V. Constitutional Law

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A. Equal Protection

With a heightened consciousness to the potential of success inherent in characterizing complained-of action as a violation of one's constitutional rights, litigants continue to show rare semantic ingenuity in their efforts to bring their case under such broad rubrics as "due process" or "equal protection." The diversity of cases which gives rise, in some sense, to these generic phrases, is as extensive as the list of items one may purchase in a supermarket. Some illustrations will add flesh and blood to this skeletal observation.

In *Indiana High School Athletic Association v. Raike*,[1] the Second District Court of Appeals upheld the trial court's judgment that the Indiana High School Athletic Association (IHSAA) and the Rushville Consolidated School Corporation rules prohibiting married students from participating in athletics violate the equal protection clause of both the United States and Indiana Constitutions. Jerry W. Raike, a 17-year-old senior in good standing at Rushville High School, married in November 1971. Consequently, the school prevented him from continuing on the baseball and wrestling teams,[2] citing the school's own rule, which stated: "Married students, or those who have been married, are in school chiefly to meet academic needs and they will be disqualified from participating in extra-curricular activities . . . except Commencement and Baccalaureate;"[3] and the IHSAA rule, which stated: "Students who are or have been at any time married are not eligible for participating in intraschool athletic competition."[4] The purposes of the rules were to "encourage wholesome amateur athletics,"[5] and the justifications for the rules included the following: Married students need time to discharge

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[1]329 N.E.2d 66 (Ind. Ct. App. 1975).

[2]Raike married during the month of November after he was already on the baseball and wrestling teams.

[3]329 N.E.2d at 69-70.

[4]*Id.* at 70.

[5]*Id.*

economic and family responsibilities; teenage marriages should be discouraged; athletes serve as models or heroes to other students, yet teenage marriages are usually the result of pregnancy, and thus the presence of married students in athletics would encourage immorality (presumably from heightened publicity of the person's private life); there would be discipline, training, and administrative problems; and there would be unwholesome interaction between married and nonmarried students unless undesirable "locker room talk" were avoided.[6] Raike claimed that the rules impaired the fundamental right to marry, that no compelling state interest was shown, and that the rules failed to satisfy even the rational basis test of constitutionality.

The court provided a useful discussion of the standards of review appropriate for equal protection cases. The "low" tier or low scrutiny test presumes the constitutionality of the classification and will not disturb it absent a showing of "no rational relationship" to a legitimate governmental interest.[7] The "high" tier or high scrutiny test, at the opposite end of the scale, inspects the classifying criteria to ascertain whether they are grounded upon certain "suspect traits,"[8] such as race or national origin, or whether the classification impinges upon rights deemed "fundamental," such as the right to vote, travel, or associate freely.[9] If so, then "strict" scrutiny will strike the statute down unless justified by a compelling governmental interest.[10] These abstract polarities have been somewhat fused in recent years with the introduction of a more flexible hybrid approach,[11] wherein the clas-

[6] *Id.*

[7] *Id.*

[8] For examples of cases employing a high scrutiny test based upon a suspect class see Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin); Korematsu v. United States, 323 U.S. 214 (1944) (national origin).

[9] For example of cases employing a high scrutiny test based upon fundamental rights see Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (freedom of association); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); United States v. Guest, 383 U.S. 745 (1966) (interstate travel); Griswold v. Connecticut, 381 U.S. 479 (1964) (freedom of association); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1957) (freedom of association); Griffin v. Illinois, 351 U.S. 12 (1956) (the right to appeal a criminal conviction).

[10] *See* Stroud, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661, 665 (1973).

[11] The *Raike* court describes this new approach as being based upon a "multi-factor, sliding scale" analysis with the two end points of the scale being the traditional two tiers of high and low scrutiny. 329 N.E.2d at 73. *See* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving*

sification must be justified by something more than any "reasonably conceivable" set of facts. Rather, there must be a fair and substantial relation to the object of the legislation. Here, the more important and closer the individual's interest comes to a specific constitutional guarantee, the greater the degree of judicial scrutiny.

In applying these norms the court first acknowledged that a "suspect" classification was not involved.[12] It then struggled with the question whether a "fundamental right" was at stake. After quickly disposing of the question whether high school students have a fundamental right to participate in school athletics and other extra-curricular activities, the court determined that despite dicta in many Supreme Court cases, the right to marry also is not conclusively recognized as a fundamental right.[13] Nonetheless, the court found both the right to marry and to participate in athletics important enough that it applied the intermediate standard.[14] It noted that in the name of promoting a wholesome atmosphere, the school would prohibit all married students from participating in nonacademic school affairs. Upon applying the intermediate standard, the court found the classification to be over-inclusive in that it included some married students of good moral character and under-inclusive in that it omitted unmarried students whose immoral conduct was as likely to be a corrupting influence as that of married high school students.[15] Metaphorically, "the classification simultaneously catches too many fish in the same net and allows others to escape."[16] And this is true even though there may be some rational basis or connection between the classification and the object sought to be obtained.

In *Vaughan v. Vaughan*,[17] the First District Court of Appeals considered a suit by a grandfather on behalf of his 4-year-old grandson against the child's parents to recover for head injuries sustained by the child when he was struck by a falling tombstone during a cemetery visit with his parents. The circuit court dismissed the action. On appeal, the appellate court held that parents are immune from liability for any torts committed against their

Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972).

[12]329 N.E.2d at 73.

[13]Although there is no conclusive United States Supreme Court holding that the right to marry is a fundamental right, it has been termed to be a penumbra of the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479, 495-96 (1964).

[14]329 N.E.2d at 75.

[15]*Id.* at 77. *See* Stroud, *supra* note 10, at 663-64.

[16]329 N.E.2d at 75.

[17]316 N.E.2d 455 (Ind. Ct. App. 1974).

unemancipated minor child and that the grant of parental immunity has a rational basis and thus does not violate the child's constitutional rights. In a brief opinion, which does not expressly spell out the inequality complained of, Judge Robertson, for the court, observed that "[t]he equal protection guarantees of both the state and federal constitutions do not prohibit all classifications. It is only demanded that the classification be reasonable and not arbitrary."[18] Judge Robertson continued by noting that there are good reasons for granting the immunity: "Unity of interest of parent and child, no truly adversary situation, difficulty of dissolving the relationship and prevention of family discord . . . . We cannot, therefore, say the grant of immunity is arbitrary and without rational basis as a matter of law."[19] It appears the thrust of the equal protection attack was that case law did not treat the plaintiff equally in that it permitted pursuit of a remedy where negligence by third parties, or by parents towards emancipated children who had attained majority, allegedly caused harm, but refused a remedy where parents negligently injured their unemancipated children. Thus, one child could have been harmed by a third party, and the other suffer identical harm from his parent; the former would have a remedy, the latter would not. In the view of the court, though, persons may be classified differently if there are "legitimate reasons" and the classification has a "rational basis."[20]

The equal protection theme arose in a different context in *Heminger v. Police Commission*,[21] in which members of the Police Department of the city of Fort Wayne, Indiana, challenged the constitutionality as applied to them of a statutory scheme for a police merit system in certain second-class cities.[22] The Third District Court of Appeals, affirming the trial court, held first that the requirement that seniority comprise 40 percent of the promotion rating of personnel was not violative of equal protection;[23] secondly, that although the statute was applicable to only one city it was not void as a prohibited special law;[24] and finally, that the challenged provisions of the statute were not unconstitutionally vague and ambiguous if given the interpretation placed on them by the police commission.[25]

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[18] *Id.* at 457.

[19] *Id.*

[20] *Id.*

[21] 314 N.E.2d 827 (Ind. Ct. App. 1974).

[22] *See* IND. CODE §§ 19-1-20-1 to -8 (Burns 1974).

[23] 314 N.E.2d at 833.

[24] *Id.* at 836.

[25] *Id.* at 838.

At the threshold of its opinion, the court noted the strong presumption favoring the constitutionality of legislative action. It then observed that

> appellants do not purport to come within the reach of a classification currently considered to possess an inherently suspect quality; nor do they contend that the classification in question impinges upon a fundamental right. As a consequence, the defendants-appellees are not required to demonstrate a compelling State interest or a *necessary* relationship between the classification and such interest.[26]

It follows in turn, then, that the court did not have to apply the stricter standard of review, which permits no inequality. The lower standard of review, employed by the court, only requires that the legislation be reasonable and not arbitrary.

The equal protection clause of the United States Constitution precludes the States from enacting legislation "which accords dissmilar [*sic*] treatment to persons placed by statute into separate classes on the basis of criteria which bear no relation to the purpose or objective of the statute."[27] The United States Supreme Court set forth the standard as follows:

> But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[28]

Applying this reasonableness standard to the statutory scheme involved, the *Heminger* court found that the instantaneous application of a pure merit system would have a "potentially chaotic effect" upon the continuity of command. Consequently, the established seniority system was not arbitrary and was not without a rational basis.[29]

A related issue in *Heminger* raised the question whether the retirement scheme violated article 4, sections 22 and 23 of the Indiana Constitution, which provide in pertinent part that the Indiana legislature shall not pass a local or special law where a

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[26]*Id.* at 831 (emphasis by the court).

[27]*Id.* at 832.

[28]F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), *quoted in* 314 N.E.2d at 832. *Royster Guano* was an early case dealing with reasonable classifications. The Court, over the dissents of Justices Brandeis and Holmes, held that a state law which taxed all the income of local corporations derived from outside the state and which aided no local business was arbitrary and thus violated the equal protection clause of the fourteenth amendment.

[29]314 N.E.2d at 833.

general law can be made applicable.[30] The plaintiff asserted that the present statute applied only to the city of Fort Wayne, that the other cities of the second class in the state with police merit statutes applicable to them did not have provisions according seniority a weight upwards of 40 percent, and that no Indiana city has a mandatory retirement age as early as 60. It was argued that neither the city of Fort Wayne nor the personnel of the police department have unique characteristics justifying different treatment.

While acknowledging that under the Indiana Code's definition of second class cities[31] only the city of Fort Wayne is clearly isolated and identified by its operation as a second class city, the court declared that this fact alone does not evidence the special legislation that the Indiana Constitution forbids.[32] The court purported to distinguish cases where similar legislation was held unconstitutional as special legislation[33] and concluded that "we are not confronted with a classification on the basis of population differences which are so slight as to render the Act completely arbitrary."[34] There is found here "a rational relationship between population and legislation controlling the employment and promotion of police personnel."[35]

In many equal protection cases, the plaintiff's underlying rationale is that his situation is identical to that of someone else who is receiving better—"unequal"—treatment. The defendant's rebuttal may be either to claim that the other person or class is not receiving any better treatment or to admit that he is receiving better treatment, but to show that the differences are marginal, are based on real differences in the situation, or are justified by broader concerns serving the overall ends of justice.

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[30]IND. CONST. art. 4, § 22 begins: "The General Assembly shall not pass local or special laws, in any of the following enumerated cases . . . ." Section 23 continues: "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

[31]IND. CODE § 19-1-20-1 (Burns 1974) provides:

> This chapter [19-1-20-1—19-1-20-8] shall apply to any city of the second class having a population in excess of one hundred seventy-six thousand [176,000] and located in a county having a population of not less than two hundred eighty thousand [280,000] nor more than four hundred fifty thousand [450,000] according to the last preceding United States census.

[32]314 N.E.2d at 834-35.

[33]The court cited the following cases: Rosencranz v. City of Evansville, 194 Ind. 499, 143 N.E. 593 (1924); School City v. Hayes, 162 Ind. 193, 70 N.E. 134 (1904).

[34]314 N.E.2d at 836.

[35]*Id.*

In *Martin v. State*[36] the defendants' Marion County conviction of first degree murder had been affirmed on appeal by the Indiana Supreme Court. On petition for rehearing, the supreme court held that the statute granting lone defendants ten peremptory challenges and granting co-defendants as a group the same total of ten peremptory challenges, which they had to exercise collectively, did not violate equal protection. The court noted that the Indiana Code did indeed define two classes of defendants, those tried alone and those tried jointly, and that the Code gives each class ten challenges.[37] The court observed that "if a statute should create and define several classes and dissimilarly assign burdens or benefits of the same type between the classes,"[38] the statute does not necessarily violate equal protection, since a reasonable basis for the dissimilarity may support statutory constitutionality. "[W]hen rights and burdens are being parcelled out to groups comprised of different numbers of persons, the individual in each such group is not necessarily entitled to identical treatment."[39]

The court acknowledged that the class to which appellant belonged, identified as comprised of multiple defendants facing a joint jury trial, "is set aside and separately treated from the class of lone defendants;"[40] but it found that the reasonable purpose of limiting peremptory challenges is both to maintain a workable level of challenges and to bring the influence of prosecution and defense into balance. The court also noted that the right of peremptory challenge is not a fundamental right, but merely statutory;[41] and if in a given case some prejudice flows toward a co-defendant in a joint trial, he has the right to seek severance.[42]

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[36]317 N.E.2d 430 (Ind. 1974).

[37]IND. CODE § 35-1-30-2 (Burns 1975) provides:

> In prosecutions for capital offenses, the defendant may challenge, peremptorily, twenty [20] jurors; in prosecutions for offenses punishable by imprisonment in the state prison, ten [10] jurors; in other prosecutions, three [3] jurors. When several defendants are tried together, they must join in their challenges.

[38]317 N.E.2d at 431.

[39]*Id.*, *citing* Dandridge v. Williams, 397 U.S. 471 (1970). In *Dandridge* the Maryland Aid to Dependent Children program was upheld, despite "sliding-scale" need standards which provided disproportionately less support to large families than small ones. The United States Supreme Court held that, at least in the area of economics and social welfare legislation, as long as there is some reasonable basis, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. *Martin* did not discuss whether *Dandridge* can be distinguished from the principal case because of difference of subject matter—jury selection in a criminal case versus receipt of a civil welfare benefit.

[40]317 N.E.2d at 432.

[41]*Id.* at 431.

[42]*Id.* at 432.

B. Due Process

In *Indiana State Employees Association, Inc. v. Boehning,*[43] the question was the extent to which due process requirements protect a state employee's claim of right to continued employment. Plaintiff Phyllis Musgrave was hired by the Indiana State Highway Commission (ISHC) as a stockroom clerk in January 1970 and in February 1973 was notified that her employment would be terminated. Her request for a hearing was denied. Defendant commissioner of the ISHC claimed that she was terminated for cause. Musgrave stipulated that her political affiliation was not an issue.[44] She challenged the state action on due process grounds, but the United States District Court for the Southern District of Indiana[45] held that it would abstain "until the Indiana courts have had an opportunity to consider the applicability of and authoritatively construe the Bi-Partisan Personnel System Act[46] and/or the Administrative Adjudication and Court Review Act[47] in determining whether employees of the Indiana State Highway Commission have a right to a pre-discharge hearing under Indiana law."[48]

The Seventh Circuit Court of Appeals reversed the decision to abstain and reached the merits. The court observed that the Indiana Administrative Adjudication and Court Review Act does not apply, since it does not authorize or direct a hearing when dismissal is for cause or political affiliation. Thus this case did not present an issue unclear under state law. Abstention, the court said, is warranted in such "special circumstances" as, possibly, where a state statute alleged to be unconstitutional could be construed by a state court as eliminating the constitutional question or when an attack on the defendant's act is made under both state and federal law and a definitive ruling on the state issue would resolve the controversy. But here, the court discerned no such substantial question as to applicable state law.[49] If the court were permitted to abstain, it would result in an impermissible requirement of exhaustion of state remedies. Furthermore, abstention is inappropriate where, as here, "[t]he right to a hearing under the federal constitution is the question presented in this ac-

[43] 511 F.2d 835 (7th Cir. 1975).

[44] *Id.* at 837-38.

[45] 357 F. Supp. 1374 (S.D. Ind. 1973).

[46] IND. CODE §§ 8-13-1.5-1 *et seq.* (Burns 1973).

[47] *Id.* §§ 4-22-1-1 *et seq.* (Burns 1973).

[48] 357 F. Supp. at 1378.

[49] *Id.*

tion, and the same question would be presented if plaintiffs were required to bring an action in an Indiana court."[50]

Turning to the merits, the court addressed the question of entitlement. Quoting *Board of Regents v. Roth*[51] to the effect that "[p]roperty interests . . . are not created by the Constitution [but] 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,"[52] the court concluded that the ISHC Bipartisan Personnel System Act sufficiently supports a claim of entitlement to continued employment on the part of employees in plaintiff's position. The reason is that "[t]he specification of authority to discharge for two types of grounds . . . clearly implies exclusion of other grounds."[53] It follows that the employee cannot be dismissed arbitrarily. The further result is that officials must provide a hearing at the request of the party dismissed where he can be "informed of the grounds for his nonretention and challenge their sufficiency."[54]

Another case dealing with a due process issue was *T.A. Moynahan Properties, Inc. v. Lancaster Village Cooperative, Inc.*[55] Here a property management corporation sued the cooperative housing project and the Department of Housing and Urban Development (HUD) to enjoin the latter from terminating its con-

[50]511 F.2d at 837.

[51]408 U.S. 564 (1972). *Roth* involved the nonrenewal of a college professor's one-year teaching contract. The Supreme Court held that no hearing was required by the fourteenth amendment for "renewal of a nontenured state teacher's contract" unless the teacher can show a "property interest" in the employment or some deprivation of "liberty." The *Roth* Court held that under the facts the lower court erred in granting summary judgment. Since no stigma had been attached which could preclude future employment, the respondent could not point to any property interest or deprivation of liberty.

[52]511 F.2d at 837, *quoting from* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[53]511 F.2d at 838.

[54]*Id.* at 837, *quoting from* Perry v. Sindermann, 408 U.S. 593 (1972). In *Perry*, the respondent had worked in the Texas state college system for ten years under one-year contracts. The regents refused to continue his employment and provided no prior hearing or reasons for their action. The respondent brought an action alleging violation of free speech and of his fourteenth amendment procedural due process rights. The Supreme Court held that lack of tenure did not of itself defeat respondent's free speech and procedural due process claims. The Court noted that although an "expectancy" of continued employment did not constitute the requisite property right to invoke the fourteenth amendment, the existence of the system's de facto tenure policy was a sufficient basis to require the college to grant respondent a hearing.

[55]496 F.2d 1114 (7th Cir. 1974).

tract to manage the project. On November 9, 1970, Lancaster and Moynahan signed an agreement on a Federal Housing Authority (FHA) form under which Moynahan was appointed Lancaster's managing agent; one of the agreement's cancellation provisions permitted the FHA, HUD's predecessor, or the mortgagee to cancel the agreement on 30-days' written notice "with or without cause." Upon receipt of a timely notice of cancellation in April 1972, which stated that Lancaster had requested HUD to exercise its termination right, Moynahan wrote to HUD asking permission to "appeal" and requesting it to express its position verbally and give an explanation for the termination. HUD refused this request.[56]

Although permitting cancellation "with or without cause," the agreement's cancellation clause was limited by case law: it could not be completely whimsical or motivated solely by disapproval of the contractor's religion or politics.[57] Cancellation also could be challenged for fraud or such gross mistake as necessarily implied bad faith[58] or by demonstrating no rational basis for the decision.

The court held that the substantive due process standard for valid action under the cancellation provision was fulfilled. The government had both a financial and proprietary interest in the project's successful operation. Further, the reason for the termination given by HUD's representative, that long-standing disputes between the parties jeopardized the project's continuing success, was not arbitrary or capricious.[59] However, the procedural due process standard was not met. Citing *Board of Regents v. Roth*,[60] the court concluded that Moynahan had a property interest in an agreement which was of benefit to it and which had a fixed term even though subject to the contingency of cancellation by a third party.[61] The nature of the required notice and hearing, the

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[56]*Id.* at 1116.

[57]*See* Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). In *Cafeteria Workers* the Court held that the fourteenth amendment had no application where a cook was summarily excluded from working at a private food concession on the grounds of a naval gun factory. The concessionaire's contract had provided that the security officer could forbid employment of anyone who failed to meet security standards.

[58]*See* United States v. Wunderlich, 342 U.S. 98 (1951). *Wunderlich* involved the meaning of a "finality clause" in a government contract. The Court held that in a standard form government contract, providing that disputes are to be decided by department heads and that their decisions can be set aside by the Court of Claims only upon a finding of fraud, fraud means "an intention to cheat or be dishonest." Further, a finding of gross error or capriciousness does not justify setting aside the department head's decision.

[59]496 F.2d at 1117.

[60]408 U.S. 564 (1972). *See* note 51 *supra*.

[61]496 F.2d at 1118.

court said, was a written statement by HUD of the reasons for the proposed action and an opportunity for Moynahan to present material which challenged the supposed facts and the rationality of the stated reasons for the action. Through procedures prior to this appeal, Moynahan had just such notice and opportunity to be heard; thus, the deficiencies in the notice of cancellation were cured.[62] Over the dissent of Judge Sprecher,[63] the court reversed the judgment of the district court insofar as it declared the cancellation of the instant agreement a nullity; but, insofar as it enjoined HUD from terminating similar agreements without following the above-stated minimal due process requirements, the lower court's judgment was affirmed.[64]

An interesting "state action" assertion was rejected in *Phillips v. Money*,[65] an action for damages and injunctive relief brought as a class action under the Civil Rights Act,[66] claiming that certain lien laws of Indiana were unconstitutional. Phillips had an altercation with Money, a service station owner, over the allegedly negligent repair work Money had done on Phillips' car. Relying on several Indiana mechanics' lien laws,[67] Money refused to return the car unless paid an additional $50 for evaluation of a continuing mechanical problem. Plaintiffs claimed that these Indiana statutes[68] "encouraged and authorized" Money to detain the auto. They claimed that though Money was in business for himself, he was acting under color of state law for the purpose of 42 U.S.C. § 1983[69] in detaining the auto and thus depriving the plaintiffs of the use of their property without due process, since the owners were not afforded notice and hearing to resolve the dispute over the legitimacy of the charge.

The Seventh Circuit Court of Appeals affirmed the dismissal of the action by the District Court for the Southern District of Indiana, holding that the detention by a private individual in possession of an automobile pursuant to a common law or statutory mechanic's lien does not constitute "state action." The court rejected the theory that the state had delegated an essentially

[62]For discussions of the nature and type of notice and hearing required to afford due process see Bell v. Burson, 402 U.S. 535 (1971), and Boddie v. Connecticut, 401 U.S. 371 (1971).

[63]496 F.2d at 1119 (Sprecher, J., dissenting). Judge Sprecher's dissent expressed the view that there was "no authority for crippling the power of the government to exercise a range of discretion consonant with contractual rights freely bargained with private contractors." *Id.*

[64]*Id.* at 1118-19.

[65]503 F.2d 990 (7th Cir. 1974).

[66]42 U.S.C. § 1983 (1970).

[67]IND. CODE § 9-9-5-6 (Burns 1973); *id.* §§ 32-8-31-1, -3, -5 (Burns 1973).

[68]*Id.*

[69]42 U.S.C. § 1983 (1970).

public or governmental function to the garageman or that he acted as an alter ego of a state agent with semblance of state authority. The court relied primarily on *Moose Lodge No. 107 v. Irvis*,[70] which confined state action to those situations of private discrimination where the state has been "significantly involved." The court then distinguished *Shelley v. Kraemer*,[71] *Burton v. Wilmington Parking Authority*,[72] and other cases where the private individual and state officials were symbiotically related. Moreover, this was not a situation where the state had delegated an essentially public or governmental function to the mechanic.

The court was also unpersuaded by plaintiffs' argument that the mechanic's refusal to redeliver the auto constituted a sub rosa exercise of the police power. To the contention that "the Indiana statutory and common law scheme affirmatively supports the garageman's action by insulating him from criminal and civil liability,"[73] and that accordingly the private party "derives some 'aid, comfort or incentive,' either real or apparent, from the state,"[74] the court answered that the question is to be resolved by a balancing process. The court summarily balanced the factors, with *Burton* in mind, and concluded that plaintiffs' attack was not against affirmative state support but against the mere "legal context in which individuals conduct their private affairs."[75]

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[70]407 U.S. 163 (1972). In *Moose Lodge*, the appellee, a black guest of a member of the appellant, a private club, was denied service at the club's dining room on the basis of his race. The Court held that the Pennsylvania liquor license regulatory scheme did not implicate the state in the licensee's guest practices sufficiently to bring the act of discrimination within "state action" for the equal protection clause where the state's regulatory system is not intended to encourage discrimination. *Id.* at 171-77.

[71]334 U.S. 1 (1948). In *Shelley* the Court held that private restrictive covenants designed to exclude designated minority members from residential areas do not per se violate the fourteenth amendment equal protection clause, but state court enforcement of such covenants does violate the clause. *Id.* at 22.

[72]365 U.S. 715 (1961). In *Burton* the Supreme Court held that the State of Delaware was a "joint participant" in the operation of a restaurant which was located in a publicly-owned parking facility built with and maintained by federal funds; therefore, when the restaurant refused to serve appellant because of his race, the State was responsible, in part, for violation of the fourteenth amendment equal protection clause. Also, the Court stated that where such a lease of public property is entered into, the lessee must comply with the fourteenth amendment's proscriptions as if they were binding covenants in the lease.

[73]503 F.2d at 993.

[74]*Id.*

[75]*Id.* at 994 (footnote omitted).

It should be clear that plaintiffs' assertion that the state had delegated an essential state function to private parties was tenuous in the extreme, and if seriously meant could only betray a complete lack of understanding of political theory. More tenable was plaintiffs' theory that the "context" of laws complained of affirmatively supported the garageman's actions. For it might be argued that the statutory law, at least, amounted to a placing of the weight of state authority behind the self-help action of a private individual, for example, detaining another private person's property pending the outcome of a dispute. However, the plaintiffs' position would have been more convincing had the garageman been accorded the right to take the owner's car away from him, rather than merely continue to hold what was already voluntarily placed in his posssession. While the court's disposition of the case seems sensible enough, especially in light of the interests to be protected between two contending private persons—the relatively immobile mechanic, whose place of business can readily be found and who generally can easily be reached by legal process, versus the often highly nomadic auto owner—"state action" remains a spacious concept, one at times amorphous enough to admit of some surprising applications.

A different form of government action, that of designating rights to a share of a state-provided pension fund for police officers, was the issue in *Ballard v. Board of Trustees.*[76] Here, a retired city policeman brought an action for restoration of his policeman's pension, which had been terminated after his felony conviction. The First District Court of Appeals reversed the trial court's judgment for the defendant.[77] The Indiana Supreme Court reversed the judgment of the appellate court and reinstated that of the trial court. The statute in question authorized the termination of pension benefits upon conviction of a felony.[78] The appellate

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[76]324 N.E.2d 813 (Ind. 1975).

[77]313 N.E.2d 351 (Ind. Ct. App. 1974).

[78]IND. CODE § 19-1-24-5 (Burns 1974) provides:

> Whenever any person who shall have received any benefit from such fund shall be convicted of a felony or shall become an habitual drunkard or shall fail to report himself for duty or for examination, or otherwise shall fail to comply with any legal requirements imposed by the board of trustees of the police pension fund, said board may upon notice to any such person discontinue or reduce in its discretion any payment that might otherwise accrue thereafter. Provided, however, that nothing contained in this act . . . shall be construed to entitle said board to recall into service any member who has previously been retired from active service on account of having served twenty [20] years or more; nor shall anything in this act be construed to entitle a retired member to a pension after he shall have been convicted of a felony or shall have become an habitual drunkard.

court had found the statutory provision unconstitutional as violative of article 1, section 30 of the Indiana Constitution which provides: "No conviction shall work corruption of blood, or forfeiture of estate." The appellate court relied heavily on the Washington case of *Leonard v. City of Seattle*[79] which reasoned that once the pension rights had vested, they were no different from any other kind of property and therefore could not be divested in the face of a constitutional provision against forfeiture of estate.

The supreme court rejected this argument, observing that pensions under a state compulsory contribution plan like the police pension fund have traditionally been considered gratuities of the sovereign which involve no agreement of the parties and thus create no contractual rights.[80] The court disagreed with the lower court's view that statutory reservations could not be imposed: "In the instant case there were several statutory reservations, one of which was that Appellant not become convicted of a felony. Appellant's interest was subject to and conditioned by the terms of the legislation which created his interest at the time he took . . . it in the first place."[81] The court noted that wide latitude must be given reasonable legislative policy, which here provided for a method of deterring criminal acts on the part of those who might be recalled into police service and which sought to support the morale of both the general public and the state's active police forces. Ballard took the employment subject to the legislature's public policy conditions; consequently, he had a vested right subject to divestment upon a condition subsequent, namely, conviction of a felony. "Appellant's 'estate' consisted of only those pension payments due him so long as he was not a convicted felon."[82] Moreover, an analysis of the historical notion of "forfeiture of estate" reveals that a pension payment, like a fine, was not an "estate" in the common law sense. Strictly speaking, the statute under review does not provide for a forfeiture, since it was not automatic but lay in the board's discretion.[83]

C. The First Amendment

The first amendment guarantee of freedom of speech received court attention in the libel and slander case of *American Broadcasting Cos. v. Smith Cabinet Manufacturing Co.*,[84] in which

[79]81 Wash. 2d 479, 503 P.2d 741 (1972).

[80]324 N.E.2d at 816.

[81]*Id.*

[82]*Id.*

[83]*Id.* at 817, *citing* Commonwealth v. Avery, 77 Ky. 625, 29 Am. R. 429 (1879).

[84]312 N.E.2d 85 (Ind. Ct. App. 1974). Defendant-appellant, American Broadcasting Companies, Inc., is a national television and radio broadcast-

a crib manufacturer sought an injunction and damages against the showing of a television documentary which allegedly inaccurately demonstrated the combustibility of a baby crib. The material, prepared for a documentary entitled "ABC News Close-Up—On Fire!," included a film segment which depicted a hand holding a lighted match against the bottom rail of one of plaintiff's model cribs. The crib caught fire within 10 seconds, a preliminary to the whole bed's being consumed within 10 minutes. After a publicity screening of the documentary, the crib company sought an injunction and damages for claimed loss of sales. The crib company alleged inaccuracy in that the program condensed a 10-minute test into a 40-second period, which made the burning of the crib appear more rapid than it was in fact, and in that the test was not run under sufficiently realistic conditions since the crib did not contain a mattress or bedclothing.

A hearing was held three days before the scheduled public showing of the documentary to determine whether the film was false and libelous and thus enjoinable. The trial court, after viewing the films in question (a film of one who tested the plaintiff's crib and a clip used in promotional advertising), issued a carefully drawn preliminary injunction directed only to those films the court personally had viewed and ABC had previously published. The order was in the alternative and would have permitted ABC to run the news documentary on the condition that the 40-second segment showing the burning of the plaintiff's baby bed include written notices designating the elapsed time sequence of the fire test of their product.[85] The order further required that ABC edit the documentary by eliminating any reference to the plaintiff or its product by name, pending a more thorough and comparative testing and documentation, to be followed by a further order of the trial court. If ABC refused to edit the documentary as ordered, it was prohibited from showing the documentary if it included the segment in question. The trial court also found that the film segment in question was knowingly false and misleading, a finding undisturbed on appeal and one from which the manufacturer argued that actual malice had been found.[86]

Viewing the case as simply falling under the broad rubric of prior restraint of freedom of speech, the First District Court of Appeals cited *Near v. Minnesota*,[87] *New York Times Co. v. Sulli-*

ing company which has various affiliates, including a local television station at Evansville, Indiana.

[85]312 N.E.2d at 87.

[86]*Id.*

[87]283 U.S. 697 (1931).

van,[88] and *Rosenbloom v. Metromedia, Inc.*[89] for the proposition that libelous statements on matters of public interest cannot be subjected to prior restraint but are matters for damages in an action at law.[90] The court concluded that the truth or falsity of the television segment is of no consequence in making a decision on the permissibility of prior restraint. "In other words, an injunction is not permitted simply because the publication will be false."[91] The court went on to demonstrate that flammability of children's cribs is indeed a matter of public interest and that the standards for broadcast journalism do not differ from those for other media in such a way as to affect the outcome of this case.

Although the court consistently repeated the position that "it [is] immaterial whether the statements in question [are] true or false,"[92] it sensed the potential for "abuse of the constitutional privilege." The court stated that in the past year these abuses have been "even more widespread than has been the case in the past."[93] Because it saw the policy alternatives as polarities between a "legal system that allows the opportunity for abuse" and "a legal system which would permit the censorship of free speech,"[94] the court did not attend to the philosophical incongruity of putting falsehood on the same plane as truth or to the practical rights of the public (here, those viewing the documentary) not to be deceived by the knowing presentation of false material. While the court's reading of precedent is correct, at least one of the policy goals its opinion claims to subserve might better have been reached by just the opposite holding: Namely, the production of a "wise decision" by the public through letting "the people . . . decide whether statements were true or false."[95] The trial court's careful effort to add written notices stating the elapsed time sequence of the fire test and to prevent naming the plaintiff or its product pending further tests would have provided untutored viewers with more facts on which to base their ultimate decision on the quality

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[88]376 U.S. 254 (1964).

[89]403 U.S. 29 (1971). In *Rosenbloom* the Court held that damages could not be recovered in a libel action involving public officials on matters of public interest unless actual malice was shown to exist.

[90]312 N.E.2d at 91. *See* Note, *Temporary Injunctions in Libel Cases*, 25 BAYLOR L. REV. 527 (1973); Note, *Broadcast Journalism: The Conflict Between the First Amendment and Liability for Defamation*, 39 BROOKLYN L. REV. 426 (1972); Note, *The* New York Times *Rule: An Analysis of Its Application*, 55 MINN. L. REV. 299 (1970); 40 FORDHAM L. REV. 651 (1972).

[91]312 N.E.2d at 89.

[92]*Id.* at 91, *citing* Robinson v. American Broadcasting Co., 441 F.2d 1396 (6th Cir. 1971).

[93]312 N.E.2d at 91.

[94]*Id.*

[95]*Id.* at 90.

of plaintiff's products. To that extent, the trial judge's position, though doubtless a prior restraint, would have better promoted the cause of abstract truth and the formation of educated public opinion.

A libel and slander case dealing with a much different matter was *Perry v. Columbia Broadcasting System, Inc.*[96] Mr. Lincoln T. Perry, whose stage name is Stepin Fetchit, sued CBS and its program sponsor because of segments in the first of seven telecasts entitled "Of Black America," shown locally in Indianapolis on WISH-TV, dealing with the history, culture, and experience of blacks in the United States.[97] The complained of section showed some of Perry's films with the narrator commenting that Perry made $2 million popularizing the "lazy, stupid, chicken-stealing idiot" character. Perry argued that the defendants "without plaintiff's permission or consent to use either his real name or take parts out of context, intentionally violated [his] right of privacy and maliciously depicted [him] as a tool of the white man who betrayed the members of his race and earned two million dollars portraying Negroes as inferior human beings."[98] In affirming the district court, the Seventh Circuit Court of Appeals rejected Perry's contention that there was an invasion of his privacy, since by his own admission on deposition he was "a household word" or a public figure in the 1930's. The court also rejected his contention that he was no longer a public figure, since he was still active in show business. The court also agreed that the issue of the treatment of blacks in American movies was of public interest and that there was no showing of actual malice or reckless disregard of the truth on the part of the telecast's producers.[99]

This is a rather straightforward case except for its unrealized potential for enlightenment on "the question whether a lapse of time will restore a public figure to the status of a private citizen."[100] With the decision that Perry was still a public figure because of continuing activity in the entertainment industry, the court felt it could pretermit this question.[101]

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[96]499 F.2d 797 (7th Cir. 1974).

[97]Perry, an Illinois resident, brought the suit against the Columbia Broadcasting System, Xerox Corporation, and Twentieth Century-Fox Film Corporation, all incorporated in New York and doing business in Indiana, and the Indiana Broadcasting Corporation, an Indiana corporation which owned and operated WISH-TV, a television station in Indianapolis. The district court's jurisdiction was based on federal diversity jurisdiction. 28 U.S.C. § 1332 (1970).

[98]499 F.2d at 799.

[99]*Id.* at 801-02.

[100]*Id.*

[101]Professor Prosser discusses the question as follows:

In *Jacob Weinberg News Agency, Inc. v. City of Marion*,[102] an action was brought by a magazine wholesaler against the city of Marion and its enforcement officials seeking a judgment of unconstitutionality of the city ordinance limiting the display of pornography to adults. Specifically, the ordinance made it a misdemeanor (1) for anyone in charge of a store or retail outlet knowingly to permit a minor to enter the premises if pornographic materials were sold or displayed thereon and (2) for a minor knowingly so to enter or his parents to knowingly permit him to do so. The ordinance also required the merchant to have a sign visible from the outside which states: "Persons Under Age of Eighteen (18) Years Prohibited from Entering These Premises."[103] Plaintiff's theory was that the threat of prosecution of certain retailers under the ordinance had caused those retailers in turn to order the plaintiff to remove the publications from the store sales racks, curtailing his income from potential sales. This, it was asserted, deprived the plaintiff of his rights of property without due process of law. The trial court dismissed the action, adopting the city's theory that the plaintiff had no standing to bring the suit and that the ordinance did not restrict plaintiff's freedom of speech. The trial court premised dismissal on the assumption that Weinberg's only claim to standing was economic, that is, that the threat of ordinance enforcement had diminished the expected proceeds from sale of the magazines.[104]

In reversing, the Second District Court of Appeals acknowledged that an economic interest of a manufacturer or wholesaler

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> One troublesome question, upon which none of the cases dealing with the Constitutional privilege has yet touched, is that of the effect of lapse of time, during which the plaintiff has returned to obscurity. There can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and that the recall of former public figures, the revival of past events that one [*sic*] were news, can properly be a matter of present public interest. If it is only the event which is recalled, without the use of the plaintiff's name, there seems to be no doubt that even a great lapse of time does not destroy the privilege. Most of the common law decisions have held that even the addition of his name and likeness is not enough to lead to liability. There are, however, two or three decisions indicating that a point may be reached at which a past event is no longer news, and the unnecessary mention of the plaintiff's name in connection with it may afford a cause of action. Thus far none of the decisions dealing with the Constitution has afforded any clue as to whether such a limitation is possible.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118, at 827-28 (4th ed. 1971) (footnotes omitted).

[102]322 N.E.2d 730 (Ind. Ct. App. 1975).

[103]*Id.* at 731.

[104]*Id.* at 733.

of merchandise in maintaining a free retail market for his stock in trade may or may not be too remote to give him standing. Here, however, Weinberg's magazines "do convey thoughts (good or bad) by printed words and pictures. This attribute of his merchandise entitles his business to the qualified protection of the First Amendment . . . ."[105] The court relied on *Bantam Books, Inc. v. Sullivan,*[106] relying particularly on a footnote in *Bantam* in which Justice Brennan noted that appellants, even though they were pubishers and not booksellers or writers, had standing to challenge the constitutionality of an anti-obscenity commission whose activity resulted in curtailment of its sales.[107] The court buttressed its argument with a quotation from *Interstate Circuit, Inc. v. City of Dallas*:[108] "Finally, appellant United Artists contends the ordinance unconstitutionally infringes upon its rights by not providing for participation by a distributor, who might wish to contest where an exhibitor would not. *Of course the distributor must be permitted to challenge the classification* . . . ."[109] The court later concluded that Weinberg "is suing *in behalf of himself* to protect *his own* claim to a First Amendment right to distribute magazines. . . . He is not . . . in the position of a mere proxy arguing the rights of his retailers; he is arguing his own claim that his own constitutional rights are infringed."[110] Therefore, under the Indiana Rules of Trial Procedure,[111] the plaintiff was permitted to bring the action and the trial court's order of dismissal was improper.

While defensible on the narrow issue of standing, the case does have some troubling overtones. The passage cited from *Bantam* was dicta and the passage cited from *Interstate Circuit* was, at root, only a reiteration of the same dicta from *Bantam.* While it is quite possible that the United States Supreme Court would indeed hold that the plaintiff had standing, however indirect or derivative his asserted free speech rights might be, the reality of plaintiff's claim, whatever the texture of the constitutional cloak in which he wrapped himself, was objection to the loss of market for his product, which here happened to be pornography. It seems somewhat strained to argue that to restrict a wholesaler's poten-

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[105] *Id.* at 733-34.

[106] 372 U.S. 58 (1963). The *Bantam* case involved the constitutionality of creating a commission whose function was to advise booksellers.

[107] 322 N.E.2d at 734, *citing* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963) (dicta).

[108] 390 U.S. 676 (1968).

[109] 322 N.E.2d at 734, *quoting from* 390 U.S. at 690 (emphasis added by Indiana court).

[110] 322 N.E.2d at 735 (emphasis in original).

[111] IND. R. TR. P. 57.

tial market by excluding children thereby limits him from "speaking" his mind. The principle argued for by the plaintiff might apply as well to the movie-theater regulations excluding minors or minors-without-accompanying-adult, or the Federal Communication Commission "family hour" primetime policy of minimizing the incidence of sex and violence in television programming. Further, one must wonder, if the plaintiff was "speaking," what it was he was saying. "It has been well observed that [lewd and obscene] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and mortality . . . ."[112]

For the distributor to characterize, as an illustration of his first amendment right of free speech, the commercial distribution of numerous publications he himself may not have read, is almost metaphorical. For insofar as the publications deal in any serious way with ideas, they might articulate views quite the contrary to those of the distributor. Such semantic license is not uncommon in areas as controversial and complicated as obscenity litigation, and, on balance, an ultimate determination on the substantive merits may well be better than dismissal on the threshold issue of standing. But the root lesson from the case may well be strategic: if counsel can persuade a court that his client should be allowed to wrap himself in someone else's first amendment cloak, he will be far better prepared to withstand the cold scrutiny of his business activities.

VI. Consumer Law

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During the survey period the major consumer law developments were statutory. The Congress was responsible for most of the activity, passing acts regulating sales warranties and credit billing and amending the Truth in Lending Act.

[112]Roth v. United States, 354 U.S. 476 (1957), *quoted with approval* in Miller v. California, 413 U.S. 1 (1973).

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