V. Constitutional Law

STEPHEN E. ARTHUR*
CHRISTOPHER D. SEIGEL**

A. Introduction

During this survey period, several Indiana statutes have come under close judicial scrutiny as litigants have continued in their efforts to persuade the courts to expand the principles of equal protection, due process and first amendment freedoms. The courts have generally attempted to honor legislative discretion and have upheld the validity of these statutes whenever possible. This Article will focus upon the application of the above-mentioned principles by the Indiana and Seventh Circuit Courts. These decisions will further be analyzed in light of current United States Supreme Court case law and relevant interpretations from other federal and state jurisdictions.

B. State Decisions

1. Indiana Obscenity Statute.—The Indiana Court of Appeals rejected a constitutional attack on the Indiana obscenity statute.[1] In *Ford v. State*,[2] the appellant was convicted of distributing an obscene magazine.[3] Appellant challenged the statute as being vague and overly broad.[4] The basis of the argument was that terms such as

---

*Member of the Indiana Bar. B.A., Indiana Central University, 1976; J.D., Indiana University School of Law—Indianapolis, 1979.

**Member of the Indiana Bar, Associate with the firm of Forbes, Mercer & Pennamped. B.S., Ball State University, 1976; J.D., Indiana University School of Law—Indianapolis, 1979.

[1]IND. CODE § 35-30-10.1-1 to -8 (1976 & Supp. 1980). During this survey period, the obscenity statute has been upheld on two other occasions. *See* Hogwood v. State, 395 N.E.2d 315 (Ind. Ct. App. 1979); Riley v. State, 389 N.E.2d 367 (Ind. Ct. App. 1979).

[2]394 N.E.2d 250 (Ind. Ct. App. 1979).

[3]The magazine depicted men and women performing sexual acts. *Id.* at 252.

[4]Appellant raised two other constitutional issues which were summarily rejected by the court of appeals. First, appellant averred that all sexual expression is protected under the first amendment. The court held obscenity is not protected speech or press under the first amendment. *Id.* at 253 (citing Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973)). In rejecting appellant's argument that the prohibition against providing sex material to consenting adults is an invasion of the right of privacy, the court cited *Paris Adult Theatre I* in which it was held that commercial sale of obscene material can be regulated even when distributed to consenting adults. 394 N.E.2d at 254. Finally, the court of appeals rejected appellant's argument that Stanley v. Georgia, 394 U.S. 557 (1969), wherein the United States Supreme Court recognized a constitutional right to possess obscene material in the privacy of the home, should be extended to

"patently offensive," "prurient interest in sex," "community standard" and "literary, artistic, political, or scientific value," do not import the same meaning to all individuals and therefore fail to provide advance notice of what material will be considered obscene.

The court of appeals reiterated the general principle that a criminal statute is vague and constitutionally defective when it fails to inform a person of ordinary intelligence of the conduct that is proscribed.[5] It set forth the present obscenity test which was established by the United States Supreme Court in *Miller v. California*.[6] The criteria for determining what constitutes obscene material are:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[7]

The court concluded that because the Indiana obscenity statute is written in a form prescribed by *Miller*, there was no first amendment infirmity.[8] It also rejected the appellant's vagueness argument

---

protect the commercial sale of obscene material to consenting adults. The court cited United States v. Orito, 413 U.S. 139 (1973), which specifically rejected this argument. 394 N.E.2d at 255.

[5]394 N.E.2d at 253. *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Constr. Co., 269 U.S. 385 (1926).

[6]413 U.S. 15 (1973).

[7]394 N.E.2d at 253 (quoting Miller v. California, 413 U.S. 15, 24-25 (1973)) (citations omitted). *See* Leventhal, *An Empirical Inquiry into the Effects of* Miller v. California *on the Control of Obscenity*, 52 N.Y.U.L. REV. 810 (1977).

[8]394 N.E.2d at 253. IND. CODE § 35-30-10.1-1 (Supp. 1980) sets forth the standards and definitions to be used in resolving the obscenity issue. Section one states:

> (a) "Matter" means (i) any book, magazine, newspaper, or other printed or written material; (ii) any picture, drawing, photograph, motion picture, or other pictorial representation; (iii) any statue or other figure; (iv) any recording, transcription, or mechanical, chemical, or electrical reproduction; or (v) any other articles, equipment, machines, or materials.
>
> (b) "Performance" means any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons.
>
> (c) A matter or performance is "obscene" if:
>
> (1) the average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;
>
> (2) the matter or performance depicts or describes, in a patently offensive way, sexual conduct; and

citing the language of *Roth v. United States*,[9] wherein the United States Supreme Court stated:

> Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . ." These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark ". . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . ."[10]

The court of appeals then concluded that the legal definition of obscenity does not change with each indictment and therefore provides sufficient notice of proscribed conduct under the obscenity statute.[11]

The majority opinion met with a strong dissent by Presiding Judge Garrard.[12] Although acknowledging that the Indiana statute adopted the correct standard of obscenity as embodied in *Miller*,[13] he

---

(3) the matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(d) "Sexual conduct" means (i) sexual intercourse or deviate sexual conduct; (ii) exhibition of the uncovered genitals in the context of masturbation or other sexual activity; (iii) exhibition of the uncovered genitals of a person under sixteen (16) years of age; (iv) sado-masochistic abuse; or (v) sexual intercourse or deviate sexual conduct with an animal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

(g) "Distribute" means to transfer possession for a consideration.

(i) "Owner" means any person who owns or has legal right to possession of any matter.

Paragraphs (f) and (h) were deleted by a 1978 amendment.

[9]394 N.E.2d at 253-54 (citing Roth v. United States, 354 U.S. 476 (1957)).

[10]354 U.S. 476, 491 (1957) (citations omitted).

[11]394 N.E.2d at 254.

[12]*Id.* at 256 (Garrard, P.J., dissenting).

[13]*Id.* at 257. The dissent states:

> However, despite numerous efforts, precision in the yardstick of definition has eluded us. Our courts have recognized that while "obscenity" is limited to representations or descriptions of certain forms of sexual conduct, the conclusion that a particular piece of material is obscene varies in the context in which the sexual expression appears and may also vary with the time and place in which it is considered.

Id.

disagreed that an average person reading the statute could determine in advance whether the material was in fact obscene.[14] Furthermore, he asserted that the real effect of the statute was to create a community of twelve jurors[15] whose determination would be largely insulated from standards of appellate review.[16]

The dissent points to an inherent weakness of the *Miller* standard. An individual is placed in the untenable position of speculating in advance whether twelve unknown members of his local community will judge his material obscene under the three-pronged standard of *Miller* and the Indiana statute. What criteria does this individual use in judging the local attitudes of his community on the issue of obscenity? Does he look at prior appellate case law which has dealt with the obscenity issue? If these cases involve similar facts to his own but arise in a different locality or section of the state, can he assume with any assurance that his local community will give similar facts a similar interpretation? Would it suffice for him to poll his community or seek a decision from the local governing body to determine what they believe are the community standards on obscenity? If these sources tell him that the material is not obscene, can he confidently rely upon their determination; or, is the individual still faced with the possibility of being judged by twelve jurors who are in the minority of that community and who believe the material to be obscene under the definition of *Miller*? The dilemma posed by the *Miller* standard prompted Mr. Justice Brennan to dissent in *Paris Adult Theatre I v. Slaton*[17] and to state:

> But after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on

---

[14] *Id.* at 258. In respect to the first prong of the *Miller* standard as adopted in IND. CODE § 35-30-10.1-1(c)(1), the dissent states:

> Were I to examine that definition to gauge my activity as a bookseller, there are questions I should like to ask: What community? Who or what establishes a standard for the community? Can material appeal to prurient interest of an *average* person, or is such appeal strictly subjective? When is the interest in sex prurient? How does one determine that prurient interest in sex is the dominant theme or merely a subsidiary aspect?

394 N.E.2d at 257.

[15] *Id.* at 258. The dissent argues that the term "local" community be judicially construed to mean a community of the entire state (citing for support IND. CONST. art. 4, § 22 and IND. CODE § 35-30-10.1-8 (Supp. 1980). 394 N.E.2d at 257 n.2.

[16] 394 N.E.2d at 258.

[17] 413 U.S. 49 (1973).

> the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.[18]

Brennan's dissenting opinion concluded that because of the difficulty in determining in advance what conduct is proscribed and what material is obscene, "no person, not even the most learned judge much less a layman, is capable of knowing in advance . . . whether certain material comes within the area of 'obscenity' . . . ."[19]

2. Indiana Public Indecency Statute.—In *State v. Baysinger*,[20] the Indiana Supreme Court rejected several lower court rulings[21] that Indiana's public indecency statute was unconstitutionally vague and overbroad.[22]

---

[18]*Id.* at 84 (Brennan, J., dissenting) (citation omitted).

[19]*Id.* at 87. The dissent further states:

> In this context, even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing. For the insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable, not alone because it makes "[b]ookselling . . . a hazardous profession," . . . but as well because it invites arbitrary and erratic enforcement of the law.

Id. at 87-88 (citations omitted).

[20]397 N.E.2d 580 (Ind. 1979).

[21]Three appeals were consolidated pursuant to IND. R. APP. P. 5(B). The nature of the individual actions is discussed by the majority opinion. 397 N.E.2d at 581.

[22]397 N.E.2d at 582. IND. CODE § 35-45-4-1 (Supp. 1980) provides:

> (a) A person who knowingly or intentionally, in a public place:
> (1) engages in sexual intercourse;
> (2) engages in deviate sexual conduct;
> (3) appears in a state of nudity; or
> (4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

The court cited Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763 (1976) for the standard of

First, the court considered appellee's argument that the statute was unduly vague because it failed to give adequate notice as to what areas are included within the term "public place."[23] The supreme court cited the language of *Peachey v. Boswell*[24] which defined the phrase "[i]n any place accessible to the public" with reference to a gambling ordinance:

> From a consideration of the terms "accessible," "public," and "public place," as defined hereinabove, together with the purpose of the Act, we have concluded that the phrase "in any place accessible to the public" as used in §10-2330, supra, means *any place where the public is invited and are free to go upon special or implied invitation—a place available to all or a certain segment of the public.*[25]

The supreme court concluded that prior case law has sufficiently defined the term "public place" as to provide fair notice of its meaning as required by due process of law.[26]

The court next considered appellee's argument that the statute sweeps broadly into the area of protected expression under the first amendment because it prohibits all "public nudity."[27] The appellee also argued that the term "public place" includes restrooms, showers, saunas, and locker rooms wherein individuals may have a right to be publicly nude.[28]

Appellee cited *Doran v. Salem Inn, Inc.*,[29] wherein the United States Supreme Court struck down a local ordinance which made it unlawful for bar owners and others to permit waitresses, barmaids, and entertainers to appear in establishments with breasts uncovered or so thinly draped as to appear uncovered. The Court determined that the defendant, who had provided topless dancing as entertainment, had standing to challenge the overbreadth of the or-

---

review when a statute is challenged. The court in *Sidle* stated:

> [W]e recognize that the Legislature is vested with a wide latitude of discretion in determining public policy. Therefore, every statute stands before us clothed with the presumption of constitutionality, and such presumption continues until clearly overcome by a showing to the contrary.
>
> In the deliberative process, the burden is upon the challenger to overcome such presumption, and all doubts are resolved against his charge.

Id. at 209, 341 N.E.2d at 766.

[23]397 N.E.2d at 582.

[24]240 Ind. 604, 167 N.E.2d 48 (1960).

[25]*Id.* at 622, 167 N.E.2d at 56-57 (emphasis added).

[26]397 N.E.2d at 583.

[27]*Id.*

[28]*Id.*

[29]422 U.S. 922 (1975).

dinance.[30] Moreover, it concluded that the ordinance in question prohibited all conduct in the form of topless dancing and was therefore overbroad since it prohibited topless dancing not only in bars but in "any public place."[31] The Court stated:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance.[32]

Because the Court determined that there was no limit to the interpretation of "any public place" it had held the ordinance to be overbroad.[33]

The Indiana Supreme Court cited the language of the United States Supreme Court in *Broadrick v. Oklahoma*,[34] that "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[35] The Indiana Supreme Court concluded that indecent public conduct is not protected speech or expression under the first amendment.[36] Moreover, it determined that there is no right to appear publicly in the nude but found that public nudity will be tolerated when related

---

[30]*Id.* at 932-34 (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)). *Cf.* California v. LaRue, 409 U.S. 109 (1972) (wherein the power of the state to regulate conduct through its authority to regulate the sale of alcohol was upheld). That Court in *LaRue* stated:

> But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct" or "action."

Id. at 117. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[31]422 U.S. at 933.

[32]*Id.* (citing Salem Inn, Inc. v. Frank, 364 F. Supp. 478, 483 (E.D.N.Y. 1973), *aff'd*, 501 F.2d 18 (2nd Cir. 1974), *aff'd in part*, 422 U.S. 922 (1975)).

[33]422 U.S. at 934.

[34]413 U.S. 601 (1973).

[35]*Id.* at 615.

[36]397 N.E.2d at 587.

to a protected communication of ideas or expression under the first amendment.[37] The court emphasized that nude dancing in bars, under the facts of this case, involved only conduct and not protected expression under the first amendment.[38] In fact, the court noted that appellee had alleged as his primary injury only a reduction in income from the sale of liquor when no nude dancing was provided.[39] The court reasoned that this was not the import of the first amendment protections.[40]

The court concluded that the statute was not substantially overbroad as contemplated by *Broadrick* because: (1) Appellee's claim was not one under the first amendment since no protected expression was involved, (2) case law has restricted and defined conduct which can be prosecuted under the public indecency statute, and (3) Indiana's obscenity statute provides procedures and standards to be used when obscenity becomes an issue.[41] Therefore, the statute was held to be constitutionally sound.

The majority opinion met with a vigorous dissent from Justice DeBruler[42] who stated that the statute was "so grossly overbroad that no court could construe it so as to render it free from this constitutional defect as to do so would require the court to exercise a legislative authority, a role we [the court] cannot assume."[43] The dissent noted that the statute is indifferent to the manner in which public nudity arises[44] and mentioned several activities which are protected under the first amendment but which arguably come within the ambit of the statute.[45] The areas mentioned were: (1) Nude dancing or acting in a professional stage production,[46] (2) engaging in a public meeting to educate on breast-feeding or breast cancer self-examinations,[47] and (3) posing nude for art classes at state universities.[48] The dissent concluded that because the statute sweeps into these areas of protected conduct and expression, it is unconstitutional.[49]

3. Indiana Death Penalty Statute.—In *State v. McCormick*,[50]

---

[37]*Id.*
[38]*Id.*
[39]*Id.*
[40]*Id.*
[41]*Id.*
[42]*Id.* (DeBruler, J., dissenting).
[43]*Id.* at 588. *See* Grody v. State, 257 Ind. 651, 278 N.E.2d 280 (1972).
[44]397 N.E.2d at 588 (DeBruler, J., dissenting).
[45]*Id.*
[46]*Id.*
[47]*Id.*
[48]*Id.*
[49]*Id.*
[50]397 N.E.2d 276 (Ind. 1979).

the Indiana Supreme Court affirmed a lower court ruling that section 35-50-2-9(b)(8) of the Indiana Code was unconstitutional as applied to the defendant. The defendant had been charged with a two count information. The first count of the information alleged murder and the second count alleged as an aggravating circumstance that the defendant had committed another unrelated murder for which he was under indictment in a separate criminal proceeding.

Indiana's death penalty statute provides a procedure which must be followed before the death penalty can be imposed.[51] Under this plan, the government must prove beyond a reasonable doubt both the principal charge and the aggravating circumstance.[52] The aggravating circumstance is proven at a sentencing hearing which is bifurcated from the trial on the principal charge.[53] If the principal charge is tried by jury, the sentencing hearing must likewise be conducted before the jury.[54] After the jury makes its recommendation on whether to impose the death penalty, the trial court makes a final and independent determination of sentence.[55] However, the trial court is not bound by the jury's recommendation.[56] During the sentencing hearing, the defense has a right to counter any aggravating circumstances demonstrated by the prosecution with evidence of mitigation,[57] to include the defendant's character, prior

---

[51]IND. CODE § 35-50-2-9 (Supp. 1980).

[52]*Id.* § 35-50-2-9(a).

[53]*Id.* § 35-50-2-9(d).

[54]*Id.*

[55]*Id.* § 35-50-2-9(e).

[56]*Id.*

[57]*Id.* § 35-50-2-9(b) provides that the prosecution must prove beyond a reasonable doubt at least one of the following aggravating circumstances:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

IND. CODE § 35-50-2-9(c) (Supp. 1980) provides mitigating circumstances which may be considered:

record, the circumstances surrounding the aggravating circumstance or other reasons why the death penalty should not be imposed.[58]

The Indiana Supreme Court determined that proof of "another murder" as an aggravating circumstance under section 35-50-2-9(b)(8) of the Indiana Code would result in a full trial on the existence of the other murder.[59] The burden of proving this murder would be proof beyond a reasonable doubt by the same jury.[60] The court noted that under the facts of the *McCormick* case, any evidence relating to the principal murder would have been inadmissible in proving the aggravating murder.[61] However, since the jury would have already heard the evidence on the principal charge, they would be unduly prejudiced in their ability to evaluate the evidence on the murder alleged as an aggravating circumstance.[62] The court reasoned that because of this potential bias, the jury might be inclined to find the defendant guilty of the aggravating murder on a level of proof less than that of proof beyond a reasonable doubt.[63] Therefore, due to the inherent risk of prejudice to the defendant, the court held that section 35-50-2-9(b)(8) was unconstitutional as therein applied.[64] The

---

(1) The defendant has no significant history of prior criminal conduct.
(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
(3) The victim was a participant in, or consented to, the defendant's conduct.
(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
(5) The defendant acted under the substantial domination of another person.
(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
(7) Any other circumstances appropriate for consideration.

[58]397 N.E.2d at 278 (citing Lockett v. Ohio, 438 U.S. 586 (1978)).

[59]397 N.E.2d at 280.

[60]*Id.*

[61]*Id.*

[62]*Id.*

[63]*Id.*

[64]*Id.* at 281. The court distinguished subsection (b)(8) as being qualitatively different from a case where some other type of aggravating circumstance is alleged. The court stated:

> Subparts (1) through (6) of subsection (b), quoted *supra*, relate directly to the crime constituting the principal charge. Very likely, the evidence which proves any of these six aggravating circumstances will have come before the jury as part of the State's case in chief in the trial of the principal charge. The prejudicial impact resulting from the introduction of this evidence at the subsequent sentencing hearing is virtually non-existent.
>
> Similarly, evidence introduced to prove subparts (7) and (9) also does not carry with it the emotional and prejudicial impact which would cause the death penalty to be imposed capriciously . . . .

court specifically limited its holding to cases where the alleged aggravating murder was not related to the principal murder charge.[65]

4. Indiana Compulsory Retirement Statute.—In *Parker v. State*,[66] a former employee of the food stamp program for the Lake County Department of Public Welfare challenged the constitutionality of Indiana Code section 4-15-8-2 which provides for compulsory retirement of state employees.[67] Parker had been retired on the first anniversary date of his employment following his seventieth birthday as required by statute. He alleged that the mandatory retirement provision violated the equal protection clause of the fourteenth amendment and the equal privileges guarantee of article 1, section 23 of the Indiana Constitution. The trial court sustained a 12(B)(6) motion for failure to state a claim upon which relief may be granted and applied a "rational basis" standard to uphold the statute.

The Indiana Court of Appeals upheld the constitutionality of the statute.[68] The court noted that challenges to mandatory retirement statutes have been uniformly rejected in other jurisdictions.[69] The court cited *Massachusetts Board of Retirement v. Murgia*,[70] wherein the United States Supreme Court rejected an equal protection challenge of a state statute which required the mandatory retirement of uniformed state policemen at the age of fifty years.[71] That Court concluded that there was no fundamental right to governmen-

---

> . . . A criminal *conviction* is the substance of the proof of subpart (7), and is necessarily implied in the proof of subpart (9). We may assume that a conviction was obtained in a constitutionally proper manner. Proof of a conviction therefore carries with it the assurance that the facts underlying that conviction have already been fully established to an untainted, unbiased jury in a forum in which the full protections of the Constitution were afforded to the defendant. Thus, we do not foresee a risk that evidence of a prior *conviction* or of a life sentence will cause the death penalty to be recommended and imposed in an arbitrary and capricious manner. By contrast, if the State alleges the defendant *committed* another murder, under subpart (b)(8), the actual evidence of the crime will be presented for the first time to the sentencing jury. The facts regarding this alleged aggravating crime will never have been presented to an impartial, untainted jury, and the risk that the previously tainted jury will react in an arbitrary manner is infinitely greater.

Id. at 280-81.

[65] *Id.* at 281.

[66] 400 N.E.2d 796 (Ind. Ct. App. 1980).

[67] IND. CODE § 4-15-8-2 (1976) provides: "Every state employee which, by IC 1971, 4-13-1, is under the control of the personnel board shall be retired compulsorily on his anniversary date immediately following his attainment of seventy (70) years of age."

[68] 400 N.E.2d at 802.

[69] *Id.* at 800.

[70] 427 U.S. 307 (1976).

[71] *Id.* at 317.

tal employment[72] and rejected an argument that uniformed policemen over the age of fifty years constituted a suspect class.[73] It therefore refused to apply a "strict level" of review and upheld the constitutionality of the retirement scheme.[74]

Based upon *Murgia* and numerous cases which have followed its lead, the Indiana Court of Appeals applied a "rational basis" standard and found the statute reasonably related to the state's objectives[75] in that (1) the retirement provisions apply equally to all state employees governed by Indiana Code section 4-15-2-1,[76] (2) mandatory retirement offers an opportunity for the employment and advancement of young personnel,[77] and (3) the statute insures the physical and mental vigor of state employees while avoiding an embarrassing and time-consuming hearing to establish a mental or physical basis for retirement.[78] The court therefore concluded that there was no denial of equal protection under the equal privileges guarantee of the Indiana Constitution.[79]

5. Freedom of Religion and the Right to Unemployment Compensation.—In *Thomas v. Review Board of Indiana Employment Security Division*,[80] the appellant, a Jehovah's Witness, was employed in the roll foundry of Blaw-Knox, a manufacturing plant primarily engaged in the production of armaments. After approximately one year, the roll foundry was closed and appellant was transferred to the turret line. Upon realizing that he was now directly working on the production of armaments, appellant quit his job and filed for unemployment compensation on the basis that he voluntarily terminated employment because of religious convictions.

---

[72]*Id.* at 313, wherein the Court stated, "[w]e have expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.' "

[73]*Id.* The court reasoned that:

> a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Id.

[74]*Id.* at 317.

[75]400 N.E.2d at 801-02.

[75]*Id.* at 802.

[77]*Id.*

[78]*Id.*

[79]*Id.*

[80]391 N.E.2d 1127 (Ind. 1979).

The Employment Security Review Board denied the claim and the appellant appealed. The Indiana Court of Appeals reversed the judgment of the Review Board and held the statute unconstitutional as applied to the appellant.[81] The court reasoned that the statute placed an "impermissible burden on his first amendment guarantee to the free exercise of his religion,"[82] and found no "compelling state interest" under the facts which justified that burden.[83]

The Indiana Supreme Court granted transfer and affirmed the Review Board's denial of compensation.[84] The court cited the Indiana Employment Security Act[85] which provides that "an individual 'who has voluntarily left his employment without good cause in connection with his work' is disqualified from receiving benefits."[86] The court stated that the purpose of the Act was to protect individuals during periods of involuntary unemployment and to encourage stable employment.[87] It noted that the statute was not intended to facilitate changing employment or to provide relief to individuals who voluntarily quit their job for personal reasons and without good cause.[88] The court cited the language of *Geckler v. Review Board of Indiana Employment Security Division*[89] that:

> As a general rule, the cases hold that "good cause," which justifies the voluntary termination of employment and entitles the claimant to compensation, must be related to the employment, and thus be *objective* in character. The cases have not extended the construction of "good cause" to include purely personal and subjective reasons which are unique to the employee, but have required that such "cause" would similarly affect persons of *reasonable* and *normal sensitivity*.[90]

The supreme court concluded that there was not a sufficient objective nexus between appellant's reason for quitting his job and his employment environment.[91] Since appellant's termination of employ-

---

[81]Thomas v. Review Bd., 381 N.E.2d 888 (Ind. Ct. App. 1978), *vacated*, 391 N.E.2d 1127 (Ind. 1979).

[82]*Id.* at 895.

[83]*Id.*

[84]391 N.E.2d at 1134.

[85]IND. CODE § 22-4-15-1 (Supp. 1980).

[86]*Id.*

[87]391 N.E.2d at 1129.

[88]*Id.*

[89]244 Ind. 473, 193 N.E.2d 357 (1963).

[90]*Id.* at 477-78, 193 N.E.2d at 359.

[91]391 N.E.2d at 1130. The court indicated that a stricter standard must be applied to individuals who voluntarily *quit* work as compared to those who refuse available work. This stricter standard is designed to assist the legislative intent to reduce

ment resulted from subjective reasons, it concluded that there was not "good cause" as contemplated by the Act.[92]

The court further rejected the argument that a denial of compensation violated appellant's first amendment guarantee to the free exercise of religion.[93] The court cited the case of *Braunfeld v. Brown*[94] wherein the United States Supreme Court enunciated the rule that a law which impedes religious observance or discriminates against religion is unconstitutional even if the burden is only indirect. However, if the state regulates conduct, the purpose of which is to advance the state's secular goals, the statute is valid, even if it indirectly burdens religion.[95] The Indiana Supreme Court concluded that the compensation statute makes no religious practice unlawful, and in seeking to advance a secular purpose, the statute has only imposed an indirect burden on the appellant's free exercise of religion.[96]

The supreme court rejected appellant's reliance upon *Sherbert v. Verner*.[97] In that case, a Seventh Day Adventist was unable to find employment because of her religious beliefs against Saturday work. She was denied unemployment compensation because it was determined that her refusal to work was without good cause. The United States Supreme Court found that the denial of benefits abridged her first amendment right to the free exercise of religion.[98] The Court stated:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is

---

unemployment by encouraging people to maintain their present jobs rather than to quit them. Furthermore, it recognizes that if employees place necessary conditions upon their acceptance of a new job, they will be likely to maintain that new employment. The court stated:

> This system also avoids a detailed speculative inquiry by employers of applicant's personal beliefs, conditions or unique situations prior to hiring and avoids requiring an employer to pay money from his fund for compensation to an employee who voluntarily or carelessly places himself in a position where he will have to choose between quitting work or his personal beliefs.

Id. See generally Geckler v. Review Bd., 244 Ind. 473, 193 N.E.2d 357 (1963); Gray v. Dobbs House, Inc., 357 N.E.2d 900 (Ind. Ct. App. 1976); Lewis v. Review Bd., 152 Ind. App. 187, 282 N.E.2d 876 (1972). These cases were cited and discussed by the majority opinion. 391 N.E.2d at 1129-30.

[92]391 N.E.2d at 1130.

[93]*Id.* at 1133-34.

[94]366 U.S. 599 (1961).

[95]*Id.* at 607.

[96]391 N.E.2d at 1131.

[97]374 U.S. 398 (1963).

[98]*Id.* at 410.

> unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[99]

The Indiana Supreme Court distinguished *Sherbert*. The court noted that in *Sherbert*, the appellant was given a choice between working on the Sabbath or not working at all. It therefore burdened her right to the free exercise of her religion.[100] However, in *Thomas*, the court determined that the appellant was not required by statute to violate a cardinal tenet of his religion.[101] Instead, it indicated that appellant's decision to quit his job was a personal philosophical choice rather than a religious choice or form of religious expression.[102] The court also noted that the appellant had admitted to being unsure of his religious convictions[103] and had expressed a willingness to return to the plant even though it was still engaged in armament production.[104]

There were dissenting opinions from two Justices, both concluding that *Sherbert* was controlling and that the appellant had improperly been denied compensation under the Act.[105] Justice Hunter's dissenting opinion noted that the appellant had quit his job shortly after being transferred to a part of the plant directly involved in the production of armaments.[106] It further noted that because the Review Board had made a specific finding that Thomas quit his job due to religious convictions,[107] the majority should not have under-

---

[99] *Id.* at 404.

[100] 391 N.E.2d at 1132.

[101] *Id.* at 1133.

[102] *Id.* The court cites Wisconsin v. Yoder, 406 U.S. 205 (1972) for the proposition that "[a] personal philosophical choice rather than a religious choice, does not rise to the level of a first amendment claim of religious expression." 391 N.E.2d at 1131.

[103] 391 N.E.2d at 1133.

[104] *Id.* The court stated:

> Thomas is not required by statute to violate a cardinal tenet of his religion. Our review of the record here reveals that the basis of claimant's belief is unclear. The precise belief is not articulated. He does not show how the exercise of his religious beliefs is hampered. He is not prevented from seeking, being available for, or accepting new work. He is not deprived of benefits extended to others. *Sherbert* does not require that benefits be extended to this claimant. To so require would be an improper expansion of that holding.

Id. at 1133-34.

[105] *Id.* at 1134-36 (Hunter, J., dissenting); *id.* at 1136-37 (DeBruler, dissenting).

[106] *Id.* at 1134 (Hunter, J., dissenting).

[107] *Id.*

rated appellant's beliefs merely because they were not eloquently stated or because appellant was struggling with those beliefs.[108] The dissent argued that it was improper to distinguish between literal and interpretative readings of religious scriptures or to distinguish between the "cardinal tenets" of various religions.[109]

6. Sex Discrimination and Grooming Standards in Private Industry.—In *The Indiana Civil Rights Commission v. Sutherland Lumber*,[110] two retail lumberyard employees brought sexual discrimination complaints against their employer under the Indiana Civil Rights Act.[111] The two employees were fired when they refused to shave their moustaches to comply with a private employer's grooming standards. The Indiana Civil Rights Commission (ICRC) determined that they were victims of sexual discrimination. This determination was rejected by the Indiana Court of Appeals.

The court of appeals determined that this case was one of first impression in Indiana.[112] They turned to federal case law which has interpreted Title VII of the Civil Rights Act of 1964 in the context of grooming standards of private employers. The court relied upon the analysis of the Fifth Circuit Court of Appeals in *Willingham v. Macon Telegraph Publishing Co.*[113] In *Willingham*, the Macon Telegraph management concluded that local sentiment against long-haired males was so intense that business necessities required a policy that these individuals be refused employment. Willingham brought a complaint against Macon Telegraph alleging that their policy discriminated against males on the basis of sex, since female employees were permitted to wear their hair at any length. The Fifth Circuit rejected this contention and concluded that the discrimination practiced by Macon Telegraph was based upon grooming standards and not upon sex.[114]

The Fifth Circuit Court of Appeals noted that the case involved

---

[108]*Id.* at 1135.

[109]*Id.* The dissent stated, "We are dealing here with a person's action pursuant to his religious beliefs, and cannot properly tell a litigant that he has misinterpreted his own beliefs." *Id.* (Hunter, J., dissenting).

[110]394 N.E.2d 949 (Ind. Ct. App. 1979).

[111]IND. CODE § 22-9-1-1 (1976 & Supp. 1980).

[112]394 N.E.2d at 954.

[113]507 F.2d 1084 (5th Cir. 1975), *enbanc vacating* 482 F.2d 535 (5th Cir. 1973).

[114]*Id.* at 1088. *See* Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976); Knott v. Missouri Pac. R.R., 527 F.2d 1249 (8th Cir. 1975); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fangan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973). *But see* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971); Aros v. McDonnell Douglas Corp., 348 F. Supp. 661 (C.D. Cal. 1972); Donohue v. Shoe Corp. of America, 337 F. Supp. 1357 (C.D. Cal. 1972).

no state action and no discrimination based upon sex alone.[115] Rather, the court noted that a more subtle form of discrimination existed. This form of discrimination has been characterized as "sex plus,"[116] which involves the classification of employees on the basis of sex, plus one other ostensibly neutral characteristic.[117] The court stated:

> The practical effect of interpreting Sec. 703 to include this type of discrimination is to impose an equal protection gloss upon the statute, i.e. similarly situated individuals of either sex cannot be discriminated against vis-à-vis members of their own sex unless the same distinction is made with respect to those of the opposite sex.[118]

Willingham argued that "sex plus" must include "sex plus any sexual stereotype" and since short hair is stereotypically male, a grooming standard which requires short hair of all males is sex discrimination as contemplated by Title VII of the Civil Rights Act. The Fifth Circuit rejected this argument and determined that Congress intended Title VII to guarantee equal job opportunities for males and females.[119] The court stated:

> [A]n employer cannot have one hiring policy for men and another for women *if* the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity.[120]

The court concluded that hair length is not immutable and enjoys no constitutional protection in the context of employer grooming standards.[121]

The Indiana Court of Appeals applied the reasoning of the federal cases which have followed the Fifth Circuit. The court of appeals adopted *Willingham's* three-tier analysis in determining whether there had been sex discrimination under the Indiana Civil Rights law.[122] This three-tier analysis queries:

---

[115]507 F.2d at 1088.
[116]*Id.* at 1088-89.
[117]*Id.* at 1089.
[118]*Id.*
[119]*Id.* at 1091. *See* 42 U.S.C. § 2000e-2 (1976).
[120]507 F.2d at 1091.
[121]*Id.*
[122]394 N.E.2d at 954.

> (1) Has there been some form of discrimination in that similarly situated individuals have received different treatment?; (2) If so, was the discrimination one which the legislative body intended to forbid as sex discrimination?; and (3) If so, may the practice be justified by the employer as a legally permissible bona fide occupational qualification?[123]

The court found discrimination under the first tier in that similarly situated employees at Sutherland Lumber had in fact received dissimilar treatment.[124] Under the second tier of the analysis, however, the court concluded that the dissimilar treatment did not amount to sex discrimination.[125] The ICRC argued that the ability to grow a beard is an immutable characteristic of males and that Sutherland Lumber's policies amounted to "sex plus" discrimination designed to deny equal opportunity by perpetuating a sexual stereotype. The court of appeals rejected this argument.[126] It reasoned that the Indiana Civil Rights legislation was designed to provide equal employment opportunity and to prevent employer discrimination which violates the fundamental rights of employees or is based upon a classification wherein the disfavored class bears some immutable characteristic.[127] It determined that even though an individual has a right to wear a beard or moustache, this is not a fundamental right.[128] Furthermore, it also rejected the argument of the ICRC that the ability to grow facial hair is an immutable characteristic of males.[129] The court said that facial hair is not an absolute characteristic like race, national origin, or color; rather, it can be changed through shaving and therefore is an indicium of an individual's personal mode of dress or a desired cosmetic effect.[130]

The court concluded that "[t]he right of an employer to promulgate grooming regulations to project a certain image is recognized as an aspect of managerial responsibility necessary in a competitive business environment."[131] Therefore, an "employer is not required [by the Indiana Civil Rights legislation] to account for the personal preferences of its employees in respect to grooming standards."[132]

---

[123] *Id.*

[124] *Id.* at 955.

[125] *Id.* at 957.

[126] *Id.* at 956.

[127] *Id.* at 955-56.

[128] *Id.* at 955.

[129] *Id.* at 956.

[130] *Id.* (citing Baker v. California Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975)).

[131] 394 N.E.2d at 956.

[132] *Id.*

The court recited the language of the United States Appellate Court for the District of Columbia which stated:

> Some courts have analogized hair-length regulations to the requirement that men and women use separate toilet facilities or that men not wear dresses. Admittedly these are extreme examples, but they are important here because they are logically indistinguishable from hair-length regulations. These examples, like hair-length regulations, are classifications by sex which do not limit employment opportunities by making distinctions based on immutable personal characteristics, which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment disadvantages for one sex. Neither sex is elevated by these regulations to an appreciably higher occupational level than the other. We conclude that Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities.[133]

Applying this rationale to its interpretation of Indiana's Civil Rights legislation, the court concluded that the ICRC had improperly construed the legislation in finding sex discrimination by Sutherland Lumber.[134]

7. Indiana Locker Law Statute.—During this survey period, the Indiana General Assembly enacted a statute concerning the search of school lockers.[135] The question of the statute's validity, in

---

[133]*Id.* (citing Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336-37 (D.C. Cir. 1973).

[134]394 N.E.2d at 957.

[135]IND. CODE § 20-8.1-5-17 (Supp. 1980) reads as follows:

(a) A student using a locker that is the property of a school corporation is presumed to have no expectation of privacy in that locker or its contents.

(b) A principal or other member of the administrative staff of a school designated in writing by the principal may, in accordance with the rules of the governing body of that school corporation, search such a locker and its contents at any time. The school corporation shall provide each student and each students' (sic) parents a written copy of all the rules of the governing body at that school corporation regarding searches of lockers and their contents.

(c) Other than a general search of lockers of all students, any search conducted under this section shall be, where possible, conducted in the presence of the student whose assigned locker is the subject of the search.

(d) A law enforcement agency having jurisdiction over the geographic area in which is located the school facility containing such a locker may, at the request of the school principal and in accordance with rules of the governing body of that school corporation, assist the school administrators in searching such a locker and its contents.

reference to the fourth amendment rights of students, is raised.[136]

In general, the statute grants the principal or his designated representative, authority to search a student's locker and the contents therein at any time.[137] The student and his parents shall be furnished a copy of the school's rules regarding locker searches.[138] A search pursuant to this statute, other than a general search of all lockers, must be made in the student's presence, whenever possible.[139] Finally, any law enforcement agency with authority over the district in which the school is located may be asked to assist the school administrators in carrying out a locker search.[140]

Utilizing the United States Supreme Court's language found in *Rakas v. Illinois*,[141] the legislature has deemed it appropriate to remove any "expectation of privacy in . . . [the] . . . locker or its contents."[142] With no reasonable privacy expectation, a student would lack standing to object to the lawfulness of a search of his locker.[143] In *Doe v. Renfrow*,[144] the United States District Court for Northern Indiana in a memorandum opinion on canine searches of students held that the school administrators stood *in loco parentis* to the students and therefore could conduct the search. The *in loco parentis* relationship modifies a student's fourth amendment rights so that a search may be conducted when school officials have reasonable cause to believe a student has violated or is violating a school policy.[145]

It is clear that a student does not lose his rights guaranteed by the fourth amendment or any other constitutional provision by entering the schoolhouse.[146] Therefore, the student's right to be free

---

[136]U.S. CONST. amend. IV.

[137]IND. CODE § 20-8.1-5-17(b) (Supp. 1980).

[138]*Id.*

[139]*Id.* § 20-8.1-5-17(c).

[140]*Id.* § 20-8.1-5-17(d).

[141]439 U.S. 128 (1978). *See* Katz v. United States, 389 U.S. 347 (1967).

[142]IND. CODE § 20-8.1-5-17(a) (Supp. 1980).

[143]The *Rakas* case involved a situation in which two robbery suspects were stopped while in a car. A search of the car by police revealed a box of rifle shells in the glove compartment and a sawed-off rifle below the seat. Neither of the two occupants of the car asserted any property or possessory interest in the car searched nor any interest in the seized articles. Therefore, they failed to show any legitimate expectation of privacy and could not challenge the constitutionality of the search. 439 U.S. 128 (1978).

[144]475 F. Supp. 1012 (N.D. Ind. 1979).

[145]*Id.* at 1019. It should be noted that the search of students herein was only for school purposes and not to initiate any criminal prosecutions. The court noted that its position might well have been different if such a motive was the purpose of the search. *Id.* at 1024.

[146]Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

from unreasonable search and seizures must be balanced against the need of school administrators to maintain order and discipline and to fulfill their duties under the *in loco parentis* doctrine in protecting the student's health and welfare.[147] Consequently, it is unclear where the Indiana courts will stand on the locker statute.[148] In any event, the question of its constitutionality will provide fertile ground for testing under the polestar of the fourth amendment standard, and it remains to be seen whether our legislature will receive a passing grade.

C. *Federal Decisions*

1. Indiana Wrongful Death Statute.—The constitutionality of Indiana's wrongful death statute[149] was challenged in *Huff v. White Motor Corp.*[150] In that case, the administratrix of the estate of a deceased truck driver initiated a wrongful death action against the truck manufacturer based upon defective design of the fuel system which was alleged to have caused the fire resulting in the driver's death.[151] A trial by jury resulted in judgment for the plaintiff,[152] and the defendant appealed with the plaintiff bringing a cross-appeal.[153]

The plaintiff argued in the cross-appeal that the wrongful death statute provides for punitive damages and that the jury should have

---

[147]M. v. Board of Educ., 429 F. Supp. 288 (S.D. Ill. 1977). *Cf.* Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977), and Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968) (rejecting the *in loco parentis* reasoning).

[148]*See generally* Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974); Comment, *Students and the Fourth Amendment: Myth or Reality?* 46 U.M.K.C.L. REV. 282 (1977); Comment, *Search and Seizure—School Officials' Authority to Search Students is Augmented by the* In Loco Parentis *Doctrine*, 5 FLA. ST. U. L. REV. 526 (1977).

[149]IND. CODE § 34-1-1-2 (1976), provides in relevant part:

> When the death of one is caused by the wrongful act or omission of another, . . . the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission.

[150]609 F.2d 286 (7th Cir. 1979).

[151]This aspect of the case and a detailed explanation of the factual background are more fully analyzed in Vargo & Leibman, *Products Liability, 1979 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 237 (1979).

[152]The United States District Court for the Southern District of Indiana granted summary judgment for the manufacturer, and the administratrix appealed. 418 F. Supp. 232 (S.D. Ind. 1976), *rev'd*, 565 F.2d 104 (7th Cir. 1977). On remand from the court of appeals the district court entered judgment on a jury verdict for the plaintiff in the amount of $700,000.00. 609 F.2d at 289.

[153]The court of appeals eventually remanded the case again for a determination of the decedent's competence concerning a statement excluded at trial. Because a new trial was conditioned on this factual determination by the district court, the court proceeded to deal with the issue discussed in this article. 609 F.2d at 297.

been allowed to consider awarding them as a part of the wrongful death recovery.[154] The plaintiff alternatively contended that if the statute does not provide for punitive damages, it violates the equal protection clause of the United States and Indiana Constitutions by discriminating against wrongful death claimants, in favor of property damage and personal injury plaintiffs, who may recover punitive damages.[155]

The court dealt with the first aspect of this two-pronged attack by stating that punitive damages are clearly not compensation for an injury, but are meant solely to punish and deter reprehensible conduct.[156] Prior to this amendment to the wrongful death statute, punitive damages were not recoverable because the only purpose of this statute was to compensate wrongful death claimants for pecuniary losses.[157] Recognizing that there have been no Indiana court decisions on this issue since 1965[158] the court concluded that the wrongful death statute still does not authorize an award of punitive damages.[159]

The court said that it believed the Indiana legislature used the phrase "including, but not limited to" to make evident that by enumerating the recoverable damages, the jury could also consider other factors in arriving at the *compensatory* damages.[160]

The court then addressed the plaintiff's constitutional attack on disallowing punitive damages. The plaintiff contended that such disallowance violated the equal protection clauses of the United States and Indiana Constitutions.[161] The court rejected this contention and upheld the statute, stating that this legislative classification did not involve race or other immutable human attributes,[162]

---

[154]*Id.*

[155]*Id.* at 298. *See* U.S. CONST. amend. XIV; IND. CONST. art. 1, § 23.

[156]609 F.2d at 297 (citing International Bhd. of Elec. Workers v. Foust, 99 S. Ct. 2121, 2125 (1979). Quoting Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the court stated, "Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.* at 350.

[157]*See* Lindley v. Sink, 218 Ind. 1, 14-15, 30 N.E.2d 456, 461 (1940).

[158]In Estate of Pickens v. Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970) the Indiana Supreme Court, citing pre-1965 cases, stated that the purpose of the present statute was "to create a cause of action to provide a means by which those who have sustained a loss by reason of the death may be compensated." *Id.* at 126, 263 N.E.2d at 155. *Accord* Bocek v. Inter-Insurance Exch., 369 N.E.2d 1093, 1096-97 (Ind. Ct. App. 1977).

[159]609 F.2d at 297.

[160]Examples of these factors given by the court include loss of care, love and affection, and loss of training and guidance for children. *See also* American Carloading Corp. v. Gary Trust & Sav. Bank, 216 Ind. 649, 660, 25 N.E.2d 777, 782 (1940).

[161]609 F.2d at 298.

[162]*Id. See* Parham v. Hughes, 441 U.S. 347, 351 (1979).

and did not affect fundamental rights.[163] Therefore, it is granted a presumption of validity absent a showing that the legislature's actions in establishing it were irrational.[164] The court concluded by stating that the equal protection clause of the Indiana Constitution is co-extensive and consistent with the federal clause.[165]

2. Indiana Statute Relating to Unobstructed View at Railroad Crossing.—In another wrongful death setting the Seventh Circuit Court of Appeals examined the constitutionality of Indiana's statute relating to unobstructed view at railroad crossings. In *Menke v. Southern Railway*,[166] the defendant contended that the Indiana statute[167] was void for vagueness because no person of reasonable and ordinary intelligence would have notice of the railroad's duty,[168] because the statute arguably failed to specify at what distance from the track a motorist must have an unobstructed view.[169]

The court upheld the Indiana statute by stating that it was not impermissibly vague.[170] In this area of legislative draftsmanship, the courts have allowed greater leeway in imprecise phrasing.[171] The court stated:

> In our view the language of the Act when considered against the background of its obvious purpose to protect motorists from hidden trains at rail crossings, its relation to other Indiana statutes, and the variety of conditions which may be

---

[163]609 F.2d at 298.

[164]*Id. See also* Vance v. Bradley, 440 U.S. 93, 97 (1979).

[165]609 F.2d at 298; *See* Haas v. South Bend Community School Corp., 259 Ind. 515, 526, 289 N.E.2d 495, 501 (1972).

[166]603 F.2d 1281 (7th Cir. 1979).

[167]IND. CODE § 8-6-7.6-1 (1976) provides:

> Each railroad in the State of Indiana shall maintain each public crossing under its control in such a manner that the operator of any licensed motor vehicle has an unobstructed view for fifteen hundred (1500) feet in both directions along the railroad right-of-way subject only to terrain elevations or depressions, track curvature, or permanent improvements.

[168]*See* United States v. National Dairy Corp., 372 U.S. 29 (1963); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); U.S. CONST., amend. XIV; IND. CONST. art. 1, § 12. Although the defendant raised this issue for the first time on appeal, thereby waiving any constitutional objection, the court treated the issue as if properly raised. 603 F.2d at 1283.

[169]The defendant based his constitutional attack upon two state court decisions which struck down statutes requiring motorists to slow down at obstructed intersections or railroad crossings. Missel v. State, 33 Okla. Crim. 376, 244 P. 462 (1926); Galveston, H. & S. A. Ry. Co. v. Duty, 277 S.W. 1057 (Tex. Civ. App. 1925) (opinion adopted in its entirety by the Texas Supreme Court).

[170]603 F.2d at 1283.

[171]*See* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); Baltimore & O.R.R. v. Groeger, 266 U.S. 521 (1925).

> present at railroad crossings, is reasonably clear, if not mathematically precise. Due process requires no more.[172]

It interpreted the statute to mean that the view required to be given a motorist was at that point where the highway intersects with the edge of the right-of-way for the railroad. Reading this statute, together with the statute requiring motorists to stop at a railroad crossing when "an approaching train is plainly visible and is in hazardous proximity to such crossing,"[173] reinforces the legislative policy under the Act.[174]

The court concluded that the statute was not impermissibly vague and falls clearly within the flexible boundaries which the due process clause places on the legislative function.[175]

3. The Foster Parent-Child Relationship and Due Process of Law.—In *Kyees v. County Department of Public Welfare*,[176] the Seventh Circuit Court of Appeals ruled upon the due process rights of foster parents and the children placed in their care.

In this particular situation, a child[177] was placed in the care of the foster parents through a standard foster care contract, which provided for a per diem amount for the temporary care of the child.[178] The record indicated that the defendants told the foster parents that placement was only short-term, and that the couple would not be considered as adoptive parents for the child.[179] Furthermore, the contract did not create any anticipation for a long-term relationship.[180] However, the foster parents continued to express interest in and emotional attachment for the child, and eventually attempted to adopt him over the defendants' objections.[181] When this

---

[172]603 F.2d at 1283.

[173]IND. CODE § 9-4-1-106(d) (1976).

[174]603 F.2d at 1283-84.

[175]*Id.* at 1284.

[176]600 F.2d 693 (7th Cir. 1979).

[177]The child was born out of wedlock on November 28, 1972. His father was unknown and his mother lacked the physical and mental capacity to care for him. On May 18, 1973, he became a ward of Tippecanoe County and was placed with two foster families before being placed in the home of Charles and Pauline Kyees. *Id.* at 694.

[178]*Id.* at 694-95.

[179]*Id.* at 695.

[180]*Id.*

[181]The Kyees filed a petition in the Tippecanoe Circuit Court seeking waiver of the necessity of defendants' approval for the adoption. The defendants opposed the adoption for three reasons: (1) The Kyees were respectively 66 and 50 years of age, and the defendants sought adoptive parents who would likely be living through the child's teenage years; (2) The Kyees had more knowledge about this particular child's background than would normally be allowed adoptive parents; and (3) Defendants felt that Mrs. Kyees did not place sufficient importance on the child's continued therapy at the Wabash Center. The court denied the petition and no appeal was taken. *Id.*

failed, the foster parents encouraged a local adoption so they could continue having contact with the child as "foster grandparents."[182] A petition for local adoption was eventually filed and dismissed because the defendants again did not consent to the adoption.[183] At the time of the original action supporting this appeal, the record indicated that the child had been adopted by an out-of-state couple.[184]

In the appeal, arising from the dismissal of a complaint filed in federal district court,[185] the plaintiffs raised the issue of whether the defendants must accord them due process before removing a foster child who had been in their care for a substantial period of time.[186]

The court began its analysis by stating the issue as follows:

> We have no difficulty in narrowing the case to the question whether the relationship between plaintiffs and John Joe [foster child] created a liberty interest which the state could not impair without due process. We see no property interest involved, and no fundamental rights wholly beyond the power of the state.[187]

However, it chose not to rest the crux of its decision on whether due process was fulfilled,[188] but rather chose to address the issue whether a foster care relationship creates a constitutionally protected liberty interest.[189]

The court began by stating that there does exist a "private realm of family life which the state cannot enter."[190] The difficulty lies in determining what actually constitutes a "family." Where the

---

[182]*Id.* at 695-96.

[183]On July 28, 1975, a local couple filed with the Tippecanoe Circuit Court a petition to adopt the child. The defendants were granted summary judgment because they did not consent to the adoption. An appeal of that decision is pending before the Indiana Court of Appeals. *Id.* at 696.

[184]*Id.*

[185]An action was filed on September 30, 1975, in federal district court naming the foster parents, the local couple who sought adoption, and the child as plaintiffs. This was a civil rights action arising under 42 U.S.C. § 1983. The foster parents' claims were dismissed upon defendants' motion for summary judgment. The court stayed a consideration of the claims of the local couple seeking adoption pending the resolution of their appeal based on denial of the adoption. *Id.* at 696-97.

[186]*Id. See* U.S. CONST., amend. V and XIV.

[187]600 F.2d at 697.

[188]*Id.*

[189]*Id.* at 697-99. In this regard, the court noted that the Kyees have had their "day in court" at the state level and that the adoption issue they raised therein is very similar to the issue of whether the child's best interests were served by removal from their home for adoption. Also, the defendants told the Kyees in advance of their plans for the child. The court thereupon chose to view the issue from the standpoint of the nature of the plaintiffs' interests.

[190]*Id.* at 697 (quoting Prince v. Massachusetts, 321 U.S. 158 (1944)).

relationship is biological, the state's power to regulate is severely curtailed.[191] However, other familial relationships are less protected. Therefore, the question is whether the relationship of the Kyees and their foster child constituted a "family."[192]

The United States Supreme Court discussed this issue of foster family relationships in *Smith v. Organization of Foster Families*.[193] Although the Court did not decide whether the situation presented was of such a protected nature that the state could not disturb it without an accordance of due process,[194] it did state that "the usual understanding of 'family' implies biological relationships," but that these relationships are "not exclusive determination[s] of the existence of a family."[195] Moreover, it observed that the emotional relationship and attachment between a foster parent and foster child is similar to that found in a traditional relationship.[196] The Court held that it is appropriate to scrutinize the applicable state law to ascertain the extent of the liberty interests being jeopardized.[197]

Relying heavily upon this analysis, the Seventh Circuit Court of Appeals examined several Indiana statutes that dealt with the status of children and the type of contracts executed by the foster parents.[198]

---

[191]*Id. See* Moore v. City of East Cleveland, 431 U.S. 494 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972); Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977).

[192]600 F.2d at 698; *Compare* Belle Terre v. Boraas, 416 U.S. 1 (1974), where a village zoning ordinance limited, with some exceptions, the occupancy of all one-family housing units to traditional families or groups of not more than two unrelated persons, and was upheld as not being aimed at transients, nor involving any deprivation of a fundamental right nor procedural disparity, and as bearing a rational relationship to a permissible state objective *with* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), where an amendment to the Food Stamp Act which excluded from eligibility any household with an individual unrelated to any other household member was held to be an irrational classification in violation of the equal protection component of the due process clause of the fifth amendment.

[193]431 U.S. 816 (1977).

[194]The Court analyzed the New York procedures that are required before a foster child can be taken from the foster parents. The Court concluded that these procedures adequately protected whatever liberty interests were at stake. *Id.*

[195]*Id.* at 843.

[196]*Id.* at 844. The United States Supreme Court stated:

> At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child and fulfill the same socializing functions as a natural family.

Id.

[197]*Id.* at 816.

[198]600 F.2d at 698 (citing IND. CODE § 31-5-7-1 (1976) (repealed 1978) (regarding care of juveniles); *id.* § 31-1-11.5-21 (1976) (regarding child custody in divorce proceedings); *id.* § 31-3-1-8 (1976 & Supp. 1980) (regarding adoption proceedings); *id.* § 29-1-18-25

The court reasoned that as in *Smith*,[199] there was an overwhelming likelihood of eventual termination of the foster relationship and, therefore, the liberty interests at stake were much more limited than those enjoyed by natural or adopted family relationships.[200]

Additionally, relying on a similar case decided by the Fifth Circuit[201] the court held that the Kyees did not have such a liberty interest, based upon the facts presented, to claim a violation of their due process rights.[202]

The foster relationship area is an unusually difficult one because the legal problems presented are frequently overrun by emotional overtones. Until the proper fact situation, which may be said to constitute a protectable liberty interest, reaches an appellate court, the placement agency involved will continue to make all the decisions.[203]

4. A University Faculty Member's Right to Freedom of Speech.—In *Eichman v. Indiana State University Board of Trustees*,[204] the Seventh Circuit Court of Appeals gave additional breadth to a university faculty member's right to speak[205] critically of university policies without the fear of retaliatory discharge.[206]

Eichman wrote several memoranda criticizing the scheduling and curriculum policies at Indiana State University at Evansville (ISUE). The court noted that these memoranda were considered by ISUE in its decision not to rehire Eichman. Relying upon the United States Supreme Court case of *Givhan v. Western Line Consolidated School District*,[207] the court held that when a faculty member expresses criticism of university policies, the remarks are entitled to

---

(1976) (regarding guardianship proceedings); *id.* § 12-3-3-2 (regarding neglect or dependency hearings)).

[199]431 U.S. 816 (1977).

[200]600 F.2d at 698.

[201]Drummond v. Fulton County Dep't of Family & Child Serv., 547 F.2d 835 (5th Cir. 1977). In that case, which is closely analogous to the facts herein, a panel decided that foster parents had liberty rights of which they could not be deprived without a due process hearing. Rehearing *en banc* was granted. The court decided that there was no constitutionally protected interest within the factual scope of the case. 563 F.2d 1200, 1206 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

[202]600 F.2d at 699.

[203]The opinion in *Kyees* did state that Justice Fairchild felt that a foster family relationship of this type can constitute a family as described in Smith, and that the family members do have liberty interests at stake of which they cannot be deprived without due process of law. *Id.*

[204]597 F.2d 1104 (7th Cir. 1979).

[205]U.S. CONST. amend. I.

[206]On appeal the plaintiff also claimed on a Title VII infringement, violations of his substantive and procedural due process rights, violation of his right to equal protection, and violation of his right to privacy. 597 F.2d at 1109-10. While these allegations make interesting reading, they will not be discussed in the context of this Article.

[207]439 U.S. 410 (1979).

first amendment protection.[208] In *Givhan*, the Supreme Court did not recognize any distinction between public and private speech in the context of critical remarks made directly to the teacher's principal.[209] The remarks were within the ambit of protections afforded by the first amendment.[210]

Herein, the court concluded that it was reversible error to hold that the memoranda written by Eichman were outside the scope of first amendment protection.[211] Thus, one's right to speak freely and critically within a university setting was preserved.

---

[208]597 F.2d at 1108.
[209]439 U.S. at 415-16.
[210]*Id.* at 413.
[211]597 F.2d at 1108.