F.2d 649 (9th Cir. 1980), Judge Kennedy held that "counsel need not be infallible" but only reasonably competent.

14. Should an appellate judge defer in all circumstances to a trial court's determination of effective assistance of counsel?

Judge Kennedy suggested extreme deference in Satchell v. Cardwell, 653 F.2d 408, 414 (9th Cir. 1981) (Kennedy, J., concurring), cert. denied, 454 U.S. 1154 (1982).

Freedom of Speech and Association

15. To what extent do government workers have First Amendment rights?

In Singer v. United States Civil Service Commission, 530 F.2d 247 (9th Cir. 1976), vacated, 429 U.S. 1034 (1977), Judge Kennedy joined in an opinion, later vacated by the Supreme Court, supporting the termination of a government employee for publicly asserting his homosexuality. The employee was active in the Seattle Gay Alliance, had displayed homosexual advertisements in his automobile, and publicly announced his homosexuality.

Judicial Philosophy

16. To what extent should the courts, in interpreting the Constitution, move beyond the framers' initial conceptions of its provisions to a more flexible reading of the ideals and goals it expresses? How does Judge Kennedy's philosophy in this area affect the resolution of issues faced by the Supreme Court that were beyond the contemplations of the framers?

17. To what extent should principles of federalism affect the abilities of civil rights litigants to seek redress in the federal courts?

Judge Kennedy has often advocated judicial restraint and vigorous assertion of various principles of federalism, such as abstention, that require that federal courts not hear cases in which state courts are already involved. For example, in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987), Judge Kennedy, in a concurrence, stated that federal courts should not hear this First Amendment challenge that was also litigated as a zoning dispute in the state courts. In this case, the owner of a dance club challenged zoning requirements and other state laws that would have restricted his club.

18. Does the nominee believe it would be constitutional, as some have proposed, to limit the jurisdiction of Article III courts to eliminate cases involving sexual and racial discrimination, habeus corpus, prisoner civil rights complaints, social security cases, and environmental cases with only limited possibility of review?

Religion

19. Is a short morning prayer conducted in public elementary schools constitutional?

20. To what extent must employers and unions modify their rules and methods to accommodate an employee's religious practices?

Judge Kennedy's opinion in International Association of Machinists & Aerospace Workers v. Boeing Co., Nos. 86-4345, 86-4373 (9th Cir. Nov. 27, 1987) (available Dec. 2, 1987 on LEXIS, Genfed library, Usapp file), upheld a worker's objection to paying union dues on religious grounds.

ANALYSIS OF THE RECORD

I

EMPLOYMENT DISCRIMINATION

Introduction

Judge Kennedy's judicial record on employment discrimination raises serious questions about his sensitivity toward the victims of discrimination. His opinions indicate little understanding of the serious damage done by employment discrimination -- in lost wages, lost benefits and lost opportunities. While he occasionally rules in favor of plaintiffs in employment discrimination matters, this is not generally the case.

Judge Kennedy has not developed a coherent overall philosophy regarding the employment discrimination laws, but his case-by-case approach leans toward restricting their application. Judge Kennedy's decisions have often failed to support employment discrimination claims based on unduly narrow interpretations of the laws or overly technical readings of the procedural rules.

In addition to denying discrimination claims based on unduly narrow or technical readings of the discrimination laws, when presented with a claim that requests expanding current discrimination theory, Judge Kennedy invariably denies the claim. Judge Kennedy has ruled in at least two

areas in the forefront of employment discrimination theory: comparable worth and homosexual rights. In each of these areas, he refused to extend the reach of current discrimination laws.

A. Sex and Race Discrimination in Employment

Analysis of Judge Kennedy's judicial record in employment discrimination cases shows that he frequently denies discrimination claims based on unduly restrictive interpretations or on technicalities, and that when he reaches the merits of a claim he generally rules against the plaintiff, as follows:

In Gerdom v. Continental Airlines, Inc.,[1/] a group of female flight attendants sued the airline over a policy requiring strict weight limits for female "flight hostesses," but not for male "directors of passenger service" with similar duties. The airline's policy required women who were 5 feet 2 inches tall to weigh no more than 114 pounds; an additional five pounds were permitted for each inch above that height. The flight attendants were weighed monthly, and any excess weight had to be reduced by two pounds weekly.

1/ 692 F.2d 602 (9th Cir. 1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983).

Failure to lose the requisite weight resulted in suspension, and then termination.

Judge Kennedy joined a dissent from the Ninth Circuit en banc decision holding that the airline policy was illegal sex discrimination. The court in reversing summary judgment noted that the "exclusively female classification in this case typifies the then prevailing pattern [in the 1970's] in the airline industry of restricting job opportunities and imposing special conditions on the basis of gender stereotypes."[2/] The court found that the airline's sole reason for imposing the weight restriction exclusively on the female job category was to cater to a perceived public preference for slender women. The airline never claimed that its weight policy impaired the functions of flight attendants regarding flight safety or food service. The court, following well-established law, held that customer preferences unrelated to ability to perform the job does not justify gender discrimination.[3/] Judge Kennedy joined in a dissent that disagreed, and would have remanded for a trial on the merits, stating, "the degree of customer contact with flight

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2/ Id. at 606.

3/ Id. at 604, 609.

hostesses dictated that they maintain a more attractive appearance."[4/]

The dissent's view that customer preferences can legitimize gender discrimination not only contradicted contemporary law,[5/] but would have created a loophole in the employment discrimination laws that would have eviscerated those laws. Allowing an employer to rely on customers' gender preferences, might permit employers to hire exclusively female flight attendants, secretaries, and nurses, and exclusively male pilots, doctors, and chauffeurs, with impunity. Such hiring based on gender, as opposed to individual abilities, was precisely the sort of discrimination our laws were intended to wipe out.

Further, the Gerdom decision is a good example of the integral role the courts can and should play in changing past patterns of employment discrimination. Before Gerdom, in 1971, the Fifth Circuit held that the exclusive hiring of women as flight attendants was a discriminatory employment practice.[6/] In 1973, the year following the commencement of

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4/ Id. at 614.

5/ Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

6/ Id. at 388-89.

the action in Gerdom, Continental began hiring men as well as women as flight attendants. At that time, the strict weight requirement at issue in Gerdom was abolished and replaced by a direction that weight be maintained in some "reasonable" correlation to height for both male and female flight attendants. In 1977 Continental abolished the weight requirements entirely.

Judge Kennedy failed to participate constructively as the courts worked to end the employment discrimination that was deeply entrenched in the airline industry.

Judge Kennedy's dissenting vote in Gerdom shows his willingness to accept requirements imposed on women's occupations which are unthinkable in similar male fields.

Judge Kennedy's sympathies are no greater for a lone woman attempting to break into a traditionally male occupation. Nancy Fadhl brought a Title VII sex discrimination suit when she was terminated nine weeks into her required fourteen week field training program to become a police officer. Fadhl v. City and County of San Francisco.[7/] The district court ruled in favor of Fadhl awarding her over $80,000 in damages. Judge Kennedy's review of the evidence recognized a substantial record from which discriminatory

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7/ 741 F.2d 1163 (9th Cir. 1984).

treatment could be found, including specific sexist comments and "numerical scores given to Fadhl on her daily reports [that] were lower than scores given to men whose performance was similar or worse, and that her scores at times did not correspond to the written scoring guidelines." Nonetheless, Judge Kennedy remanded the case to the district court because the district court erroneously found that Fadhl had not attended her termination hearing -- even though Judge Kennedy noted that he was "uncertain" whether this error would affect the district court's ruling.

On remand, the district court simply deleted any mention of Fadhl's presence at the hearing, and on the second appeal to a new panel of the Ninth Circuit not including Judge Kennedy, the panel affirmed the district court.[8/] While Judge Kennedy has a reputation of "sticking to the facts," here he appeared to invent a factual problem that the court below did not see as significant and then used it to disregard otherwise overwhelming evidence of deliberate discrimination.

Judge Kennedy also remanded another Title VII disparate treatment case, this one involving a Native American woman who was awarded over $60,000 in damages for

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8/ 804 F.2d 1097 (9th Cir. 1986) (per curiam).

discrimination in job promotions and harassment based on her race and sex. In White v. Washington Public Power Supply System,[9/] Judge Kennedy wrote an opinion remanding the action and ordering a new trial in part because the district court's findings of fact and conclusions of law required too high a burden of proof from the defendants in their rebuttal case, although the district court's oral decision applied the correct burden of proof.[10/] While this holding could have been dispositive, Judge Kennedy also relied in part on his view of the weakness of plaintiff's factual case. As he wrote, "[t]he trial court's finding of discrimination was tainted not only by the application of the incorrect burden of proof, but also by the use of dubious factual premises."[11/]

Judge Kennedy stepped beyond the proper role of an appellate court by indicating his view of the facts, particularly his view of the lack of credibility of White's expert witness based solely on this expert having once complained to the Equal Employment Opportunity Commission over alleged discriminatory treatment when rejected for a job by WPPSS.

9/ 692 F.2d 1286 (9th Cir. 1982).

10/ Id. at 1289 n.1.

11/ Id. at 1289.

The weight to be given factual evidence, and in particular the credibility of witnesses, are issues traditionally within the province of the trial court. By commenting on the facts in this way, Judge Kennedy usurped the trial court's prerogative.

Further, Judge Kennedy's doubt regarding the factual basis of White's case, along with an error in a legal technicality, led him to remand the action. Here again, as in Fadhl, Judge Kennedy stretched to find a reason to believe that the employer did not discriminate.

In addition, White is noteworthy because Judge Kennedy goes on to comment on his view of the proper application of various discrimination laws on remand. Among other views, he writes that section 1981[12/] prohibits only race discrimination, not sex discrimination. This narrow interpretation of section 1981 has been rejected by at least one other court.[13/]

12/ 42 U.S.C. § 1981 (1982).

13/ Parmer v. National Cash Register, 346 F. Supp. 1043 (S.D. Ohio 1972), aff'd, 503 F.2d 275 (6th Cir. 1974); see also, Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1974).

In Laborde v. Regents of University of California,[14/] Judge Kennedy joined a majority opinion affirming the dismissal of a discrimination claim in which the defendant was not held to such an exacting standard as the plaintiffs in White and Fadhl. Alice Laborde, a tenured assistant professor of French and Italian at the University of California at Irvine, was denied a promotion to full professorship on the ground of "inadequate scholarship."[15/] The panel denied her claim of discrimination despite recognizing her impressive number of scholarly publications as well as the "many favorable comments" in her academic file. The panel also noted that Laborde made out a prima facie showing of discriminatory treatment, including showing that "men with similar qualifications have been promoted to full professor."[16/] Nonetheless, the majority failed to find an error necessary for reversal.

Judge Ferguson of the Ninth Circuit, dissenting from a denial of an en banc vote, lambasted the panel for failing to find discrimination:

14/ 686 F.2d 715 (9th Cir. 1982), cert. denied, 459 U.S. 1173 (1983).

15/ Id. at 717.

16/ Id.

> The panel presents the strongest case possible that Alice Laborde is the victim of invidious sex discrimination.
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> The opinion states in clear language that men with qualifications similar to hers have been promoted to full professor positions.
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> Yet the opinion concludes that she is not entitled to promotion because she failed to meet the University's standards for scholarship and research.
>
> The logical conclusion of that analysis is that men who do not meet the standards of scholarship and research will be promoted but women will not unless they meet the standards. Title VII prohibits that type of discrimination.[17/]

Judge Kennedy also joined in the majority in Sengupta v. Morrison-Knudsen Co.[18/] that rejected a claim of race discrimination under a Title VII disparate impact theory. Sengupta had worked as a senior engineer on a shale oil project in a 28-person department of large company. Adverse economic conditions forced the company to lay off a number of workers. Of the 5 employees laid off in Sengupta's unit, 4 were black.

The Sengupta court held, affirming a grant of summary judgment, that the appropriate group to use for statistically proving a prima facie case of discrimination was not plaintiff's 28-member department but rather all

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17/ Id. at 720.

18/ 804 F.2d 1072 (9th Cir. 1986).

281 employees in this division of the company. This holding precluded Sengupta from requiring defendant to proffer business reasons for the discrimination and from the opportunity to rebut those reasons. A more generous interpretation of the discrimination laws might have led to a different result in this case. While 28 workers is a small group, 4 out of 5 lay-offs of blacks is a suspiciously high enough proportion perhaps to warrant requiring the employer to offer a neutral explanation for this apparently discriminating act.

In several discrimination cases where the issue was whether complaints were timely filed in the district court, Judge Kennedy has ruled against the plaintiff. Koucky v. Department of the Navy[19/] (handicapped former federal employee, required to file complaint within 30 days of receipt of negative EEOC decision and name head of agency in suit, had suit dismissed because he filed 5 days after deadline); Equal Employment Opportunity Commission v. Alioto Fish Co.[20/] (dismissing case despite a finding of a pattern of continuous discrimination in restaurant, because defendant was prejudiced due to 62-month lapse between time complaint filed with EEOC and when EEOC filed complaint in district

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19/ 820 F.2d 300 (9th Cir. 1987).

20/ 623 F.2d 86 (9th Cir. 1980).

court); Revis v. Laird[21/] (no retroactive application of 1972 congressional amendments extending Title VII administrative and judicial remedies to federal employees). But see Lynn v. Western Gillette, Inc.[22/] (ninety day period to file Title VII complaint in federal court begins to run from day of receipt of Right to Sue letter, not from earlier date when EEOC informally tells party that conciliation efforts with employer have failed). Again, these cases seem to show a pattern of using technical legal devices to lessen the availability and enforceability of the discrimination laws.

Judge Kennedy affirmed a district court judgment holding that an employer who takes over a company may be required to abide by the terms of a consent decree entered into to correct racial discrimination by the previous employer.[23/] It should be noted, however, that the successorship doctrine is well-established in the labor law context.[24/] Without such a requirement, an employer would be

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21/ 627 F.2d 982 (9th Cir. 1980) (Judge Kennedy joined the opinion of Judge Sneed).

22/ 564 F.2d 1282 (9th Cir. 1977).

23/ Bates v. Pacific Maritime Association, 744 F.2d 705 (9th Cir. 1984).

24/ Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973); NLRB v. Hot Bagels and Donuts of Staten Island, Inc., (Continued)

able to avoid the consequences of an adverse legal finding of discrimination or a consent decree by simply selling the company.

The lack of concern for people subjected to race and sex discrimination displayed in Judge Kennedy's decisions is mirrored in his extrajudicial life. Right before his nomination to the Supreme Court, Judge Kennedy resigned from two clubs with histories of excluding blacks and women. Judge Kennedy joined The Olympic Club of San Francisco when its bylaws permitted membership to "only white male citizens." The Olympic Club dropped the whites-only rule in 1968, but no women or blacks are among the more than 4,000 current members. Judge Kennedy also resigned from the Del Paso Country Club of Sacramento. Of the 670 members, none is black.[25/]

The Commentary to Canon 2 of the American Bar Association Code of Judicial Conduct states:

> It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to

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(Continued)
622 F.2d 1113 (2d Cir. 1980); NLRB v. Winco Petroleum Co., 668 F.2d 973 (8th Cir. 1982); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974).

25/ Legal Times, Nov. 16, 1987, at 11.

> perceptions by minorities, women, and others, that the judge's impartiality is impaired.[26]

Judge Kennedy appears to have been in violation of this tenet of judicial ethics until just before his nomination to the Supreme Court.

B. New Theories of Employment Discrimination Law

Judge Kennedy seems unwilling to extend the reach of current employment discrimination laws to embrace new doctrines. Judge Kennedy has ruled in at least two areas on the forefront of employment discrimination law -- comparable worth and homosexual rights -- and in each of these areas he has denied the plaintiffs' claims.

1. Comparable Worth

Judge Kennedy has decided one landmark Title VII case, American Federation of State, County & Municipal Employees ("AFSCME") v. State of Washington.[27] In AFSCME, the first case before any Court of Appeals based on the doctrine of comparable worth, Judge Kennedy, writing for a unanimous panel of the Ninth Circuit, rejected application of

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26/ Code of Judicial Conduct Canon 2 commentary (1984).

27/ 770 F.2d 1401 (9th Cir. 1985).

the doctrine in that case but held out the possibility that it might apply in another situation. The comparable worth theory rejected by Judge Kennedy holds that government jobs requiring comparable education, skill, and effort should pay the same. This theory is an attempt to remedy the low pay that many women in traditionally female occupations receive compared to men in less skilled occupations.

In AFSCME, a class of 15,500 state employees of the State of Washington working in job categories composed of at least 70% female workers alleged sex discrimination in salaries and sought injunctive and monetary relief dating back to 1979. Plaintiffs sought relief under the theory of comparable worth, arguing that jobs "impos[ing] similar responsibilities, judgments, knowledge, skills, and working conditions" should pay similar salaries.28/

Based on reports done for the State of Washington in 1974 and updated in 1975, 1976, and 1980, it was found that there was "an average salary difference of 20 percent, favoring men over women for work of similar complexity and value. . . . The update revealed that since salary increases have been established on a percentage basis, the inequality

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28/ 578 F. Supp. 846, 862 (W.D. Wash. 1983).

gap between men's and women's salaries for similar work has now increased."[29/]

Faced with the overwhelming disparity between the salaries earned by women and those earned by men in comparable jobs, the district court noted the national interest in eliminating employment discrimination.[30/] The district court focused on the "broad remedial policy behind Title VII," quoting the Supreme Court:

> "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. S. Rep. No. 867, 88th Cong., 2d Sess., 12 (1964). We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear Congressional mandate."[31/]

Accordingly, the district court found that the wide disparity in salaries between jobs with similar skills was discriminatory and a violation of Title VII. Judge Kennedy, writing for the panel on appeal, reversed, for reasons that show the narrow view he takes of the role of discrimination laws.

29/ Id. at 862 (quoting Governor Dixy Lee Ray's Message to the Legislature, January 15, 1980).

30/ Id. at 863.

31/ Id. at 856, quoting County of Washington v. Gunther, 452 U.S. 161, 178 (1981).

Comparable worth is an admittedly new theory in search of an elusive, but noble, goal -- correcting the massive economic disparity that has historically existed, and currently exists, between women and men in this country. Not once in his review of the district court decision does Judge Kennedy acknowledge that the ambitious reach of the comparable worth theory is aimed at mending and changing an enormous economic, and ultimately social and political, imbalance.

Significantly, Judge Kennedy stated that "Title VII does not obligate [the Washington legislature] to eliminate an economic equality that it did not create."[32/] But Title VII was promulgated to fight the effects of prior discrimination, woven into and out of the fabric of our society, that most of us were not responsible for creating. Title VII is not concerned only with the creation of discriminatory inequalities, as Judge Kennedy seems to claim, but with their perpetuation as well. It is ambitious because it needs to be.

Instead of analyzing the legal sufficiency of the record before him, Judge Kennedy simply asserted that the entire market system is on trial and that "a compensation

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32/ AFSCME, 770 F.2d at 1407.

system, the result of a complex of market forces, does not constitute a single practice that suffices to support a claim under disparate impact theory."[33/]

Moreover, Judge Kennedy gave short shrift to possible application of a more traditional and accepted discrimination doctrine -- disparate impact analysis. While it is debatable whether comparable worth in a Title VII case is an appropriate legal theory for remedying past discrimination, it is wrong to assert, as Judge Kennedy does about the discriminatory patterns of economic inequality suffered by plaintiffs in AFSCME, that "[t]he instant case does not involve an employment practice that yields to disparate impact analysis."[34/]

The courts have instituted a three-tiered test to prove disparate impact cases under Title VII. First, plaintiff must show that a facially neutral employment practice has a substantial discriminatory effect upon a protected class. Then, the employer may rebut by showing that the discriminatory practice is justified by a legitimate business necessity. Finally, the plaintiff must show that the reason offered is merely a pretext for discrimination. Discrimina-

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33/ Id.

34/ Id.

tory intent need not be proven directly as part of plaintiff's prima facie case.[35/]

Notwithstanding the large class of plaintiffs in AFSCME and the wide-ranging alleged discrimination, Judge Kennedy could have applied traditional disparate impact analysis under Title VII to the facts of AFSCME even without opening the door to the broader questions potentially posed by comparable worth theories. The plaintiffs undertook extensive factual investigations and offered these to the court to prove the first prong of their case. The district court found that the State of Washington "failed to produce credible, admissible evidence demonstrating a legitimate and overriding business justification."[36/]

While in other cases Judge Kennedy pored over the factual record to find minor questions tending to show the absence of discrimination, here he simply rejects the factual record and again finds no discrimination.

2. Homosexual Rights

In another area in which proponents are recently attempting to expand the scope of the discrimination laws --

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35/ See, e.g., Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

36/ AFSCME, 578 F. Supp. at 863.

homosexual rights -- Judge Kennedy has opted for a more restrictive approach.

In Beller v. Middendorf,[37] Judge Kennedy faced Navy regulations prohibiting homosexual acts. Plaintiffs, with otherwise untarnished performance records, admitted engaging in private homosexual activity and were discharged from the Navy. They brought suit alleging due process violations.[38]

Judge Kennedy concluded that substantive due process analysis (i.e., privacy analysis), and not equal protection analysis, was appropriate because the appeals were not presented as implicating a suspect class but rather as implicating an aspect of the fundamental right to privacy. However, he grafted onto this privacy analysis elements traditionally considered part of equal protection analysis, stating that this case fell somewhere between the compelling state interest test and the rational relationship test of equal protection law.[39] He conceded that some kinds of consensual homosexual behavior might face "substantial

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37/ 632 F.2d 788 (9th Cir. 1980), cert. denied sub nom. Miller v. Weinberger, 454 U.S. 855 (1981) and Beller v. Lehman, 452 U.S. 905 (1981).

38/ 632 F.2d at 792.

39/ Id. at 807-08.

constitutional challenge." However, Judge Kennedy concluded that deference accorded the military outweighed whatever heightened solicitude was appropriate for consensual private homosexual conduct.[40/] Judge Kennedy upheld as sufficient governmental interests the Navy's concerns

> about tensions between known homosexuals and other members who "despise/detest homosexuality"; undue influence in various contexts caused by an emotional relationship between two members; doubts concerning a homosexual officer's ability to command the respect and trust of the person he or she commands; and possible adverse impact on recruiting.[41/]

Judge Norris, writing in dissent from the Ninth Circuit's refusal to rehear Beller en banc, fully exposed the analytical flaws in Judge Kennedy's opinion.[42/] As Judge Norris pointed out, Judge Kennedy gave no critical scrutiny to the relationship between the Navy's asserted interests and its regulations. The Navy offered nothing "to indicate that maintenance of such discipline war-readiness requires that the private lives of Navy members meet the approval of other

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40/ Id. at 810.

41/ Id. at 811.

42/ Miller v. Rumsfeld, 647 F.2d 80 (9th Cir. 1981), cert. denied, 454 U.S. 855 (1981). The critique of Judge Kennedy's treatment of the privacy issue can be found in the section of this report dealing with the right of privacy.

members, citizens of host nations, or the Navy itself. Intolerance is not a constitutional basis for an infringement of fundamental personal rights."[43/]

Judge Norris demonstrated that none of the Navy's asserted problems was in any way confined to homosexual activity. The Navy had experienced tension and hostility between members of different racial groups. Emotional relationships occur between male and female Navy personnel. The Navy could fear that blacks or women might be unable to gain the respect of certain personnel. Yet women and blacks could not be discharged from service on these bases constitutionally. Parents of recruits would be more concerned about their children's association with persons who use dangerous illegal drugs than with homosexuals, yet drug use was not grounds for mandatory discharge. The Navy did not not have a legitimate interest in protecting the sensibilities of intolerant persons in foreign countries.[44/]

Lastly, Judge Norris criticized as disingenuous the Beller panel's conclusion that individual fitness hearings could not be a less restrictive alternative. The Navy

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43/ Id. at 88.

44/ Id. at 88-89.

already used individual fitness hearings extensively for conduct other than homosexuality.[45/]

Judge Kennedy's lack of zeal in protecting the rights of homosexuals is further demonstrated by Singer v. United States Civil Service Commission.[46/] Singer concerned the discharge of a homosexual Equal Employment Opportunity Commission employee. The plaintiff, who disclosed his homosexuality at the time he was hired, was discharged for "immoral and notoriously disgraceful conduct" under the Civil Service regulations. That conduct consisted of embracing a male at his prior place of employment; indicating by dress and demeanor that he intended to continue homosexual conduct; applying for a marriage license with another man; being the subject of publicity in which he identified himself as an EEOC employee; being active on the Board of Directors of the Seattle Gay Alliance, through which his name and place of employment were mentioned in the planning of a symposium; and displaying homosexual advertisements on his car windows.[47/]

45/ Id. at 89-90.

46/ 530 F.2d 247 (9th Cir. 1976), vacated, 429 U.S. 1034 (1977).

47/ 530 F.2d at 249.

Judge Kennedy joined in the opinion of the court upholding the dismissal of plaintiff's civil rights suit. The court held that the discharge of a homosexual was justified by a finding that his conduct affected the efficiency of the Civil Service.[48/] The court accepted the Civil Service Commission's findings that the plaintiff:

> 'openly and publicly flaunt[ed] his homosexual way of life and indicat[ed] further continuance of such activities,' while identifying himself as a member of a federal agency . . . 'impeded the efficiency of the service by lessening public confidence in the fitness of the Government to conduct the public business with which it was entrusted.'[49/]

The court also concluded that the government's interest in promoting the efficiency of the public service outweighed the plaintiff's interest in exercising his First Amendment rights through "publicly flaunting and broadcasting his homosexual activities."[50/] The Supreme Court vacated this opinion in light of a new position by the government.[51/]

As Judge Norris noted about the Navy, the Civil Service "is not in the business of promoting its own moral

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48/ Id. at 255.

49/ Id.

50/ Id. at 256.

51/ 429 U.S. 1034 (1977).

views . . . . Intolerance is not a constitutional basis for an infringement of fundamental personal rights."[52/] The Singer court never questioned why the Civil Service Commission could label homosexuality "immoral and notoriously disgraceful conduct." Clearly the court agreed with this characterization, because it too used the word "flaunt" to describe the plaintiff's openness about his sexual persuasion. Nor does the court ever explain why plaintiff's conduct would affect the efficiency of the Service, other than by lessening public confidence. The court, like Judge Norris, should not have "accepted that the [Civil Service] has a legitimate interest in protecting the sensibilities of intolerant persons . . . ."[53/] The court, with which Judge Kennedy joined, displayed its own intolerance.

In yet another case, Judge Kennedy failed to support the rights of homosexuals. One year before Singer was decided, a district court struck down Civil Service Commission regulations excluding all active homosexuals as

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52/ Miller v. Rumsfeld, 647 F.2d at 88 (Norris, J., dissenting from denial of rehearing en banc).

53/ Id. at 89.

unsuitable for government employment.[54/] The court granted summary judgment for the plaintiff, awarded him backpay and reinstatement, and held that the suit was a proper class action. However, the court denied reinstatement with backpay for other class members.

The Ninth Circuit, in a per curiam opinion, upheld the denial of retroactive relief for the class:

> The court's rationale would invalidate discharge for homosexual activity only where such activity had no rational bearing on the individual's job performance. Thus the issue of liability would have to be separately litigated for each person who claimed to be a class member . . . . It would be burdensome to discover class members and give notice of their right to recover, making the action for reinstatement and backpay difficult to manage.[55/]

The panel cut off retroactive class relief even where the unlawfulness of the service's regulations was clearly established, implying that most class members would not be able to show that their homosexuality had no rational bearing on job performance.

Overall, Judge Kennedy has exhibited a lack of conviction in enforcing the discrimination laws.

54/ Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973), aff'd in part, 528 F.2d 905 (9th Cir. 1975) (per curiam).

55/ 528 F.2d at 906-07.

II

DISCRIMINATION IN EDUCATION, HOUSING, VOTING RIGHTS, AND CRIMINAL LAW

Introduction

Outside of the employment context, Judge Kennedy has further demonstrated a resistance to acknowledging and remedying discrimination. A review of his decisions in the areas of education, housing, voting rights, and criminal law, exposes a lack of sensitivity to discrimination plaintiffs and an unwillingness to give them the opportunity to develop their cases in the courts.

A. Discrimination in Education

Judge Kennedy has authored or joined in opinions in discrimination in education cases that have prevented plaintiffs from developing their cases in the courts. He has terminated existing jurisdiction, denied standing, and upheld summary judgment for defendants. Among the more noted of these decisions is Spangler v. Pasadena City Board of Education.[1/]

In Spangler, the district court had retained continuing jurisdiction over the Pasadena City Board of

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1/ 611 F.2d 1239 (9th Cir. 1979).

Education ("the Board") to remedy racial segregation in public schools held to be unlawful in 1970. The Board claimed to be in compliance with court orders and to have remedied racial segregation in the schools to the extent of its power, and applied to the district court to relinquish jurisdiction. The district court refused to do so, based on evidence indicating that the Board would allow resegregation to occur.[2/]

A Ninth Circuit panel vacated the district court's decision and ordered the district court to terminate the case. The court held that the Board's present compliance with the desegregation plan and its representation that it would continue to engage in affirmative action required an end to jurisdiction.[3/] Judge Kennedy concurred in an opinion joined by Judge Anderson (making it a de facto second opinion of the court), writing separately "to give emphasis to certain aspects of this case."[4/]

Judge Kennedy recognized that the effects of a constitutional violation and proper duration of the remedy

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2/ Id. at 1240.

3/ Id. at 1241-42.

4/ Id. at 1242.

are difficult to measure.[5/] He also recognized that from 1970 to 1977, the Board was not in compliance with the desegregation plan on thirteen occasions.[6/] Nevertheless, Judge Kennedy was willing to err on the side of underestimating the proper duration of the remedy, concluding that the Board had been in "substantial compliance" with the plan, and that the effects of the Board's discrimination had been eliminated.[7/]

The district court had found that if jurisdiction terminated, the Board intended to reinstitute the neighborhood school pattern existing before 1970, which would recreate the pre-1970 racial percentages in the schools. Board members had made public statements criticizing the desegregation plan and endorsing neighborhood schools. The Board had explored alternative student assignment methods that would increase racial imbalance. Judge Kennedy responded:

> I assume, without deciding, that the likelihood a school board will engage in new acts of intentional discrimination may be considered by a court as one factor in favor of retaining jurisdiction to insure the effects of a past violation are eliminated . . . . The

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5/ Id.

6/ Id. at 1243.

7/ Id.

> district court's conclusion, nevertheless, is clearly erroneous based on this record.8/

Judge Kennedy rejected the district court's conclusion, based on hard evidence, regarding the Board's intention to allow resegregation, accepting instead the Board's "official resolution promising not only to engage in no acts of intentional discrimination, but also to adopt and maintain 'affirmative action programs designed to improve racial integration among students, faculty and administrative staff of the District.'"9/

Judge Kennedy conceded that "[t]he Board's future actions may at some date be held unconstitutional,"10/ but potential plaintiffs would then have to commence a new civil action.11/ It would have been consistent with the strong policy of ensuring that constitutional violations be remedied, and with the interests of judicial efficiency, for Judge Kennedy to allow the court's supervision, already in place, to continue until the threat of future unlawful resegregation was eliminated. Instead, Judge Kennedy made it

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8/ Id. at 1245.

9/ Id.

10/ Id. at 1246.

11/ Id. at 1247.

necessary to invoke the court's processes all over again in order to attack continuing violations of the Board.

Judge Kennedy too easily accepted a mere promise by a Board that only nine years before was found guilty of intentional race discrimination in its schools. He was undisturbed by clear evidence that as soon as jurisdiction terminated, the Board would reinstitute neighborhood schools causing resegregation. He was willing to accept nine years as plenty of time to remedy the effects of a racially discriminatory school policy that must have existed for a much longer period of time. Judge Kennedy rationalized as follows:

> Where the court retains jurisdiction, a board may feel obliged to take racial factors into account in each of its decisions so that it can justify its actions to the supervising court. This may make it more, rather than less, difficult to determine whether race impermissibly influences board decisions, for the subject is injected artificially into the decision process, and the weight that racial considerations might otherwise have had is more difficult to determine.12/

The whole point of continuing jurisdiction is to ensure that the violator takes race into account in its decision-making in a permissible and judicially mandated way; there is no need to determine the weight that racial considerations otherwise might have had. Judge Kennedy's obfuscatory

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12/ Id.

rationale displays a resistance to remedying past discrimination, even when the judicial machinery to do so is already in place.

B. Discrimination in Housing

In the housing context, Judge Kennedy interpreted civil rights legislation strictly so as to deny access to courts to those discrimination plaintiffs. In TOPIC v. Circle Realty,[13] an association of black and white families ("TOPIC") sued three real estate brokers for racial steering, defined as "directing non-white home seekers to housing in designated minority residential areas, and directing white home seekers to housing in designated white residential areas."[14] TOPIC used teams of black couples and white couples posing as home seekers to uncover racial steering practices. TOPIC's alleged injuries were:

> being deprived of the important social and professional benefits of living in an integrated community . . . embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettoes . . . .[15]

13/ 532 F.2d 1273 (9th Cir.), cert. denied, 429 U.S. 859 (1976).

14/ 532 F.2d at 1274.

15/ Id.

Judge Kennedy wrote the opinion of the Ninth Circuit holding that TOPIC and its members did not have standing under the Fair Housing Act[16/] to bring their suit because they were not actual home seekers subjected to racial steering. Judge Kennedy distinguished a similar case, Trafficante v. Metropolitan Life Insurance Co.,[17/] in which the Supreme Court held that tenants of an apartment complex had standing under the Fair Housing Act to challenge their landlord's allegedly discriminatory renting practices. Judge Kennedy held that section 3610 of the Fair Housing Act, under which Trafficante was brought, allowed suits to vindicate the rights of third parties, but section 3612, under which TOPIC was brought, did not allow such suits.[18/]

Section 3612 provides that "[t]he rights granted by [the Fair Housing Act] may be enforced by civil actions" in federal or state courts. Judge Kennedy read into this broad language a restriction allowing access to the courts "only to . . . those who are the direct objects of the practices [the Fair Housing Act] makes unlawful."[19/] Judge Kennedy

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16/ 42 U.S.C. §§ 3604, 3612.

17/ 409 U.S. 205 (1972).

18/ 532 F.2d at 1275.

19/ Id.

further restricted the reach of the Fair Housing Act by defining "the direct objects" as those who "make bona fide efforts to buy or rent housing."[20/] Thus, Judge Kennedy concluded that TOPIC did not have standing because its members were not real home seekers and therefore were not the direct objects of any unlawful practices.

Judge Kennedy reasoned that "[s]ection 3610 contemplates the resolution of disputes in the slower, less adversary context of administrative reconciliation and mediation," while "[s]ection 3612 has no pre-conditions to suit."[21/] While section 3612 may provide "preferential access to judicial processes,"[22/] Judge Kennedy did not explain why this leads to the conclusion that it provides no access for plaintiffs like TOPIC.

Judge Kennedy's reasoning and holding in TOPIC were expressly rejected by Justice Powell writing for the Supreme Court three years later in Gladstone, Realtors v. Village of Bellwood.[23/] In Gladstone, residents of a neighborhood used testers to uncover racial steering by real estate agencies

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20/ Id.

21/ Id. at 1276.

22/ Id.

23/ 441 U.S. 91 (1979).

and brought suit under section 3612. The Supreme Court found that "[n]othing in the language of [section 3612] suggests that it contemplates a more restricted class of plaintiffs than does [section 3610]."[24/] Legislative history indicated that "all [Fair Housing Act] complainants were to have available immediate judicial review. The alternative, administrative remedy was then offered as an option to those who desired to use it."[25/]

The Supreme Court went on to hold that the claim of residents that the transformation of their neighborhood from an integrated to a predominantly segregated community deprives them of the social and professional benefits of living in an integrated society is injury sufficient to satisfy the constitutional standing requirement.[26/] Judge Kennedy implied the opposite in TOPIC by distinguishing Trafficante because it involved residents of an apartment building rather than of a community.[27/] As the Supreme Court made clear, "[t]he constitutional limits of respondents' standing to protest the intentional segregation of their community do not

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24/ Id. at 102.

25/ Id. at 106.

26/ Id. at 111-12.

27/ TOPIC, 532 F.2d at 1275.

vary simply because that community is defined in terms of city blocks rather than apartment buildings."[28/]

Judge Kennedy has also displayed a lack of zeal in remedying race discrimination in housing in other cases. For example, in Fountila v. Carter,[29/] a landlord was found guilty of refusing to rent a single family house to plaintiffs because they were a black family. The jury awarded $1 in actual damages and $5,000 in punitive damages.[30/]

Judge Kennedy joined in the opinion of the Ninth Circuit on the landlord's appeal. The court held that the jury was entitled to conclude from the evidence that the defendant discriminated in conscious and deliberate disregard of the plaintiff's rights,[31/] and that the issue of punitive damages was properly submitted to the jury.[32/] The court recognized that "an otherwise supportable verdict must not be disturbed on appeal unless 'grossly excessive,' 'monstrous,' or 'shocking to the conscience.'"[33/]

28/ Gladstone, 441 U.S. at 114.

29/ 571 F.2d 487 (9th Cir. 1978).

30/ Id. at 488.

31/ Id. at 492.

32/ Id. at 491.

33/ Id. at 492.

Notwithstanding these findings, the court vacated the $5,000 punitive damage award. The court found the discrepancy between the punitive and actual damage awards "striking."[34/] The court also held that while the $1000 limitation on punitive damage awards in the Fair Housing Act did not apply, the jury should have been instructed to take it into account in determining the appropriate award.[35/] Further, the jury was not properly instructed on the purpose of punitive damages.[36/] The court, searching for some means of justification for its acts, even considered the landlord's age.[37/] What the court never discussed was the humiliation suffered by the victims of the discrimination and the need to deter such conduct.

C. Discrimination in Voting Rights

Judge Kennedy also has been unsympathetic to race discrimination plaintiffs in the voting rights sphere. In

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34/ Id.

35/ Id. at 495.

36/ Id. at 494.

37/ Id. at 492.

Aranda v. Van Sickle,[38/] members of the San Fernando Mexican-American community brought suit against the city of San Fernando, its Mayor and members of the city council, alleging that the at-large election scheme to elect the city council was unconstitutional. Since 1911, only three Mexican-Americans had been elected to the city council despite the fact that Mexican-Americans comprised approximately fifty percent of the population. Mexican-Americans comprised only twenty-nine percent of the registered voters. The barrio was a geographically distinct community organized along racial lines. Neither members of the city council nor the mayor had lived in the barrio for the ten years prior to the suit.[39/]

Mexican-American poll watchers were harassed by police during the 1972 elections. Private homes of citizens were often used as polling places; without exception, none were Spanish-surnamed households. A very small percentage of Spanish-surnamed persons participated in the operation of elections. Mexican-Americans were sparsely represented on city commissions. The city employed many more whites than

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38/ 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980).

39/ 600 F.2d at 1268-69.

Spanish-surnamed persons, and Spanish-surnamed persons comprised the vast majority of the lower paid employees.[40/]

Plaintiffs alleged examples of the city being unresponsive to the needs of the Mexican-American community. They also cited examples of discriminatory campaign tactics used in elections in which there were strong Mexican-American candidates, and a city letter that implied that a district election system would produce no qualified Mexican-American candidates.[41/]

The district court granted summary judgment for defendants, issuing findings of fact that can only be described as shallow and insulting. For example, the district court found that the concentration of Mexican-Americans in the barrio "is the result of individual desire of the Mexican-Americans to associate with those with similar racial and economic status."[42/] The district court also found that "[t]he failure of Mexican-American voters to elect Mexican-American candidates to the council in proportion to their population in the city is attributable, largely, to apathy of the Mexican-American voters and not to racially

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40/ Id. at 1269.

41/ Id. at 1269-70.

42/ Id. at 1273.

polarized voting."[43/] The Ninth Circuit adopted the district court's findings and agreed with the district court that there was "no proof whatsoever of any restrictive electoral system."[44/]

Although Judge Kennedy found that "[c]ertain conclusions of the trial court do remain troublesome,"[45/] he concurred in the judgment and approach of the circuit court. He acknowledged that the necessary element of intent could be inferred from evidence showing that the political processes leading to nomination and election were not equally open to participation by the group in question. Nevertheless, Judge Kennedy concluded that the evidence could not support such an inference.[46/]

Judge Kennedy was satisfied (and presumably expected fifty percent of the population to be satisfied) with the fact that Mexican-American candidates campaigned in recent elections, and "a Mexican-American candidate was almost elected to the council in 1974."[47/] Judge Kennedy

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43/ Id.

44/ Id. at 1272.

45/ Id. at 1275.

46/ Id.

47/ Id. at 1277.

concluded that location of all private polling places in white homes outside the barrio did not deny access to political processes. He denied plaintiffs the chance to develop this fact at trial, never considering why Mexican-Americans from the barrio would be systematically deterred from exercising their fundamental right to vote by being forced to encroach upon a white middle or upper class private domain in order to do so.

Judge Kennedy rejected the district court's finding that low Mexican-American representation on the council and commissions was due to low civic awareness as a result of high unemployment and low levels of education and not as a result of racial discrimination. He stated that it was not proper on summary judgment to conclude that this was not the product of deliberate bias. Instead of reversing summary judgment, however, Judge Kennedy merely stated that restructuring the election system was not necessarily the appropriate remedy.[48/]

Judge Kennedy also dismissed as insufficient plaintiffs' evidence showing that Mexican-Americans were employed primarily in nonprofessional and lower paid

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48/ Id. at 1278.

categories.[49/] He emphasized San Fernando's small size and long-standing policy of at-large elections.[50/] Here too Judge Kennedy concluded that a finding of intentional discrimination could be made on the facts, but because plaintiffs requested invalidation of the at-large election system, he would not reverse summary judgment.[51/]

Judge Kennedy clearly was troubled by the district court's shallow, insensitive findings. He also believed that summary judgment was not appropriate on the issue of intentional discrimination. His reasoning could have allowed him to give the plaintiffs a chance to develop their facts at trial and he could have suggested alternative appropriate remedies. Instead, he allowed the district court's findings and conclusion to stand on the ground that the requested remedy might not be appropriate.

An interesting counterpoint to Aranda is Flores v. Pierce.[52/] A Mexican-American couple's application for a liquor license was protested by the town police chief, Mayor,

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49/ Id.

50/ Id. at 1279.

51/ Id. at 1280.

52/ 617 F.2d 1386 (9th Cir. 1980), cert. denied, 449 U.S. 875 (1980).

and city councilmen. The California licensing authority initially denied the application based on the protests by the city officials, but later granted it on the plaintiffs' administrative appeal.[53/] Plaintiffs won a jury verdict in their civil rights suit against the police chief, Mayor, and city councilmen, for damages caused by the delay in granting the licenses.

Judge Kennedy, writing for the Ninth Circuit on the defendants' appeal, upheld the verdict. The evidence against the defendants was overwhelming. Of the five applications for licenses made in the period involved in the suit, the only two contested were of Mexican-Americans planning to serve a Mexican-American clientele. The three others were not. All five applications were for the same neighborhood. No application by a non-Mexican-American owner to serve a non-Mexican-American clientele had ever been protested. The city council had insisted on an ad hoc rather than uniform protest policy. There was also clear evidence of statements by defendants invoking racial stereotypes. These facts completely belied defendants' rationale that they were protesting to prevent undue concentration of licenses, to

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53/ Id. at 1388.

promote temperance, and to prevent aggravation of an existing police problem.[54/]

Judge Kennedy concluded that the evidence was more than sufficient to support the finding that defendants acted with the intent to discriminate on the basis of race.[55/] He went on to hold that an official forfeits qualified immunity if he acts with proscribed discriminatory intent.[56/]

The facts in Flores, as Judge Kennedy noted, were nearly as extreme as those in Yick Wo v. Hopkins,[57/] the seminal case holding that the effect of a law may be so harsh against a particular race as to require an inference of intent to discriminate.[58/] In such a case, Judge Kennedy seems willing to enforce a remedy against the wrongdoers. In a case like Aranda, however, Judge Kennedy is not willing to give plaintiffs a chance even to develop their case. Defendants who are not guileless enough to utter racial stereotypes and who practice more subtle and invidious forms of

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54/ Id. at 1389-90.

55/ Id. at 1390.

56/ Id. at 1392.

57/ 118 U.S. 356 (1886).

58/ 617 F.2d at 1389.

race discrimination have much less to fear from Judge Kennedy.

D. Discrimination in Criminal Law

As discussed above, Judge Kennedy's treatment of sex discrimination in employment displays lack of sensitivity to, and resistance to enforcement of, the constitutional rights of women. Two cases outside the employment context follow that trend.

In United States v. Smith,[59] three male inmates of a federal penitentiary were found guilty of committing forcible sodomy on another male prisoner. They were convicted under the federal Assimilative Crimes Act[60] by application of a Washington statute that defined the offense of rape to include homosexual sodomy.[61] The federal rape statute only applied to the rape of a female.[62]

The defendants argued that application of the Washington statute denied them equal protection because conviction under that statute carried a twenty-year minimum

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59/ 574 F.2d 988 (9th Cir. 1978), cert. denied, 439 U.S. 852 (1978).

60/ 18 U.S.C. § 13.

61/ Wash. Rev. Code Ann. §§ 9.79.170, .140 (1977).

62/ 574 F.2d at 990.

sentence while conviction under the federal rape statute carried no such minimum.[63] Defendants argued that Congress acted with reference to homosexual rape when it enacted the federal rape statute.

Judge Kennedy, writing for the court, held that equal protection was not violated when Congress punished one offense by assimilation of a state statute but provided its own definition and punishment for a rationally distinguishable offense.[64] To reach that holding, Judge Kennedy concluded that rape of a female and homosexual sodomy were rationally distinguishable offenses. Judge Kennedy wrote:

> It is rational to determine that the harm, both physical and mental, suffered by victims of these two crimes are of a different quality in each instance. These distinctions are reflected in traditions and community attitudes that have prevailed for centuries, and penal laws may properly take account of such differences by assigning a separate generic classification to each offense.[65]

The implication of Judge Kennedy's opinion is clear: Rape of a male is a more heinous crime than rape of a female. Judge Kennedy's opinion subjected the defendants to a stricter statute than they would have been subjected to had

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63/ Id. at 991.

64/ Id.

65/ Id.

they gang-raped a woman. He pointed out that the Washington statute, which defined rape of a female and sodomy as the same offense, was an exception among the states and the Model Penal Code.[66/] He supported the distinction between heterosexual and homosexual rape with "traditions and community attitudes that have prevailed for centuries," traditions that have given short shrift to the seriousness of heterosexual rape.

Judge Kennedy could have commended the state of Washington for recognizing that the rape of a man is no more heinous than the rape of a woman. He could have ruled that the federal rape statute must be interpreted to apply to male rape victims as well as female rape victims or be unconstitutional. Instead, he propagated the myth that the rape of a woman is somehow more natural than the rape of a man.

In United States v. Flores,[67/] Judge Kennedy joined in a per curiam opinion that reviewed the sentences of a husband and wife who were both found guilty of the same federal drug violations. The husband was sentenced for a three year internment with a subsequent three year special

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66/ Id. at 990.

67/ 540 F.2d 432 (9th Cir. 1976) (per curiam).

parole. The wife was sentenced as a young adult offender to a three year term of probation.[68/]

The trial judge made the following statement before sentencing:

> With respect to Marcela Flores, I'm also convinced that she is just as guilty as is her husband. And, but for one factor, I would feel obligated to impose upon her the same sentence imposed upon her husband. But she does have a child and is expecting another one. And I just don't think the interests of justice require the Government to take both parents away from these children.[69/]

The husband claimed that the unequal sentence based upon pregnancy constituted unlawful sex discrimination.

The Ninth Circuit, with virtually no analysis, concluded that the wife's preferential treatment based upon "her condition" was rational and within the discretion of the trial court, and that the husband's rights were in no way prejudiced.[70/] The court noted that there is no requirement that two people convicted of the same crime receive identical sentences. The court stated that the Supreme Court has held

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68/ Id. at 438.

69/ Id.

70/ Id.

that discrimination based on pregnancy is not invidious and therefore does not violate equal protection.[71/]

This opinion can be characterized as nothing short of disgraceful. The Constitution may not require that two people convicted of the same offense receive the same sentence, but surely a judge cannot constitutionally give a black man or a woman a longthier sentence simply because of his race or her sex. The judge made clear that the only reason he was able to avoid being "obligated" to impose identical sentences was the fact that the wife was pregnant and that "she" already had one child.

Contrary to the court's implication, the Supreme Court did not hold that the Constitution permits discrimination based on the mere fact of pregnancy. The court in Flores cited without analysis one Supreme Court case, and ignored another one, Cleveland Board of Education v. La Fleur,[72/] which struck down school board regulations governing pregnant teachers.

The court reinforced the stereotype that women are and must be the caretakers of their children, and that

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71/ Id.; see Geduldig v. Aiello, 417 U.S. 484 (1974) (state insurance fund not required to provide benefits for "normal pregnancy").

72/ 414 U.S. 632 (1974).

fathers do not share equally in that responsibility. The court made clear its bias when it stated that "she [not 'they'] does have a child."[73/] Flores is an ominous decision for female plaintiffs who hope that Judge Kennedy will look upon them as equal to men. The lack of any analysis of this blatant judicial enforcement of sexual stereotypes indicates that the court did not consider this a very serious issue.

73/ 540 F.2d at 438.

III

RIGHT TO PRIVACY

Introduction

Judge Kennedy's views on the right to privacy are difficult to discern. Moreover, his philosophy regarding important fundamental rights, such as the right to privacy, not specifically stated in the Constitution is murky. As in other areas, Judge Kennedy seems extremely hesitant -- even in a speech on the subject -- to give much more than an oblique statement of his theoretical approach to what he calls "unenumerated rights."[1/]

A close reading of Judge Kennedy's sparse writings on privacy reveals a few disturbing points. His only significant privacy decision, Beller v. Middendorf[2/], employed a dubious method of analysis that both avoids the hard issues and dilutes the right of privacy as defined by the Supreme Court. In this case, Judge Kennedy upheld the Navy's discharge of servicemen for homosexual activity.

1/ Speech by Anthony M. Kennedy to the Canadian Institute for Advanced Legal Studies, The Stanford Lectures, "Unenumerated Rights and the Dictates of Judicial Restraint" (Unpublished, Stanford University, 1986) (hereinafter "Unenumerated Rights").

2/ 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

However, Judge Kennedy did cite the generation of Supreme Court privacy decisions as precedent in Beller.

Further, Judge Kennedy indicated in his speech that he considers privacy the least legitimate of the "unenumerated rights" recognized by the Supreme Court. He ultimately questions the legitimacy of all of these rights based on his personal philosophy of the role of the Constitution.3/

Analysis

In Beller, Judge Kennedy's most important privacy decision, Judge Kennedy upheld a Navy regulation mandating the discharge for homosexual activity regardless of an individual's fitness for naval service. In highly questionable analysis, Judge Kennedy stated he did not have to address the important question of whether consensual private homosexual conduct is a fundamental right. Traditional privacy analysis is under the "due process clause" of the Fifth Amendment which prohibits deprivation of life, liberty or property without due process of law. This analysis asks whether the conduct in question is a fundamental right, and then as a second step asks whether the infringement of the right by the government would further "compelling state

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3/ "Unenumerated Rights."

interests" and whether the infringement required be narrowly tailored to further those interests. Judge Kennedy recognized that this is the analysis used in Supreme Court privacy decisions such as Roe v. Wade.[4/] However, Judge Kennedy inexplicably glossed over the privacy analysis engaged in by the Supreme Court in favor of a new balancing approach.[5/]

Judge Kennedy's balancing approach grafted what is traditionally equal protection analysis onto due process analysis. Courts structure the first, "fundamental right," question posed under substantive due process analysis differently when using an equal protection approach. The question becomes the government's action against the protected class of individuals, i.e. homosexuals, must pass the higher strict scrutiny test or some other more

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4/ 632 F.2d at 807.

5/ Kennedy claimed that opinions in Zablocki v. Redhail, 434 U.S. 374 (1978), and Moore v. City of East Cleveland, 431 U.S. 494 (1977), supported a substantive due process analysis that balanced the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals. 632 F.2d at 807. As Kennedy's colleague, Judge Norris, pointed out in an emphatic dissent from a denial of a rehearing of Beller, this test has in fact never been supported by the full Court. Miller v. Rumsfield, 647 F.2d 80, 81-82 (9th Cir. 1981), cert. denied, 454 U.S. 855 (1981). See also infra pp. 6-7.

forgiving test such as the rational basis test. Judge Kennedy was unable to fit consensual homosexual conduct into either a strict scrutiny or rational basis category, using instead a special intermediate tier for homosexuals. Judge Kennedy then concluded that under this intermediate test, the Navy's regulation was constitutional. In so concluding, Judge Kennedy relied heavily on the military context of the case, and the special deference given the military.

By inexplicably using a method of analysis that departs from traditional privacy analysis, Judge Kennedy was able to duck answering the hard question of whether there is a right to privacy for homosexual activity.

Further, Judge Kennedy acknowledged the existence of "substantial academic comment" in favor of including homosexual conduct in the right to privacy and was willing to "concede" -- but only "arguendo" -- that some kinds of government regulation of homosexuals may face "substantial constitutional challenge."[6/] Judge Kennedy failed to state his views any more definitely.

However, Judge Kennedy let the alleged interests of the Navy override the "heightened solicitude" he had just conceded may be due consensual homosexual conduct.

6/ 632 F.2d at 809-10.

He gave uncritical deference to the Navy without examining the legitimacy of the Navy's claims, including the claim that:

> a substantial number of naval personnel have feelings, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties.[7/]

Similar "feelings" about members of a particular race or religion would not be considered legitimate under the Constitution.[8/] This shows the lack of scrutiny Judge Kennedy gave to the regulation in question.

Although the Supreme Court recently refused to extend privacy protection to private consensual homosexual conduct in Bowers v. Hardwick (which upheld Georgia's criminal sodomy statute),[9/] as did Judge Bork in an earlier case on facts very close to those in Beller (which reached the same result as Kennedy did),[10/] both of these decisions squarely addressed the question of whether the Supreme Court's privacy decisions extended to private consensual

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7/ Id. at 811-812.

8/ Miller, 647 F.2d at 88 (Norris, J., dissenting from denial of rehearing en banc).

9/ 106 S. Ct. 2841 (1986).

10/ Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

homosexual conduct. Similarly, Justice Powell, whom Judge Kennedy was nominated to replace, addressed the fundamental rights question in Moore v. City of East Cleveland[11/] in deciding that he would extend the privacy cases to invalidate a zoning ordinance that in essence required the break-up of extended families. Moreover, in City of Akron v. Akron Center for Reproductive Health, Inc.,[12/] Justice Powell noted for the Court, that "restrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest."[13/] Judge Kennedy did not follow this approach in Beller.

In short, Beller is an analytically confusing opinion. Whether Judge Kennedy's dubious approach is the result of his discomfort with the right to privacy and unenumerated rights altogether, is not clear.

In addition to Beller, Judge Kennedy decided a few other opinions that touched on the issue of right to privacy. None of them clearly indicate Judge Kennedy's views on whether such a right exists under the Constitution. For

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11/ 431 U.S. 494 (1977).

12/ 462 U.S. 416 (1983).

13/ Id. at 427 (emphasis added).

example, Judge Kennedy joined an opinion denying a privacy claim finding that the right to privacy did not prevent a city from requiring that the viewing areas of public establishments containing film or videotape viewing devices (booths where sexually explicit films were shown) be visible from a continuous main aisle.[14/]

Also, in a self-described "emphatic dissent" in a criminal procedure case, United States v. Penn,[15/] Kennedy relied in part on two privacy cases, -- Moore[16/] and Pierce v. Society of Sisters[17/] -- in criticizing the majority's acceptance of a police officer's bribe of a five-year-old child in order to procure evidence against the child's mother. Characterizing the "parent-child union" as an "essential liberty" that has a "fundamental place in our culture," Kennedy stated that the bribe constituted a severe and manipulative intrusion into this union.[18/] He would have

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14/ Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243 (9th Cir. 1982).

15/ 647 F.2d 876, 888 (9th Cir. 1980) (en banc) (Kennedy, J., dissenting), cert. denied, 449 U.S. 903 (1980).

16/ 431 U.S. 494 (1977).

17/ 268 U.S. 510 (1925) (parents have right to opt out of public school attendance for their children in favor of private schools).

18/ 647 F.2d at 888-89.

excluded the evidence discovered using the bribe. Interestingly, he nowhere mentions the concept of "privacy."

Accordingly, Judge Kennedy's decisions neither expressly accept or reject a constitutional right of privacy. However, it is of particular concern in the privacy area that his Beller opinion did not explain, affirm, or expressly adopt the reasoning of Griswold, Roe, and other privacy cases.

Concerns raised by Beller only deepen upon a reading of Judge Kennedy's 1986 speech at Stanford University, "Unenumerated Rights and the Dictates of Judicial Restraint."[19/]

In "Unenumerated Rights", Judge Kennedy said that the "constitutional text and its immediate implications, traceable by some historical link to the ideas of the Framers, must govern the judges."[20/] He further suggested that the essential rights in a "just" system are not coextensive with the essential rights of the American constitutional regime,[21/] noting that despite the "spacious" language of the Bill of Rights and the Civil War amendments, it is the

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19/ "Unenumerated Rights."

20/ Id. at 20.

21/ Id. at 13.

political branches that have the responsibility, and the legitimacy, to determine the "attributes of a just society."[22/]

These views ultimately led him to question the legitimacy of fundamental rights, in particular the right to privacy. While he noted that it "forts constitutional dynamics, and it defies the [precedential] method to announce in a categorical way" that there can be no unenumerated rights,[23/] he also noted that the exercise of enumeration has been fraught with "persistent difficulties"[24/] and put the judiciary in a "tentative position."[25/] For Judge Kennedy, the most plausible justification for such rights is to find some foundation for them in the structure of the constitution -- the right to travel, he suggests, plausibly may be justified as inherent in a system of federalism, while the right to vote can be explained as a necessary reenforcement of state political processes.

22/ Id. at 3.

23/ Id. at 5.

24/ Id. at 16.

25/ Id. at 5.

Kennedy could find no such "plausible" justification for the right of privacy, however.[26] Indeed, in discussing the right that has been characterized as "the most comprehensive of rights and the right most valued by civilized men . . . the right to be let alone,"[27] Kennedy relies almost exclusively on Bowers, the 5-4 Supreme Court sodomy decision that is the most critical of the idea of a right to privacy.

Moreover, Roe v. Wade and the many subsequent decisions explicitly affirming it are not discussed; Griswold is merely mentioned in passing. The results in Meyer v. Nebraska,[28] which overturned a law forbidding the teaching of German in elementary schools, and Pierce v. Society of Sisters,[29] which prevented a state from forcing children into public, as opposed to parochial, or other private school, "seem correct and fully sustainable" because of the

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26/ Id. at 6.

27/ Bowers v. Hardwick, 106 S. Ct. 2841, 2848 (1986) (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

28/ 262 U.S. 390 (1923).

29/ 268 U.S. 510 (1925).

relationship they bear to freedom of expression under the First Amendment.[30/]

Most importantly, however, Kennedy seems to suggest that at least the right to engage in homosexual conduct may be one of the rights best left to the "just," rather than the "constitutional" society:

> Many argue that a just society grants a right to engage in homosexual conduct. If that view is accepted, the Bowers decision in effect says the State of Georgia has the right to make a wrong decision -- wrong in the sense that it violates some people's views of rights in a just society. We can extend that slightly to say that Georgia's right to be wrong in matters not specifically controlled by the Constitution is a necessary component of its own political processes. Its citizens have the political liberty to direct the governmental process to make decisions that might be wrong in the ideal sense, subject to correction in the ordinary political process.[31/]

Thus, as the right to travel and to vote are "plausible" because they bear some relationship to the necessities of the constitutional system, a right to engage in private consensual homosexual conduct may not be justified because the structure of the political process requires this result.

30/ "Unenumerated Rights" at 12.

31/ "Unenumerated Rights" at 13-14.

Kennedy's apologia for Bowers fits neatly with his "plausibility" test for fundamental rights.

As he did in Beller, Judge Kennedy simply casts doubt on his willingness to recognize a right to privacy, but does not clearly state his views.

IV

CRIMINAL PROCEDURE

Introduction

Judge Kennedy's record in criminal procedure cases reveals several areas of concern. He has narrowly interpreted rights established for criminal defendants under the Fourth, Fifth, and Sixth Amendments to the Constitution. However, it must be noted that his respect for precedent -- including the oft-maligned exclusionary rule and Miranda warnings -- has caused him to uphold, occasionally begrudgingly, many constitutional claims.

In Fourth Amendment search and seizure cases, Judge Kennedy has sought loopholes in the exclusionary rule and has limited the areas in which we all can claim a legitimate expectation of privacy, but he has argued for suppression of evidence in egregious cases.

His approach to Fifth Amendment issues such as Miranda warnings and double jeopardy is often mechanical, and at times is disturbingly narrow in its view of constitutional protection for the accused. He tends to give these protections a very technical application, thus declining to address the potential harm unforeseen and unintended by the creators of those protections.

Likewise, in Sixth Amendment decisions on the right to counsel and the right to confront adverse witnesses, he

has charted a narrow course. He has been unsympathetic to claims of ineffective assistance of counsel and has been willing to uphold convictions in which significant Sixth Amendment considerations were arguably compromised.

A. The Exclusionary Rule

Despite infrequent gripes about its inflexibility, Judge Kennedy has generally followed precedent in applying the exclusionary rule. He has, however, recently demonstrated a willingness to expand loopholes to that rule. In United States v. Peterson,[1/] Judge Kennedy went beyond the limits set out by Supreme Court precedent and expanded the "good faith" exception to the exclusionary rule as enunciated by the Supreme Court in United States v. Leon.[2/] This exception allows admissal of evidence when the police act in good faith based on a facially valid, but technically deficient, warrant. Judge Kennedy seized on the rationale of Leon to allow admission of evidence seized in an illegal search that, unlike Leon, had nothing to do with a deficient warrant. In Peterson, the defendants were arrested based on evidence gathered in part from overseas wire-taps conducted illegally

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1/ 812 F.2d 486 (9th Cir. 1987).

2/ 468 U.S. 897 (1984).

by Filipino law enforcement agents and represented to United States agents as legal under Filipino law.

Conceding that Leon addressed only good faith reliance on a facially valid search warrant, Judge Kennedy argued that "the exclusionary rule does not function as a deterrent in cases in which the law enforcement officers acted on a reasonable belief that their conduct was legal."[3/] He then expanded the good faith exception to include objectively "reasonable" reliance on foreign law enforcement officers' representations that they have complied with their own laws. This expansion is quite troubling, for Kennedy's analysis reveals the seeds of possible emasculation of the exclusionary rule and its twin values of deterring police misconduct and preserving the integrity of the judicial system.

Fear of a crusade against the exclusionary rule by this judge must be tempered somewhat, however, as Judge Kennedy has not seen fit to apply the exception at every opportunity presented to him. In United States v. Spilotro,[4/] Judge Kennedy wrote the opinion for the court affirming the district court suppression order and specifically declined to

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3/ Peterson, 812 F.2d at 492.

4/ 800 F.2d 959 (9th Cir. 1986).

apply the good faith exception of Leon to an instance where a warrant was overly broad. The warrant in question did not describe the items to be seized with sufficient particularity. Instead, it listed as items to be seized any evidence of a violation of thirteen broad statutes. Unlike the unique situation later presented in Peterson, the Leon decision specifically addressed this scenario. Thus, Kennedy held that this overbreadth rendered the warrant "so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid."[5/] It remains to be seen (and the Committee should inquire) as to when, in other cases involving tempting situations not previously addressed by the Supreme Court, Judge Kennedy would again expand the exception.

Once hesitant to fashion or invoke exceptions to the exclusionary rule, Judge Kennedy has seemingly grown more venturesome in recent years. In one of his earlier criminal procedure opinions, United States v. Rubalcava-Montoya,[6/] Judge Kennedy declined to take an opportunity to expand the "emergency circumstances" exception to the exclusionary rule.

5/ Id. at 968 (quoting Leon, 468 U.S. at 923).

6/ 597 F.2d 140 (9th Cir. 1978).

The court reversed two convictions, finding that a customs agent had insufficient cause to search the trunk of a defendant's car, a search that resulted in finding five illegal aliens. The government argued that although the officer lacked probable cause to search, his good faith belief that human life might be in danger justified a search. In a footnote, Judge Kennedy admitted that "[t]he invitation to recognize that a policeman should be encouraged to act in emergency circumstances [absent probable cause] . . . is tempting."[7/] He declined to accept that invitation, however, because "such a rule would be a clear extension of existing precedents . . . ."[8/]

Just two years later, however, in United States v. Gardner,[9/] Judge Kennedy relied on the "exigent circumstances" exception to uphold a conviction obtained by a cursory warrantless search of the upper level of a house in which a suspect had just been arrested, on the premise that there had been individuals in the house who posed a danger to the officers present. And in a concurrence in Satchell v.

7/ Id. at 143 n.1.

8/ Id.

9/ 627 F.2d 906 (9th Cir. 1980).

Cardwell,[10] Judge Kennedy wrote that a police officer's opening of defendant's screen door was "reasonable and necessary" under the exigent circumstances and thus did not merit application of the exclusionary rule. The court affirmed the district court's denial of the habeas corpus petition.

Judge Kennedy has demonstrated a troubling tendency to limit the scope of the Fourth Amendment right to be free from unreasonable searches and seizures, a threshold issue under the exclusionary rule.

In United States v. Sledge,[11] Judge Kennedy upheld convictions based on the warrantless search of an apartment that appeared to have been abandoned, when in fact the defendants may have intended to return. Defendants had given the landlord notice of their intent to vacate their apartment by the end of the month. Two days prior to the end of that month, the landlord observed that the front door of the apartment was left wide open for several hours. The next day the landlord returned to the apartment, where he found a note he had left still on the door. Entering the apartment, he

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10/ 653 F.2d 408, 414 (9th Cir. 1981) (Kennedy, J., concurring), cert. denied, 454 U.S. 1154 (1982).

11/ 650 F.2d 1075 (9th Cir. 1981).

found it virtually empty of defendants' belongings, although there were five or six items of their clothing still there. Concluding that the defendants had vacated their apartment, the landlord began to clean it, whereupon a shotgun and paraphernalia connected with the manufacturer of PCP were discovered. The landlord then called an agent of the DEA, to whom he explained his actions of the previous few days. He told the agent he had retaken possession of the apartment because he thought the tenants had vacated. The agent then seized several items of evidence in the apartment.

Judge Kennedy found for a divided panel that the officer had reasonable grounds to conclude that the premises had been abandoned by the defendants. Thus, they had no legitimate Fourth Amendment privacy interest in the apartment, and any evidence seized in it was not subject to the exclusionary rule.

In a dissent, Judge Fletcher opined that defendants had exhibited a subjective expectation of privacy in the apartment, and thus a warrant should have been obtained.

In United States v. Allen,[12/] an opinion that the nominee listed as one of his twenty-five most significant

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12/ 675 F.2d 1373 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981).

opinions in his response to the Judiciary Committee Interrogatories, Judge Kennedy premised his decision on minimizing the appellants' expectation of privacy. In that case, customs agents had become suspicious of ongoing activities on defendant Allen's property near the coast of Oregon. A warrantless helicopter surveillance was conducted, in which photographs of the ranch property were taken through a telephoto lens. One agent carried out on-site surveillance when he accompanied two officials of the Bureau of Land Management who were visiting the ranch to seek a public easement across the ranch for fishermen and hunters. He declined to identify himself as an agent when challenged by Allen. Several officers trespassed on Allen's property in search of evidence, although none was taken at that time. Seismic sensors to monitor vehicular activity in and around the property were placed at the entrances to Allen's ranch.

Notwithstanding the questionable tenor of this aggressive investigation, Kennedy wrote the opinion upholding the convictions. While conceding that one need not construct "an opaque bubble over his or her land in order to have a reasonable expectation of privacy,"[13/] Judge Kennedy wrote that several factors existed to reduce Allen's expectation of

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13/ Id. at 1380.

privacy in this instance. Those factors included the fact that the ranch was virtually on the United States seacoast border where Coast Guard helicopters routinely traversed the nearby air space, thus diminishing any subjective privacy expectation.

Judge Kennedy held that the customs agent's concealment of his identity on the visit to the ranch did not violate the Fourth Amendment. Judge Kennedy also expressed "doubt" that the trespass by agents onto the ranch during the course of the surveillance violated the Fourth Amendment, but since no evidence resulted from that action, no further consideration was needed. In addition, while Allen's chance arrest on a nearby road 37 hours after the agents raided the ranch was admittedly illegal, Judge Kennedy held that it was not a basis for reversing the conviction.

In United States v. Sherwin,[14/] Judge Kennedy held for an en banc court that a search made of broken cartons containing allegedly obscene books by the manager of a trucking terminal was not a "search" within the aegis of the Fourth Amendment, and that subsequent FBI review of the materials displayed to them by the manager was not a "seizure" under the Fourth Amendment. The key issue on this appeal

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14/ 539 F.2d 1 (9th Cir. 1976) (en banc).

from a suppression order was whether the subsequent review of those books by the FBI, without a warrant, was legal. Judge Kennedy found it was, because "once a private search is completed, the subsequent involvement of government agents does not retroactively transform the original intrusion into a governmental search."[15/]

In Sherwin, Judge Kennedy specifically declined to follow a recent decision in United States v. Kelly,[16/] which held that the government's subsequent acquisition of books discovered in a private search constitutes a "seizure" in violation of the Fourth Amendment. In Walter v. United States,[17/] a case presenting a factual setting similar to Sherwin and Kelly, the Supreme Court adopted the latter's reasoning -- not Kennedy's -- in holding that the Fourth Amendment required FBI agents to obtain a warrant before viewing allegedly obscene films from a private citizen who had mistakenly received the shipment of films and opened the film containers.

15/ Id. at 6.

16/ 529 F.2d 1365 (8th Cir. 1976).

17/ 447 U.S. 649 (1980).

While not out of the judicial mainstream, Kennedy's opinions in Sledge, Allen, and Sherwin reveal a limited view of the scope of the Fourth Amendment right to privacy.

Judge Kennedy appears more likely to grant the government the power to conduct warrantless searches under the "administrative" or "regulatory" exception to the warrant clause. In a dissent to United States v. Piner,[18/] Judge Kennedy argued that random safety checks of private boats by the Coast Guard are not unreasonable within the meaning of the Fourth Amendment. The majority held that the random stopping and boarding of a vessel after dark for safety and registration inspection, where there is no cause to suspect noncompliance, was not justified by any governmental need to enforce compliance with safety regulations and thus constituted a violation of the Fourth Amendment. It therefore upheld a suppression order. Citing what he termed the long history of Coast Guard boarding authority and the exception for administrative searches, Judge Kennedy, dissenting, implied that operators of vessels at sea had a lesser expectation of privacy, at least with regards to Coast Guardsmen boarding their decks. In United States v. Villamonte-

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18/ 608 F.2d 358 (9th Cir. 1979).

Marquez,[19] an unrelated case, the Supreme Court held that a warrantless and suspicionless stop of a vessel was reasonable under the Fourth Amendment, thus implicitly vindicating Judge Kennedy's reasoning.

Moreover when confronted with instances of police practices he deems egregious, Judge Kennedy has been forceful in applying the exclusionary rule.

In United States v. Penn,[20] Judge Kennedy dissented from an en banc decision that permitted the government to introduce as evidence a jar of heroin pointed out by the defendant's five-year old son after the police had offered the child $5 to show them its location. The majority held that although they "disapprove[d] of the police tactic used," there was no constitutional ground on which to suppress the evidence.

Judge Kennedy emphatically disagreed. He condemned the tactic used by police as an assault on the parent-child relationship, labeling it "pernicious in itself and dangerous as precedent."[21] To allow the fruits of such a search to be

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19/ 462 U.S. 579 (1983).

20/ 647 F.2d 876 (9th Cir.) (en banc), cert. denied, 449 U.S. 903 (1980).

21/ Id. at 889.

admitted as evidence "distorts the idea of reasonableness" under the Fourth Amendment, even assuming the police were acting in good faith.[22/] In one of his most eloquent (if rare) defenses of civil liberties, Kennedy wrote: "Indifference to personal liberty is but the precursor of the state's hostility to it."[23/]

In United States v. Rettig,[24/] Judge Kennedy authored an opinion overturning the convictions of two alleged cocaine smugglers on the grounds that Drug Enforcement Agency ("DEA") agents had "substantially exceeded any reasonable interpretation" of the provisions of a search warrant.[25/] In that case, a federal magistrate denied a search warrant to investigate cocaine smuggling but issued an arrest warrant, which the DEA then executed. Agents arrested one of the defendants, with marijuana in his possession, at his residence. Agents then obtained a search warrant from a state court judge, ostensibly to discover and seize evidence to support the charge of marijuana possession. No mention was made to the state judge of the previous day's denial of a

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22/ Id. at 888.

23/ Id. at 889.

24/ 589 F.2d 418 (9th Cir. 1978).

25/ Id. at 423.

search warrant or of intent to search for evidence of the cocaine conspiracy.

Judge Kennedy determined that the breadth and character of the search conducted by the DEA indicated that it was in effect a search for evidence pertaining to the cocaine charge and not to the marijuana charge. The nondisclosure of the search's true objective "deprived [the judge] of the opportunity to exercise meaningful supervision over their conduct and to define the proper limits of the warrant."[26/] Thus, the fourth amendment safeguard -- having a neutral and detached magistrate oversee a search -- was abrogated, and the warrant was transformed into an instrument for conducting an illegal general search. Judge Kennedy's sanction for this tactic was severe: all evidence was suppressed.

In United States v. Cameron,[27/] Judge Kennedy reversed a conviction where he held for the court that the procedures used by the police in carrying out the body cavity search of a drug smuggling suspect were unreasonable and in violation of the Fourth Amendment. Judge Kennedy harshly criticized the insensitive and oppressive methods used by the officers, who subjected Cameron to two forced digital probes,

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26/ Id. at 422.

27/ 538 F.2d 254 (9th Cir. 1976).

to two enemas, and to forced consumption of liquid laxative, despite his continued protest. "Any body search, if it is to comport with the reasonableness standard of the fourth amendment, must be conducted with regard for the subject's privacy and be designed to minimize emotional and physical trauma."[28/] Finding that less intrusive means of obtaining the evidence could have been considered, including holding the suspect until a warrant (not required, but a positive factor in assessing reasonableness) was obtained, Kennedy applied the exclusionary rule to suppress the evidence. Although a quantity of heroin was ultimately found in this instance, he expressed skepticism about whether such tactics are even effective.

B. Miranda Warnings

Judge Kennedy's opinions reveal a technical approach to issues arising under Miranda v. Arizona,[29/] a case that requires police to tell suspects their rights. Not unlike other jurists, Judge Kennedy has applied the rule of Miranda as a "bright line" test; if the police advised a defendant of the Miranda warnings when required, ensuing

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28/ Id. at 258.

29/ 384 U.S. 436 (1966).

incriminating statements were ruled admissible. Conversely, if the police had failed to so advise a defendant, any incriminating statement was ruled inadmissible.

The Miranda warnings were crafted to provide a prophylactic means to insure that any incriminating statement made by a defendant was made voluntarily and intelligently and was not the product of police coercion. While adhering to a faithful technical application of Miranda, Judge Kennedy has displayed little inclination to apply the precepts underlying the Miranda decision to situations where similar concerns suggest it may be advisable.

For example, in United States v. Contreras,[30/] Judge Kennedy, writing for the court to affirm the convictions, appeared to rely on the fact that Miranda warnings were duly recited to defendants as satisfaction of the underlying premises of Miranda, and declined to scrutinize in depth whether or not the incriminating statements made were in fact voluntarily and intelligently given. In Contreras, the defendants had been given a state grant of immunity in exchange for certain information about a California crime gang. After the defendants had been granted their state

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30/ 755 F.2d 733 (9th Cir. 1985), cert. denied, 474 U.S. 832 (1985).

immunity, they were interviewed by federal agents whom the state investigators kept regularly informed about developments in the investigation of the gang. Before being interviewed by the federal agents, the defendants were each advised of their Miranda rights. Each defendant later testified before a grand jury, again after being advised of his Miranda rights. Defendants were subsequently indicted and convicted in federal court for violations of various RICO provisions.

The defendants challenged the district court's finding that the waivers were knowing and intelligent, arguing that the Miranda warnings should have been expanded to include advice that the testimony they had given under the grant of state immunity could not be used against them in a federal prosecution. The interrogation should not have begun, defendants argued, until they were given explicit advice that their previous state testimony could not be used in any manner. The fact that they were not so warned meant that their waivers were not intelligently given, and the statements made should therefore be suppressed. The dissent agreed with the contention that the defendants had not made a knowing and intelligent waiver of their Fifth Amendment privilege against self-incrimination "because the advice of the agents would have reasonably led the defendants to

believe that, for purposes of the federal prosecution, their silence had already been broken."[31/]

Judge Kennedy disagreed. "The Miranda warning, now so central for law enforcement in every jurisdiction, would be unworkable if lower courts were to begin drafting required supplements to it for various types of cases."[32/] He opined that the "ordinary sense of the agents' remarks"[33/] was such that there was no objective flaw or misleading inference in the advice given by the federal agents. Judge Kennedy declined to investigate further the voluntariness issue once the warnings were found to have been given. "The Miranda warnings given by the agents and their explicit warnings that federal prosecution could be commenced were all that the circumstances of this case required."[34/]

Judge Kennedy has applied the same technical approach when granting defendants relief for police failure to read Miranda rights. In United States v. Scharf,[35/] Judge

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31/ Id. at 738 (Canby, J., concurring in part and dissenting in part).

32/ Id. at 736.

33/ Id. at 737.

34/ Id.

35/ 608 F.2d 323 (9th Cir. 1979).

Kennedy demonstrated his technical approach to the rule of Miranda when the police failed to comply with the procedures. In that case, police officers suspected that defendant Coolidge was somehow involved in a bank robbery. Over the course of several encounters, Coolidge was questioned by the police on the highway, at the site of the robbery, while sitting in a police car, and several times in his home. At no time was any Miranda warning given.

In focusing on the encounters in which incriminating statements were made by Coolidge, the court determined that the questioning had taken place in a custodial setting, thus requiring the Miranda warnings be given. Judge Kennedy's opinion for the court focused on the considerable time Coolidge had spent talking to police, the pervasive presence of police officers and police cars near his home, and the intensity of surveillance of the defendant to conclude that "the suspect in the circumstances faced significant restraints and . . . was not free to leave. His statements were the product of police interrogation conducted without the Miranda warnings required by his custodial status, and they must be suppressed."[36/]

36/ Id. at 325.

In Neuschafer v. McKay,[37/] Judge Kennedy wrote for a divided panel that remanded a petition for habeas corpus to the district court for an evidentiary hearing to determine whether a confession was legally obtained. Neuschafer, who had been convicted and sentenced to death for the murder of a fellow inmate, contended that his constitutional rights were violated by use of a confession derived from an interrogation begun four days after he had requested a lawyer and none was provided.

Citing the controlling precedent of Edwards v. Arizona,[38/] which bars the use of any confession after a suspect has requested a lawyer unless the suspect has initiated the interview leading to his confession and has knowingly and intelligently waived his rights to counsel before confessing, Judge Kennedy determined that the issue of whether Neuschafer initiated the conversation that led to his confession remained unresolved. One member of the panel disagreed, chiding the majority for prolonging a case in which it was clear that the defendant was guilty.

The case returned to the Ninth Circuit after the evidentiary hearing by the district court. The lower court

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37/ 807 F.2d 839 (9th Cir. 1987).

38/ 451 U.S. 477 (1981).

found that in the course of the investigation about the murder Neuschafer had requested an attorney, who was not provided. Several days later, still not having been provided with an attorney, Neuschafer handed a note to a prison guard requesting a meeting to talk about the murder. Neuschafer was then read his Miranda rights. He indicated that he understood his rights, did not request an attorney, and proceeded to give an incriminating statement eventually introduced into evidence at trial. Based on the district court's findings, Judge Kennedy found for the panel that the conditions of Edwards v. Arizona were satisfied and that the confession was admissible.[39/] The court denied habeas relief.

C. Double Jeopardy

The double jeopardy clause of the Fifth Amendment guarantees that no person will twice be required to defend himself against accusations regarding the same crime. Judge Kennedy has often limited the doctrine, generally taking a narrow approach, especially where the offense in question is a serious felony.

39/ Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987).

In Brimmage v. Sumner,[40/] a state court convicted Brimmage of robbery and felony first-degree murder. He was sentenced to life imprisonment without the possibility of parole for the murder and to a concurrent 15-year sentence for the robbery. He contended in his habeas corpus petition that the robbery sentence constituted a multiple punishment for the same offense and should be overturned.

Although Judge Kennedy conceded that such a punishment normally constitutes double jeopardy, his opinion for the court found no violation here. Citing Supreme Court precedent for the proposition that where the legislative record clearly indicates an intent to impose cumulative punishments, such imposition does not offend the double jeopardy clause,[41/] he then deferred to a series of Nevada Supreme Court decisions suggesting that the Nevada legislature intended multiple punishments for the defendant's crimes.[42/] In so finding, Judge Kennedy conceded that those Nevada decisions did not explicitly state such an intent, but only that it was reasonably inferable. In a strong dissent, Judge Boochever stated that there is no "indication that the

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40/ 793 F.2d 1014 (9th Cir. 1986).

41/ Missouri v. Hunter, 459 U.S. 359, 368-69 (1983).

42/ Brimmage, 793 F.2d at 1015-16.

Nevada Legislature intended that multiple punishment be imposed, or, indeed, even considered that issue."[43/]

Judge Kennedy's disturbing dissent in Adamson v. Ricketts,[44/] an important double jeopardy decision, is based on a legally defensible but morally dubious stance. Charged with a car-bombing murder, Adamson entered into a plea agreement under which he would testify against two other individuals and plead guilty to second degree murder with actual incarceration time of 20 years. A superior court judge accepted the plea, and Adamson cooperated fully. On the basis of his testimony, the other defendants were convicted of first degree murder.

While their convictions were pending on appeal, Adamson's sentence was imposed. When the other defendants' convictions were reversed and remanded for new trials, the state sought to secure Adamson's testimony at the new trials. He refused, saying he had met his obligation and requested additional consideration. In response, the state, treating Adamson as having breached his plea agreement, prosecuted and convicted him for first degree murder.

43/ Id. at 1017.

44/ 789 F.2d 722 (9th Cir. 1986) (en banc), rev'd, 107 S. Ct. 2680 (1987).

The state argued that this did not constitute double jeopardy because the first conviction was for second degree murder while the second was for first degree murder. A majority in the Ninth Circuit soundly rejected that approach. If accepted, the court noted, such reasoning would entirely vitiate double jeopardy clause protection.

Judge Kennedy dissented, arguing that the protection of the clause does not extend where a plea-based conviction is properly set aside. He went on to say:

> The defendant took a risk not without some attractions for him. He was serving a twenty-year sentence. If the state elected to try him for first degree murder, conceivably he might have won an acquittal. It is hardly surprising that one as depraved as Adamson would shrink from a breach of contract and a gamble on the results. The court errs in not recognizing his defiance for what it is.[45/]

Judge Kennedy's dissent is insensitive to fundamental notions of inherent unfairness that the majority intuitively discerned in the state's treatment of Adamson.

On appeal, the Supreme Court reversed the en banc majority, though on the narrower ground that Adamson waived

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45/ 789 F.2d at 749.

his claim by the terms of his agreement.[46/] Four members of the Court sharply dissented.

D. The Rights to Counsel and to Confront Prosecution Witnesses

Judge Kennedy's opinions demonstrate a very conservative approach to both the Sixth Amendment right to counsel and to confront and cross-examine witnesses. He has been unsympathetic to appeals based on complaints of ineffective assistance of counsel, and joined in a dissent from a ruling that expanded the rights of prisoners suspected of committing crimes while in prison. Judge Kennedy has also held that the admission of video-taped testimony of a witness who died before he could be cross-examined by a murder defendant did not violate the confrontation clause.

1. Judge Kennedy Exhibits a Conservative View of the Right to Counsel.

In United States v. Gouveia,[47/] the majority of an en banc panel held that where a federal prisoner is suspected of committing a crime while in prison and is placed in administrative detention pending trial, he is constitutionally

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46/ 107 S. Ct. 2680 (1987).

47/ 704 F.2d 1116 (9th Cir. 1983) (en banc), rev'd, 467 U.S. 180 (1984).

entitled to an attorney prior to an indictment. The majority distinguished the circumstances in a prison case from those in which the Supreme Court had held that the right to counsel does not attach until adversary proceedings are initiated (i.e., at indictment or preliminary hearing). The majority ruled that if an inmate is held after the maximum disciplinary period has expired (90 days), he should be allowed an attorney to assist him in the preparation and preservation of a defense.

The dissent, in which Judge Kennedy joined, called the majority's ruling an "unprecedented expansion of the right to counsel"[48/] and reiterated that the right to counsel attaches only when adversarial judicial criminal proceedings are initiated. Citing numerous instances in which the Supreme Court has declined to extend the right to counsel to indigent suspects, the dissent concluded that the "extraordinary safeguard of the right to counsel is unnecessary to protect against such abuse. Suspects are amply protected by the 'ethical responsibility' of the prosecutor and due process standards."[49/] The Supreme Court agreed with the

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48/ Id. at 1127 (Wright, J., dissenting).

49/ Id. at 1128 (Wright, J., dissenting) (citing United States v. Ash, 413 U.S. 300, 320-21 (1973)).

dissent and reversed the majority's decision, ruling that the prisoners were not entitled to appointment of counsel until adversarial judicial proceedings had been initiated against them.[50/]

In Portland Police Ass'n v. City of Portland,[51/] Judge Kennedy ruled for the court and used procedural grounds to decline addressing the constitutionality of a departmental order requiring police officers to prepare reports after "major incidents" with no guarantee that the officers would have the right to consult with an attorney. Finding that because no officer had yet suffered injury due to the order, Judge Kennedy held that the complaint failed to present a justiciable controversy and should be dismissed for lack of jurisdiction. The court vacated a district court ruling on the merits of the case against the plaintiffs. Judge Reinhardt, in dissent, argued that a court should address the "serious and substantial" constitutional question presented.[52/] While this case was decided on procedural grounds, it reflects a hesitancy on the part of Judge Kennedy to provide relief to those seeking to assert the right to counsel.

50/ United States v. Gouveia, 467 U.S. 180 (1984).

51/ 658 F.2d 1272 (9th Cir. 1981).

52/ Id. at 1276 (Reinhardt, J., dissenting).

2. Judge Kennedy Has Been Unsympathetic to Claims of Ineffective Assistance of Counsel.

Defendants' appeals based on claims of ineffective assistance of counsel have failed to sway Judge Kennedy. In United States v. Medina-Verduqo,[53/] Judge Kennedy wrote for the court that while the Sixth Amendment requires that suspects be afforded reasonably competent and effective representation, "counsel need not be infallible."[54/] Id. at 653. Kennedy determined that the defendants' trial counsel had a reasonable basis for the tactics he employed at trial and labeled the defendants' contention "unconvincing." Kennedy reached a similar decision earlier, in Greenfield v. Gunn,[55/] where he affirmed the denial of a writ of habeas corpus based on a claimed deprivation of effective assistance of counsel -- an alleged failure by defendant's attorney to explore a potential defense.

Judge Kennedy has written that the Sixth Amendment right to counsel does not afford the right to representation

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53/ 637 F.2d 649 (9th Cir. 1980).

54/ Id. at 653.

55/ 556 F.2d 935 (9th Cir. 1977), cert. denied, 434 U.S. 928 (1977).

by a non-lawyer of the defendant's choice.[56] He also would apparently defer to the observations of the trial court on questions of the competence of the trial attorney.[57]

Judge Kennedy's approach to the effective assistance of counsel issue appears to be within the regime established by the Supreme Court in Strickland v. Washington,[58] which was decided after the decisions written by Judge Kennedy above. Strickland held that a defendant must show that counsel's assistance was not within the range of competence demanded of counsel in criminal cases and that the defendant suffered actual prejudice as a result.

3. Judge Kennedy Is Reluctant to Recognize Claims Involving the Right to Confront and Cross-Examine Witnesses

In Barker v. Morris,[59] Judge Kennedy held that admission of the videotaped testimony of a witness who subsequently died did not violate the confrontation clause where the testimony in the murder trial was necessary and

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56/ United States v. Wright, 568 F.2d 142 (9th Cir. 1978).

57/ Satchell v. Cardwell, 653 F.2d 408, 414 (9th Cir. 1981) (Kennedy, J., concurring), cert. denied, 454 U.S. 1154 (1982).

58/ 466 U.S. 668 (1984).

59/ 761 F.2d 1396 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986).

possessed particular guarantees of trustworthiness. The witness, a Hell's Angel member dying of throat cancer, testified against several suspects on videotape. Defense counsel for those suspects in custody at the time conducted extensive cross examination, all of which was recorded on the videotape. Defendant Barker, a fugitive at the time of the hearing, had no attorney present at the videotaping. Barker was subsequently arrested, tried, and convicted of murder in a state trial in which the videotape was presented as evidence. A state appellate court later held the videotape inadmissible under California's evidence code, but upheld the conviction on "harmless error" grounds.

In reviewing the petition for habeas corpus, the Ninth Circuit panel addressed directly whether the introduction of the videotape violated the Sixth Amendment confrontation clause. Judge Kennedy analyzed the confrontation clause in terms suggesting its sole purpose is to ensure accuracy, and diminished the importance of cross-examination by the defendant. He wrote that the videotaped testimony was analogous to several well-established hearsay exceptions, but one his analogies, the "dying people don't lie" rule, is much-criticized, and the state courts had specifically held that the videotape was <u>inadmissable</u> hearsay. Furthermore, he implied that the defendant did not deserve his Sixth Amendment rights, noting that any lack of opportunity to cross examine

the witness was "directly attributable to Barker's fugitive status."[60/] Judge Kennedy also noted that the tape was strongly supported by independent corroboration for each of its essential elements, and the witness had been subjected to extensive cross examination by other defense attorneys.[61/] The court found no violation of the confrontation clause.

Judge Kennedy will grant confrontation clause relief where the facts are compelling. In Chipman v. Mercer,[62/] the trial court refused to permit cross-examination for bias by the defendant Chipman of the sole eyewitness to the burglary of which he was accused. When counsel undertook to cross-examine the witness on the subject of her known dislike for a relative of defendant and her possible hostility to defendant, the trial court did not permit the questions to proceed. The district court granted a habeas petition, and Judge Kennedy's opinion affirmed the district court.

At the outset, Kennedy announced that confrontation questions must be treated on a case-by-case basis. In his view, "the confrontation clause applies to the essentials of

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60/ Id. at 1400.

61/ Id. at 1402.

62/ 628 F.2d 528 (9th Cir. 1980).

cross-examination, not to all the details of its implementation,"[63] and, as such, the clause "should not become the source of a vast and precise body of constitutional common law."[64] He also would grant broad deference to trial court rulings.[65]

On the facts of this case, Judge Kennedy believed that the potential bias was of sufficient import that reversal was required. Weighing the crucial significance of this eyewitness' testimony, and the reasonable likelihood that the alleged bias may have existed and may have impacted on the witness' truthfulness, Judge Kennedy felt constrained to rule in the defendant's favor. He commented in closing that the seeming harshness of a rule requiring reversal where a confrontation clause error is established is diminished by the fact that such error is only establishable where the violation prevents cross-examination in an area of particular relevance, that is, where the error is likely to have materially affected the outcome of a trial.[66]

63/ Id. at 531.

64/ Id. at 531.

65/ Id.

66/ Id. at 533.

In Burr v. Sullivan,[67/] Judge Kennedy held for the court that a habeas petitioner was denied his Sixth Amendment right to confrontation when the state trial court prohibited his attorney from cross-examining a prosecution witness about possibly impeaching circumstances. The Sixth Amendment included the right to cross-examine the witnesses as to their possible bias or self-interest in testifying. Judge Kennedy held that the defendant's need to cross examine principal government witnesses about burglaries to which they had admitted in prior juvenile proceedings outweighed the need of the state to maintain confidentiality of its juvenile records, and thus the state trial court's striking of that cross examination was constitutional error.

67/ 618 F.2d 583 (9th Cir. 1980).

V

CAPITAL PUNISHMENT

Introduction

Judge Kennedy has had few cases involving capital punishment. He has demonstrated that he will not expand the constitutional requirements that ensure that capital punishment is imposed rationally. He has also demonstrated, however, that he is reluctant to affirm an improperly imposed death sentence on an "obviously" guilty defendant or deny that defendant habeas corpus review. Dicta in Judge Kennedy's capital punishment opinions suggest that he will narrowly interpret and apply those constitutional safeguards that ensure that only the most heinous murderers are executed.

Analysis

Judge Kennedy's most substantial capital punishment opinion is his separate opinion in Adamson v. Ricketts.[1/] There, Judge Kennedy joined a dissent and wrote a separate dissent that would have upheld a death sentence imposed on defendant Adamson for first degree murder, even though Adamson had previously pleaded guilty to second degree murder

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1/ 789 F.2d 722 (9th Cir. 1986) (en banc), rev'd, 107 S. Ct. 2680 (1987).

for the same crime and received a lengthy prison sentence. Adamson agreed to plead guilty to the noncapital crime in exchange for his testimony at other trials. The dissenters narrowed the double jeopardy clause of the Constitution which protects citizens from being tried twice for the same crime. The Supreme Court, in a five-four decision with Justice Powell in the majority, ultimately reversed the Ninth Circuit, but did not wholly adopt the reasoning of Judge Kennedy concerning double jeopardy.

Judge Kennedy's Adamson opinion represents an uncharacteristic foray into analysis not necessary to the resolution of a case.[2/] The Ninth Circuit divided on whether defendant Adamson's plea agreement constituted a waiver of double jeopardy protection. Judge Kennedy's separate dissent was initially premised on a theory that the jeopardy that attaches upon conviction based on a guilty plea is different than the jeopardy that attaches upon conviction based on a trial. According to Judge Kennedy, a defendant who breaches a plea agreement cannot invoke the double jeopardy clause as a bar to prosecution for an offense more serious than the one for which he was originally convicted. The Supreme Court reversed on the narrower ground that Adamson waived his

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2/ 789 F.2d at 747 (Kennedy, J., dissenting).

double jeopardy protection by the terms of his plea agreement. In sharp dissent, four members of the Supreme Court explained that Adamson had not violated his plea bargain and had not implicitly waived his double jeopardy rights.

In Adamson, Judge Kennedy used a cramped construction of the double jeopardy clause to affirm a death sentence imposed on a defendant who had complied with the terms of his plea bargain by testifying in fourteen court appearances in five separate cases resulting in seven convictions.[3/] For reasons not related to Adamson's testimony, two of these convictions were reversed after Adamson began serving his sentence. Adamson temporarily balked at retestifying, but subsequently offered to continue to testify. Judge Kennedy's double jeopardy analysis wholly ignored the fact that the state had substantially received the benefit of its bargain with Adamson and had previously determined that the death sentence need not be imposed.

Judge Kennedy's pronouncements on the double jeopardy clause that unduly restrict double jeopardy protection raise serious concerns. That he would make these pronouncements in a case involving life and death raises questions about the care he takes in such cases.

3/ See 107 S. Ct. at 2688 n.3 (Brennan, J., dissenting).

In two other cases, however, Judge Kennedy has demonstrated some sensitivity to the constitutional rights of those sentenced to death. But even in these cases, Judge Kennedy's statements on points of law not directly relevant to the disposition of the case suggest that he will limit the rights of the condemned.

In Vickers v. Ricketts,[4/] Judge Kennedy reversed a conviction for premeditated murder and vacated a death sentence where the jury had not been instructed that it could convict the defendant of a lesser noncapital offense of unpremeditated murder. Although Judge Kennedy noted that there was "abundant, clear, and persuasive" evidence that the murder was premeditated, the defendant had introduced some testimony that he suffered from a "brain disorder" that caused him to become uncontrollably violent.[5/]

In analysis not relevant to the court's holding, Judge Kennedy suggested that the defendant's failure to request jury instructions on the lesser noncapital offense might have prevented him from raising his claim in the federal courts if a state court had determined that his claim

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4/ 798 F.2d 369 (9th Cir. 1986), cert. denied, 107 S. Ct. 928 (1987).

5/ Id. at 371-72.

was procedurally barred from further consideration.[6] In a separate concurrence, Judge Reinhardt pointed out that, under Ninth Circuit precedent in similar circumstances, the Constitution required a trial court to inform the jury that it could return a conviction for a noncapital offense even if the defendant's attorney did not request such an instruction. Accordingly, failure to request such an instruction could not prevent federal court review of the error.[7] Judge Kennedy's erroneous suggestion that the fundamental right to have a jury consider an offense less than a capital one could be lost through procedural misstep is disturbing.

Similarly, in Neuschafer v. McKay,[8] Judge Kennedy reversed a lower court's refusal to hold an evidentiary hearing on a death row inmate's claim that his confession was involuntary and remanded the case for a hearing. Judge Chambers dissented from the remand on the grounds that there was no doubt that the death row inmate was guilty. After an evidentiary hearing, Judge Kennedy authored a second

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6/ Id. at 373.

7/ Id. at 374 (Reinhardt, J., concurring) (citing Miller v. Stagner, 757 F.2d 988, 993, modified, 768 F.2d 1090 (9th Cir. 1985), cert. denied, 106 S. Ct. 1269 (1986)).

8/ 807 F.2d 839 (9th Cir. 1987).

opinion affirming the federal trial court's finding that the defendant's confession was voluntary.[9/]

In analysis not necessary to the disposition of the second appeal, Judge Kennedy observed that even if the inmate could show that his sentence was harsher than those imposed for similar crimes, he would still not have established a claim for federal relief. This ruling limiting defendants' rights was not necessary to the disposition of the appeal.

9/ Id. at 374 (Reinhardt, J., concurring) (citing Miller v. Stagner, 757 F.2d 988, 993, modified, 768 F.2d 1090 (9th Cir. 1985), cert. denied, 106 S. Ct. 1269 (1986).

VI

FREEDOM OF SPEECH, FREEDOM OF THE PRESS, AND FOIA (the Freedom of Information Act)

Introduction

If confirmed by the Senate, Judge Kennedy may play a crucial role in the development of jurisprudence relating to many First Amendment concerns, especially freedom of speech and of the press. The importance of his role derives in part from Justice Powell's central position on these issues during his tenure. Justice Powell voted in the majority in all eleven First Amendment free speech cases decided by the Supreme Court during the 1986-87 term, and he provided the decisive, majority vote in six of those cases where the vote was 5-4, more than any other Justice.1/ Unfortunately, none of Judge Kennedy's opinions on First Amendment concerns provides a clear indication of his stance on the most difficult and controversial cases now reaching the Supreme Court.

Judge Kennedy has been generally supportive of the media in free press and libel decisions. The cases before him were generally uncontroversial, and decided by unanimous

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1/ Barnett, Free Speech in the New Court, ABA Journal, December 1, 1987, at 48.

panels, so this support may be the result of his strict adherence to settled precedents. Judge Kennedy is at times less supportive of First Amendment rights of free speech by individuals or organizations. If this portends a pattern in his opinions, it would limit the free speech rights of those with the least resources for publishing their views -- non-media speakers.

A. Freedom of Speech

Judge Kennedy has not had the opportunity to determine such issues as what constitutes a public forum and what are the boundaries of speech (i.e. where does speech end and unprotected behavior begin). Judge Kennedy, however, has at times determined that speech was outside of the guaranteed protection of the First Amendment. He has also ruled on several ancillary issues regarding obscenity.

In Singer v. United States Civil Service Commission,[2/] a federal government employee was fired for, among other things, being active in the Seattle Gay Alliance, displaying homosexual advertisements in his automobile window and publicly indicating his homosexuality. Judge Kennedy

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2/ 530 F.2d 247 (1976), judgment vacated and remanded in light of position of Solicitor General, 429 U.S. 1034 (1977).

joined in an opinion, supporting the termination, even though the employee had disclosed his homosexuality before he was hired. The employee alleged that the firing violated his First Amendment rights of free speech and association. The majority opinion ruled against the employee based on the government's right to regulate its workers. The Supreme Court vacated this opinion at the request of the government after the employing agency changed its regulations to prohibit blanket terminations of homosexual employees.[3/]

In another context, Judge Kennedy also ruled against the free speech rights of a government worker. In Kotwica v. City of Tucson,[4/] Kotwica, a city employee asked for and received permission to speak to a reporter on the condition that she would not discuss a particular subject, the development of a competitive gymnastics team in Tucson. When she spoke about the topic she was suspended for a day. Although Judge Kennedy, writing for the court, admitted that the comments were speech, he concluded that public employees' First Amendment rights must be balanced with the state's interest in a responsible and efficient governmental system. For Judge Kennedy, it was easy to reverse the grant of

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3/ 429 U.S. 1034 (1976).

4/ 801 F.2d 1182 (9th Cir. 1986).

summary judgment to the employee. Kotwica had misstated the government's position. The government's stake in having its position stated accurately so that the public can evaluate it was stronger than Kotwica's First Amendment rights, said Judge Kennedy. Therefore, Kotwica "could be disciplined not only because she was insubordinate but also because her speech disserved the first amendment interest of others [i.e. the government and the public]."[5/] How would Judge Kennedy have acted if Kotwica had accurately represented the government's position, thus furthering the government's and public's interest in awareness of the government position?

In Kotwica, Judge Kennedy relied upon two Supreme Court decisions, Connick v. Myers[6/] and Pickering v. Board of Education,[7/] but expanded the weight given to the government's interest so that the test was skewed in favor of the state. Aside from the fact that Kotwica was told not to speak on the topic, the case is indistinguishable from Pickering where the court said:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public

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5/ Id. at 1185.

6/ 461 U.S. 138 (1983).

7/ 391 U.S. 563 (1968)

> attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.[8/]

Hence Judge Kennedy went beyond Supreme Court precedent to deny First Amendment rights.

Outside the governmental context, Judge Kennedy would have denied free speech rights of a worker who spoke against union leadership. In a labor law case, a panel of the Ninth Circuit ruled that sections 411 and 412 of Title 29 of the United States Code protect the speech rights of an elected official of a union so that he could not be fired from his job, even though kept as a union member, for expressing views in opposition to the union leadership.[9/] The panel distinguished Finnegan v. Leu[10/] which denied these

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8/ 391 U.S. at 572-73 (footnote omitted).

9/ Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d 1472 (9th Cir. 1986), petition for cert. filed, 56 U.S.L.W. 3029 (U.S. June 4, 1987) (No. 86-1940).

10/ 456 U.S. 431 (1982).

rights to appointed officials. Judge Kennedy dissented from this part of the holding, stating that Finnegan controlled, that federal judges should exercise restraint with respect to internal union affairs, and that there is no protection if union officials must "'choos[e] between their rights of free expression ... and their jobs.'"[11/]

Judge Kennedy found no free speech rights in a criminal tax case. In United States v. Freeman,[12/] Freeman claimed as defense to a charge that he had aided and abetted violation of the tax laws the fact that he had only advocated tax noncompliance and that this was speech protected by the First Amendment. Judge Kennedy stated that the First Amendment did not bar prosecution but conceded where there is some evidence that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a First Amendment defense would be a legitimate matter for the jury's consideration. Writing for the court, he affirmed the convictions on two counts where the court felt no First

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11/ 804 F.2d at 1486 (Kennedy, J., concurring and dissenting) (quoting Finnegan v. Leu, 456 U.S. at 437, quoting Retail Clerks Union Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012, 1021 (D.D.C. 1969)).

12/ 761 F.2d 549 (9th Cir. 1985), cert. denied, 106 S. Ct. 1982 (1986).

Amendment activity was implicated but reversed twelve counts where the court should have instructed the jury on the issue.

Judge Kennedy addressed the issue of obscenity only indirectly in United States v. Sherwin;[13/] In this case, a magistrate ordered the seizure of a shipment of allegedly obscene materials after receiving an affidavit describing the shipment and specifying that the shipment included an allegedly obscene magazine, Private No. 8, whose contents were described in the affidavit. Judge Kennedy held for the en banc court that no prior adversarial hearing was necessary, even though materials arguably protected by the First Amendment were to be seized. Instead, following Heller v. New York,[14/] all the Constitution required was a personal examination and determination of probable cause for obscenity by a neutral magistrate. The defendants are entitled to a hearing after the seizure, but Judge Kennedy was silent on what constitutes obscene material and how a magistrate should evaluate materials.

In a footnote in Sherwin, Judge Kennedy observed that when materials are seized in violation of the First Amendment, the appropriate remedy is the return of the seized

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13/ 539 F.2d 1 (9th Cir. 1976) (en banc).

14/ 413 U.S. 483 (1973).

property, but not its suppression as evidence.[15] However, in a related case,[16] where Judge Kennedy sat on the panel and concurred in the result, the court held that other magazines seized simultaneously with Private No. 8 were improperly seized because they were not identified in the search warrant. Since these magazines were arguably protected by the First Amendment, the nexus and plain view exceptions to the Fourth Amendment prohibitions against unreasonable searches and seizures were irrelevant. As a result, both the police officer's affidavit to the magistrate and the magistrate's seizure order must be specific to prevent police officers from making ad hoc determinations of obscenity.

In a difficult decision regarding political contributions, Judge Kennedy agreed that Congress could limit the contributions. In California Medical Ass'n v. Federal Election Comm'n,[17] Judge Kennedy upheld for the en banc court the constitutionality of the Federal Election Campaign Act (the "FEC") from challenges that its limitation on

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15/ 539 F.2d at 8 n.11.

16/ United States v. Sherwin, 572 F.2d 196 (9th Cir. 1977), cert. denied, 437 U.S. 909 (1978) (Sherwin II).

17/ 641 F.2d 619 (9th Cir. 1980) (en banc), aff'd, 453 U.S. 182 (1981).

contributions to a political action committee ("pac") infringed First Amendment rights. The Supreme Court had previously held that it was constitutional to limit individual contributions to candidates. Judge Kennedy concluded that if persons could make unlimited contributions to pacs, which in turn could make contributions to candidates, the limitation an individual contributions to candidates could easily be evaded. Relying on Buckley v. Valeo,[18/] Judge Kennedy indicated that such contributions, unlike limitations on expenditures, are really symbolic acts of support rather than articulation of ideas. Limitations on contributions do not significantly diminish the effectiveness or quantity of speech since the FEC does not foreclose unlimited spending by individuals on their own. However, as Judge Wallace observed in partial dissent, the limitations upon contributions to candidates by individuals is intended to thwart the corruptive quid pro quo of a direct gift to a candidate; this concern is irrelevant with a contribution to a pac.

Some of Judge Kennedy's cases raise concerns about his willingness to restrict rights of free speech. He has several times gone beyond Supreme Court precedent to do so.

18/ 424 U.S. 1 (1976) (per curiam).

B. Freedom of Speech vs. State and Local Laws

In two cases touching free speech issues Judge Kennedy has sought to block the requested relief by invoking strict application of abstention principles, whereby the federal court dismissed the case and relegated the plaintiff to state court proceedings.

In World Famous Drinking Emporium, Inc. v. City of Tempe,[19/] the owner of a go-go dancing club challenged zoning and nuisance laws as violative of his civil rights under the Federal Constitution. Prior to commencing the federal action, the owner had sued and had been sued by the City of Tempe in the state courts. The majority affirmed the dismissal of the federal suit on abstention grounds, under Younger v. Harris[20/] which permits federal courts to abstain when: there are on-going state proceedings; important state interests are implicated; and there is an adequate opportunity to raise federal issues in the state proceedings. Judge Kennedy concurred in the judgment, stating that Younger and the related Huffman v. Pursue, Ltd.[21/] controlled.

19/ 820 F.2d 1079 (9th Cir. 1987).

20/ 401 U.S. 37 (1971).

21/ 420 U.S. 592 (1975).

In a different municipal ordinance case concerning billboards, Judge Kennedy wrote for a unanimous court that the federal statute under which the advertiser sought relief did not create a private right of action. Ordinarily the court could then stop and remand the case, as it did, to see if the advertiser might also win on its state law claims. However, the court through Judge Kennedy raised on its own the question whether abstention was appropriate under another line of Supreme Court cases. The court left this issue open, but it implicitly forced the issue in the district court during the proceedings on remand.[22/]

Hence, in two cases, Judge Kennedy used a procedural ground -- abstention -- to decline to rule on First Amendment rights.

C. Rights of the Press and Libel Law

In contrast to the Free Speech cases above, Judge Kennedy has generally shown himself sympathetic to the media, protecting it from prior restraints and the chilling effects of libel suits. He does not think courts should interfere with their editorial function and grants them deference.

22/ National Advertising Co. v. City of Ashland, 678 F.2d 106 (9th Cir. 1982).

For example, in Goldblum v. National Broadcasting Corp.,[23/] Goldblum, who had been imprisoned for his participation in a securities fraud, attempted to enjoin NBC from televising a film about him. Goldblum argued that the film would jeopardize his release on parole and his right to a fair trial in a pending civil action. Judge Kennedy held for the court that a district court's order to submit the film for prior review was a prior restraint and therefore presumptively unconstitutional. Judge Kennedy supported the fundamental principle of the First Amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place in strong language writing:

> We find no authority which is even a remote justification for issuance of a prior restraint . . . . The order not only created a reasonable apprehension of an impending prior restraint, it was also a threatened interference with the editorial process.[24/]

Judge Kennedy has also ruled in favor of the press in libel cases. In Church of Scientology of California v. Adams,[25/] the Church of Scientology of California sued a St.

23/ 584 F.2d 904 (9th Cir. 1978).

24/ Id. at 906-07.

25/ 584 F.2d 893 (9th Cir. 1978).

Louis newspaper for libel regarding a series of articles about Scientology. The action was brought in California although the newspaper's contact with California was minimal. Less than 200 copies of the newspaper reached California. Judge Kennedy concluded for the court that this contact was insufficient to make it appropriate for a court in California to hear the case. Conceding that copies of most major newspapers will be found throughout the world, Judge Kennedy stated that he did not "think it consistent with fairness to subject publishers to personal jurisdiction solely because an insignificant number of copies of their newspapers were circulated in the forum state."[26/] He therefore affirmed the district court's dismissal. Judge Kennedy cited no support for this proposition, which is inconsistent with Buckley v. New York Post Corp.[27/] and Anselmi v. Denver Post, Inc.[28/]

Instead, according to Judge Kennedy, the test for defamation jurisdiction was "whether or not it was foreseeable that a risk of injury by defamation would arise in the

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26/ Id. at 897.

27/ 373 F.2d 175 (2d Cir. 1967) (which Judge Kennedy does not mention).

28/ 552 F.2d 316 (10th Cir. 1977), cert. denied, 432 U.S. 911 (1977).

forum state." In a conclusory statement, he decided it was unforseeable.

In another libel decision, Judge Kennedy also ruled in favor of the press. In Koch v. Goldway,[29/] the mayor of Santa Monica attacked Ilse Koch, a German national and opponent of the mayor, by allegedly saying "there was a well-known Nazi war criminal named Ilse Koch during World War II. Like Hitler, Ilse Koch was never found. Is this the same Ilse Koch?" Asserting that a statement is defamatory only if it is a statement of fact (and not merely an opinion), Judge Kennedy concluded for the court that the statement was not factual since the plaintiff had been born in the 1940s' and thus could not be the war criminal. Instead the mayor's statement was only a vicious slur and thus not libel. Despite apparent disgust toward the mayor, Judge Kennedy concluded that the plaintiff had no redress and agreed with the district court that summary judgment for Goldway was proper.

In another of Judge Kennedy's media decisions, Judge Kennedy ruled that CBS had a right of access to documents filed in connection with criminal proceedings. Judge Kennedy conceded that the press's right of access has limits.

29/ 817 F.2d 507 (9th Cir. 1987).

Private property interests and the right to a fair trial might overcome the right to access, but the interests opposing access must be specified with particularity and the denial of access must be narrowly tailored to serve that interest. However, in the instant case the government had not done this, and the court issued the requested writ of mandamus.[30/]

Overall Judge Kennedy has supported First Amendment rights of the press.

D. Commercial Speech

Judge Kennedy has recognized that limitations on the speech rights of businesses raise First Amendment concerns. In FTC v. Simeon Management Corp.,[31/] he wrote a unanimous opinion affirming the denial of a preliminary order banning unfair and deceptive practices by Simeon pending a final resolution of the FTC's contentions. Simeon ran several weight-loss centers whose clients used a legal drug as part of the program, even though the FDA had not specifically approved the drug for that purpose. The opinion emphasized the narrow scope of appellate review of such an

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30/ CBS, Inc. v. United States Dist. Court, 765 F.2d 823 (9th Cir. 1985).

31/ 532 F.2d 708 (9th Cir. 1976).

order and noted the necessity of judicial review of any FTC determination affecting First Amendment rights. He also argued that it was dangerous to ban speech relating to underlying activities that are themselves legal.

In another case the FTC found false some advertising for a gasoline additive and broadly banned future deceptions by the advertising agency that produced the advertisements and the oil company that manufactured the product. A unanimous opinion by Judge Kennedy affirmed the FTC findings but narrowed the order to the particular product reviewed. To allow the FTC to review all future claims by either company regarding any product they promote, wrote Judge Kennedy, amounts to an oppressive prior restraint on protected speech.[32/]

E. Freedom of Information Act (FOIA)

Judge Kennedy has limited FOIA when confronted with conflicting statutes. In United States v. United States District Court,[33/] John DeLorean had made a FOIA request for documents relating to his activities. Judge Kennedy held for a unanimous court that, because DeLorean was a criminal

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32/ Standard Oil Co. of Calif. v. FTC, 577 F.2d 653 (9th Cir. 1978).

33/ 717 F.2d 478 (9th Cir. 1983).

defendant at the time and the documents were for his defense, he was limited by the requirements of Rule 16 of the Federal Rules of Criminal Procedure specifying the discovery permissable in criminal cases. Judge Kennedy wrote that FOIA could not be used as an alternative discovery mechanism. Therefore, the court vacated the district's order to supply the information. This decision places a restriction on FOIA requests not stated in the statute and hampers the ability of any criminal defendants to discover the nature of the charges against them.

On the other hand, in Long v. IRS,[34/] Judge Kennedy wrote for a unanimous panel rejecting various objections by the IRS to information requests in order to fulfill the stated congressional policy mandating the fullest possible disclosure. Burden on the government, as long as not totally unreasonable, was irrelevant. When the IRS still refused to comply, Judge Kennedy joined a unanimous opinion reversing the district court and ordering compliance by an injunction.[35/] In a concurrence joined by the other members of the

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34/ 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980).

35/ Long v. IRS, 693 F.2d 907 (9th Cir. 1982).

panel, Judge Kennedy properly reprimanded the IRS for its dilatory litigation tactics.

VII

FREEDOM OF RELIGION

Introduction

Judge Kennedy's record on the religion clauses of the First Amendment is extremely limited. Judge Kennedy has had only two cases that directly implicate First Amendment issues. While Judge Kennedy has sat on a few additional panels that raised issues relating to the religion clauses, these issues were not central to those decisions.

Due to the paucity of decisions, it is impossible to discern Judge Kennedy's views in this area. Further, Judge Kennedy has not enunciated a systematic approach to interpretation and application of the religion clauses but instead addresses these issues on a case by cases basis. Perhaps because he has not developed a methodology, Judge Kennedy follows precedent closely. Judge Kennedy's predelictions as a Supreme Court Justice, when he is less bound by precedent, or when confronted with a case of first impression, are difficult to discern.

Analysis

Judge Kennedy's most notable opinion is Graham v. Commissioner of Internal Revenue Service.[1/] In Graham, members of the Church of Scientology ("the Church") appealed a decision of the United States Tax Court that they were not entitled to deduct from their taxes as charitable donations certain payments made to the Church. Church members argued that denial of certain charitable contribution deductions violated their rights under the free exercise and establishment clauses of the First Amendment. These clauses state: "Congress shall make no law respecting on establishment of religion or prohibiting the free exercise thereof." Additionally, the Church members alleged that the Commissioner had selectively enforced the tax laws against them, and not against other churches.

The Tax Court found that, as part of its religious training, the Church provided numerous services to its adherents in a commercial manner. The Tax Court held that payments made by Church members to the Church were not contributions or gifts but, rather, transfers made with the expectation of receiving a commensurate gift in return.

1/ 822 F.2d 844 (9th Cir. 1987).

Three issues were raised on appeal: (1) did the payments to the Church qualify for treatment as charitable deductions under the Internal Revenue Code; (2) was there a free exercise violation; and (3) was there selective enforcement of the laws against the Church.

Relying on recent Supreme Court precedent,[2/] Judge Kennedy, writing for the court, held that where a contributor "expects a substantial benefit in return, then the contribution cannot be deducted."[3/] Because the facts in Graham evidenced an expectation, a quid pro quo, of some service from the church, the payments to the Church were not entitled to charitable deduction treatment under I.R.C. § 170.

Addressing the free exercise issue, Judge Kennedy, again relying on explicit Supreme Court precedent, held that to show a free exercise violation, the Church member has the burden of demonstrating that a "governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in

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2/ United States v. American Bar Endowment, 477 U.S. 105 (1986).

3/ 822 F.2d at 849.

conduct or having a religious experience which the faith mandates."[4/] Judge Kennedy reasoned that the fact that government does not "subsidize" a religious practice does not "create a burden" on the free exercise of religion.[5/] Moreover, Judge Kennedy held that the government was a compelling state interest in promoting charitable gifts and contributions and in the maintenance of a uniform tax system. This interest justified any possible burden on the exercise of the taxpayers' religion.

Judge Kennedy's opinion easily dispensed with the appellant's establishment clause argument by pointing out the neutral application of I.R.S. rules for charitable deductions and, even assuming that the tax law, although neutral in its purpose, "has the effect of treating Scientologists more harshly than other religions, this disparate effect is not unconstitutional, for the reason that the government has a sufficient and compelling justification for its rule, in the context of tax law."[6/]

In his second substantive religion case, International Association of Machinists & Aerospace Workers

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4/ Id. at 850-51.

5/ Id. at 852.

6/ Id. at 853.

v. Boeing Co.,[7] Judge Kennedy joined an opinion addressing the accommodation of religion in the workplace. Boeing Co. was only the second Court of Appeals decision to consider these issues after the Supreme Court's decision in Estate of Thornton v. Caldor, Inc.[8] which struck down a Connecticut law requiring employers to respect any Sabbath day off requested by employees.

In Boeing Co., Nichols, a Boeing employee, refused to join the Machinists Union, which was required for her job. Nichols asserted that union membership and support of labor organizations were contrary to her religious convictions. Instead she offered to contribute a sum equal to her union dues to charity. The Machinists union rejected the offer and requested that she be discharged. Boeing asserted that discharge would violate the discrimination laws -- Title VII -- which require employers to take reasonable steps to accommodate the religious beliefs of their employees.[9]

Relying on Ninth Circuit and Supreme Court precedent, the court in Boeing, joined by Judge Kennedy held that

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7/ Nos. 86-4345, 86-4373 (9th Cir. Nov. 27, 1987) (LEXIS, Genfed library, Usapp file).

8/ 472 U.S. 703 (1985).

9/ 42 U.S.C. § 2000e(j).

substitution of a charitable contribution in lieu of joining or supporting a labor union was a reasonable accommodation under the discrimination laws.

The court further held the provisions of the discrimination laws were constitutional under the establishment clause of the First Amendment because they were enacted to promote the secular purpose of prohibiting discrimination in the workplace. The substituted charity allows the adherent to work without violating his religious beliefs and without increasing or decreasing the advantages of membership in a religious faith; and the accommodation would not result in excessive governmental entanglement with religion because a court's only task is to determine the sincerity of the adherent's beliefs. In reaching this conclusion, the court relied on the Lemon v. Kurtzman,[10/] test repeatedly embraced by Supreme Court precedent.

The court in Boeing Co. correctly distinguished Estate of Thornton v. Caldor, Inc., a recent Supreme Court opinion invalidating a Connecticut law requiring an unqualified accommodation to an employee, on the ground that there was a complete failure to take into account the interests of the employer and other employees in accommodating the

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10/ 403 U.S. 602 (1971).

religious adherent, while in Boeing, the employer's concerns were considered. The court in Boeing Co. reasoned that if there had been a greater hardship upon the union, through a widespread refusal to pay union dues, for example, the charitable contribution might have been disallowed.

VIII

PRISONERS' RIGHTS

Introduction

Judge Kennedy has decided very few cases involving prisoners' rights -- prisoners' civil suits for damages or to obtain better conditions in prisons. In these few decisions he relies heavily on prior precedent, where available. He will support the prisoners' claims when presented with facts clearly indicating official misconduct. But he appears unwilling to expand legal doctrines to allow prisoners greater rights than those previously established. He has also restricted prisoners' rights based on unduly narrow readings of procedural rules.

Analysis

Judge Kennedy at times is reluctant to decide prisoners' rights cases, when he can avoid doing so on procedural grounds. For example, in Wiggins v. Rushen,[1/] Judge Kennedy denied as moot a claim of a former maximum security prisoner regarding allegedly undue restrictions on his access to a prison law library. The prisoner has been transferred from a maximum security facility to a vocational

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1/ 760 F.2d 1009 (9th Cir. 1985).

school while his suit was pending. Judge Kennedy decided that this mooted the Claim, vacating the lower court's injunction requiring better access to the library.

In deciding the mootness issue Judge Kennedy used the traditional test of whether the issue was "capable of repetition yet evading review." Judge Kennedy, rejecting the possibility that the prisoner could be transferred or convicted again, stated that the case was moot because there was no reasonable expectation that the claimant would be subjected to the same action again.[2/] He further held that the claim was not one that would evade review because it had been reviewed in the prisoner's suit for damages and other prisoners could bring it. He further stated that the exception was limited to extraordinary cases where the challenged action is of limited duration.[3/] The dissent, written by Judge Fletcher, criticized Judge Kennedy for not remanding the case to the trial court for fact finding to determine the applicability of this fact-based exception to the mootness bar.[4/] The dissent noted the possibility that prisoners may be transferred after claims are brought and that maximum

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2/ Id. at 1011.

3/ Id.

4/ Id. at 1012.

security is often of limited duration, thus making claims less likely to be reviewable.[5/] Judge Fletcher further stated that it was not "absolutely clear," as the Supreme Court requires, that there was no reasonable expectation of repetition because the prisoner was in fact awaiting trial on charges brought against him while on parole.[6/] Judge Kennedy's interpretation of the mootness doctrine was unduly narrow and not required by Supreme Court precedent.

In another case, Judge Kennedy took a middle ground between upholding prisoners' rights and denying them. In Spain v. Procunier,[7/] Judge Kennedy modified the lower court's finding that certain practices of the San Quentin prison guards violated the inmates' constitutional rights. These practices included the use of tear gas to remove uncooperative prisoners from their cells, the requirement that the prisoners wear various mechanical restraints, and a denial of outdoor exercise. On the one hand, while Judge Kennedy's opinion upheld the lower court's finding that the denial of outdoor exercise violated the Eighth Amendment, and

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5/ Id. at 1013.

6/ Id. at 1012 (quoting Vitek v. Jones, 445 U.S. 480, 487 (1980)).

7/ 600 F.2d 189 (9th Cir. 1979).

modified the lower court's ruling to enjoin the Department of Corrections from violating their new regulations regarding mechanical devices.[8/] On the other hand, Judge Kennedy finding a split in the precedents regarding tear gas, decided to allow its use in certain circumstances, and remanded the case to the district court for the formulation of specific standards.[9/] Judge Kennedy permitted the use of low doses of tear gas on prisoners in their cells, despite allegations that it caused anguish to prisoners in adjacent cells who were cooperating with prison officials.

In addition, Judge Kennedy has several times upheld the rights of prisoners when he found obvious official misconduct. For example, in Jones v. Taber,[10/] a convicted felon awaiting sentencing in prison was taken from his cell, stripped, gagged, bound, chained to a wall, doused with cold water, and beaten with a night stick for three to five hours. He was then put into a special segregation facility for 19 days and subsequently signed a release of his civil rights claims. Judge Kennedy, reversing and remanding summary judgment, ruled in favor of the prisoner. He held that the

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8/ Id. at 199.

9/ Id. at 196.

10/ 648 F.2d 1201 (9th Cir. 1981).

voluntariness of the release was to be determined with reference to the coerciveness of atmosphere, including the factors of a lack of counsel, the prisoner's testimony that his refusal to sign would lead to harsher treatment, a minimal attempt to explain nature of waiver, and the prisoner's placement in special segregation for over two weeks before the release was offered. Judge Kennedy did note that voluntariness did not require the presence or assistance of counsel although the lack of it was a consideration.[11/]

In another case of particularly egregious official misconduct, Judge Kennedy also ruled in favor of the prisoner. In Bouse v. Bussey,[12/] Judge Kennedy joined in a per curiam decision reversing the district court's dismissal of a prison inmate's suit against prison guards for forceably taking a sample of the inmate's pubic hair without a warrant. The decision found that while "some investigative procedures designed to obtain incriminating evidence from the person are such minor intrusions upon privacy and integrity that they are not generally considered searches or seizures"[13/] for Fourth Amendment purposes, the "painful and humiliating

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11/ Id at 1205.

12/ 573 F.2d 548 (9th Cir. 1977) (per curiam).

13/ Id. at 550.

invasion upon the most intimate parts of [plaintiff's] anatomy"[14/] were subject to constitutional protections. The court, citing United States v. Cameron,[15/] held that a search, in order to comport with the Fourth Amendment reasonableness requirement, must minimize emotional and physical trauma.[16/] Finding that the search at issue did not meet that standard, the court reversed and remanded.

Another example of Judge Kennedy supporting prisoners' rights is Akao v. Shimoda.[17/] There he joined a per curiam opinion reversing the trial court's dismissal of a complaint by prisoners without a lawyer ("pro se" complaint) that alleged that prison overcrowding violated the prisoners' right to be free from cruel and unusual punishment. The prisoners alleged that due to population increase, there was an increase in stress, tension, communicable diseases and confrontations between inmates. The lower court held that the prisoners failed to state a claim under the Eighth Amendment. The Ninth Circuit held that while it is true that the

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14/ Id.

15/ 538 F.2d 254, 258 (9th Cir. 1976).

16/ 573 F.2d at 550.

17/ 820 F.2d 302 (9th Cir. 1987) (per curiam), language modified, 832 F.2d 119 (9th Cir. 1987).

allegation of overcrowding without more does not state a claim under the Eighth Amendment, the complaint had alleged more than this and should not have been dismissed without permitting the prisoners the opportunity to file an amendment.[18/] The court stressed that a pro se complaint was to be held to a less strict standard than complaints drafted by attorneys and that dismissal was only appropriate if it was "beyond a doubt" that prisoners could prove no set of facts that would entitle them to relief.[19/] It remanded the case to the district court to allow the prisoners to file an amendment.

Further, in Bartholomew v. Watson,[20/] Judge Kennedy joined an opinion written by Judge Alarcon holding that prison procedures that precluded an inmate from calling another inmate or a prison staff member as a witness before a disciplinary committee in all cases involving institutional security violated minimal due process. Noting that such testimony is usually the most relevant evidence a prisoner could offer, the court stated that it could not be barred absent a case-by-case determination of the potential hazards

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18/ Id. at 303.

19/ Id.

20/ 665 F.2d 915 (9th Cir. 1982).

flowing from it.[21/] The court affirmed the trial court's finding of unconstitutionality.

21/ Id. at 918.