V. Constitutional Law

CARLYN E. JOHNSON*

A. Equal Protection

1. Abortion Regulation.—In *Indiana Hospital Licensing Council v. Women's Pavilion of South Bend, Inc.*,[1] the Indiana Court of Appeals affirmed the trial court's decision that an Indiana statute[2] requiring the licensing of ambulatory outpatient surgical centers was unconstitutional as applied to first trimester abortion clinics.

The Indiana Hospital Licensing Council sought to enjoin the operation of Women's Pavilion of South Bend, a first trimester abortion clinic, on the grounds that it was operating without a license in violation of a state statute that required the licensing of all ambulatory outpatient surgical clinics.[3] Women's Pavilion argued that the statute, as applied, unduly burdened a woman's decision to control her own body by having an abortion during the first trimester of pregnancy and, therefore, was a violation of both equal protection and due process.

In addition to this constitutional argument, Women's Pavilion contended that application of the licensing statute to first trimester abortion clinics was contrary to the legislative intent of the statute. In *Arnold v. Sendak*,[4] the federal district court declared as unconstitutional a portion of an Indiana statute[5] that made abortion a criminal act unless performed in a hospital or a licensed health facility. The Indiana General Assembly subsequently amended the criminal statute to delete the unconstitutional section.[6] Women's Pavilion argued that the deletion in the criminal statute indicated that the legislature did not intend the licensing statute to apply to first trimester abortion clinics. Therefore, the first issue before the court in *Licensing Council* was one of legislative intent.

The State argued that deletion of the statutory provision making abortion a criminal act unless performed in a hospital or a licensed health facility meant only that the state may not require performance

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[1]420 N.E.2d 1301 (Ind. Ct. App. 1981).

[2]IND. CODE § 16-10-1-7 (1982); *see also id.* § 16-10-1-6(b).

[3]*Id.* § 16-10-1-7.

[4]416 F. Supp. 22 (S.D. Ind.), *aff'd*, 429 U.S. 968 (1976).

[5]IND. CODE § 35-1-58.5-2(a)(1) (1976) (amended 1978). A hospital or licensed health facility is defined in IND. CODE § 16-10-4-2 (1982) (the definition referred to in *Sendak* was previously codified at *id.* § 16-10-2-1 (1976)).

[6]Act of March 9, 1978, Pub. L. No. 143, 1978 Ind. Acts 1311 (codified at IND. CODE § 35-1-58.5-2 (1982) (amending IND. CODE § 35-1-58.5-2(a) (1976)).

of an abortion in a "hospital" or "health facility licensed under Indiana Code section 16-10-2," the latter being a facility providing medical care longer than 24 hours.[7] Therefore, in the State's view, abortions could be required to be performed in licensed outpatient facilities. The court quickly disposed of the State's argument, pointing out that ambulatory outpatient surgical centers are included within the statutory definition of "hospital."[8] Therefore, the court found that the legislature's "deletion of that portion of the statute providing for the performance of an abortion in a hospital effectively deleted the requirement that an abortion be performed in an ambulatory out-patient surgical center . . . ."[9] Because the appellate court ultimately found that the application of the licensing statute to abortion facilities was unconstitutional, the court declined to analyze further the effect of the partial repeal of the criminal abortion statute.[10]

In holding that the Indiana licensing statute imposed an unconstitutional burden on a woman's decision concerning abortion, the appellate court examined a number of cases dealing with regulations burdening a woman's decision to abort.[11] The court acknowledged that since 1972 when the United States Supreme Court decided *Roe v. Wade*[12] and *Doe v. Bolton*,[13] a woman's right to have an abortion is considered a "fundamental right which is subject to state regulation during the first trimester only upon a showing of compelling state interest."[14]

In examining the case before it, the court in *Licensing Council* initially noted that the Courts of Appeals for the Sixth and Seventh Circuits have held that over-regulation of personnel and facilities re-

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[7]420 N.E.2d at 1309.

[8]*Id.* (quoting IND. CODE § 35-1-58.5-1(c) (1976)).

[9]420 N.E.2d at 1309.

[10]*Id.* at 1310.

[11]*Id.* at 1310-15. *E.g.*, Harris v. McRae, 448 U.S. 297 (1980) (Hyde Amendment held not unduly burdensome because state is under no obligation to remove the pre-existing barrier of poverty); Maher v. Roe, 432 U.S. 464 (1977) (Connecticut regulation prohibiting funding of elective abortions but allowing state subsidy of childbirth held not unduly burdensome because it simply encouraged alternative to abortion and did not impose any restrictions); Connecticut v. Menillo, 423 U.S. 9 (1975) (Connecticut statute prohibiting abortion to be performed by non-physician held not unduly burdensome); Doe v. Bolton, 410 U.S. 179 (1973) (Georgia statutory provision limiting performance of abortion to hospitals licensed by a particular private organization found unduly burdensome); Mahoning Women's Center v. Hunter, 610 F.2d 456 (6th Cir. 1979) (city ordinance imposing medical and building code regulations on first trimester abortion clinics held unduly burdensome); Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) (Chicago regulation regarding personnel and facilities required for performance of abortion held unduly burdensome).

[12]410 U.S. 113 (1973).

[13]410 U.S. 179 (1973).

[14]420 N.E.2d at 1314.

quired for abortion performance impinges upon a fundamental right.[15] The court also examined the trend begun in 1977 with *Maher v. Roe*[16] of "distinguishing between impermissible direct state burdens on the abortion decision and permissible state encouragement of an alternative" to abortion.[17] The court found that: "Although a state may not impose unwarranted regulations directly interfering with access to abortions, it is not obliged to utilize its legislative power to remove pre-existing non-governmental restrictions on a woman's access to abortions."[18]

Applying these principles, the court in *Licensing Council* held that the Indiana licensing statute, as applied to first trimester abortion clinics, directly burdened the woman's fundamental decision.[19] Women's Pavilion testified that compliance with the licensing statute would cause most of the first trimester abortion clinics to " 'either raise their fees tremendously so the procedure would not be available or else they would be forced to close,' "[20] thus making abortion less available. Therefore, the court found that "the hurdle obstructing a woman's access to a first trimester abortion is not a preexisting one but is a direct product of governmental interference."[21]

Because the Indiana licensing statute directly burdened a fundamental right, the statute was unconstitutional unless justified by a compelling state interest. The state failed to demonstrate a compelling interest behind the licensing regulations. To the contrary, the appellate court was persuaded that, given the extremely low complication and mortality rates for first trimester abortions, there was not only a lack of compelling need, but *no* need for compliance with many of the statutory licensing requirements.[22] While acknowledging "without hesitation" the State's valid interest in promoting maternal health, the court concluded that the Indiana statute was not narrowly drafted to serve that interest.[23] Because testimony of the witnesses

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[15]420 N.E.2d at 1311-12 (citing Mahoning Women's Center v. Hunter, 610 F.2d 456 (6th Cir. 1979); Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975)).

[16]432 U.S. 464 (1977).

[17]420 N.E.2d at 1312.

[18]*Id.*

[19]*Id.* at 1319.

[20]*Id.* at 1308 (quoting the testimony given by Dr. Streeter).

[21]420 N.E.2d at 1313.

[22]*Id.* at 1317-18. The statutory requirements include hallway space, on-site blood supplies, defibrillator, cardiac monitor, and emergency electrical generator. IND. CODE § 16-10-1-6(b) (1982).

[23]420 N.E.2d at 1318-19. The issue is still a very current one. On May 24, 1982, the United States Supreme Court agreed to hear three more cases concerning just how far states may go in regulating abortions. *See* Simopoulous v. Virginia, 211 Va. 1059, 277 S.E.2d 194, *review granted*, 50 U.S.L.W. 3927 (U.S. May 24, 1982) (No. 81-185);

from both sides showed no need to apply the vast majority of the licensing requirements to first trimester abortion clinics, the court held that the State had failed to show a compelling state interest.[24]

In so holding, the court flatly rejected what was essentially an equal protection argument by the plaintiff, who claimed that the licensing regulations could withstand constitutional scrutiny because they were "abortion neutral" and applied to all surgical procedures involving a similar degree of risk. The court noted that, although the regulation scheme appeared to be neutral, its enforcement was not.[25] In illustrating the exceedingly disproportionate impact the regulations had on abortion, the court pointed out that eight of the state's non-outpatient ambulatory surgical centers performed first trimester abortions, and seven of them performed such abortions exclusively.[26] Moreover, the court held that " '*any* proposed regulation, *even if applied universally to all similar medical procedures*, because of the fundamental right of a woman to procure an abortion during the first trimester, *would have to meet a compelling governmental interest requirement.*' "[27]

Thus, although the Indiana court acknowledged that a state may require that a first trimester abortion clinic be licensed, the licensing requirements may only require compliance with general regulations such as maintenance of sanitary facilities, building code standards, and the like, unless the state can clearly show a compelling interest for further regulations.[28] Because the State failed to demonstrate a compelling interest in *Licensing Council*, the licensing scheme, as applied to the first trimester abortion clinics, was unconstitutional.

2. Affirmative Action.—In *Lehman v. Yellow Freight System, Inc.*,[29] the Court of Appeals for the Seventh Circuit affirmed the district court's decision that a white male plaintiff's civil rights were violated when a less qualified black male, rather than the plaintiff, was hired pursuant to an informal affirmative action plan. At trial, the evidence showed that Lehman, the white plaintiff, and Tidwell, the black male who was hired, were both casual or temporary employees of Yellow Freight. Tidwell, unlike Lehman, did not possess a chauffeur's license

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City of Akron v. Akron Center for Reproductive Health, Inc., 651 F.2d 1198 (6th Cir. 1981), *review granted*, 50 U.S.L.W. 3928 (U.S. May 24, 1982) (No. 81-746); Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 664 F.2d 687 (8th Cir. 1981), *review granted*, 50 U.S.L.W. 3928 (U.S. May 24, 1982) (No. 81-1623).

[24]420 N.E.2d at 1319.

[25]*Id.* at 1315.

[26]*Id.*

[27]*Id.* (emphasis added by court) (quoting Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141, 1153-54 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975)).

[28]420 N.E.2d at 1318.

[29]651 F.2d 520 (7th Cir. 1981).

at the time he was hired, although he did obtain one immediately thereafter. Additionally, while Lehman was an experienced driver, Tidwell did not have any driving experience and required some on-the-job training. The evidence also indicated that Yellow Freight had a self-imposed minority increase quota for its Muncie, Indiana terminal, but that the Muncie manager who hired Tidwell was unaware of the quota. The manager, however, did testify that race was a factor in Tidwell's hiring.

Lehman, relying on *Regents of the University of California v. Bakke*,[30] attempted to show that Tidwell was hired pursuant to a quota system which violated Lehman's civil rights.[31] However, both the district and appellate courts based their decisions on *United Steel Workers of America v. Weber*.[32] In *Weber*, the United States Supreme Court held that a plan giving preferential treatment to black workers until the percentage of black workers in the plant in question equalled the percentage of black workers in the area's work force did not violate Title VII of the Civil Rights Act of 1964.[33]

Because Yellow Freight's manager did not hire Tidwell with the Yellow Freight quota plan in mind, the court refused to determine whether the company's quota plan was valid.[34] Rather, the *Lehman* court looked directly to the manager's hiring decision and stressed the need for the manager's hiring decision to be based on some indication that the present discrimination was necessary to remedy past discrimination, or, at the least, to minimize a statistical disparity between the racial compositions of the local labor force and the employer's work force.[35] Additionally, the court in *Lehman* held that there must be some time limit on preferential hiring decisions and found these minimum requirements to be lacking in the manager's decision.[36] Even though the action of Yellow Freight's manager had the *effect* of making the Muncie terminal's minority representation almost equal to the representation in the local work force, the hiring was not done with that goal in mind. Therefore, although the court indicated that it did not wish its decision to be understood as a set back for affirmative action plans, it held that the preferential hiring was a violation of Lehman's civil rights.[37] A plan lacking the *Weber*

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[30]438 U.S. 265 (1978).

[31]Lehman alleged that the hiring quota violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1976) and violated 42 U.S.C. § 1981 (1976).

[32]433 U.S. 193 (1979). The *Weber* decision was handed down after *Lehman* was filed, but before the district court issued its opinion.

[33]*Id.* at 197; *see* 42 U.S.C. § 2000(e) (1976).

[34]651 F.2d at 524, 526 n.13.

[35]*Id.* at 527.

[36]*Id.* at 528.

[37]*Id.*

requirements, the court said, would pose "serious dangers for the rights of non-minority applicants."[38]

Lehman indicates that an individual hiring decision must meet the requirements set forth in *Weber*, even if a valid formal affirmative action plan exists. This requirement could cause extensive litigation because it will be much easier to challenge an individual's hiring decision than a formal plan; likewise, proving an individual's intent will be much harder than proving the requirements of a plan.

3. School Desegregation.—In March, 1982, the Court of Appeals for the Seventh Circuit handed down another decision in the fourteen-year-old Indianapolis Public Schools desegregation case.[39] In *United States v. Board of School Commissioners of Indianapolis*,[40] the appellate court affirmed the trial court's order that the State of Indiana pay the entire cost of remedying the interdistrict violations of black students' constitutional rights. The Seventh Circuit agreed with the district court's finding that the state alone was liable for the interdistrict violations[41] and, therefore, should pay the entire cost of remedying them.

The State argued that the Indiana "Transfer Statute"[42] should be applied to interdistrict busing. The statute provides that the State shall pay one half of the cost of transportation ordered by a court if the school has practiced de jure segregation, if a unitary school system cannot be implemented within the boundaries of the school corporation, and if the court orders students transferred to another school corporation to effect a desegregation plan acceptable within the meaning of the fourteenth amendment.[43] However, the court of appeals held the transfer statute to be inapplicable to the present case because the statute applies only to a transferor school corporation practicing de jure segregation.[44] The interdistrict constitutional violations in this

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[38]*Id.*

[39]*See* United States v. Board of School Comm'rs of Indianapolis, 677 F.2d 1185 (7th Cir. 1982). For a review of the complicated history of this case, see Note, *Indianapolis Desegregation: Segregative Intent and the Interdistrict Remedy*, 14 IND. L. REV. 799, 803-10 (1981).

[40]677 F.2d 1185 (7th Cir. 1982).

[41]*Id.* at 1188. The state was found liable because the Uni-Gov statute adopted by the Indiana General Assembly in 1969 excluded the school corporations in the Marion County suburbs from consolidation, and because the Housing Authority of Central Indiana, a state agency, had refused to put public housing, which would be occupied largely by blacks, outside the Indianapolis Public School District's boundaries. *Id.* at 1190-91 (Posner, J., dissenting).

[42]IND. CODE §§ 20-8.1-6.5-1 to -10 (1982). The statute was enacted at the suggestion of the trial judge in the earlier stages of the *Indianapolis* case. 677 F.2d at 1190 (Posner, J., dissenting).

[43]IND. CODE §§ 20-8.1-6.5-1 to -10 (1982).

[44]677 F.2d at 1187.

case were attributable solely to the State, rather than to the Indianapolis school district or to any of the suburban school districts. Therefore, the court held that the State, as wrongdoer, must pay the costs of the remedy.[45]

Additionally, the State raised the more interesting question of the extent and the appropriateness of federal court intervention in the processes of state government. The district court order provided not only that the State must pay for the desegregation remedy, but required that the payment should come first from any unappropriated state funds. Further, the district court order provided that any payment made should not reduce the amounts to which a school, whether a party to the suit, would otherwise be entitled to under state law.[46]

On appeal, the State argued that the district court order was an improper invasion of its sovereignty and, therefore, was contrary to the tenth amendment which explicitly reserves nondelegated powers to the states. The court of appeals disagreed, however, stating that a court, acting in equity, has the power to fashion a remedy for violations of the federal Constitution.[47] The appellate court rejected the State's reliance on *Evans v. Buchanan*,[48] which prevented a federal court from setting a level of taxation different from that established by the state. The *Indianapolis* court found *Evans* to be inapplicable because the district court's order in *Indianapolis* had not attempted to restructure state or local taxes.[49] Rather, the federal court had simply ordered the state to pay the "costs of remedying its wrongdoing" which a court may do by "reallocat[ing] appropriations for other governmental functions, or rais[ing] taxes."[50]

Because of the finding that only the State was guilty of the interdistrict violations, the court also rejected the State's argument that the suburban Marion County schools were liable for constitutional violations and should share the remedying costs.[51]

However, in a dissenting opinion, Judge Posner stated that the

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[45]*Id.* at 1190. In fact, the court went on to state that the "Transfer Statute" no longer makes sense because one of the conditions which triggers implementation of the statute is that a unitary school system cannot be implemented within the boundaries of the school corporation. *Id.* at 1186-87 (citing IND. CODE § 20-8.1-6.5-1 (1982)). However, the court of appeals noted that a decision handed down after the adoption of the Transfer Statute, held, in essence, that "a unitary school system can always be established within the geographical boundaries of the school district that committed the de jure segregation." 677 F.2d at 1187 (citing Milliken v. Bradley, 418 U.S. 717, 745-46 (1974)).

[46]677 F.2d at 1189.

[47]*Id.* at 1188 (citing Milliken v. Bradley, 433 U.S. 267, 281 (1977) (*Milliken II*)).

[48]582 F.2d 750 (3rd Cir. 1978).

[49]677 F.2d at 1188.

[50]*Id.* at 1190.

[51]*Id.* at 1188.

court should leave the responsibility for deciding who should bear the costs of financing the desegregation order to the State.[52] Judge Posner postulated that the legislative representatives of the suburban Marion County white voters procured the school exception in the Uni-Gov statute,[53] and without that action no interdistrict busing order would have been necessary. Nevertheless, the majority found that only the State was guilty of interdistrict constitutional violations;[54] therefore, only the State was required to pay.

B. First Amendment—Freedom of Speech

In *Perry Local Educators' Association v. Hohlt*,[55] a case of first impression within the circuit, the Court of Appeals for the Seventh Circuit reversed the district court and held that an agreement between the Metropolitan School District of Perry Township and Perry Education Association, the teachers' collective bargaining representative, was unconstitutional.[56] The agreement permitted the Perry Education Association to use the school system's internal mail distribution plan, but prevented the use of the mail plan by the Perry Local Educators' Association, a rival union. In a well-reasoned decision, the circuit court found that the exclusive agreement violated the rival union members' free speech and equal protection rights.[57] In reaching this conclusion, the court admittedly rejected the trend of recent state and federal cases approving similar exclusive access agreements.[58] However, lest its decision be construed too broadly, the court carefully qualified the scope of its holding by stressing that it was premised on the discrimination between the members of the separate unions, and not solely on the fact that other, outside organizations were allowed to use the mail system.[59]

The district court had granted summary judgment for the existing union, holding that "the restrictions placed upon the use of facilities

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[52]*Id.* at 1193.

[53]*Id. See* IND. CODE § 18-4-1-1 (1976) (repealed 1982).

[54]677 F.2d at 1188.

[55]652 F.2d 1286 (7th Cir. 1981) (appeal pending, No. 81-896 (U.S. 1982)).

[56]*Id.* at 1301.

[57]*Id.*

[58]*Id.* at 1289 n.7 (citing among others, Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976); Memphis Am. Fed'n of Teachers Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976); Federation of Del. Teachers v. De La Warr Bd. of Educ., 335 F. Supp. 385 (D. Del. 1971); Local 858, American Fed'n of Teachers v. School Dist. No. 1, 314 F. Supp. 1069 (D. Colo. 1970); Geiger v. Duval County School Bd., 357 So. 2d 442 (Fla. Dist. Ct. App. 1978); Clark County Classroom Teachers Ass'n v. Clark County School Dist., 91 Nev. 143, 532 P.2d 1032 (1975) (alternative holding); Maryvale Educators Ass'n v. Newman, 70 A.D.2d 758, 416 N.Y.S.2d 876 (N.Y. 1979)).

[59]652 F.2d at 1301.

not open to the general public . . . [were] 'so inconsequential that . . . [they] cannot be considered an infringement of the First Amendments rights of free speech' " of the rival union members.[60] Further, the district court had applied a rational basis level of scrutiny to the equal protection claim and had found that the exclusive access policy was rationally related to the goal of preserving labor peace within the school system.[61]

The court of appeals initially noted that, although an exclusive access policy by a private employer would clearly constitute an unfair labor practice under the National Labor Relations Act, the school district was a governmental employer rather than a private employer.[62] Further, the appellate court noted that the Indiana Education Employment Relations Board, the state agency governing labor relations, had ruled that a school district may, as a matter of state law, grant a majority union the exclusive right to use school communication facilities.[63] Nevertheless, although admitting that efficient government operation may justify "reasonably necessary" restrictions on governmental employees' first amendment rights, the court explicity held that "the first amendment and equal protection clause apply with full force to the goverment in its role as employer."[64]

In considering the first amendment challenge, the court distinguished what it considered to be the two leading cases upholding teacher bargaining units' exclusive access,[65] contending that the courts in those cases applied the wrong standard of review.[66] Succinctly delineating the issue, the *Perry* court stated:

> With deference, we suggest that both [courts] erred by confusing the constitutional standards applicable to a rule that evenhandedly excludes all private communications from a particular government facility with the standards applicable to a rule that grants access to certain speakers or certain viewpoints and denies access to others. A challenge by an excluded speaker to the former sort of rule is a claim for absolute

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[60]*Id.* at 1289 (quoting Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471, 481 (2d Cir. 1976)).

[61]652 F.2d at 1289.

[62]*Id.* at 1291.

[63]*Id.* (citing Pike Indep. Professional Educators, No. U-76-16-5350 (May 20, 1977)).

[64]652 F.2d at 1292. The court noted that previous cases had held the government may not, among other things, "forbid its employees to join a union, compel them to finance political or ideological advocacy by their collective bargaining representative, refuse to permit teachers other than union representatives to speak at open school board meetings . . . ." *Id.* (citations omitted).

[65]Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976); Memphis Am. Fed'n of Teachers, Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976).

[66]652 F.2d at 1292-93.

access; a challenge to the latter sort is a claim for equal access.[67]

Thus, rather than applying a low level rational basis standard of review, the *Perry* court held that the agreement, permitting differential access to the school communications system, required "rigorous scrutiny."[68] Further, the high level of review was applicable to both the equal protection and first amendment challenges. Illustrating a comprehension of constitutional principles applicable to differential access cases, the *Perry* court explained that, "The peculiar identity of equal protection and first amendment analysis in differential access cases follows logically from the explicit constitutional designation of speech as fundamental and from the fact that the first amendment's proscription against censorship is itself simply a specialized equal protection guarantee."[69]

The fact that the school district's internal mail system was not a public forum, and therefore not required to be open to any group, did not affect the level of scrutiny. Having opened its forum to one group, the school district could not exclude another group based upon the content of the communications. Content neutrality, the court held, is an "all-pervasive restriction," especially where, as here, the communications were quite near the "very apex of any hierarchy of protected speech."[70]

Having firmly established its commitment to a rigorous standard of review, the *Perry* court rejected the defendant union's attempts to justify its exclusive access. The legal duties argument was disposed of as being both overinclusive and underinclusive and as furthering no discernible state interest.[71] Similarly, because the union had not shown that permitting the rival union equal access to the mail system would interfere with the teaching process, the court refused to accept the defendant union's argument that the access policy preserved labor peace.[72]

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[67]*Id.* at 1293.

[68]*Id.* at 1296.

[69]*Id.*

[70]*Id.* at 1298-99.

[71]*Id.* at 1300. The access policy was overinclusive because the agreement did not limit the union's use of the mail system to messages related to its legal duties to members, and underinclusive because the school permitted other outside groups, such as the Y.M.C.A. and scouting organizations, to use the system. *Id.* at 1288, 1300.

[72]652 F.2d at 1300-01. In November of 1981, an appeal of this case was filed with the Supreme Court of the United States and the case has been docketed. The merits of the case and the question of jurisdiction will be heard at the same time. 42 S. Ct. Bull. (CCH) 656 (Jan. 11, 1982).

C. *Fifth Amendment—Self-Incrimination*

In *In re Contempt Findings Against Schultz*,[73] the Indiana Court of Appeals interpreted Indiana's prior immunity statute[74] as granting only use, as opposed to transactional, immunity. That statute has since been repealed, and the new one expressly limits the type of immunity a court may grant to use immunity.[75] Nevertheless, *Schultz* is important because the court found that the grant of use immunity is sufficient to protect the defendant from the perils of self-incrimination.[76] Therefore, use immunity, whether express or implied, is constitutional.

The facts of this case showed that although the defendant, Schultz, had received a fifty-five-year prison sentence for arson and manslaughter, he had implicated another defendant, LaBine, as the person actually responsible for the victim's death. At LaBine's trial, Schultz repeatedly invoked his privilege against self-incrimination in response to the State's questions about the event, even though the State had granted Schultz immunity. As a result, Schultz was found in contempt of court on 27 occasions and given three month consecutive sentences for each offense.

On appeal, Schultz argued that his grant of immunity was void because it did not protect him from further prosecution in other jurisdictions, or from prosecution for perjury in Indiana. The appellate court stated that absolute immunity is not a prerequisite to compulsory testimony.[77] All that is needed to compel a person to testify is a grant of immunity "co-extensive with the scope of [the] privilege" against self-incrimination.[78]

The appellate court discussed the distinction between transactional immunity, which protects a witness against *any prosecution* for offenses to which his testimony relates, and use immunity, which simply prevents the state from using the compelled *testimony* in any respect, but does not prevent future prosecutions.[79] Recognizing the scope of use immunity, the court concluded that such use immunity leaves the government in the same position as if the witness had refused to testify. The government has the information but cannot use "it or its fruits" against the person; therefore, the immunity is constitutionally sufficient under the fifth amendment.[80]

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[73]428 N.E.2d 1284 (Ind. Ct. App. 1981).

[74]IND. CODE § 35-6-3-1 (1976) (repealed 1981) (now codified at IND. CODE §§ 35-37-3-1 to -3 (1982)).

[75]IND. CODE § 35-37-3-3(a) (1982).

[76]428 N.E.2d at 1288.

[77]*Id.* at 1289.

[78]*Id.* at 1287.

[79]*Id.* Transactional immunity, in effect, operates as a pardon for the offenses disclosed by the testimony.

[80]428 N.E.2d at 1288-89.

In addition to rejecting Schultz's argument that mere use immunity was void, the court rejected his argument that the immunity was void because it failed to protect him from prosecution for perjury.[81] The court held that "the privilege against self-incrimination entitles a witness to keep silent, but does not license him to commit perjury."[82] The current statute reiterates this conclusion: "A grant of use immunity does not prohibit the use of evidence the witness has given in a prosecution for perjury."[83]

The court also upheld Schultz's contempt citations,[84] thus indicating that the current statute, which expressly allows the court to find a witness in contempt if he has been granted immunity but refuses to testify,[85] is valid. The appellate court did, however, reverse the lower court's finding of 27 separate contempt offenses.[86] The court held that once the subject matter about which the defendant refuses to testify is defined, the prosecutor may not compound the number of offenses by asking repeated questions about the subject; thus, Schultz was guilty of "one continuing act of contempt."[87]

D. Due Process

1. Post-trial Contempt Hearing.—In *Johnson v. State*,[88] the Indiana Court of Appeals held, for the first time, that due process requires a neutral and detached magistrate to preside over a post-trial contempt hearing, rather than the trial judge who issued the citation. In *Johnson*, the trial court judge, at a post-trial hearing, held a criminal defendant's pauper attorney in direct civil and criminal contempt of court for ignoring an order in limine at trial.[89]

The court of appeals acknowledged that, because of the importance of maintaining the authority and dignity of the court, direct contempt has historically been dealt with summarily.[90] However, the *Johnson* court, relying upon the United States Supreme Court decision in *Mayberry v. Pennsylvania*,[91] found that, where a *post-trial* hearing is held to determine a contempt citation, the need to protect the

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[81]*Id.* at 1289.

[82]*Id.*

[83]IND. CODE § 35-37-3-3(b) (1982).

[84]428 N.E.2d at 1291.

[85]IND. CODE § 35-37-3-3(c) (1982).

[86]428 N.E.2d at 1291.

[87]*Id.* at 1290-91 (citing Yates v. United States, 355 U.S. 66 (1957); United States v. Yukio Abe, 95 F. Supp. 991 (D. Hawaii 1964)).

[88]426 N.E.2d 104 (Ind. Ct. App. 1981).

[89]*Id.* at 105-06. The judge first found the attorney to be in civil contempt but later amended his entry to include a finding of criminal contempt as well.

[90]*Id.* at 106.

[91]400 U.S. 455 (1971).

orderly administration of justice or the dignity of the court no longer exists.[92] Therefore, due process requires the hearing to be conducted by a neutral magistrate.[93] The court reasoned that justice is better served when there is neither the likelihood nor the appearance of judicial bias against the party accused of contempt.[94]

Although such reasoning can hardly be questioned, the court failed to discuss *Mayberry* and, thus, neglected to note that *Mayberry* contained arguably distinguishable facts. In *Mayberry*, the trial judge was subjected to personal verbal attacks.[95] However, in *Johnson*, there was no indication that the violation of the trial judge's order was a personal attack on the judge's integrity which would carry any potential for judicial bias. Indeed, in *Mayberry*, the Supreme Court held "that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one *reviled* by the contemnor."[96] Thus, in its brief opinion in *Johnson*, the Indiana court neglected to explain its rationale for expanding upon the Supreme Court's decision in *Mayberry*.

2. Burden of Proof.—In *Jacks v. Duckworth*,[97] the Court of Appeals for the Seventh Circuit held that, because jury instructions were to be read as a whole, the trial court's instructions did not violate the defendant's right of due process, even if one instruction appeared to shift the burden of proof.[98] In reaching its decision, the court of appeals interpreted the recent Supreme Court decision, *Sandstrom v. Montana*.[99]

The plaintiff, Jacks, had been convicted of the first degree murder of his wife and had been sentenced to life in prison, despite a plea of not guilty by reason of insanity. The Indiana Supreme Court, on direct appeal, affirmed the conviction.[100] Jacks then filed a petition for a writ of habeas corpus alleging that he had been denied due process of law because a jury instruction on the element of intent had, in effect, shifted the burden of proof from the state to the defendant.[101]

Under Indiana law, intent is a necessary element of first degree murder;[102] thus, the state has the burden of its proof. The jury

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[92]426 N.E.2d at 107.

[93]*Id.*

[94]*Id.*

[95]400 U.S. at 466.

[96]*Id.* (emphasis added).

[97]651 F.2d 480 (7th Cir. 1981), *aff'g* 486 F. Supp. 1366 (N.D. Ind. 1980), *cert. denied*, 102 S. Ct. 1010 (1982).

[98]651 F.2d at 486.

[99]442 U.S. 510 (1979).

[100]Jacks v. State, 394 N.E.2d 166 (Ind. 1979).

[101]Jacks v. Duckworth, 486 F. Supp. 1366 (N.D. Ind. 1980).

[102]IND. CODE § 35-42-1-1 (1982).

instruction in question told the jury that they could look to surrounding circumstances to determine intent, but "that every one is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent."[103] Jacks argued that in *Sandstrom*, the United States Supreme Court had found that a similar jury instruction containing the words "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," created either a burden-shifting presumption or a conclusive presumption of the requisite intent.[104] On that basis, the Court in *Sandstrom* held that the defendant was deprived of his constitutional right to due process.[105]

In *Jacks*, the Seventh Circuit noted the *Sandstrom* decision but distinguished it from the instant case because the jury instructions in *Jacks* contained language which nullified the "mandatory injunction to presume the requisite intent from the act committed."[106] In determining intent, the jurors in *Jacks* were told that they could look to all the surrounding circumstances, that there might be "justifying or excusing" facts,[107] and that the circumstances might be "such as to indicate the absence of such intent."[108] Therefore, taken as a whole, the jury instructions did not compel the jury to presume intent and, thus, did not violate Jacks' right to due process.[109]

In his dissent, Judge Swygert accused the majority of narrowly construing *Sandstrom*, stating that, except for the final phrase, "unless circumstances are such to indicate the absence of such intent," the disputed instruction in *Jacks* was identical to the *Sandstrom* instruction.[110] Swygert argued that the majority had interpreted *Sandstrom* as standing for the proposition that only a jury instruction which creates an irrebuttable presumption of intent is a violation of due process.[111] By allowing circumstances, in this case insanity, to prove the absence of intent, the instruction in *Jacks* did not create such an irrebuttable presumption. Swygert, however, interpreted *Sandstrom* to mean that a jury instruction would violate due process if it created an irrebuttable presumption of intent *or* if it shifted the burden of proof of intent to the defendant.[112] The instruc-

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[103]651 F.2d at 491 (Appendix C, State's Instruction No. 5).

[104]442 U.S. at 513, 524. Jacks directed the court's attention to the *Sandstrom* case after his case had been fully briefed to the Indiana Supreme Court. 394 N.E.2d at 175.

[105]442 U.S. at 524.

[106]651 F.2d at 485-86.

[107]*Id.* at 485.

[108]*Id.* at 491.

[109]*Id.* at 486.

[110]*Id.* at 491 (Swygert, J., dissenting).

[111]*Id.*

[112]*Id.*

tion in *Jacks* did shift the burden of proof of intent by requiring the defendant to prove circumstances which would rebut the "presumed intent." Therefore, in Judge Swygert's opinion, this shift in the burden of proof was a violation of Jacks' due process rights.[113]

3. Jury Size.—In *O'Brien v. State*,[114] the Indiana Court of Appeals found no constitutional deficiency in an Indiana statutory system which permits a Class D felony case to be tried to a six-member jury in a county court, or to a twelve-member jury in a circuit or superior court.[115] A six-member Clark County Court jury convicted O'Brien of possessing more than 30 grams of marijuana, a Class D felony.[116] O'Brien's motion for a twelve-member jury had been denied by the trial court. O'Brien appealed his conviction, contending that he had a fundamental constitutional right to a twelve-member jury in a felony case, regardless of the type of court which heard his case.

In 1975, the Indiana General Assembly created the county court system, providing that the county courts would have jurisdiction over minor civil and criminal matters which would be decided by six-member juries.[117] The same year, the Indiana Supreme Court held that the six-member jury provision was constitutional.[118] In 1979, the jurisdiction of the county courts was extended to include Class D felonies, but the circuit and superior courts also retained jurisdiction over these cases.[119] Thus, a person charged with a Class D felony might face a jury with six or twelve members, depending on which forum the prosecutor chose.

In *Williams v. Florida*,[120] the United States Supreme Court, upholding the constitutionality of six-member juries, stated that the exact number of jury members is irrelevant, provided that the jury is large enough to give the accused a " 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' "[121] The Court in *Williams* was convinced that there was no evidence of any "discernible difference between the results reached by the two different-sized juries."[122] Applying *Williams*, the *O'Brien* court held that there was "no constitutional difference between a six-

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[113]*Id.* at 493.

[114]422 N.E.2d 1266 (Ind. Ct. App. 1981).

[115]*Id.* at 1270. *See* IND. CODE § 35-1-30-1 (Supp. 1981) (repealed 1981) (now codified at IND. CODE § 35-37-1-1 (1982)).

[116]IND. CODE § 35-1-30-1 (1982).

[117]Act of May 5, 1975, Pub. L. No. 305, 1975 Ind. Acts 1667, 1697 (now codified at IND. CODE §§ 33-10.5-1-1 to -8-6 (1982)).

[118]*In re* Pub. Law No. 305 and Pub. Law No. 309, 263 Ind. 506, 334 N.E.2d 659 (1975).

[119]Act of April 10, 1979, Pub. L. No. 282, 1979 Ind. Acts 1469-70 (now codified at IND. CODE § 33-10.5-3-1(a)(3) (1982)).

[120]399 U.S. 78 (1970).

[121]*Id.* at 100 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

[122]399 U.S. at 101.

member jury and a twelve-member jury so long as each provides the requisite safeguard against overzealous prosecutors and eccentric judges."[123]

The *O'Brien* court declined to find that a twelve-member jury was a fundamental right because fundamental rights are " 'those which have their origin in the express terms of the constitution or which are necessarily to be implied from those terms.' "[124] Because there is no fundamental right to a twelve-member jury, there need not be a compelling state interest for the choice of jury size but, rather, only a substantial relationship between the classification and the purpose being sought by the legislation.[125] The court in *O'Brien* found a substantial relationship between the reduced jury size and the legislative interest in promoting a fair and efficient system of justice by providing a speedier, more efficient, and less expensive forum for handling relatively less serious felonies.[126]

4. Extradition Procedure.—McBride v. Soos,[127] on remand to the federal district court, contains an interesting discussion of the effect of improper extradition procedures. McBride, alleging violation of his civil rights because certain Missouri extradition statutory procedures were not followed, sued local Indiana police officials.[128] The constitutional issue was whether McBride had waived his extradition procedural rights. The district court said that there was no written waiver, and that the evidence showed no waiver of any type because "every reasonable presumption should be indulged against finding a waiver of constitutional rights."[129] However, even though there was no waiver, the court found that the defendants had acted in good faith at all times and, therefore, were not liable for any procedural noncompliance.[130]

The more interesting aspect of the case, however, was the court's finding that McBride *might* be entitled to damages *if* his procedural extradition rights had been violated, but, absent a showing of injury, he would be entitled only to nominal damages.[131] Apparently McBride was not seeking to have his conviction set aside,[132] but rather to per-

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[123]422 N.E.2d at 1270.

[124]*Id.* (quoting Sidle v. Majors, 264 Ind. 209-10, 341 N.E.2d 763, 766 (1976)) (citing San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973)).

[125]422 N.E.2d at 1270.

[126]*Id.*

[127]512 F. Supp. 1207 (N.D. Ind. 1981).

[128]McBride brought suit under 42 U.S.C. § 1983 (1976), alleging violation of Mo. Rev. Stat. §§ 548.101, .141, .151, .171 (1978). 512 F. Supp. at 1209-10.

[129]512 F. Supp. at 1212 (citing Fuentes v. Shevin, 407 U.S. 67, 94 n.31 (1972)).

[130]512 F. Supp. at 1213.

[131]*Id.* at 1213-14. *See* Carey v. Piphus, 435 U.S. 247 (1978).

[132]It is well settled that noncompliance with the extradition process will not invalidate a subsequent conviction. *See* Ker v. Illinois, 119 U.S. 436 (1886).

suade the court to treat his conviction as a compensable injury. However, the court refused to do so without a showing by McBride that compliance with the extradition procedural protections would have resulted in a different consequence.[133]

E. Guarantee of Remedy for Injury

In an interesting case, *Seymour National Bank v. State*,[134] the Indiana Supreme Court held that the term "enforcement of a law"[135] in the Indiana Tort Claims Act,[136] which grants immunity from tort liability to a governmental entity or its employees if the loss complained of results from enforcement of a law, is not ambiguous;[137] thus, the lower court's grant of summary judgment for the State was proper.

In November, 1981, the supreme court granted the plaintiff's petition for rehearing and, in reaffirming its interpretation of the Indiana Tort Claims Act,[138] the supreme court summarily rejected two constitutional challenges to the Tort Claims Act.[139] On rehearing, the plaintiff contended that the immunity statute violated the Indiana Constitution's guarantee of a remedy for injury suffered. The constitution provides that: "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."[140] The supreme court rejected this argument basing its decision on the appellate court decision in *Krueger v. Bailey*,[141] which had upheld the Tort Claims Act. The plaintiff also challenged the Tort Claims Act on equal protection grounds, asserting that there was no rational basis for a classification which immunizes government employees, but no other citizens, from liability for damages resulting from the exercise of their right to enforce the law. The court summarily rejected this contention, finding that the equal protection argument was inapplicable because the plaintiff's complaint "was not against a citizen but against the State."[142] Therefore, it appears from *Seymour* that the immunity from tort liability granted in the Tort Claims Act is constitutionally sound.

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[133]512 F. Supp. at 1215-16.

[134]422 N.E.2d 1223 (Ind. 1981). For a full discussion of the procedural history and the immunity question, see Mead, *Torts, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 377, 411 (1983).

[135]*See* IND. CODE § 34-4-16.5-3(7) (1982).

[136]*Id.* §§ 34-4-16.5-1 to -19 (1982).

[137]422 N.E.2d at 1226.

[138]Seymour Nat'l Bank v. State, 428 N.E.2d 203 (Ind. 1981).

[139]*Id.* at 205.

[140]*Id.* (quoting IND. CONST. art. I, § 12).

[141]406 N.E.2d 665, 670 (Ind. Ct. App. 1980).

[142]428 N.E.2d at 205.