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Constitutional Law

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INTRODUCTION

This Survey article examines the New Mexico appellate court decisions in which Federal Constitutional issues were considered. This article does not examine those cases which involved interpretations of the New Mexico Constitution except insofar as similar or parallel provisions in the New Mexico Constitution and the Federal Constitution were concurrently treated. The article is divided into two parts. The first part deals with the civil cases in which constitutional issues were raised, and the second part deals with criminal cases. In both parts the cases are divided and considered according to the constitutional provisions which were primarily discussed by the courts.

I. CIVIL LAW

A. *Freedom of Speech*

During the Survey year the New Mexico appellate courts examined two cases under the free speech clause of the first amendment to the United States Constitution. Both cases involved university professors who were terminated from positions at New Mexico universities. The professors alleged that their terminations were the result of their engaging in constitutionally protected speech. These cases, one by the New Mexico Supreme Court and one by the court of appeals, muddled the issue of whether speech activity is a question of fact or law.

In the first case, *Jacobs v. Stratton,*[1] plaintiff, a non-tenured university business professor employed under a series of one-year contracts between the years 1970 and 1975, was not given an additional one-year contract for the 1975–1976 academic term. During the period of plaintiff's employment at the university he published a series of articles in student and local newspapers and engaged in other speech activities which were highly critical of the university administration. In the fall of 1974 plaintiff was notified that based upon his academic performance, his contract might not be renewed for the following academic year pending the outcome of a concilia-

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1. 94 N.M. 665, 615 P.2d 982 (1980).

tory session between plaintiff and university administrators.[2] The conciliatory session, which was held in accordance with procedures prescribed by the faculty handbook, resulted in the plaintiff's being notified that his contract would not be renewed. Plaintiff then appealed to the Board of Regents which held a *de novo* hearing after which it, too, decided not to renew plaintiff's contract. Plaintiff then brought suit in state district court against the Board of Regents and the members of the administration, seeking damages for breach of his employment contract. The plaintiff brought a §1983[3] action, claiming a deprivation of rights under the first amendment and the due process and equal protection clauses of the fourteenth amendment. At trial the jury returned a verdict in favor of the plaintiff in the amount of $80,000. The judgment was appealed to the New Mexico Court of Appeals and was reversed. The New Mexico Supreme Court granted certiorari.

Although the plaintiff raised several constitutional issues in the case,[4] the primary issues with which the supreme court dealt related to the freedom of speech claims. Citing the now famous case of *Perry v. Sindermann,*[5] the court first reiterated the general rule of law that a non-tenured professor ". . . could be discharged for no reason whatsoever or for a variety of reasons . . . [provided that] the decision not to renew a contract was not based on the exercise of constitutionally protected First Amendment freedoms."[6] The court then discussed the burdens on the parties in such cases stating that, consistent with the holding in *Mt. Healthy City Board of Education v. Doyle:*[7]

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2. The administration consisted of the President and Vice-president of the University, and the Dean of the College of Business.

3. 42 U.S.C. § 1983 (1976):

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

4. With respect to the due process and equal protection claims the court said, in effect, that plaintiff had a constitutional due process right to have procedures followed which were set out in the faculty handbook because the procedures created a property right in the plaintiff entitling him to due process. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). Although the court did not find that the faculty handbook procedures had been violated, this case appears to extend the holding in the New Mexico Court of Appeals case of Hillis v. Meister, 82 N.M. 474, 483 P.2d 1314 (Ct. App. 1971), in which the court ruled that the faculty handbook was part of a contract between the university and a faculty member. That contract is now a property right entitled to constitutional protection. The court in *Jacobs* never addressed and did not rule upon the equal protection claims raised by the plaintiff.

5. 408 U.S. 593 (1972).

6. 94 N.M. at 667, 615 P.2d at 984.

7. 429 U.S. 274 (1977).

> The plaintiff has the dual burden of showing that his conduct was constitutionally protected and that his conduct was a motivating factor in the Board's decision. The defendant has the burden of showing it would have reached the same decision in the absence of the protected conduct.[8]

The pivotal issue turned upon the failure of the trial court to give a tendered instruction which would have defined constitutionally protected speech and required the jury in examining the speech to balance the interests of the teacher against the interests of the university. The supreme court reversed the jury verdict[9] and required that an instruction be given which was consistent with the holding in the United States Supreme Court case of *Pickering v. Board of Education,*[10] from which the court quoted extensively:

> '[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'[11]

The court set forth the kind of analysis of the allegedly protected speech which must be undertaken by jurors in turning the balance required by *Pickering.* The court stated that there are three elements which determine that balance. First, plaintiff's statements must be examined to determine whether they were directed at persons with whom the plaintiff would be in close contact and whether such statements would impair a close working relationship. Second, the statements must be analyzed to determine if they were detrimental only to the interests of university administrators as individuals, rather than the school itself. Third, the statements must be examined to determine whether they were directed toward matters of legitimate public concern upon which any citizen might be allowed to comment.[12] Thus, if the speech activity interfered with close working relationships, was a personal attack upon individuals, and did not relate to a matter of public concern, such activity would not be entitled to constitutional protection.

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8. 94 N.M. at 667, 615 P.2d at 984.
9. *Id.* The court noted that it was reversing the trial court for different reaons than the court of appeals.
10. 391 U.S. 563 (1968).
11. *Id.* at 568; 94 N.M. at 667, 615 P.2d at 984.
12. 94 N.M. at 668, 615 P.2d at 985.

The court did not determine whether the plaintiff's statements fell, as a matter of law, within the area of protected speech for which the university administration could not terminate the plaintiff. The court instead remanded the case for a new trial.[13] This case thus indicates that whether statements of the plaintiff constitute protected speech activity is a factual question to be determined by the jury, using the three guidelines given by the court.

Lux v. Board of Regents of New Mexico Highlands University[14] was decided following the *Jacobs* case by the New Mexico Court of Appeals. In contrast to *Jacobs,* the *Lux* court itself undertook to determine whether statements of a university professor were protected conduct for which the university could not act to terminate the professor's employment. In *Lux,* as in *Jacobs,* the court was presented with the nonrenewal of a contract, this time for a professor who also served as an assistant academic dean and director of a federal program.

In 1971 plaintiff had been hired as a professor of history and in that capacity was granted tenure in 1972. He was subsequently employed in the multiple positions of assistant academic dean, director of Title III programs (a federal program),[15] and associate professor of history for the summer of 1972 through the 1972–73 academic year. The positions of assistant academic dean and director of Title III programs were not tenured positions. The Title III program which plaintiff directed was created as a result of a three-year federal grant which was to run through the 1974–1975 school year. During the program period dissatisfaction arose with respect to that program which led to a student take-over of the administrative offices in December of 1973. The President of the University asked the plaintiff to report to the Board of Regents on the program and on the student situation. Plaintiff appeared before the Board of Regents in October of 1973 and gave a speech which was highly critical of the administration. After that meeting, the president assumed more responsibility for the program. Plaintiff continued to criticize the administration and sent letters to the regents criticizing the president until July 31, 1975, when the president informed plaintiff that the plaintiff's administrative employment would not be renewed and that he would be terminated on August 31, 1975. He was to continue his employment as a history professor. Plaintiff sued the University Board of Regents and individual members of the administration. Again, as in *Jacobs,* plaintiff brought a § 1983 action, and raised

13. *Id.* at 667, 615 P.2d at 984.
14. 95 N.M. 361, 622 P.2d 266 (Ct. App. 1980), *appeal pending.*
15. *See* 20 U.S.C. §§ 1051 to 1056 (1965).

issues arising under the first and fourteenth amendments to the United States Constitution, alleging a deprivation of free speech, due process,[16] and equal protection.[17] The jury returned a verdict in favor of the plaintiff against only the president of the University.

In deciding the free speech claims of the plaintiff, the New Mexico Court of Appeals examined the content of the speech, which was in the form of a letter delivered to the Board of Regents at its October meeting. The letter contained highly inflammatory language which the court described as "vituperation and personal vilification" of the university administration.[18] Again relying upon the cases of *Perry v. Sindermann* and *Pickering v. Board of Education,* the court stated that in order ". . . for a comment to be accorded constitutional protection it must be upon matters 'of legitimate public concern.' "[19] The court found that plaintiff's comments were not in fact made to the public, having been made directly to the Board of Regents at one of its meetings, and that only one sentence of the comments related to the main issue before the Board of Regents, which was the Title III program.[20] The fact that plaintiff engaged in a personal attack upon the university administration rather than addressing the issue of the federal program which "might have been a matter of legitimate public interest" led the court to hold that such comments by the plaintiff ". . . did not serve to foster rational discourse, exchange of ideas, and meaningful discussion about a matter of legitimate public interest, and it is these functions that free speech protection are intended to foster."[21]

The court determined that as a matter of law the kind of speech engaged in by the plaintiff was not constitutionally protected under the First Amendment and that a directed verdict should have been granted to the defendant president. The court ordered that the jury verdict be overturned and judgment be entered in favor of the defendant President of the University.

In both *Jacobs* and *Lux* the New Mexico Supreme Court and the court of appeals confirmed the United States Supreme Court rul-

16. See text accompanying nn 28-31 for a discussion of the due process claims raised by plaintiff.

17. Although the court held there was no denial of due process or equal protection, the court in fact never discussed the issue of equal protection in its opinion. 95 N.M. at 369, 622 P.2d at 274.

18. 95 N.M. at 368, 622 P.2d at 273.

19. *Id.*

20. The court's statement that the plaintiff's comments were not made to the public should not have been relevant in light of the United States Supreme Court's holding in Givhan v. Western Line Consolid. Sch. District, 439 U.S. 410, 414 (1979). *Givhan* stated that a public employee does not forfeit his first amendment rights if his views are expressed privately rather than publicly.

21. 95 N.M. at 368, 622 P.2d at 273.

ings[22] that a university employee's right to engage in speech conduct is not absolute in either the public or private arena. If the speech activity affects working relationships, is nothing more than a personal attack on officials, and has little or nothing to do with a matter of legitimate public interest, the speech activity will not be constitutionally protected. In every case the teacher's right to engage in speech must be balanced against the interests of the institutional employer. The cases, however, raise questions concerning whether the judge or the jury is to strike the balance between the respective interests of teacher and the institution. The supreme court in *Jacobs* seemed to say that whether the speech engaged in is constitutionally protected is a factual matter for a jury to decide. Although it reversed the first jury verdict, it did remand the case for a new trial. On the other hand, the court of appeals itself undertook to examine the content of the speech in *Lux* and determined that the speech was not constitutionally protected.[23] These cases point out that the standard in such cases may be more easily stated than applied. Under what circumstances the New Mexico Supreme Court will itself examine the content of alleged free speech activity remains to be seen. In the meantime, the district courts have been given little guidance in determining whether the speech activity of state institutional employees is a question of fact or of law.

B. *Due Process*

During the Survey year the appellate courts had several occasions in which due process under the fourteenth amendment to the United States Constitution was raised as a primary issue. The courts considered a wide variety of constitutionally protected interests.

In addition to the free speech claims raised in *Lux v. Board of Regents,*[24] discussed above, plaintiff in *Lux* also had alleged that his due process rights under the fourteenth amendment to the United States Constitution[25] and the New Mexico Constitution[26] had been

22. Pickering v. Board of Education, 391 U.S. at 568; Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. at 284.

23. 95 N.M. at 368, 622 P.2d at 273.

24. 95 N.M. at 361, 622 P.2d 266 (Ct. App. 1980).

25. U.S. Const. amend. XIV § 1 states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26. N.M. Const. art. 2, § 18 states: "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person."

violated. Plaintiff asserted that he had a protectable "liberty" interest entitling him to a hearing before termination from his employment. Citing *Board of Regents v. Roth,*[27] the court of appeals set forth the constitutional standard in New Mexico for applying due process in the protection of liberty interests, stating:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of hearing is paramount. But the range of interests protected by procedural due process is not infinite.[28]

In examining plaintiff's due process claims, the court considered whether plaintiff had the kind of liberty interest at stake which required the due process protection of a hearing. The court concluded that no hearing was required. Plaintiff's asserted liberty interest derived from a memorandum which the university president had prepared. This memorandum was reviewed by members of the Board of Regents, an academic dean, and the president's personal secretary. The memorandum was critical of the plaintiff professor's performance in his position as an administrator. Plaintiff claimed that the remarks contained in the memorandum seriously damaged his standing and reputation as a professor and administrator. The plaintiff argued that *Board of Regents v. Roth*[29] had established a liberty interest which could be protected against government action which seriously harmed one's standing in the community or foreclosed opportunities for reemployment. In other words, government action which "stigmatized" someone could infringe on one's liberty for future employment, and therefore due process protections were required.

The court did not decide whether the president's statements were themselves libel and damaging to plaintiff's good name and reputation. It found instead that the statements were not made public.[30] The court reasoned that because the statements in the memorandum were confidential and were restricted to members of the university community having an interest in receiving such information, the statements were not public and therefore could not have damaged plaintiff's reputation or employability in the larger academic community.[31] Thus, no liberty interest entitled to due process protection existed.

27. 408 U.S. 564 (1972).
28. 95 N.M. at 364, 622 P.2d at 269.
29. 408 U.S. at 573.
30. *See* Bishop v. Wood, 426 U.S. 341 (1976).
31. 95 N.M. at 366, 622 P.2d at 271.

Lux suggests that damaging remarks made by government officials in New Mexico infringe upon liberty interests provided they are made public, and may entitle the person affected to the due process protections afforded by the fourteenth amendment. The court did not decide, however, what are the limits of the term "public." The results might have been different had the president's statements been published in a campus newspaper or delivered to persons within the university community not having anything to do with plaintiff's program or its administration. Those questions have yet to be addressed.

Another due process case during the survey year concerned parental rights. In *In re Arnall*[32] the New Mexico Supreme Court concluded two things: first, that the termination of parental rights requires procedural due process, and second, that failure to raise an objection to the lack of due process at trial did not waive that right, because parental rights are fundamental rights entitled to procedural protection at any stage. In *Thatcher* the maternal grandparents of an infant filed a petition in district court seeking guardianship of the infant. The putative father of the infant also filed a petition in the same court for custody and guardianship. The mother, who consented to her parents' petition, responded to the father's claim by denying paternity. After the trial the district court found paternity, granted guardianship to the father, and terminated the parental rights of the mother pursuant to statute.[33] The mother appealed the

32. 94 N.M. 306, 610 P.2d 193 (1980).

33. N.M. Stat. Ann. §40-7-4(B) (Supp. 1979) provides:

B. The court shall terminate parental rights with respect to a minor child when:

(1) the minor has been abandoned by the parent or parents; or

(2) the minor has been left under such circumstances that the identity of the parents is unknown and cannot be ascertained, despite a diligent search by the department, and the parents have not come forward to claim the minor within six months following the abandonment of the child; or

(3) the child is a neglected or abused child as defined in Section 32-2-3 NMSA 1978 and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the conditions which render the parent unable to properly care for the child; or

(4) the child has been placed in foster care by a court order or has been otherwise placed by parents or others into the physical custody of such family and the following conditions exist:

(a) the child has lived in the foster home for an extended period of time;

(b) the parent/child relationship has disintegrated;

(c) a psychological parent/child relationship has developed between the foster family and the child;

(d) if the court deems the child of sufficient capacity to express a preference, the child prefers no longer to live with the natural parent; and

(e) the foster family desires to adopt the child.

decision, arguing that the termination of her parental rights violated due process because the issue of the termination of her parental rights was neither raised in the initial pleadings nor tried on the merits. The first time the issue of the termination of parental rights was known to the mother was during closing argument when counsel for the father requested in an oral motion that the mother's parental rights be terminated. Counsel for the mother failed to object to the introduction of this new issue at the time of the conclusion of the case. On appeal the supreme court reversed the district court. The court concluded that the failure to raise an objection was not a bar to consideration of the issue on appeal because parental rights are fundamental rights which cannot be waived without an opportunity for a full and fair hearing. The court also found that the mother was never given notice, either in the pleadings or during the course of trial, that her parental rights were at issue and that lack of notice violated her procedural right to due process.[34]

Following the *Arnall* case the New Mexico Supreme Court considered another alleged procedural due process violation in the case of *McCoy v. New Mexico Real Estate Commission.*[35] Again, the question was whether a party was given proper notice of possible adverse action where the pleadings did not specify matters before the court, but which the court ruled upon at trial. *McCoy* involved the revocation of a real estate broker's license under the Criminal Offender Employment Act (hereinafter cited as COEA).[36] McCoy had been convicted of a fourth degree felony after which the New Mexico Real Estate Commission sent her a notice charging her with a violation of the Real Estate Broker and Salesmen's Act (hereinafter cited as REBSA).[37] This statute allows the Commission to revoke a broker's license upon the broker's conviction of a felony related to dealings as a real estate broker or as a real estate salesman.[38] The Com-

34. 94 N.M. at 308, 610 P.2d at 195.

35. 94 N.M. 602, 614 P.2d 14 (1980).

36. N.M. Stat. Ann. §§28-2-1 to -6 (1978).

37. N.M. Stat. Ann. §§61-29-1 to -19 (1978). 1981 N.M. Laws ch. 241, §34, repealed this section, effective July 1, 1984.

38. N.M. Stat. Ann. §61-29-12 (1978) reads:

> The [Real Estate] commission shall have the power to refuse a license for cause or to suspend or revoke a license at any time where the licensee has by false or fraudulent representations obtained a license, or where the licensee in performing or attempting to perform any of the actions mentioned herein is deemed to be guilty of:
>
> * * * *
>
> F. conviction in any court of competent jurisdiction of a felony or any offense involving moral turpitude which is related to dealings as a real estate broker or a real estate salesman.

1981 N.M. Laws ch. 241, §34, repealed §61-29-12, effective July 1, 1984.

mission held a hearing and concluded that the fourth degree felony, involving a conspiracy to import marijuana, was sufficient grounds for the revocation of a license and revoked McCoy's license for one year. McCoy then appealed to the trial court, where for the first time, the Commission argued that the decision to revoke McCoy's license was not only pursuant to the Real Estate Brokers and Salesman's Act, as originally charged, but also on the basis of the COEA. The COEA is a much broader statutory provision than the REBSA. The COEA permits a state agency having jurisdiction to revoke the license of someone engaged in a regulated trade or business, if the person has been convicted of a felony *not* directly related to the particular trade or business and the agency determines after investigation that the person convicted has not been sufficiently rehabilitated to warrant the public trust.[39]

The trial court affirmed the Commission's decision and included a reference to the applicability of the COEA even though the Commission had not based its initial decision on the COEA and McCoy had not been given notice or a hearing on its application to her set of circumstances. The Commission had also failed to comply with the specific procedural requirements of the COEA.[40]

On appeal to the supreme court the Commission abandoned its reliance upon the Real Estate Brokers and Salesmen's Act, admitting that the Act "is restricted to felonies committed by licensees relating to their dealings in real estate as brokers or salespeople."[41] The Commission argued instead that McCoy was not prejudiced by the

39. N.M. Stat. Ann. §28-2-4(A)(2) (1978) provides as follows:
A. Any board or other agency having jurisdiction over employment by the state or any of its political subdivisions or the practice of any trade, business or profession may refuse to grant or renew, or may suspend or revoke, any public employment or license or other authority to engage in the public employment, trade, business or profession for any one or any combination of the following causes:

* * * *

(2) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction does not directly relate to the particular employment, trade, business or profession, if the board or other agency determines, after investigation, that the person so convicted has not been sufficiently rehabilitated to warrant the public trust.

40. N.M. Stat. Ann. §28-2-4(B) (1978) provides that:
B. The board or other agency shall explicitly state in writing the reasons for a decision which prohibits the person from engaging in the employment, trade, business or profession, if the decision is based in whole or part on conviction of any crime described in Paragraph (1) of Subsection A of this section. Completion of probation or parole supervision, or of a period of three years after final discharge or release from any term of imprisonment without any subsequent conviction, shall create a presumption of sufficient rehabilitation for purposes of Paragraph (2) of Subsection A of this section.

41. 94 N.M. at 603, 614 P.2d at 15.

failure of the Commission to charge her and revoke her license pursuant to the relevant statute, that is, the COEA. Citing *Arnall,* the supreme court held that the Commission's failure to properly charge McCoy and conduct proceedings in accordance with the proper statute did not afford McCoy reasonable notice and an opportunity to be heard and was, therefore, a violation of procedural due process.[42]

In *Board of Education of Alamogordo Public Schools District No. 1 v. Bryant,*[43] the court had to determine whether a teacher's right to due process was violated when a tenured teacher was not reemployed pursuant to an anti-nepotism statute. Bryant had been employed by the Alamagordo Public Schools for four years and had obtained tenure. Her father was then elected to the local school board. The school board held a hearing and concluded that Bryant's continued employment would be a violation of a statute which prohibited nepotism in the public schools.[44]

Bryant appealed to the State Board of Education arguing that the nepotism statute was not applicable to persons already employed when a family member is elected to the local school board and that her termination violated her property and liberty rights to continued employment with the school district. Bryant won before the State Board of Education[45] and the local school board appealed to the New Mexico Court of Appeals.

42. The court also found that it was prejudicial error for the Commission to have failed to follow the procedures established by the COEA because the Commission had failed to state in writing the reasons for its decision prohibiting McCoy from engaging in her business and because the Commission had failed to investigate whether McCoy had been sufficiently rehabilitated to merit the public trust. N.M. Stat. Ann. §28-2-4 (1978); 94 N.M. at 603-04, 614 P.2d at 15-6.

43. 95 N.M. 620, 624 P.2d 1017 (Ct. App. 1980). [Editors' note: After this article was written, the New Mexico Supreme Court reversed the court of appeals and affirmed the ruling of the State Board of Education. New Mexico State Bd. of Educ. v. Board of Educ. of Alamogordo Public School Dist. No. 1, 95 N.M. 588, 624 P.2d 580 (1981). For a discussion of the supreme court opinion, *see* Browde, *Administrative Law,* 12 N.M. L. Rev. 1 (1982).]

44. N.M. Stat. Ann. §22-5-6 (1978) provided as follows:

> No local school board shall employ or approve the employment of any person in any capacity by a school district if the person is related by consanguinity or affinity within the first degree to any member of the school board governing the district. This section does not prohibit the continued employment of any person who is employed by a school district on July 1, 1972, and who, on that date, is related within the prohibited degree to a member of the governing school board.

In 1981, the legislature amended this statute to avoid the difficulties presented by this case. The statute now reads in pertinent part:

> A. No local school board shall initially employ or approve the initial employment in any capacity of a person who is the spouse, father, father in law, mother, mother in law, son, son in law, daughter or daughter in law of a member of such local school board.

45. The State Board of Education agreed with Bryant that the statute in fact did not apply to persons employed at the time a family member was elected to the school board and that the local board had not presented sufficient evidence for its decision which thus violated her right to due process. 95 N.M. at 622, 624 P.2d at 1019.

The court resolved that there was no liberty right at stake because Bryant had not been terminated as a result of any effort by the school board to restrict her constitutional rights, such as her right of free speech; nor had she been charged with anything that might seriously damage her standing and association in the community or impose upon her a stigma or other disability that would foreclose her freedom to take advantage of other employment opportunities.[46] In considering the extent of Bryant's constitutional rights[47] the court summarized that "[t]he deprivation of rights, then, if any rights exist, is not inherently and automatically unlawful. It is the failure to accord due process in exercising power which results in the loss of 'life, liberty, or property' that is forbidden."[48]

The court did determine that Bryant's tenured status constituted a property right to continued employment which therefore necessitated the invocation of her constitutional right to due process. Upon consideration of whether Bryant was deprived of due process, the court determined that what due process required was notice and an opportunity for hearing "appropriate to the nature of the case."[49] The court said that if Bryant received notice and a full and fair hear-

46. *See* Board of Regents v. Roth, 408 U.S. 564 (1972).

47. In Board of Regents v. Roth, the Supreme Court quoted Meyer v. Nebraska, 262 U.S. 497 (1923), which defined the term "liberty" under the Fourteenth Amendment as follows:

> While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men, [citation omitted]. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. 408 U.S. at 572.

The Supreme Court also defined property interests in *Roth,* stating:

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577.

48. 95 N.M. at 623, 624 P.2d at 1020.

49. 95 N.M. at 624, 624 P.2d at 1021.

ing, the local school board was free to terminate her employment if good and just cause existed. Stating that the nepotism statute prohibiting her reemployment did constitute "good and just cause" for her termination, the court of appeals upheld the dismissal.[50]

One important aspect of this case is that "good and sufficient cause" for termination of a teacher need not be grounded upon any conduct engaged in by the teacher affected. Moreover, the mere existence of a liberty or property right does not mean that a teacher's employment cannot be terminated. It means only that the employment can be terminated after notice and a hearing which comports with due process. This is, therefore, the same standard as that set forth in *Board of Regents v. Roth.*[51]

In *Maurer v. Thorpe,*[52] the New Mexico Supreme Court held that a plaintiff who is required by law to join his insurance company as an indispensable party-plaintiff because of the company's subrogation right, has a due process right to join the defendant's insurance company as a party-defendant. Plaintiff was injured in an automobile accident, and brought suit against the driver and owner of the vehicle which allegedly struck plaintiff's vehicle. Plaintiff's insurance company paid him, and, because of the insurance company's subrogation right, was named as a party-plaintiff in plaintiff's suit. Plaintiff sought to name defendant's insurer as a party-defendant. The district court dismissed defendant's insurer from the case, however, and the court of appeals affirmed. The supreme court reversed, holding that it was prejudicial to plaintiff's case to require plaintiff's insurer to be named as a party-plaintiff,[53] and at the same time not to permit defendant's insurer to be a named party-defendant.

The court discussed the rule that knowledge of defendant's insurance is generally withheld from the jury because of its prejudicial effect,[54] and agreed that this rule may be justified where a plaintiff attempts to bring a direct action against the insurer and no insurer is named as a party-plaintiff.[55] The court said, however, that the policy to prevent prejudice "is not applicable where plaintiff is compelled by law to join its insurer to its cause of action" because knowledge

50. In a dissenting opinion, Judge Lopez argued that the nepotism statute was ambiguous and deprived Bryant of property and liberty rights contrary to the due process clauses of the Federal and New Mexico Constitutions, but he did not elaborate. 95 N.M. at 625, 624 P.2d at 1022.

51. 408 U.S. at 569-570.

52. 95 N.M. 286, 621 P.2d 503 (1980).

53. *See* Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

54. *See* Fort v. Neal, 79 N.M. 479, 444 P.2d 990 (1968).

55. 95 N.M. at 287, 621 P.2d at 504.

of insurance is already before the jury.[56] The court observed a possibility of prejudice where plaintiff is required to reveal the existence of his own insurance to a jury but is also required to withhold evidence of defendant's insurance:

> It may be perceived that a plaintiff and its insurance company are bringing suit against an uninsured defendant. Also the disclosure that the insurer has paid a certain amount to plaintiff might tend to determine the amount of damage suffered, thereby liquidating the claim to the amount paid by the plaintiff's insurer. Finally, the jury may believe that the plaintiff has already been sufficiently compensated for its injury and thereby deprive plaintiff of any additional amounts to which he might rightfully be entitled. The plaintiff is in effect being denied the opportunity to present its case in a meaningful manner and is thereby denied due process of the law.[57]

Under this reasoning, the court concluded that the only method to insure that the rights of the parties are balanced is to require that both insurance companies be named as parties to the action.[58] The court stated that it is "fundamentally unfair and violates concepts of due process of law" to deny equal treatment with respect to plaintiffs' and defendants' insurance coverage.[59] Quite aside from its constitutional significance, this case may have a far-reaching effect and open the door to direct action against insurance carriers.

In *Pedrazza v. Sid Fleming Contractor Inc.*,[60] the supreme court considered whether workmen's compensation is a fundamental right or property interest which is to be afforded due process protection.[61]

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56. *Id.*

57. *Id.* at 287-88, 621 P.2d at 504-05.

58. The court was careful to point out that its decision "does not create a direct action against defendant's insurer nor do we declare the insurer to be an interested party and therefore subject to joinder . . ." 95 N.M. at 288, 621 P.2d at 505. However, in a specially concurring opinion Justice Payne argued for the abolition of the rule barring admission of evidence relating to the existence of a defendant's insurance coverage even where plaintiff was not required to name its insurer as party-plaintiff, pointing out that states which permit direct action against insurance companies have not substantiated fears that juries would return verdicts for larger amounts if they knew insurance companies rather than defendants were paying claims. *Id.*

59. 95 N.M. at 288, 621 P.2d at 505. Plaintiff also raised the claim that different treatment afforded plaintiffs' and defendants' insurance coverage was a denial of equal protection, but the court did not address this issue. Clearly, however, the court could just as well have relied upon equal protection grounds, because the analysis under due process points out that no rational basis exists to distinguish between plaintiffs' and defendants' insurance coverage when plaintiff is otherwise required to name its insurance carrier as a party-plaintiff. Without a rational basis for the distinction, the difference in treatment could not withstand an equal protection analysis.

60. 94 N.M. 59, 607 P.2d 597 (1980).

61. The case also raised claims of equal protection which will be discussed *infra* at pages 210-11.

In *Pedrazza* a workman was killed in an accident while he was employed by a New Mexico contractor. The mother of the decedent workman's children, who were residents of Mexico,[62] brought suit on their behalf for benefits under the New Mexico Workmen's Compensation Act.[63] The defendant contractor moved to dismiss the case on the ground of the existence of a statute which barred claims for injuries to a workman brought by relatives who are non-residents of the United States.[64] The district court dismissed the complaint, and plaintiff appealed. Plaintiff argued that the statute violated due process in that it interfered with a fundamental right and a vested property interest.

Concerning the "fundamental right" claim, the supreme court noted that no law existed which had declared workmen's compensation to be a fundamental right under the Constitution, and summarily dismissed this contention. The court did decide, however, that the Workmen's Compensation Act contains vested property interests, but stated that those vested property interests are limited to the terms of the workmen's compensation statute. Furthermore, the court said that because the statute specifically excludes non-resident aliens, such non-residents have no vested property interest entitled to due process protection. The court stated that a worker's dependents have only an "inchoate right to benefits prior to the worker's death, and after his death their right vests as property, if at all, according to the terms of the Act."[65] The New Mexico legislature had not conferred any right upon non-resident aliens in the Workmen's Compensation Act; therefore no violation of procedural due process existed.

In a second workmen's compensation case, *Casillas v. S.W.I.G. and Argonaut Insurance Company,*[66] plaintiff challenged the Workmen's Compensation Act[67] on the ground that the disability benefits provided were inadequate and therefore violated due process. In *Casillas* plaintiff suffered a compensable injury and was paid disability benefits amounting to two-thirds of his average weekly wage which worked out to be less than the statutory minimum wage scale. Stat-

62. The opinion does not indicate the immigration or citizenship status of the workman, but that fact is irrelevant to the holding in this case.

63. N.M. Stat. Ann. §§52-1-1 to -69 (1978).

64. N.M. Stat. Ann. §52-1-52 (1978) states in pertinent part that: "No claim or judgment for compensation under this act . . . shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman."

65. 94 N.M. at 62, 607 P.2d at 600. "Federal courts have stated the due process problem confronting us thusly: 'To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972).' " 94 N.M. at 62, 607 P.2d at 600.

66. 96 N.M. 84, 628 P.2d 329 (Ct. App. 1981).

67. N.M. Stat. Ann. §52-1-41 (1978).

ing that plaintiff's claim involved "substantive due process," the New Mexico Court of Appeals reiterated much of what had been stated in *Pedrazza;* that "[a] state violates the due process clause when it interferes with a fundamental right or a vested property interest" but that "workmen's compensation is not a fundamental right."[68] The court further reasoned that plaintiff had a vested property interest in benefits provided by the Act, but was not entitled to larger benefits because the "[l]egislature has not seen fit to confer" them.[69] The court concluded that the provisions of the Act apply equally to all workers subject to the statute, that the benefits provided by the Act have a reasonable relation to the economic purposes involved, and that large discretion is to be afforded the legislature to determine what the public interest requires. Therefore, no substantive due process violation could be based on the dollar amount of the disability benefits. Furthermore, other benefits must be taken into consideration besides the dollar amount of the disability benefits that were paid to the plaintiff. These other benefits include:

> A uniform scale of compensation which substitutes for the "varying and widely divergent estimates of juries" [citation omitted]; a right to compensation which eliminates legal defenses favorable to the employer [citation omitted]; medical and related benefits [citation omitted] . . . and rehabilitation services [citation omitted].[70]

Because economic benefit over and above the disability benefits did exist, the low dollar amount for compensation did not give rise to a violation of due process rights.[71]

C. *Equal Protecton*

Four cases decided during the Survey year concerned the equal protection clause of the fourteenth amendment of the United States Constitution,[72] and the similar guarantee of the New Mexico Constitution.[73] In every case in which both New Mexico state and federal equal protection clauses were at issue, the courts treated the analysis under both clauses as if they were the same. The courts also appeared to pay great deference to the legislature.

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68. 96 N.M. at 86, 628 P.2d at 331.

69. *Id.*

70. *Id.* at 629, 628 P.2d at 332.

71. Judge Sutin dissented, arguing that the failure to provide adequate compensation to a sustenance level for the disabled workman violated the due process clause. He also used the opportunity to challenge the supreme court's ruling in *Pedrazza* that the denial of benefits to nonresident aliens was also a denial of due process. 96 N.M. at 89-90, 628 P.2d at 334-335.

72. *Supra,* note 25.

73. *Supra,* note 26.

The first case before the courts was *Anaconda Company v. Property Tax Department,*[74] in which Anaconda Company challenged, among other things, the constitutionality of the valuation statute for ad valorem taxes. This statute permits an additional fifty percent deduction from the value of uranium property when the uranium is obtained from an underground mine, but denies the deduction when uranium is obtained from an open-pit mine.[75]

The statutory scheme provided for a fifty percent deduction from the sales price of uranium material whether it was obtained from an underground or open-pit mine; it also provided an additional fifty percent deduction on the original deduction (for a total of seventy five percent) for uranium produced from an underground mine. Anaconda operated an open-pit mine and was denied the additional fifty percent deduction by the New Mexico Bureau of Revenue. Anaconda then filed for a refund for the additional fifty percent deduction in state district court which the court denied. Anaconda appealed to the New Mexico Court of Appeals. Writing for the court of appeals, Judge Lopez held that the statutory scheme did not violate the equal protection clauses of the State and Federal Constitutions.[76]

Judge Lopez set forth the basic principles involved in an equal protection case.[77] First, "there must be a rational basis for the

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74. 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), *cert. den.* 94 N.M. 628, 614 P.2d 545 (1980).

75. N.M. Stat. Ann. §7-36-25 (1978) provides in pertinent part:

> C. The value for property taxation purposes of . . . uranium mineral property is the annual net production value of the uranium mineral property.
>
> * * * *
>
> E. For the purposes of this section, the 'annual net production value' means:
>
> (1) the sales price of uranium-bearing material disposed of as ore or solution, less fifty percent of that sales price as a deduction for the cost of producing and bringing the output to the surface and of transporting and selling it; or
>
> (2) in the case of uranium-bearing material not disposed of as ore or solution but processed or beneficiated . . . the value of U_3O_8 contained in ore solution determined on the basis of U_3O_8 content of the ore or solution at fifty percent of the taxpayer's average unit sales price during the preceding calendar year of U_3O_8 contained in the concentrate form commonly known as "yellowcake" . . . less fifty percent of the value as a deduction for the cost of producing and bringing the output to the surface and of milling, treating, reducing, transporting and selling uranium-bearing material severed and saved from an underground mine.

76. Judge Wood wrote a specially concurring opinion in which Judge Hendley joined. This opinion agreed with Judge Lopez's analysis of other issues raised in the case but disagreed with his constitutional analysis while agreeing with the result. 94 N.M. at 212, 608 P.2d at 524.

77. In addition to the equal protection challenges, Anaconda Company also argued that the uniformity of taxation provision of the New Mexico Constitution was violated. N.M. Const. art. 8, § 1 provides:

> Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class. Different methods may be provided by law to determine value of different kinds

classification"[78] "and a substantial difference between the categories."[79] Second, the legislature, in matters of taxation, must be afforded the "greatest freedom in classification."[80] Third, "every presumption is to be indulged in favor of the constitutionality of the tax."[81] Fourth, the tax classification must be "reasonable" and "uniform and equal on all subjects of the class;"[82] and fifth, the party attacking the constitutionality of the tax has the burden of negating "every conceivable basis which might support the classification." The tax will not be set aside if any facts exist which could justify the classification.[83]

Applying these tests, the court concluded that the tax classification distinguishing between underground and open-pit mines is reasonable because of the difference in the cost of producing the uranium in the two types of mines. Anaconda argued that the cost of producing yellowcake, the final uranium product from the mine, was about the same for both underground and open-pit mines, and that the appropriate cost comparison should have been on the basis of the yellowcake produced rather than uranium ore produced. The court, however, said it would not substitute its view for that of the legislature in selecting the classification.[84]

Although Anaconda was the only large producer of yellowcake which did not have the benefit of the additional fifty percent deduction which it claimed was discriminatory, the court recited that "[a]bsolute equality in taxation cannot be obtained and is not required under the Fourteenth Amendment."[85] The court found that

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of property, but the percentage of value against which tax rates are assessed shall not exceed thirty-three and one-third percent.

However, the court considered the tests for violations of the equal protection clauses and the uniformity of taxation provision to be the same and limited its discussion to the equal protection arguments.

78. City of New Orleans v. Dukes, 427 U.S. 297 (1976), Gruschus v. Bureau of Revenue, 74 N.M. 775, 339 P.2d 105 (1965).

79. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

80. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 548 P.2d 89 (1969).

81. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Gruschus v. Bureau of Revenue, 74 N.M. 775, 339 P.2d 105 (1965).

82. *Id.*

83. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); McGowan v. Maryland, 366 U.S. 420 (1961); Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 548 P.2d 89 (1969); Anaconda Company v. Property Tax Department, 94 N.M. 202, 210, 608 P.2d 514, 522 (Ct. App. 1979).

84. While the trial court's only justification that the tax classification was reasonable was because of the difference in the cost of producing uranium ore to the surface, the court of appeals stated that even if the cost of yellowcake production for Anaconda's open-pit mine was greater than for underground mining operations, that fact would be irrelevant because "inequalities that result occasionally and incidentally in the application of a system not arbitrary in its classification are not sufficient to defeat the system." 94 N.M. at 211, 608 P.2d at 523.

85. *Id.* at 212, 608 P.2d at 524.

because no other open-pit mines were permitted the deduction, the tax was uniform and equal on all subjects of the class even though Anaconda may have been the only member in the open-pit classification. The court also found that the difference between underground and open-pit mines was substantial so that the requirement that a substantial difference in categories existed was met. The classification was reasonable, the tax uniform and equal on all subjects, and Anaconda had failed to negate every conceivable basis which supported the classification. The court held, therefore, that there was no equal protection impairment.

Judges Wood and Hendley in their special concurrence disagreed with Judge Lopez and thought that the statute was unconstitutional. They agreed that the difference in cost was the only justification for the taxation classification, but observed that the statutory deduction was divided into two parts—"(1) the cost of bringing [the uranium ore] to the surface, and (2) processing costs after reaching the surface."[86] The difference in classification which was based upon the cost of bringing the ore to the surface as the first part of the statute provided would be constitutionally permissible. The concurring judges concluded, however, that Anaconda had in fact negated the basis for allowing the deduction for underground mines as to the second part because Anaconda was able to show that the costs for processing of the ore after reaching the surface were essentially the same for open pit mining as for underground. Taxation of that part of Anaconda's process, therefore, discriminated unfairly, and denied Anaconda Company equal protection.

The concurring judges went on to say that the legislative intent was clear that the additional fifty percent deduction was meant to apply only to underground mines. This tax advantage unconstitutionally favored such mines and therefore the deduction afforded them was void. The legislative intent was clear that the deduction was not meant for open-pit mines, so the deduction could not apply to Anaconda's mines. Therefore, Judges Wood and Hendley concurred in the result which denied Anaconda Company the deduction.

The specially concurring opinion in *Anaconda* was clearly the better reasoned. Further, it should have been the opinion of the court, because two of the three judges joined in that opinion. An incongruity now exists in that the opinion of the Court of Appeals written by Judge Lopez states that the taxation scheme is constitutional, while a majority of the court, as expressed by Judge Wood, feels that the scheme is unconstitutional. The precedential value of such an opin-

86. *Id.* at 213, 608 P.2d at 525.

ion is questionable. The courts should be careful that this anamoly does not occur in the future.

Pedrazza v. Sid Fleming Contractor, Inc.,[87] gave rise to an equal protection claim, as well as the due process claim discussed above. Plaintiff also claimed that those provisions of the Workmen's Compensation Act[88] which denied recovery to non-resident aliens violated the equal protection clause. The plaintiffs argued that the Workmen's Compensation Act discriminated against aliens and that the court should apply "strict scrutiny" in its analysis. Plaintiffs further argued that even under a less rigorous standard the statute did not bear a rational relation to a legitimate state interest. The supreme court rejected those arguments, stating that plaintiffs' non-resident status prevented the court from applying equal protection at all because plaintiffs were "beyond the equal protection clause."[89]

Citing the United States Supreme Court[90] the court pointed out that in order for equal protection guarantees to be extended to aliens, the aliens must fall within the jurisdiction of the United States. The court admitted that non-resident aliens had been subjected to hostile legislation by the state, but held that as non-residents they were "beyond the protective reach of the equal protection clause"[91] because they were not born or naturalized citizens of the United States or persons within the state's jurisdiction. A dependent's claim, such as the one in *Pedrazza*, does not derive from a worker who is covered by the Workmen's Compensation Act, but rather, the dependent must have rights conferred directly by the statute. The court said that "the status of the dependent, and his relationships to the [Workmen's Compensation] Act, determines whether he recovers."[92] Therefore plaintiffs' non-resident status prevented their recovery as dependents of the injured worker.

Although the result of the case seems harsh in that non-resident dependent children were denied recovery under the Workmen's Compensation Act, the court was quick to add that plaintiffs were not denied other avenues of recovery. The usual limitation making the Workmen's Compensation Act the exclusive remedy to workers (and their resident dependents) would not apply to non-resident alien dependents.[93] Plaintiff-dependents could seek relief under an or-

87. 94 N.M. 59, 607 P.2d 597 (1980).
88. N.M. Stat. Ann. §52-1-52 (1978).
89. 94 N.M. at 62, 607 P.2d at 600.
90. Johnson v. Eisentrager, 339 U.S. 763 (1950).
91. 94 N.M. at 62, 607 P.2d at 600.
92. 94 N.M. at 63, 607 P.2d at 601.
93. *Id.*

dinary negligence theory. From the vantage point of the employer, therefore, little seems to be gained by the exclusion of non-resident aliens recovery under the Workmen's Compensation Act. Disallowing recovery under the Act for non-resident aliens leaves the employer open to challenges of negligence and other claims without limitation, thus permitting greater recovery to non-resident aliens than they might otherwise receive if they were included within the provisions of the Act. This seems antithetical to the legislature's apparent intent in excluding non-resident aliens in the first place. Although non-resident aliens are barred by the Act itself and have no remedy for recovery on equal protection grounds, non-resident alien dependents may recover for injuries to their related workmen from employers who are otherwise covered under the Act. Clearly the legislature should consider whether the policies inherent within the Act would be better served by including non-resident alien dependents, even though such non-residents are not subject to the constitutional protection of the equal protection clause.

Garcia v. Albuquerque Public Schools Board of Education[94] presented the appellate courts with the first constitutional challenge to the New Mexico Tort Claims Act[95] on equal protection grounds.[96] Plaintiff, a twelve year old student, brought suit in district court to recover damages for injuries received when he was struck by his teacher. The district court dismissed the complaint on the ground that the Tort Claims Act granted immunity to the defendants because they did not fall within the eight exceptions from immunity provided in the Act.[97] Plaintiff claimed that it was a denial of equal protection under both Federal and State Constitutions to allow recovery to only those injured persons who fell within the enumerated exceptions, and that, rather than provide blanket immunity with specified exceptions, the legislature should have provided blanket liability with specified exceptions.

Judge Lopez wrote an opinion for the court of appeals, in which only one judge joined, and declared that the Tort Claims Act was

94. 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

95. N.M. Stat. Ann. §§41-4-1 to -25 (1978).

96. The Tort Claims Act was enacted after the New Mexico Supreme Court abolished common law sovereign immunity in Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975).

97. The Tort Claims Act waives immunity for government entities and employees for damages for (1) the operation or maintenance of motor vehicles, aircraft and watercraft; (2) the operation or maintenance of any building, public park, machinery, equipment or furnishings; (3) the operation of airports; (4) the operation of certain public utilities and services; (5) the operation of certain medical facilities; (6) health care services; (7) maintenance of highways, streets and certain appurtenances; and (8) certain unlawful acts of law enforcement officers. N.M. Stat. Ann. §§41-4-5 through 41-4-12 (1978).

not unconstitutional because it was rationally related to a legitimate state interest.

Judge Lopez advanced three reasons which justify the legislature's decision to grant partial immunity to government entities and employees. First, "there is a need to protect public treasuries"; second, "[p]artial immunity enables the government . . . to function unhampered by the threat of time and energy consuming legal actions which would inhibit the administration of traditional state activities"; and third, "[i]n order to effectively carry out its services, many of which are financially unprofitable . . . the government needs the protection provided by some immunity."[98]

The court concluded that any classification involving sovereign immunity is a policy decision. The courts will not dictate policy to the legislature where no fundamental rights or suspect classifications exist, and where there is a rational basis for the classification. Judge Lopez held that the Tort Claims Act, therefore, insofar as it applied to both governmental entities and employees, did not violate the equal protection clauses of the state and federal constitutions. Judge Sutin specially concurred in the case and agreed that the Tort Claims Act was constitutional. Judge Sutin differed from the majority in that he would have permitted additional claims presented in the complaint to be adjudicated in the district court.[99]

Judge Walters strongly dissented. Citing the provision of the Act which states that "liability for acts or omissions under the [Act] shall be based on traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty,"[100] Judge Walters found that the classification scheme did not have a rational basis. The scheme reduced the "reasonably prudent person's standard of care, and the 'concepts of duty' . . . to nothing more than sanctimonious mummings."[101] Because she could find no rational basis for the eight classified exceptions from immunity, Judge Walters felt that the Act was arbitrary, and therefore unconstitutional.

In fact, neither Judge Lopez nor Judge Sutin advanced any ration-

98. 95 N.M. at 393, 622 P.2d at 702.

99. 95 N.M. at 394, 622 P.2d at 703. Plaintiff's complaint had set out three separate claims, only one of which brought into focus the constitutionality of the Tort Claims Act. The remaining claims concerned whether the teacher was acting within the scope of duty, which is required under the Act. Judge Lopez had affirmed the dismissal of all counts in the complaint but allowed plaintiff leave to amend the complaint. Judge Sutin would have allowed those counts involving whether the teacher had acted within the scope of the teacher's duties to stand.

100. N.M. Stat. Ann. §41-4-2 (1978); 95 N.M. at 396, 62 P.2d at 705.

101. *Id.*, 622 P.2d at 705.

ale which justifies the particular exceptions provided in the statute. They merely defered to the power of the legislature to provide partial immunity with exceptions. They did not look at the justification for each exception to determine if it was rationally related to a legitimate state interest when compared to torts for which no exceptions exist. It is therefore likely that the statute will continue to be attacked on constitutional grounds. Such challenges will certainly argue that the exceptions be based on some clearly stated justifications which rationally relate to a legitimate state interest.

Katz v. New Mexico Department of Human Services[102] offered yet another equal protection challenge to a legislative classification.[103] In *Katz* plaintiff applied to the Department of Human Services (DHS) for Medicaid benefits for medical services provided to her by a chiropractor and a physical therapist. After a hearing the DHS denied her benefits. She then brought suit against DHS claiming, among other things, that the denial of benefits for chiropractic and physical therapeutic services violated her constitutional right to equal protection.[104]

The court considered the exclusion of chiropractors and physical therapists from eligible recipients under the federal Medicaid program as administered by the state. The supreme court's reasoning in *Katz* was the same as that in the other equal protection cases. The court noted that Congress has a broad discretion in legislating social welfare programs and that a "congressional desire to limit Medicaid expenditures" is a rational basis to justify the statutory discrimination. The denial of benefits for services from chiropractors and physical therapists, therefore, was not so arbitrary or unreasonable as to constitute a denial of equal protection.[105]

The common thread that seems to run through the fabric of all the equal protection challenges is that great deference is paid to legislative classifications. Those classifications which are based in part upon differences in cost seem to be given the widest latitude even where the rationale for the particular classification appears vague and vulnerable to attack.

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102. 95 N.M. 530, 624 P.2d 39 (1981).

103. *See* N.M. Stat. Ann. §27-2-12 (1978). *Cf.* 42 U.S.C. § 1396(c) (1976).

104. Plaintiff also claimed her due process rights were violated because she was given inadequate notice and time to prepare for the administrative hearing. The Supreme Court found her due process claim to be without merit because she had in fact attended the hearing, but the court did not discuss just how much notice and time she had had to prepare for the hearings.

105. 95 N.M. at 534-35, 624 P.2d at 43-44.

D. *Privileges and Immunities*

In *Lung v. O'Chesky,*[106] the Supreme Court had the rare occasion to consider the application of the privileges and immunities clause[107] in a tax case. Plaintiffs, who were Texas residents, but employees of a federal enclave at White Sands Missile Range in New Mexico, challenged the New Mexico income tax on constitutional grounds.[108] Plaintiffs challenged the New Mexico statutory tax structure as applied to non-residents. The New Mexico taxation scheme denied to non-residents credits which residents received, for gross receipts taxes paid on food and medical expenses.[109] Plaintiffs claimed that

106. 94 N.M. 802, 617 P.2d 1317 (1980).

107. U.S. Const. art. IV, §2 states in pertinent part: "The Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. . . ."

108. In addition to the challenge under the privileges and immunities clause, plaintiffs sought relief from the income tax on grounds that (1) it was a violation of due process in that there was not a sufficient "fiscal relation" between plaintiffs and the state of New Mexico; (2) it discriminated against them by allocating and apportioning deductions according to how much total income was earned in New Mexico without taking into consideration the fact that Texas did not have an income tax and plaintiffs were not able to take deductions from 100% of their income and (3) New Mexico could not tax income earned within a federal enclave. Without citing a single constitutional provision, the court rejected all of plaintiff's claims.

109. N.M. Stat. Ann. §7-2-14.1 (Supp. 1980) provided:

> A. Any resident who files an individual New Mexico income tax return and who is not a dependent of another taxpayer may claim a food tax credit for gross receipts taxes on food purchases to which he has been subject during the taxable year for which the return is filed. The tax credit provided by this section shall be in an amount equal to forty dollars ($40.00) for each exemption domiciled in New Mexico allowed for federal income tax purposes.
>
> B. No claim for the tax credit provided in this section shall be filed by a resident who was an inmate of a public institution for more than six months during the taxable year for which the tax credit could be claimed or who was not physically present in New Mexico for at least six months during the taxable year for which the tax credit could be claimed.
>
> C. The tax credit provided for in this section may be deducted from the taxpayer's New Mexico income tax liability for the taxable year. If the tax credit exceeds the taxpayer's income tax liability, the excess shall be refunded to the taxpayer.

N.M. Stat. Ann. §7-2-15 (1978) provided:

> A. Any resident who files an individual New Mexico income tax return and who is not a dependent of another taxpayer may claim a tax credit for the taxable year in an amount equal to the amount computed under Paragraph (1) or Paragraph (2) of this subsection:
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> (1) an amount of five dollars ($5.00) for each exemption allowed for federal income tax purposes; or
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> (2) four percent of the gross amount of expenditures in New Mexico for medical or dental expenses allowable in computing the deductible medical and dental expenses for federal income tax purposes, excluding from the allowable deductions amount paid for hospital services not subject to the Gross Receipts and Compensating Tax Act and hospital and accident insurance premium costs.
>
> B. No claim for the tax credit provided in this section shall be filed by a resident who was an inmate of a public institution for more than six months during the taxable year for which this tax credit could be claimed or who was not physically

the failure to grant the tax credits to non-residents solely because of their non-resident status violated the privileges and immunities clause of the United States Constitution. The court used a "rational basis" test[110] and noted that so long as distinctions between residents and non-residents are rationally related to legitimate state interests, the distinction may be permitted. The state interest in this case was "to grant relief from gross receipts and property taxes to low-income individuals who actually pay those taxes."[111] The court found that the legislature could reasonably conclude that non-residents of New Mexico do not actually pay gross receipts taxes on food and medical expenses and therefore any credit given to them would not reflect taxes collected on such items by New Mexico. A rational basis existed for the distinction between residents and non-residents. The court held, therefore, that denying tax credits to non-residents for taxes on food and medical expenses does not violate the privileges and immunities clause.

Whether it was rational for the legislature to believe that non-residents of the state do not actually pay taxes on groceries and medicine is subject to question and may be a matter of degree. The rationale may be valid in an area where a non-resident lives outside but near a New Mexico border and works within New Mexico. In all likelihood food and medical care would be purchased in the non-resident's home state. In those instances where a non-resident works for extended periods of time in New Mexico, however, and perhaps occupies temporary housing in this state, the amount of money for food and medical care expended within New Mexico could be substantial. Under these circumstances it seems unduly harsh to deny a tax credit for taxes paid on food and medical expense if the tax policy is based on the incorrect assumption that those expenses will not be incurred

present in New Mexico for at least six months during the taxable year for which the tax credit could be claimed.

C. Any taxpayer electing to take the credit provided by this section may also claim otherwise qualified, the credit under Section 7-2-14 NMSA 1978.

D. The credit provided by this section may be deducted from the taxpayer's New Mexico income tax liability for the taxable year. If the tax credit exceeds the taxpayer's income tax liability, the excess shall be refunded to the taxpayer.

110. *Compare* this case with Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 387-388 (1978), in which the Supreme Court construed the privileges and immunities clause to mean that states are required to treat residents and non-residents equally only "[w]ith respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union." There, the Supreme Court did not apply a rational basis test to the privileges and immunities clause, but did do so with respect to claims in the case brought under the fourteenth amendment. The New Mexico Supreme Court failed to make any distinction between the two tests and applied a rational basis test to the privileges and immunities clause.

111. 94 N.M. at 805, 617 P.2d at 1320.

in New Mexico. A non-resident might pay just as much as a New Mexico resident for those items. Nonetheless, so long as some rational basis exists for the legislature's distinction between residents and non-residents with respect to taxation the court is willing to conclude that no constitutional violation occurs.[112]

E. *Full Faith and Credit*

The case of *Webb v. Arizona Public Service Company*[113] presented the court of appeals with the issue of whether the full faith and credit clause[114] and the doctrine of res judicata were applicable in a workman's compensation case. The court concluded that they were not.

Plaintiff, who lived and worked in New Mexico for an Arizona employer doing business in New Mexico, was injured in an accident while on the job. After the injury, plaintiff received a notice from the Industrial Commission of Arizona enclosing a check to cover wages lost. The notice required plaintiff to request a hearing within sixty days or the notice and the amount tendered became final. Although plaintiff did not timely request the hearing, a hearing was granted before the Industrial Commission in which it was determined that plaintiff was not permanently disabled and required no further treatment. While the matter was pending before the Industrial Commission of Arizona, plaintiff filed a workman's compensation claim against the Arizona employer in New Mexico district court. The New Mexico claim arose from the same facts. The employer then sought to abate the New Mexico case, but the district court proceeded and found the plaintiff to be totally disabled.

On appeal, the defendant employer contended that the doctrines of full faith and credit and res judicata precluded the district court from hearing the same issues between the same parties which were heard before the Industrial Commission of Arizona. The Court of Appeals disagreed, primarily considering portions of the Workmen's Compensation Act[115] and a number of United States Supreme

112. Whether the result in this case would have been different if the court had used the proper test enunciated in Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1978), is uncertain. The court would have been required to determine if treating non-residents differently with respect to the tax deduction interfered with such basic and essential activities as to frustrate the purposes of the formation of the Union. That analysis is not undertaken here.

113. 95 N.M. 603, 624 P.2d 545 (Ct. App. 1981).

114. U.S. Const. art. IV § 1 provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

115. N.M. Stat. Ann. §§ 52-1-1 to -69 (1978).

Court cases in which the issue had been raised but remains unsettled.[116]

The New Mexico Workmen's Compensation Act provides in pertinent part: "The payment or award of benefits under the workmen's compensation law of another state . . . to an employee . . . otherwise entitled on account of such injury . . . to the benefits of this act shall not be a bar to a claim for benefits under this act. . . ."[117] This statute was adopted in 1975 and, according to the court of appeals, contemplates that New Mexico benefits are to be paid notwithstanding any similar benefits provided by another state. The court concluded that Arizona had no power to determine plaintiff's rights under the New Mexico Workmen's Compensation Act, but only had the power to determine plaintiff's rights under the Arizona statute. Therefore, there could be "no constitutional objection to a fresh adjudication of those rights" in New Mexico.[118]

Although the court of appeals primarily relied upon the statutory provision and the United States Supreme Court analyses in *Industrial Commission v. McCartin*[119] and *Thomas v. Washington Gas Light Co.*,[120] the court also relied upon ample precedent which existed in New Mexico in the cases of *Chapman v. John St. John Drilling Company*[121] and *La Rue v. El Paso Natural Gas Co.*[122] Both of the New Mexico cases, however, applied the *McCartin* rule requiring the New Mexico Court to determine whether the first state awarding benefits prohibited a worker from receiving benefits in another state either by statute or judicial decision. The court in *Webb* appears to render this inquiry unnecessary and to be very protective of the integrity of the New Mexico Workmen's Compensation Act against similar provisions in other states. The court seemed to indicate that with the addition of section 52-1-65, quoted above, the kind of analysis in *McCartin* is no longer required in New Mexico, and the appli-

116. In Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1947) the Supreme Court determined that a final foreign judgment in a workmen's compensation case was res judicata and entitled to full faith and credit. In the same year, however, the Supreme Court severely limited the holding in *Magnolia* in the case of Industrial Commission v. McCartin, 330 U.S. 622 (1947) concluding that res judicata and full faith and credit were not applicable unless the laws of the first state making an award, either by judicial decision or statute, made it clear that an employee is prohibited from receiving similar benefits from another state. Then in Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980), a plurality of the court overruled *Magnolia,* while a majority of the court decided that *McCartin* was controlling, albeit analytically indefensible. There, the court held that a second, supplemental rather than a full compensation award to a worker was not a violation of the full faith and credit clause.

117. N.M. Stat. Ann. §52-1-65 (1978).

118. 95 N.M. at 608, 624 P.2d at 550.

119. 330 U.S. 622 (1947).

120. 448 U.S. 261 (1980).

121. 73 N.M. 261, 387 P.2d 462 (1963).

122. 57 N.M. 93, 254 P.2d 1059 (1953).

cation of full faith and credit and res judicata need no longer be considered.[123]

This kind of holding may reflect a recognition by courts, including the United States Supreme Court, of the inadequacy of relief granted under workmen's compensation statutes generally, and the corresponding need for liberal recoveries. The full faith and credit clause thus seems to present no barrier to recovery in workmen's compensation cases. It is also interesting to note that the court of appeals' opinion never addressed the potential unfairness and severity of the result to employers. Employers may be subject to multiple recoveries depending on the number of states in which they operate, and workers may receive windfalls by seeking multiple recoveries in different states. This area deserves legislative attention. The legislature must insure that both workers and employers are treated fairly and may reasonably know in advance how much may be recovered and from what source.

II. CRIMINAL LAW

A. *Due Process*

The most common constitutional challenges during the *Survey* year in the criminal law context were claims that due process had been violated under the fifth and fourteenth amendments to the United States Constitution. The following cases illustrate the range of questions arising in connection with those claims.[124]

In *State v. Rickerson,*[125] the New Mexico Supreme Court considered whether the trial court's inquiry into the numerical division of a jury prior to reaching a verdict is a *per se* violation of due process. Defendant Rickerson was charged with criminal sexual penetration of a minor. The jury instruction at trial concerned that crime and the lesser included offense of criminal sexual contact of a minor. After several hours of deliberation the jury could not reach a verdict and so informed the judge. The judge then asked the foreman to recite the numerical split without divulging whether the vote was for or against conviction. The vote was 3 to 9 on the greater offense, and the jury also informed the judge that it could not agree on the lesser

123. If the occasion should arise that New Mexico courts are called upon to determine benefits to a New Mexico worker who has received benefits from a state in which those benefits are deemed to be exclusive, the full faith and credit clause may be applicable under the *McCartin* analysis. In that instance, under the supremacy clause (U.S. Const. art. VI), section 52-1-65 may not be controlling.

124. Other challenges under the fourth, fifth, sixth amendments will be treated in depth in Stelzner, *Criminal Procedure,* 12 N.M. L. Rev. 271 (1982).

125. 95 N.M. 666, 625 P.2d 1183 (1981).

included offense either. The judge then sent the jury back to the jury room without further comment. Defendant moved for a mistrial on the ground that the numerical inquiry was a "shotgun" instruction.[126] Two hours later, the jury returned a guilty verdict on the lesser included offense. Defendant appealed to the court of appeals which reversed the conviction. The New Mexico Supreme Court granted certiorari.

The court examined New Mexico precedent and cases in which the United States Supreme Court had addressed this issue. Earlier New Mexico case law had established the *Nelson-Pirch* rule,[127] in which three factors were to be considered in determining if the trial court's actions had an impermissably coercive effect upon the jury. The court must determine first, whether the trial court gave any additional instructions to the jury, especially a shotgun instruction. Second, whether the trial court cautioned the jury not to surrender honest convictions and third, whether time limits were imposed.

The *Nelson-Pirch* rule was replaced by the *Aragon* rule[128] which simply made an inquiry into the numerical division of jurors reversible error. The *Aragon* rule was based upon the Supreme Court case of *Brasfield v. United States,*[129] which had made it impermissible for the federal courts to inquire into the numerical division of juries.

Rickerson overruled the *Aragon* rule and reaffirmed the *Nelson-Pirch* rule. The New Mexico Supreme Court decided that the United States Supreme Court's ruling in *Brasfield* was not based upon constitutional principles applicable to the states, but rather was an exercise of the Supreme Court's supervisory powers over the federal courts and was not mandatory on the states. The court noted that only one state had held *Brasfield* to be constitutionally mandated in state court trials[130] and that the remainder of cases in other jurisdictions had specifically held otherwise.[131] The New Mexico Supreme

126. A shotgun instruction is generally perceived to put excessive pressure on a juror to join the majority in its verdict and is not to be given in New Mexico. N.M. U.J.I. Crim. 50.30.

127. The rule was derived from the cases of State v. Nelson, 63 N.M. 428, 321 P.2d 202 (1958) and Pirch v. Firestone Tire & Rubber Co., 80 N.M. 323, 455 P.2d 189 (Ct. App. 1969), *cert. denied,* 80 N.M. 316, 454 P.2d 973 (1969).

128. Derived from the case of State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App. 1976), *cert. denied,* 89 N.M. 206, 549 P.2d 284 (1976).

129. 272 U.S. 448 (1926).

130. People v. Wilson, 390 Mich. 689, 213 N.W.2d 193 (1973).

131. *See* Cornell v. State of Iowa, 628 F.2d 1044 (8th Cir. 1980), *cert. denied,* 101 S. Ct. 944 (1981); Ellis v. Reed, 596 F.2d 1195 (4th Cir. 1979), *cert. denied,* 444 U.S. 973 (1979); People v. Carter, 68 Cal. 2d 810, 69 Cal. Rptr. 297, 442 P.2d 353 (1968); Lowe v. People, 175 Colo. 491, 488 P.2d 559 (1971); Muhammad v. State, 243 Ga. 404, 254 S.E.2d 356 (1979); People v. Kirk, 76 Ill. App. 3d 459, 394 N.E.2d 1212 (1979), *cert. denied,* 447 U.S. 925 (1980); State v. Cornell, 266 N.W.2d 15 (Iowa 1978), *cert. denied,* 439 U.S. 947 (1978); State v. Smith, 431 S.W.2d 74 (Mo. 1968); Gov't of Virgin Islands v. Romain, 600 F.2d 435 (3rd Cir. 1979).

Court held that inquiry into the numerical division of the jury is not constitutionally impermissible per se. The court added that justification for such inquiry exists in those instances when the court needs to determine if further deliberations are necessary or whether the jury should be discharged, and when defendants are charged with more than one count and the jury needs to be polled to protect the defendant from double jeopardy.[132]

Thus, while the rule against inquiry into the numerical division of jurors is not permitted in the federal courts, such inquiries are not unconstitutional and are authorized in the New Mexico courts so long as it can be shown that such inquiry has no coercive effect upon the jury. The court, of course, has wide latitude in deciding whether any coercion occurs.

Montoya v. O'Toole[133] offered a challenge under the due process clauses of the Federal and State Constitutions with respect to whether the method for the classification of drugs under the Controlled Substances Act[134] violates fair notice requirements.[135] The statute in question delegates to the New Mexico Board of Pharmacy the responsibility of examining and classifying different drugs.[136] The classifications determine which criminal penalties attach.

Defendant, who had been charged with possession of a controlled substance commonly known as valium, claimed that no statutory provision exists to alert a person that a drug has been added to the list of controlled substances. The defendant argued that this lack of notice violated due process requirements, which prohibit vagueness in the creation of new penal statues.[137]

The supreme court admitted that the drug was not listed initially with those scheduled under the Controlled Substances Act, but concluded that the notice procedure did not violate due process because

132. *See* O'Kelly v. State, 94 N.M. 74, 607 P.2d 612 (1980); N.M.R. Crim. P. 44(e).

133. 94 N.M. 303, 610 P.2d 190 (1980).

134. N.M. Stat. Ann. §§30-31-1 to -40 (1978).

135. *See* N.M. Stat. Ann. §§30-31-3 and 30-31-5 (1978) which required the New Mexico Board of Pharmacy to consider drugs and schedule them according to their potential for abuse, accepted medical use, and the possibility of physical or psychological dependence.

136. This case also presented a state constitutional challenge that the legislature had improperly delegated to the New Mexico Board of Pharmacy the authority to schedule drugs in violation of the separation of powers provision. This provision states: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted." N.M. Const. art. 3, §1. The supreme court rejected the challenge, finding that the Board of Pharmacy has been "defined and confined the role . . . to that of fact-finder" and has "no discretion in enacting substantive law" which is a legislative function. 94 N.M. at 305, 610 P.2d at 192.

137. *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939).

"a reasonable person reading Sections 30-31-3 and 30-31-5 would see that he also needs to read the regulations of the Pharmacy Board to obtain a complete list of scheduled drugs."[138] The court also observed that the statute required notice and a hearing prior to the adoption of any regulations scheduling a new drug. Further, these procedures must be followed by a thirty-day delay before the regulation becomes effective.[139] These safeguards protect the statute from a constitutional attack on due process grounds.[140]

State v. Haar[141] presented a challenge to the trial court's refusal to disclose the recommendations of the probation department in a presentence report to the defendant or his counsel. Defendant, who was convicted of criminal damage to property and battery, claimed that under the New Mexico Rules of Criminal Procedure[142] and under *Gardner v. Florida,*[143] he was entitled to review the confidential recommendations of the probation department which were delivered to the judge prior to sentencing. The court of appeals disagreed, stating that "such disclosure is not constitutionally mandated."[144]

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138. 94 N.M. at 305, 610 P.2d at 192.

139. N.M. Stat. Ann. §61-1-29 (1978) provided:

> No regulation or amendment or repeal thereof shall be adopted by the board until after a public hearing by the board. Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state the subject, the time and the place of the hearing and the manner in which interested persons may present their views. The notice shall also state where interested persons may secure copies of any proposed regulations. The notice shall be published in a newspaper of general circulation in the state, and the board shall give notice to all persons who have made a written request to the board for advance notice of its hearings. At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any person heard or represented at the hearing shall be given written notice of the action of the board. The board may designate a hearing officer to take evidence in the hearing. A record shall be made of all proceedings at the hearing. No regulation or amendment or repeal thereof shall become effective until thirty days after its filing under the State Rules Act.

140. 94 N.M. at 305-306, 610 P.2d at 192-193.

141. 94 N.M. 539, 612 P.2d 1350 (Ct. App. 1980), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980).

142. N.M. R. Crim. P. 56(b) provides: (b) Inspection. The report shall be available for inspection by only the parties and attorneys by the date specified by the district court, and in any event, no later than two working days prior to any hearing at which a sentence may be imposed by the court.

143. 430 U.S. 349 (1977). The Supreme Court held that it is a denial of due process to impose a sentence of death based in part upon a presentence report which was not fully disclosed to defendant and his counsel and which was not made a part of the record for review by an appellate court.

144. 94 N.M. at 541, 612 P.2d at 1352. The court also rejected defendant's claim that he was entitled to inspect the recommendations made in the presentence report under Rule 56 because the right to inspect under that rule goes only to information about a defendant at a dispositional hearing—not recommendations of the probation office. Defendant had not claimed that material information, the reliability of which he could challenge, had been withheld.

The court distinguished *Gardner v. Florida,* stating that it applies only to capital punishment cases, and that in that case information rather than recommendations had been withheld, and that the recommendations had not been included for review by an appellate court.[145] The court of appeals concluded that there were at least three good policy reasons to keep such recommendations confidential:

> First, it aids the court in terms of uniformity and equal sentencing—the probation office being a repository of information to achieve the goal of making the punishment fit the crime in each case. Second, if a judge treats a defendant in a manner more lenient than that recommended, the probation office may encounter difficulty in supervising that individual as a probationer or a parolee. Third, the person who would benefit most from disclosure of the information would be counsel. He could prepare or not, depending on what recommendation is given. Counsel should always be prepared to do his best to aid his client at sentencing.[146]

Although the disclosure of the presentence report recommendation may not be constitutionally required in every case, the policy reasons for not doing so are vulnerable to attack. The court offered no empirical data supporting its conclusions that the confidentiality of the recommendations results in equal sentencing or that a more lenient sentence than that recommended would make or has made supervision of a defendant more difficult.[147] Nor was there any indication that counsel, if informed what the recommendation was, would be less prepared. In fact, knowing the recommendation may help counsel to rebut the bases for it, or to prepare otherwise on more pertinent matters affecting the defendant at sentencing. Therefore, the court's policy considerations are not particulary helpful in examining the case in a constitutional context.

B. *Jury Trial*

The *Haar* case also contained issues arising under the sixth amendment right to jury trial.[148] Defendant had been charged in magistrate

145. *Id.,* 612 P.2d at 1352.

146. *Id.,* 612 P.2d at 1352.

147. A more logical result would be that supervision would be easier because a lighter sentence would relieve probationary personnel of enforcing stringent sentence conditions and the defendant might be more cooperative for having received the lighter sentence.

148. U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

court on two counts—one for criminal damage to property[149] and a second for aggravated battery.[150] A jury convicted him on the criminal damage to property charge and a lesser included offense of simple battery rather than the aggravated battery charge. Defendant was then sentenced to ninety days on each count to be served consecutively. Defendant appealed to the district court where he requested and was denied a jury trial. The district court convicted defendant on the original charges and sentenced him to six months on each of the counts, to be served concurrently. Defendant appealed, contending that he was entitled to a jury trial in the district court because he was on trial for multiple offenses, the aggregate penalty for which could not exceed six months.[151]

The court of appeals reframed the issue to be whether a defendant is entitled to a *de novo* jury trial in the district court after having a jury trial in magistrate court. The court concluded that a jury is not constitutionally required in such circumstances so long as the defendant in the second trial in the district court is not faced with a sentence longer than that received in the magistrate court.

Defendant argued that he was entitled to a *de novo* jury trial in district court, relying on *City of Farmington v. Sandoval.*[152] *Sandoval* involved an appeal from a municipal court rather than a magistrate court, and required a jury trial on the grounds that a defendant could be sentenced to a greater penalty. The court of appeals rejected that argument and distinguished the statutes which provide for appeals to district court from municipal as opposed to magistrate court.[153] The court decided that the legislature intended[154] to restrict appeals from magistrate courts so as not to permit the imposition of greater sentences, although greater sentences are permitted on appeals from municipal courts. Because a district court could not by statute enhance the sentence imposed by the magistrate court, no jury trial was required and, hence, no sixth amendment violation existed. The court said:

> . . . whenever a defendant is exposed to a term of confinement of over six months, he is entitled to a jury. It makes no dif-

149. N.M. Stat. Ann. §30-15-1 (1978).

150. N.M. Stat. Ann. §30-3-5(A) and (B) (1978).

151. *See* Condispoti v. Pennsylvania, 418 U.S. 506 (1974), which held that where sentences imposed on multiple convictions in the aggregate exceed six months, a jury trial is required even though no single sentence exceeds six months.

152. 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

153. N.M. Stat. Ann. §35-15-8 (1978) provides that the district court may impose a sentence the same, greater or lesser than that imposed by a municipal court. The corresponding provision, N.M. Stat. Ann. §35-13-2 (1978), applicable to magistrate courts, does not contain similar language.

154. *See* 1975 N.M. Laws, ch. 212 and ch. 242.

> ference that this exposure is in the context of a de novo trial. However, if the judge in the de novo hearing is not empowered to sentence anew or if he is prohibited from enhancing the earlier penalty, then a jury need not be afforded.[155]

In this case, the district court had, in fact, given the defendant a greater sentence than the magistrate court by sentencing him to two six-month sentences to be served concurrently rather than two ninety-day sentences to be served consecutively. The court of appeals therefore remanded the case to the district court for resentencing so that the sentence imposed for each count was not greater than the sentence which had been imposed by the magistrate court, and there would be no sixth amendment violation.[156]

C. *Speedy Trial*

State v. Sandoval,[157] another sixth amendment case, presented the question of whether the right to speedy trial can be adjudicated in an extradition proceeding.[158] Defendant was initially arrested in New Mexico in 1976 on a murder charge pending in California. He was released, rearrested, and released at least three times, until, in 1979, after a hearing on the extradition, a New Mexico district judge ruled that the delay in extradition had violated defendant's sixth amendment right to speedy trial. No appeal was taken from that ruling. In 1980 another warrant for extradition was issued, however, and another district court ordered that the first ruling was res judicata, requiring dismissal of the case and the release of the defendant. The state appealed and the supreme court reversed, holding that: "An asylum state in extradition proceedings is without authority to adjudicate the defendant's right to a speedy trial in the demanding state upon charges lodged against him there."[159]

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155. 94 N.M. at 540, 612 P.2d at 1351. *See* also, Baldwin v. New York, 399 U.S. 66 (1970).

156. Although the opinion does not indicate whether defendant even raised the issue, the court also concluded that defendant's acquittal on the original aggravated battery charge in magistrate court could not be retried in a *de novo* trial in district court because of the double jeopardy clause. U.S. Const. amend. V. *See,* State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

157. 95 N.M. 254, 620 P.2d 1279 (1980).

158. Extradition is also found in the U.S. Const. art. IV §2 which in pertinent part provides: A Person Charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

159. 95 N.M. at 256, 620 P.2d at 1281. Michigan v. Doran, 439 U.S. 282, 289 (1978) severely limited the right of an asylum state, once extradition has been granted, to consider only (a) whether the extradition documents are facially correct; (b) whether the defendant has been charged in the demanding state; (c) whether the defendant is the person named in the request for extradition and (d) whether the defendant is a fugitive.

This case implies that a trial court is without jurisdiction to determine any issues, including the constitutional issue of the right to speedy trial, other than the merits of the extradition proceedings alone.[160]

D. *Double Jeopardy*

The recurring problem of whether double jeopardy attaches in connection with the declaration of a mistrial was addressed in the case of *State v. Wardlow.*[161] The New Mexico Supreme Court concluded that it does not.

Defendant was tried on counts of battery on a peace officer and aggravated assault. He was acquitted on the aggravated assault charge, but the jury could not reach a verdict on the battery on a peace officer charge or on the lesser included offense of simple battery. The trial court declared a mistrial because the jury was unable to reach a verdict on the principal battery charge. Defendant took an interlocutory appeal to the court of appeals, which then certified the case to the supreme court. Defendant claimed, among other things, that a new trial would violate his constitutional right against double jeopardy.[162]

The supreme court declared that defendant could be retried, stating that double jeopardy does not attach in those circumstances when a jury is unable to agree on a verdict.[163] With its decision in *Wardlow,* the court effectively overruled *State v. Castrillo,*[164] although it stated that it saw no conflict with this prior ruling. In *Castrillo* the court had required that when a jury is deadlocked on a charge involving included offenses, the trial court must determine whether the jury has voted to acquit or convict the defendant on any of the lesser included offenses.[165] The *Wardlow* trial court did not perform this duty, because of a peculiar finding of the jury.

The holding in *Wardlow* seemed to result as much from the jury's confusion as from sound principles of law. If the jury had agreed to acquit on the lesser charge of simple battery, the trial court would

160. The court also held that extradition proceedings do not deal with questions of guilt or innocence, and, therefore, the doctrines of res judicata, double jeopardy and estoppel do not apply and are not to be considered in extradition proceedings. 95 N.M. at 256, 620 P.2d at 1281.

161. 95 N.M. 585, 624 P.2d 527 (1981).

162. The double jeopardy clause reads as follows: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." U.S. Cosnt. amend. V.

163. *See* Downum v. United States, 372 U.S. 734 (1963).

164. 90 N.M. 608, 566 P.2d 1146 (1977).

165. 90 N.M. at 611, 566 P.2d at 1149. N.M. R. Crim. P. 44(d) also provides that, if a jury poll shows that a jury has unanimously voted not guilty as to any degree of an offense, "a verdict of not guilty shall be entered for that degree and for each greater degree of the offense."

have been required to enter a verdict of not guilty on the greater charge of battery on a peace officer.[166] Questioning by the trial court, however, revealed that the jury had voted unanimously not to consider the lesser charge of simple battery because, in the words of the foreman, "the jury did not believe that that was an appropriate charge."[167] Because the jury did not vote on the guilt or innocence of the defendant on the simple battery charge, but only found the charge "inappropriate," the supreme court concluded that there was disagreement among the jurors and that defendant could be retried on both charges.[168]

The case, therefore, hinged more upon semantics than the Constitution. The supreme court merely found that the jury's decision that the simple battery charge was "inappropriate" meant "not applicable" rather than "not guilty." It is this aspect of the case which seems inconsistent with *Castrillo*. The policy expressed in *Castrillo* is that where the record is not clear as to which offenses the jury decided, doubt is to be resolved in favor of the liberty of the citizen, and double jeopardy requires dismissal of the case.[169] *Wardlow* seems to resolve doubt in favor of the state, and allows defendants to be retried.

E. *Cruel and Unusual Punishment*

State v. Smallwood[170] offered the question of whether injury inflicted upon a pretrial detainee in jail constituted cruel and unusual punishment in violation of the eighth amendment of the United States Constitution, and corresponding provisions of the New Mexico Constitution.[171] In *Smallwood* a co-defendant in a robbery charge was severely burned when he was doused with an acidic material while being detained awaiting trial in a county jail. Just before the trial defense counsel moved to dismiss the charge on humanitarian grounds because of the suffering defendant had incurred. The trial court granted the motion stating that it was doing so because of the constitutional proscription against cruel and unusual punish-

166. *See* N.M. R. Crim. P. 44(d).

167. 95 N.M. at 586, 624 P.2d at 528.

168. No question was raised concerning whether the jury was properly instructed that if it was in doubt on the greater offense, it should then consider the lesser included offense and enter a verdict of guilty or not guilty as applicable. N.M. U.J.I. Crim. 50.12.

169. 90 N.M. at 613, 566 P.2d at 1151.

170. 94 N.M. 225, 608 P.2d 537 (Ct. App. 1980).

171. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The parallel provision of the New Mexico Constitution which was specifically raised in this case is found in art. 2, Section 13 and is exactly the same.

ment.[172] On appeal by the state, the court of appeals rejected the trial court's position, citing prior federal and New Mexico precedents to the effect that constitutional claims of cruel and unusual punishment cannot be raised prior to conviction.[173] The court did state that injuries in the nature of "punishment" suffered by a pretrial detainee may give rise to a constitutional claim of denial of due process for which adequate remedies exist. However, such injuries cannot provide a substantive defense to a criminal charge.[174]

F. *Search and Seizure*

A 2-1 New Mexico Court of Appeals opinion written by Judge Hendley in the case of *State v. Capps,*[175] was a harbinger of things to come in the case of *Robbins v. California,*[176] in which a plurality of the United States Supreme Court required a search warrant in the search of a car trunk prior to an arrest. The facts in the two cases were strikingly similar. In each case police officers stopped an automobile and, prior to making any arrest, smelled marijuana and opened the truck of the car where they found marijuana wrapped in closed plastic garbage sacks. Defendants were then charged with various drug offenses. The officers testified that the garbage sacks were the type commonly used for packaging marijuana. Defendants moved to suppress the evidence on grounds that the searches of the sacks in the trunks were violations of the fourth[177] and fourteenth amendments to the United States Constitution.

The New Mexico Court of Appeals concluded that defendant Capps had an expectation of privacy in the garbage sacks which were searched in the trunk of the car even though they were not luggage and that in order for law enforcement officers to search the items in the trunk a warrant was required.[178] The court rejected the notion

172. The trial court also dismissed charges against both defendants on other grounds not involving constitutional issues which rulings were subsequently overruled on appeal.

173. *See* Ingraham v. Wright, 430 U.S. 651 (1977); Bell v. Wolfish, 441 U.S. 520 (1979); State v. Blankenship, 79 N.M. 178, 441 P.2d 218 (Ct. App. 1968).

174. 94 N.M. at 229, 608 P.2d at 541.

175. 20 N.M. St. Bar Bull. 399 (Ct. App. Dec. 30, 1980), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980). [Ed. note: After this article was written, the supreme court decided to hear the case and reversed the court of appeals. 21 N.M. St. B. Bull. 219 (Jan. 27, 1982)].

176. 101 S. Ct. 2841 (1981).

177. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

178. In United States v. Chadwick, 433 U.S. 1 (1977) the Supreme Court had refused to extend the automobile exception to the Fourth Amendment (*see* Chambers v. Maroney, 399 U.S. 42 (1970)) to include luggage because of its mobility; and in Arkansas v. Saunders, 442 U.S.

that the nature of the container determines whether an expectation of privacy exists.[179]

The court also negated the state's claim that the search of the garbage sacks was done under exigent circumstances or that the search was effected incident to a lawful arrest[180] for the protection of the police officer or to prevent the destruction of evidence. Therefore, the evidence was suppressed and the court extended a citizen's right to privacy to virtually any container within the trunk of an automobile.[181]

753 (1979) the court also refused to permit warrantless searches of everything found within an automobile. In State v. White, 94 N.M. 687, 615 P.2d 1004 (Ct. App. 1980) the New Mexico Court of Appeals had previously held that sealed boxes and bags were within the kinds of containers falling within an expectation of privacy.

179. The Supreme Court in *Robbins* also specifically addressed this issue and refused to draw a distinction based upon the kind of container found within a trunk stating that ". . . even if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished." 101 S. Ct. at 2846.

180. *See* Chimel v. California, 395 U.S. 752 (1969); State v. Rhodes, 80 N.M. 729, 460 P.2d 259 (Ct. App. 1969).

181. In New York v. Belton, 101 S. Ct. 2860 (1981), decided the same day as *Robbins*, the Supreme Court in a 5 to 4 opinion extended the right of law enforcement officers to search, incident to lawful arrest, the entire passenger compartment of an automobile including the contents of any containers which were open or closed. Therefore, while the nature of containers within automobiles may have no constitutional significance, their placement within the automobile does and may determine whether evidence is suppressed or not on Fourth Amendment grounds.