

IV. Constitutional Law

NORA L. MACEY*

A. *The Void for Vagueness Doctrine: Due Process and First Amendment Rights*

The Seventh Circuit decided cases involving challenges to the facial validity of an Indiana drug paraphernalia statute and an Indianapolis loitering ordinance. In both cases, the laws were alleged to be impermissibly vague and to impinge on protected first amendment conduct. The court, however, approached the two cases in markedly different ways.

1. *Indiana Drug Paraphernalia Act.—Nova Records, Inc. v. Sendak*¹ considered and rejected a challenge to Indiana's 1980 drug paraphernalia law, which imposes criminal penalties on individuals who manufacture, sell, or possess materials intended to facilitate or enhance illegal drug use.² Two previous attempts by the Indiana legislature to regulate dealing in drug paraphernalia had been sidetracked by constitutional challenges.³ The current enactment fared better both because of changes in the statutory language and changes in the legal standards applied by the court.

The Indiana Act provides, in relevant part:

A person who knowingly or intentionally manufactures or designs an instrument, device, or other object that he intends to be used primarily for:

- (1) introducing into the human body a controlled substance;
 - (2) testing the strength, effectiveness, or purity of a controlled substance; or
 - (3) enhancing the effect of a controlled substance:
- in violation of this chapter, commits manufacture of paraphernalia, a Class D felony.⁴

*Associate with the law firm of Segal & Macey—Indianapolis. B.A., Trinity College, Washington D.C., 1970; J.D. Indiana University School of Law—Bloomington, 1975.

¹1706 F.2d 782 (7th Cir. 1983).

²IND. CODE § 16-6-8.5-5 (repealed 1981) (similar versions at IND. CODE §§ 16-6-8.5-5.1, 35-48-4-8.1, 35-48-4-8.2, 35-48-4-8.3 (1982)).

³The 1975 enactment was repealed after it was temporarily enjoined by one member of a three judge court. The 1977 enactment was declared unconstitutionally vague by a three judge court in Indiana Chapter, *NORML v. Sendak*, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980). The 1977 law was repealed and superceded by the current law, Act of Mar. 3, 1980, Pub. L. No. 115-1980, 1980 Ind. Acts 1303, which was the subject of this appeal. 706 F.2d at 783-44.

⁴IND. CODE § 35-48-4-8.1 (1982).

Subsequent sections of the statute simply substitute the words "delivers/dealing"⁵ and "possesses/possession"⁶ for "manufactures/manufacture," to express the statute's additional prohibitions against dealing in and possession of paraphernalia. A separate section provided for forfeiture of items including books, records, and other materials "used or intended for use" in violation of statutes regulating controlled substances.⁷

Plaintiffs claimed that this language is impermissibly vague because it fails to provide adequate notice of the precise kinds of items prohibited or sufficient guidelines to preclude arbitrary enforcement.⁸ Plaintiffs noted particularly that the Indiana statute contains no list of examples of prohibited items and no identification of factors relevant to determining whether or not an item is being marketed in violation of this statute. By contrast, the inclusion of lists of examples and factors is one feature of the Model Drug Paraphernalia Act which has led to its approval by courts, including the Seventh Circuit.⁹ Although the Indiana law is similar to the Model Act, plaintiffs argued that its omission of the Model Act's list of examples and factors rendered it irretrievably vague on its face.¹⁰

The Seventh Circuit rejected this argument relying on the United States Supreme Court's decision in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,¹¹ which approved a municipal licensing ordinance regulating the sale of drug paraphernalia, defined in the ordinance as items "designed or marketed for use" with illegal drugs.¹² The Court in *Hoffman* recognized that courts may tolerate varying degrees of vagueness depending on the nature of the challenged law; economic regulations, regulations with civil rather than criminal penalties, and regulations which do not interfere with first amendment rights may satisfy a less stringent vagueness test.¹³ The licensing ordinance in *Hoffman* was characterized as essentially business regulation, but the Court noted that its "quasi-criminal" prohibitory and stigmatizing effect might require "a relatively strict test."¹⁴ In any event, the Court found the

⁵*Id.* § 35-48-4-8.2.

⁶*Id.* § 35-48-4-8.3

⁷IND. CODE § 16-6-8.5-5 (repealed 1981) similar version at § 16-6-8.5-5.1 (1982)).

⁸706 F.2d at 789. *Accord* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

⁹*Camille Corp. v. Phares*, 705 F.2d 223 (7th Cir. 1983).

¹⁰706 F.2d at 789.

¹¹455 U.S. 489 (1982).

¹²*Id.* at 492. In *Hoffman Estates*, the Supreme Court reversed a decision of the Seventh Circuit, *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d 373 (7th Cir. 1981), which found the drug paraphernalia ordinance vague on its face.

¹³455 U.S. at 498.

¹⁴*Id.* at 499 (footnote omitted).

Hoffman ordinance “sufficiently clear” under the test for either quasi-criminal or criminal laws.¹⁵

Relying on these observations in the Supreme Court’s decision, the Seventh Circuit adopted the standards applied to the business related licensing ordinance in *Hoffman* to approve the broader criminal prohibitions in the Indiana Act.¹⁶ The appeals court gleaned from *Hoffman* four guiding principles for its analysis of the statute’s vagueness: (1) the dual focus of the vagueness inquiry is whether the law is sufficiently clear to provide adequate notice and preclude arbitrary or discriminatory enforcement; (2) an otherwise vague statute may be saved by an adequate scienter requirement; (3) courts should not presume that facial vagueness will not be cured by a future pattern of enforcement of subsequently adopted guidelines; and (4) a law is unconstitutionally vague “only if it is ‘vague in all of its applications [in the sense that] no standard of conduct is specified at all.’ ”¹⁷

The court held that the Indiana Act was not impermissibly vague under these standards, relying principally on the scienter requirement of the statute.¹⁸ The court read the Indiana law to prohibit individuals from manufacturing, selling, or possessing items only if they personally intend them to be used with illegal drugs. In the court’s view, the requirement that a specific illegal intent be proved compensates for the lack of examples of prohibited items and the absence of a list of factors relevant to distinguishing legal from illegal conduct.¹⁹

The scienter requirement also obviated any first amendment problems. In the court’s view, protected speech of a political nature, such as books or posters advocating reform of drug laws, is excluded because not intended within the meaning of the statute to facilitate or enhance the use of illegal drugs.²⁰ Speech, symbolic or otherwise, encouraging drug

¹⁵*Id.* at 500.

¹⁶706 F.2d at 787. By contrast, the Seventh Circuit had earlier held that “criminal legislation not restricted to economic or business activity” requires “a somewhat more searching examination” than the Supreme Court’s approach to the licensing ordinance in *Hoffman*. *Record Head Corp. v. Sachen*, 682 F.2d 672, 676 (7th Cir. 1982).

¹⁷706 F.2d at 787 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 497 & n.7 (1982) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971))).

¹⁸706 F.2d at 789-90.

¹⁹*Id.* at 790. Compare *Record Head Corp. v. Sachen*, 682 F.2d 672 (7th Cir. 1982), in which the court found the scienter requirements in the challenged ordinance insufficient to cure the ordinance’s vagueness in identifying the items prohibited and in enunciating the factors for determining prohibited conduct. The court in *Nova Records* distinguished its holding in *Record Head* on the ground that the *Record Head* scienter requirement was “circular,” although it acknowledged that the ordinance in *Record Head*, read in its entirety, could have supported the finding of an adequate scienter requirement. 706 F.2d at 790 n.6.

²⁰706 F.2d at 788.

use itself is a form of unprotected commercial speech "proposing illegal activity [which] can be regulated or banned entirely."²¹

Finally, the court concluded that the Indiana Act is not vague on its face because it is "capable of constitutional application," and any risk of arbitrary enforcement which might result from the inadequacy of the statute's guidelines could be better raised in a post enforcement challenge to the law as applied.²² In so doing, the court retreated from an earlier, more searching, approach to vagueness inquiries in this context which had been criticized by the Supreme Court in *Hoffman*.²³ The Seventh Circuit decision reversed by the Supreme Court in *Hoffman* was based in part on the the court's concern that the ordinance's enforcement would be used "to harass individuals choosing lifestyles and views different from those of the majority culture."²⁴ In invalidating the *Hoffman* ordinance, the court of appeals had not presumed good faith enforcement, but searchingly examined the vagueness inherent in the language of the ordinance and speculated as to instances in which it might be improperly applied.²⁵

By contrast, in *Nova Records* the Seventh Circuit had no hesitation in applying the very deferential standards of *Hoffman* to a statute which, unlike the *Hoffman* ordinance, regulates individual as well as business conduct and which contains substantial criminal penalties.²⁶ The wholesale adoption of *Hoffman* standards with respect to criminal statutes is contrary to the Seventh Circuit's own pronouncement less than a year earlier in *Record Head Corp. v. Sachen*.²⁷ Moreover, previous Seventh Circuit decisions had required drug paraphernalia statutes to contain both a list of examples and an intent requirement.²⁸ In these cases, the

²¹*Id.* (citation omitted).

²²*Id.* at 792.

²³See *Flipside, Hoffman Estates v. Village of Hoffman Estates*, 639 F.2d 373 (7th Cir. 1981), *rev'd*, 455 U.S. 489 (1982).

²⁴*Flipside, Hoffman Estates v. Village of Hoffman Estates*, 639 F.2d 373, 384 (7th Cir. 1981).

²⁵*Id.*

²⁶706 F.2d 782. Violation of the Indiana statute with respect to manufacture, sale, or possession of drug and paraphernalia is a Class D Felony, punishable under Indiana law by imprisonment for a fixed term of two years and a fine up to ten thousand dollars. The term of imprisonment may be doubled under aggravating circumstances. IND. CODE § 35-50-2-7 (1982).

²⁷682 F.2d 672 (7th Cir. 1982). See *supra* note 16. But see *Record Head*, 682 F.2d at 682 (Pell, J., dissenting).

²⁸As the Seventh Circuit stated in *Levas & Levas v. Village of Antioch*, 684 F.2d 446 (7th Cir. 1982):

Thus there is a large, but not entirely amorphous class of items that can be paraphernalia, and an intent requirement that differentiates innocent transfers of multi-purpose items from illegal transfers of drug paraphernalia. That combination satisfies the fair notice aspect of the vagueness test, even in its strictest form.

Id. at 452. See also *Camille Corp. v. Phares*, 705 F.2d 223, 227 (7th Cir. 1983).

statute's scienter requirement was relevant, but not conclusive, in determining whether or not the regulation satisfied the "fair notice" half of the vagueness test. Under *Nova Records*, the statute's scienter provision by itself appears to satisfy the constitutional requirement of fair notice.

The presence of a scienter requirement, however, does not provide protection against the risk of arbitrary enforcement, an equally important concern underlying the void for vagueness doctrine.

The court's decision in *Nova Records*, approving a statute which contains no list of factors to aid in distinguishing legal from prohibited conduct, does not persuasively demonstrate how the risks of arbitrary enforcement with which the court had been concerned in its previous decisions,²⁹ are reduced by a statute without definitions or guidelines for enforcement. Moreover, the court had stated unequivocally in a prior decision that the reliance on the possibility of subsequent guidelines and patterns of enforcement to cure facial vagueness, which the Supreme Court approved in *Hoffman*, is simply not appropriate for criminal statutes.³⁰ The *Nova Records* decision, however, relaxed the court's previous standards for reviewing vagueness challenges to criminal statutes. Under these more deferential standards, the Indianapolis drug paraphernalia law finally received judicial approval.

2. *Indianapolis Loitering Ordinance.*—*Waldron v. McAtee*³¹ presented the Seventh Circuit with a challenge to an Indianapolis loitering ordinance alleged to be unconstitutionally vague both on its face and as applied. The ordinance prohibits "loitering" or "prowling" "at a time or in a manner not usual for law abiding citizens" or "under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity" if the loitering creates "danger of a breach of the peace" or "the unreasonable danger of a disturbance to the comfort or repose of any person acting lawfully in the public way."³² The ordinance authorizes police officers to arrest any individual in apparent violation of these prohibitions if the individual refuses to move on or fails to give the police officer a "lawful reason" for his conduct. Violators are subject to fines up to five hundred dollars.³³

The ordinance was challenged by the plaintiff, Waldron, who alleged that he was accosted and detained by policemen while talking with friends near the downtown public library just after midnight. According to Waldron's affidavit, the police officers threatened to arrest him under the loitering ordinance unless he moved on and warned him that he would be arrested in the future if he met with friends in the same place

²⁹See *supra* notes 27-28.

³⁰682 F.2d at 678.

³¹723 F.2d 1348 (7th Cir. 1983).

³²MARION COUNTY, IND., CODE § 20-9(a) (1979).

³³*Id.* § 20-9(f). The ordinance is reproduced in full in an appendix to the decision of the district court. *Waldron v. McAtee*, 556 F. Supp. 101, 106 (S.D. Ind.), *vacated*, 723 F.2d 1348 (7th Cir. 1983).

at that time of night. Waldron asserted that since this incident he has avoided meeting with friends or engaging in other activities in the downtown area at night for fear of arrest under the loitering ordinance. Alleging that the ordinance is vague on its face and as applied to his conduct, Waldron sought an injunction against its enforcement. The district court, however, concluded that the ordinance was directed only at conduct and speech not protected by the first amendment, and ruled that it was not impermissibly vague under existing authority construing similar language in other contexts.³⁴ On appeal, the Seventh Circuit declined to review the district court's decision on its merits. Instead, on its own initiative, it invoked the doctrine of abstention, ordering the court to vacate its previous orders and stay further proceedings until the Indiana courts had an opportunity to construe the Indianapolis loitering ordinance. As there was no state litigation pending on the issue, the court, in effect, required Waldron to institute and pursue a state declaratory judgment action as a prerequisite to federal jurisdiction of his constitutional claims.³⁵

Under the doctrine of abstention, a federal court, in appropriate cases, defers ruling on a federal claim over which it has jurisdiction until a state court has had an opportunity to rule on a question of state law which may obviate the need for federal action.³⁶ In *Baggett v. Bullitt*,³⁷ the United States Supreme Court held that abstention was not appropriate where plaintiffs challenged as void for vagueness state loyalty oath regulations for teachers and other public employees, even though the state courts had never had an opportunity to construe the challenged state statutes. The Supreme Court distinguished the narrow class of cases involving vagueness issues where the unsettled state law question concerns the application of the law to specific persons or to a specific course of conduct; in these cases, abstention may be appropriate.³⁸ By contrast, abstention is not appropriate where a complaint

³⁴Waldron v. McAtee, 556 F. Supp. 101, 105 (S.D. Ind.), *vacated*, 723 F.2d 1348 (7th Cir. 1983). The district court relied on dictionary definitions to define words in the ordinance like "loiter" and "prowl." Phrases like "disturb the repose of a person acting lawfully" and "breach of the peace" were defined according to cases in Indiana and elsewhere construing similar language. With respect to the structure of the ordinance as a whole, the district court concluded that its intent was to prevent disturbances of four general types: (1) rioting and crowd control problems; (2) fighting, (3) obstruction of traffic, and (4) threats to personal safety. Under this construction, the court found the ordinance not unconstitutionally vague because its language sufficiently identified "the general area of conduct" to be regulated and could not easily be drafted with greater precision while still maintaining comprehensiveness in regulating the broad scope of conduct to be prohibited. *Id.* at 104-05.

³⁵723 F.2d at 1352

³⁶*Id.* at 1351. See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) where the Court first invoked the modern doctrine of abstention).

³⁷377 U.S. 360 (1964).

³⁸*Id.* at 377.

is based on allegations that plaintiffs “cannot define the range of activities in which they might engage in the future, and do not want to forswear doing all that is literally or arguably within the purview of the vague terms.”³⁹ Under *Baggett* these broader challenges to a statute on its face are not appropriate for abstention.⁴⁰

The majority in *Waldron* narrowly construed the allegations in Waldron’s complaint to fit within the appropriate scope of abstention defined in *Baggett*. The court thus emphasized the “as applied” portion of the plaintiff’s complaint, and determined that the state courts should first determine whether or not the Indianapolis ordinance covered his conduct. The facial challenge to the vagueness of the ordinance was thus deferred until the “as applied” challenge could be pursued in state court, unless the plaintiff chose to present both challenges in state court. Moreover, as the court noted, if the state court definitively construed the statute not to cover Waldron’s conduct, then he would have no standing to challenge the ordinance on its face, and the federal court could avoid even a deferred ruling on the ordinance’s constitutionality.⁴¹

In spite of its attempt to bring its decision within the *Baggett* framework, the Seventh Circuit’s decision to abstain in this case clearly extends the boundaries of the abstention doctrine with respect to constitutional claims that statutes are void for vagueness. Although the court emphasized the specific factual allegations of the complaint, the complaint was predominantly a facial challenge to the ordinance. The plaintiff’s allegations as to the enforcement of the ordinance against his conduct were all directed at establishing his standing to challenge the ordinance, not at defining the scope of his challenge. Under any fair reading of his complaint, the plaintiff’s constitutional concern was not whether the ordinance prohibits him from meeting with friends at the public library. The plaintiff’s core allegation was that the ordinance did not make clear which activities it allows and which it bars. Even more importantly, the ordinance was challenged because it arguably does not provide sufficient guidelines to prevent its discretionary application to legitimate, even constitutionally protected, conduct.⁴²

³⁹*Id.* at 378.

⁴⁰The *Baggett* analysis was reaffirmed in *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289 (1979). The Court in *Babbitt* ordered abstention in a federal suit challenging, on grounds of vagueness, provisions in a state agricultural labor law providing criminal penalties for violations of the prohibitions and provisions restricting consumer publicity with respect to labor disputes. The Court concluded that state court construction of each of these provisions was possible in a single adjudication, and suggested simple narrowing constructions for each provision to avoid constitutional problems. The Court noted that the case was one which involved a straightforward choice between one or two alternatives in construing the statute with respect to the plaintiffs involved and thus fell within the area appropriate for abstention under *Baggett*. 442 U.S. at 308-10.

⁴¹723 F.2d at 1353.

⁴²In the court’s view, the Indianapolis ordinance is vague but not “that vague,” or at least not so vague as to be incapable of salvation by authoritative judicial construction.

The court recognized that abstention is generally not appropriate where a state law is challenged on its face, but based its decision to abstain here on the fact that the Indianapolis ordinance was also challenged as applied.⁴³ Yet, the result is that the court *has* abstained on both issues since the facial challenge will not be heard until the "as applied" challenge has been fully litigated. The effect of this decision is to leave the ordinance in effect without judicial approval, even though it is alleged to deter individuals in their right to come and go in downtown Indianapolis without risk of arrest under the ordinance as written or as enforced. For these and other reasons, Judge Swygert vigorously dissented from the decision of the panel majority. In his view, there was no real likelihood that the various possible interpretations of the Indianapolis ordinance could be resolved in the context of a single abstract state court declaratory judgment action.⁴⁴ In addition, he specifically disapproved of the use of abstention in cases where, as here, first amendment rights may be at stake.⁴⁵ Using abstention in a case involving constitutional claims is the equivalent to a requirement of exhaustion of state remedies,⁴⁶ a requirement for constitutional litigation rejected by the Supreme Court.⁴⁷

The *Waldron v. McAtee* case did not decide a question of substantive constitutional law. However, its invocation of the abstention doctrine to preclude federal review of a facial vagueness challenge to a state law implicating first amendment concerns may have a far-reaching effect on the ability of individuals to vindicate constitutional rights in federal court. A broadened abstention policy, coupled with wide restrictions on federal interference in state criminal matters,⁴⁸ and stricter standing requirements, can effectively narrow the scope of federal constitutional rights by creating barriers to their enforcement in federal court.

B. Due Process

1. *Notice and Unconstitutional Takings.*—a. *Zoning ordinances as unlawful takings.*—Although previous Indiana decisions had approved

Id. at 1352-53. The court, however, does not suggest the limiting construction that can be expected to cure the variety of imprecisions in the ordinance. Compare *Waldron*, 723 F.2d 1348 with *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979); see *supra* note 40.

⁴³723 F.2d at 1355.

⁴⁴*Id.* (Swygert, J., dissenting).

⁴⁵Judge Swygert thus concluded:

Moreover, abstention is particularly inappropriate where the impact of the statute on first amendment rights is uncertain. Then not only is further constitutional adjudication unlikely to be avoided, but constitutionally protected conduct may be deterred while the courts are resolving the issues in a piecemeal fashion.

723 F.2d at 1357 (Swygert, J., dissenting) (citation omitted).

⁴⁶*Id.* at 1356.

⁴⁷See *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Steffel v. Thompson*, 415 U.S. 452 (1979); .

⁴⁸See *Younger v. Harris*, 401 U.S. 37 (1971).

a wide range of zoning regulations, the Indiana Supreme Court in *Ailes v. Decatur County Area Planning Commission*⁴⁹ declared two local ordinances unconstitutional because they required discontinuance of existing legal nonconforming property uses within a fixed amortization period. The court held that a zoning ordinance which seeks to eliminate existing land uses in this way exceeds the state's police power and constitutes an unlawful taking without compensation in violation of due process.⁵⁰

Plaintiffs in the consolidated appeals had each operated junkyards at their residences for many years. Under zoning ordinances adopted by local planning commissions, their property was rezoned as residential, and they were required to eliminate their junkyards, together with any other nonconforming uses, within a three or five year amortization period after adoption of the zoning ordinance.⁵¹ When the plaintiffs failed to eliminate the offending use within the fixed amortization period, the local planning commissions obtained injunctions against their violations of the zoning ordinances. The plaintiffs sought relief from the injunctions, claiming that the zoning ordinances were unconstitutional. The trial courts and the Indiana Court of Appeals concluded that the zoning ordinances represented a reasonable accommodation between public and private interests and found them constitutional in all respects.⁵²

The Indiana Supreme Court disagreed. Acknowledging the issue to be one of first impression in Indiana, the court declined to follow the view of the majority of other jurisdictions which allows the constitutionality of a particular ordinance to be determined by the standard of reasonableness, on a case-by-case basis, balancing factors relating to the respective public and private interests in each case.⁵³ The supreme court found this analysis of factors to be completely irrelevant to determining the simple question whether the zoning regulation was an unlawful taking of private property:

⁴⁹448 N.E.2d 1057 (Ind. 1983).

⁵⁰*Id.* at 1060. The due process clause of the fourteenth amendment has been construed to require states to provide just compensation for the taking of private property. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁵¹The two ordinances involved contained similar language. The Ripley County ordinance required discontinuation of prior lawful uses within five years while the Decatur County ordinance required discontinuation within three years of the enactment of the zoning ordinance. RIPLEY COUNTY, IND., ZONING ORDINANCES § 3.5; DECATUR COUNTY ORDINANCES § 3.23 (1975); *quoted in Ailes*, 448 N.E.2d at 1058-59.

⁵²437 N.E.2d 1375 (Ind. Ct. App. 1982), *rev'd*, 448 N.E.2d 1057 (Ind. 1983).

⁵³*See* Annot., 22 A.L.R. 3d 1134 (1968 & Supp. 1981)

The court of appeals identified several relevant factors:

For example, the public benefit may be determined by considering the offensiveness of the nonconforming use in view of the surrounding neighborhood; the private loss may be measured by the value of the nonconforming use, the damages incurred by compliance including the hardship imposed on the user, and the length of time allowed for amortization.

437 N.E.2d at 1380.

From a constitutional standpoint, it does not appear that a resolution of any of these factors can make that reasonable which is basically and from the outset unreasonable. We must bear in mind that we are dealing with a use of a person's private property that was continuing and lawful at the time of the passage of the ordinance. It became unlawful only by reason of the provisions of the ordinance.⁵⁴

The court distinguished the long line of cases in Indiana which had approved various forms of zoning regulations.⁵⁵ Those cases involved ordinances that prohibited expansion of preexisting nonconforming uses and reinstatement of nonconforming uses after being once abandoned. While these ordinances are permissible, it is not permissible, under the court's view, to require elimination of existing nonconforming uses, even if a period of time is provided for amortizing the lost use: "We hold, however, that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power."⁵⁶ Only Justice Hunter dissented from the court's decision; he urged adoption of the view in the majority of other jurisdictions and followed by the court of appeals, as the approach which strikes the proper balance between public and private rights.⁵⁷

The Indiana Supreme Court's decision in *Ailes* represents a significant restriction on modern zoning regulations. It also evidences a general disinclination to permit traditional concepts of private property to be outweighed by more contemporary concepts of public interest. The court suggested that the remedy for truly obnoxious property uses is a common law nuisance action, which in the court's view may be a more legitimate means of serving the public interest than enactment of broad zoning ordinances.⁵⁸

. *b. Notice of tax sale.*—The United States Supreme Court considered the constitutionality of Indiana tax sales statutes in *Mennonite Board of Missions v. Adams*.⁵⁹ The statutory scheme at issue provided for the

⁵⁴448 N.E.2d at 1060.

⁵⁵See *Metropolitan Development Comm'n of Marion County v. Marianos*, 408 N.E.2d 1267 (Ind. 1980); *Misner v. Presdorf*, 421 N.E.2d 684 (Ind. Ct. App. 1981). *Dandy Co. v. Civil City of South Bend*, 401 N.E.2d 1380 (Ind. Ct. App. 1980); *Jacobs v. Mishawaka Board of Zoning Appeals*, 395 N.E.2d 834 (Ind. Ct. App. 1979).

⁵⁶448 N.E.2d at 1060.

⁵⁷*Id.* at 1061-62 (Hunter, J., dissenting).

⁵⁸*Id.* at 1060.

⁵⁹103 S. Ct. 2706 (1983). For a further discussion of this case, see Harvey, *Civil Procedure and Jurisdiction, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 91, 96 (1985).

county to hold annual tax sales for property on which taxes had been delinquent for fifteen months or more.⁶⁰ The statutes required the county to provide notice by certified mail to the landowners, and to post and publish notice to the public for a three week period prior to the sale.⁶¹ A person or institution holding a mortgage on the property was not given any personal notice under the statutes. After the tax sale, interested parties had two years to redeem the property.⁶² If the property was not redeemed within the redemption period, a deed which was not subject to prior liens on the property would be issued to the tax sale purchaser.⁶³ Notice of the imminent expiration of the redemption period was provided to the property owners, but no notice was provided to the mortgagee.⁶⁴ Once the deed was issued, the tax sale purchaser had clear and unencumbered title to the property, and the prior interest of a mortgagee was terminated.

The notice provisions of these statutes were challenged by the Mennonite Board of Missions which held a mortgage to secure a loan on property in Elkhart, Indiana. The property was sold at a tax sale to the purchaser Adams who, after expiration of the redemption period, obtained an unencumbered deed to the property, which he then asserted in a quiet title action against the former owner and the Mennonite Board of Missions. The Mennonite Board had not been notified of the tax sale until after expiration of the redemption period. Until this time, the owner had made the regular payments on the mortgage held by the Mennonite Board. The Board had no reason to know, and did not know, that taxes had not been paid.

In its defense to the quiet title action, the Mennonite Board asserted that the failure to provide it with actual notice of the tax sale or the expiration of the redemption period violated due process by failing to provide notice adequate to protect the Board's legal interest in the property.⁶⁵ The Indiana Court of Appeals rather summarily rejected this argument, relying on the decision of another district on the same issue.⁶⁶

The case was appealed to the United States Supreme Court, which reversed the Indiana court and declared the Indiana statute unconstitutional. Relying on a line of cases which invalidated under the due process clause various forms of constructive notice, the Court rejected

⁶⁰IND. CODE § 6-1.1-24-1, -12 (1982).

⁶¹*Id.* § 6-1.1-24-3, -4.

⁶²*Id.* § 6-1.1-25-1.

⁶³*Id.* §§ 6-1.1-25-14, -4(d).

⁶⁴*Id.* § 6-1.1-25-6.

⁶⁵The Board also asserted that the notice procedure violated equal protection. The Indiana Court of Appeals rejected the equal protection argument and the United States Supreme Court considered only the due process challenge.

⁶⁶427 N.E.2d 686, 688 (Ind. Ct. App. 1981), *rev'd*, 103 S. Ct. 2706 (1983).

any remaining differences with respect to notice requirements based on the traditional distinctions between in rem and in personam proceedings.⁶⁷ The Court held that the Indiana statute violated the due process clause because it failed to require notice personally or by mail to all those with interests in the property whose identity and address were "reasonably ascertainable."⁶⁸

The Court's holding was not limited to the particular context in which the case arose, the Court broadly held: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."⁶⁹ Three members of the Court vigorously dissented, arguing that the Court's adoption of a per se rule in favor of actual notice unwisely abandoned the previous practice of balancing in each case individual and state interests to determine the strictness of the constitutional requirements and foreclosed the states from adopting constructive notice provisions which might better serve the competing interests involved.⁷⁰

The rule adopted by the Supreme Court in *Mennonite Board of Missions* crystallizes a trend favoring actual service. Contrary to the concerns expressed by the dissenting justices, the rule announced by the Court can always be modified if, in particular circumstances, the state can show a strong reason for avoiding actual notice. In the meantime, the decision provides the kind of guidance to state legislatures which only a bright line rule can achieve.

With respect to Indiana law, the Court declined to decide two issues as to the validity of the current tax sale statutes in Indiana. It did not rule on the constitutionality of providing notice to the former owner, but not to a mortgagee, of the expiration of the redemption period. In view of the significant legal interest involved, there is no apparent basis to distinguish between the mortgagee's right to actual notice of the tax sale and a correlative right to notice of the expiration of the redemption period.

⁶⁷103 S. Ct. at 2710-11 & n.3. See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (holding that a state must provide notice by mail to all interested parties whose identity can be easily ascertained prior to initiating an accounting to settle a common trust fund). The Court in *Mullane* expressly found constructive notice by publication inadequate in that to protect the due process rights of those with a property interest in the trust.

⁶⁸103 S. Ct. at 2712. The Court did not limit its holding to the facts of the case; it called the requirement of notice by means likely "to ensure actual notice . . . a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . ." *Id.*

⁶⁹*Id.*

⁷⁰103 S. Ct. at 2715-16 (O'Connor, J., dissenting).

The Supreme Court also declined to rule on the constitutionality of the statute as amended by the Indiana legislature in 1980. The amendment permits a mortgagee to obtain actual notice of tax sales by filing a form with the county auditor and paying a small service fee.⁷¹ The enactment of this procedure, however, may not avoid the duty under the *Mennonite Board* decision to notify mortgagees who do not comply. The Supreme Court, in adopting a per se rule of actual notice, was not persuaded by arguments that a party that could easily protect its own interests was not entitled to automatically receive the benefit of actual notice at the state's expense.⁷²

2. *Abortion Regulation.*—In 1982 the Indiana legislature enacted a provision requiring parental notification prior to performing an abortion on an unemancipated minor.⁷³ The statute was promptly challenged in a class action suit on behalf of a class of pregnant or potentially pregnant resident and out-of-state minors. The main focus of the litigation was the portion of the statute which permitted minors, upon application to the juvenile court, to obtain a waiver of the notification requirement.⁷⁴ The plaintiffs alleged that the statutory procedures were inadequate to protect the substantive rights of mature minors to obtain an abortion in a prompt, unburdened, and confidential manner. After a trial on the plaintiffs' claims, the district court found the statute constitutional in all respects. On appeal, the Seventh Circuit in *Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson*⁷⁵ disagreed, holding that several aspects of the statute impermissibly infringed on the constitutional rights of a mature minor to obtain an abortion. Unable to sever the unconstitutional from the constitutional portions of the statute, the court struck down the notification requirement in its entirety and enjoined its further enforcement.

⁷¹Act of Feb. 28, 1980, Pub. L. No. 45-1980, Sec. 1, 1980 Ind. Acts 534 (codified at IND. CODE § 6-1.1-24-4.2 (1982)).

⁷²By contrast, Justice O'Connor, in dissent, stated that "[w]hen a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the State save the party from its own lack of care." 103 S. Ct. at 2717 (O'Connor, J., dissenting).

⁷³Act of Feb. 25, 1982, Pub. L. No. 203-1982, 1982 Ind. Acts 1516 (codified at IND. CODE § 35-1-58.5-2.5 (1982) (amended 1984)). The statutory language analyzed by the court is set out in full in an appendix to *Indiana Planned Parenthood Affiliates Assoc., Inc. v. Pearson*, 716 F.2d 1127, 1144 (7th Cir. 1983). Following the Seventh Circuit's decision, the statute was amended to conform to the constitutional requirements set down by the court. Act of March 5, 1984, Pub. L. N. 106-1984, Sec. 5, 1984 Ind. Acts 1045, 1052-53 (codified at IND. CODE § 35-1-58.5-2.5 (Supp. 1984)).

⁷⁴The statute provided that a "minor who objects" to providing notification to her parents or guardian under the statute, or the minor's physician, may request the juvenile court to waive the notice requirement. The court must respond to this petition within 48 hours, and must waive the notice requirement if it determines "that the minor is mature enough to make the abortion decision independently or that notification would not be in the minor's best interests." IND. CODE § 35-1-58.5-2.5(d) (1982) (amended 1984).

⁷⁵716 F.2d 1127 (7th Cir. 1983).

The court's review of the Indiana notification statute was guided by the recent Supreme Court decisions of *Akron v. Akron Center for Reproductive Health, Inc.*,⁷⁶ and *Planned Parenthood Association v. Ashcroft*.⁷⁷ The Court in *Akron* recognized a constitutional right to an abortion without parental notification or consent for "an immature minor whose best interests are contrary to parental involvement."⁷⁸ To protect this constitutional right, a statute requiring parental consent or notification must provide an adequate bypass procedure to permit the minor to establish her maturity or her overriding interest in obtaining an abortion without parental involvement.⁷⁹

The Seventh Circuit, in reviewing the Indiana statute under this standard, approved the concept of a parental notification requirement,⁸⁰ as well as the portion of the statute granting the juvenile court jurisdiction to consider minors' petitions to waive the notice requirement, and the statute's substantive standard for determining when a waiver of notification should be granted. The court, however, found the procedures for obtaining waiver to be unconstitutional in several respects. The court found unconstitutional the Indiana statute's failure to provide either for expedited appellate review of an adverse decision on the minor's petition for waiver of parental notification or for the appointment of counsel for indigent minors seeking waiver of parental notification.⁸¹ The court, piecing together the various plurality and concurring opinions in *Akron*, *Ashcroft*, and other Supreme Court cases, concluded that express procedures for an expedited appeal must be included in a constitutionally drafted parental notification statute.⁸² While no Supreme Court decision

⁷⁶103 S. Ct. 2481 (1983).

⁷⁷103 S. Ct. 2517 (1983).

⁷⁸103 S. Ct. at 2491 n.10 (citation omitted).

⁷⁹In *Akron*, the Supreme Court found the bypass procedures in a local ordinance inadequate under these standards. The Akron ordinance was defective because it made a blanket determination that all minors under the age of 15 are too immature to make an abortion decision or that an abortion is never in the minor's best interests without parental approval. *Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481. By contrast, in the companion decision in *Ashcroft*, a Missouri minor consent statute was found to provide adequate procedures. The Missouri statute did not permit a juvenile court to deny a petition for an abortion unless it first found the minor was not mature enough to make her own decision. *Planned Parenthood Ass'n. v. Ashcroft*, 103 S. Ct. 2517.

⁸⁰716 F.2d at 1133 (citing *Akron*, 103 S. Ct. at 2497). Because the parental notification statute regulates abortions for minors, it need not meet the compelling state interest test applicable to regulation of adult abortions. 716 F.2d at 1133 (citing *Charles v. Carey*, 627 F.2d 772, 776-78 (7th Cir. 1980)).

⁸¹716 F.2d at 1134-36.

⁸²*Id.* at 1137-39. The court rejected the state's argument that Indiana courts already have authority to expedite appeals on their own initiative, since such a procedure was both uncertain and discretionary under Indiana law. By contrast, the Missouri statute approved in *Ashcroft* expressly required the Missouri Supreme Court to adopt a procedure for expedited consideration of appeals under the statute. 716 F.2d at 1134-36. This defect in the Indiana statute was cured in the 1984 amendment, which provides for "an expedited

compelled the conclusion that the state must provide counsel, the court of appeals relied on the importance generally attached in the Supreme Court's decisions to an adequate procedure for obtaining waiver, and on the practical difficulties necessarily present for minors in obtaining competent legal representation in these circumstances.⁸³ The court determined that the Indiana statute impinged on minor's interests in confidentially by expressly subjecting the records of proceedings on petitions for waiver of parental notification to the disclosure laws applicable generally to juvenile court proceedings.⁸⁴ The statute also violated the minor's confidentiality by requiring the juvenile court to notify the minor's parents once the petition for waiver is denied, a procedure which improperly forecloses a minor's ability to approach her parents in her own way once her request for waiver has been denied and which may impermissibly deter minors from pursuing the waiver procedures.⁸⁵

Finally, the court concluded that the requirement that a minor wait twenty-four hours after actual notice to her parents before having an abortion is an impermissible burden on the minor's right to an abortion which is not outweighed by any legitimate state interest. In disapproving the twenty-four hour waiting period, the court relied on authority finding waiting periods unconstitutional for adults, concluding that the reasoning in those cases applies equally to minors.⁸⁶ The court, however, approved the provision requiring a forty-eight hour wait in the case of constructive notice since this period is necessary to assure that prior notice is effected in cases in which actual notice is not possible.⁸⁷

The Seventh Circuit's carefully written decision in *Indiana Planned Parenthood* should provide guidance both to other courts and to legislatures in construing the various recent pronouncements of the Supreme

appeal, under rules to be adopted by the Indiana Supreme Court." IND. CODE § 35-1-58.5-2.5(f) (Supp. 1984). On August 30, 1984 the Indiana Supreme Court adopted new Appellate Rule 16, which provides for a direct appeal to the Indiana Supreme Court within 10 days of an adverse waiver decision and the immediate consideration of the appeal without briefs or oral argument. See IND. R. APP. P. 16.

⁸³The court also relied on its own earlier decision in *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978), which stated:

It appears that Legal Services Corporation attorneys will be unable to handle actions under the Act. See 42 U.S.C. § 2996f(b)(8) (prohibiting the use of Legal Services Corporation funds where an individual seeks to procure a non-therapeutic abortion). Thus, a minor is required to navigate at least the initial stages of a judicial procedure either on her own or with private counsel. Yet, it is obvious that private counsel will be beyond the resources of most teenagers.

582 F.2d at 1389 n.28 (7th Cir. 1978).

⁸⁴716 F.2d at 1139 n.12. The court agreed with the state, however, that allowing access to the waiver proceeding to persons "providing services" did not allow access to parents. *Id.* at 1139.

⁸⁵*Id.* at 1141.

⁸⁶*Id.* at 1142-43. See *Akron*, 103 S. Ct. at 2503; *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1014 (1st Cir. 1981).

⁸⁷716 F.2d at 1143.

Court on the issue of parental consent and notification as a requirement for a minor's abortion. Its holding that indigent minors have an absolute right to appointment of counsel in waiver hearings, in particular, goes beyond the express requirements of Supreme Court precedent, and provides substantive as well as procedural protection for minors whose ability to choose an abortion is being increasingly constricted by legislation requiring parental consent or notification.

C. Equal Protection

The Indiana Court of Appeals held in *Portman v. Steveco, Inc.*⁸⁸ that a provision of the Indiana Workmen's Compensation Act which created a presumption of dependency in favor of widows but not widowers was a form of gender-based discrimination in violation of the equal protection clauses of the Indiana and United States Constitutions.⁸⁹ Under the Indiana Act, the surviving spouse's entitlement to the statutory death benefit requires a finding of dependency for support on the deceased worker. The statute, however, created a conclusive presumption that a wife living with her husband is dependent. The same presumption was accorded a husband only if he established that he was "both physically and financially incapable of self-support."⁹⁰

Under the decision of the United States Supreme Court in *Wengler v. Druggists Mutual Insurance Co.*,⁹¹ such a provision violates the equal protection clause. It discriminates both against the surviving husband, who is denied the presumption available to widows, and against the working woman who is entitled to the same protection for her spouse, in the event of her death that a male worker receives. Based on this controlling authority, the Indiana Court of Appeals found the Indiana provision unconstitutional.⁹²

The more difficult question for the court was the manner in which it should order the gender-based discrimination to be eliminated. The Supreme Court in *Wengler* left the question of remedy to the state, and those states considering the question have split on the appropriate remedy. The majority have ordered the state to extend the presumption of dependency to widowers, so that neither widows nor widowers would be required to make a special showing.⁹³ However, other courts have

⁸⁸453 N.E.2d 284 (Ind. Ct. App. 1983). For a further discussion of a related case, see Coriden, *Workers' Compensation, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 469, 469 (1985) (earlier decision, discussed under the name *Clem v. Steveco, Inc.*).

⁸⁹IND. CONST. art. I, § 23; U.S. CONST. amend. XIV. The Indiana equal protection clause has been held to be coterminous, in certain contexts, with the parallel provision of the federal Constitution. *Sidle v. Majors*, 264 Ind. 206, 341 N.E.2d 763 (1976).

⁹⁰IND. CODE § 22-3-3-19(b) (1982).

⁹¹446 U.S. 142 (1980).

⁹²453 N.E.2d at 287.

⁹³See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 601 S.W.2d 8 (Mo. 1980); Oknefski

eliminated the presumption of dependency and required both men and women to affirmatively prove dependency as a condition to receipt of statutory death benefits.⁹⁴ The Indiana court adopted the majority view, ordering the state to extend its presumption to widowers as well as widows. In the court's view, this remedy was in accord with the generally "beneficent" purposes of social legislation of this kind, and more closely served the apparent legislative purpose of granting a favorable presumption to at least some classes of surviving spouses.⁹⁵ The remedy adopted by the court is in accord with the majority of other jurisdictions, and also with the general policy disfavoring the essentially punitive response to claims of differential treatment which adopts a less rather than a more favorable practice to a remedy inequality.⁹⁶

D. Eighth Amendment

The Seventh Circuit considered a sweeping challenge to conditions at the Indiana State Prison in Michigan City in *Wellman v. Faulkner*.⁹⁷ The plaintiffs alleged that the totality of conditions at the Michigan City prison constituted cruel and unusual punishment in violation of the eighth amendment. The district court rejected the totality of the circumstances challenge, but found constitutional violations in the general overcrowding at the prison and in specific instances of medical mistreatment. On appeal the Seventh Circuit agreed with these findings, holding in addition that the systematic failure to provide adequate medical care also violated constitutional guarantees.⁹⁸

With respect to the level of medical care, the court concluded that the plaintiffs' satisfied standards for proving an eighth amendment violation with evidence of a "deliberate indifference" to serious medical needs of prisoners.⁹⁹ Lack of medical care rises to the level of "deliberate indifference" when there is either evidence of a pattern of negligent acts by the medical staff, or evidence of gross institutional deficiencies in staff, facilities, equipment, or procedures.¹⁰⁰ The court found evidence in the record of repeated instances of medical mistreatment, including

v. Workmen's Comp. Appeal Bd., 63 Pa. Commw. 450, 439 A.2d 846 (1981) *Davis v. Aetna Life & Casualty Co.*, 603 S.W.2d 718 (Tenn. 1980).

⁹⁴453 N.E.2d at 287. *See, e.g.,* *Arp v. Workers' Compensation Appeals Bd.*, 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977); *Day v. W.A. Foote Mem. Hosp., Inc.*, 412 Mich. 698, 316 N.W.2d 712 (1982).

⁹⁵453 N.E.2d at 287.

⁹⁶For example, the Equal Pay Act prohibits employers from lowering a man's pay in response to a woman's claim for equal pay. 29 U.S.C. § 206(d)(1) (1982).

⁹⁷715 F.2d 269 (7th Cir. 1983).

⁹⁸*Id.* at 271.

⁹⁹*Id.* at 272 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

¹⁰⁰715 F.2d at 272 (*citing* *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)).

the prison's denial of treatment for known ailments for up to five years and its failure to treat an inmate visibly suffering from cardiovascular shock for a period of nine hours. The court also noted a pattern of staffing deficiencies in the failure to fill the position of staff psychiatrist for more than two years, and the staffing of two of the three full-time medical doctor positions with physicians from abroad who neither spoke nor understood much of the English language. The record also evidenced recurring problems with stocking necessary medical supplies.

The district court had attributed the deficiencies in medical care at the Michigan City prison to an inadequate salary structure authorized by the Indiana legislature and thus declined to find an eighth amendment violation. The court of appeals, however, concluded that inadequate funding reinforced its conclusion that the deficiencies were systematic and not likely to be remedied.¹⁰¹

Although it affirmed the district court's findings of substantive violations, the court of appeals remanded the case to the district court for reconsideration of the award of damages to individual defendants who had been unconstitutionally denied medical treatment. The district court had assessed damages personally against the individual defendants who were senior officials in the prison administration.¹⁰² The court reaffirmed that an individual defendant is responsible for a constitutional deprivation only if the plaintiffs establish the defendant's personal responsibility for the deprivation.¹⁰³ In previous decisions, the court had afforded plaintiffs a presumption during the pleading stages that senior officials are responsible for claimed deprivations.¹⁰⁴ However, the court in this case emphasized that this presumption does not survive beyond the pleading stage to trial and post-trial review. After discovery is completed, the plaintiffs again have the burden to establish the personal responsibility of an individual defendant for the specific acts complained of as a prerequisite to the recovery of damages. Accordingly, the case was remanded to the district court for clarification of the plaintiffs' right to damages in view of the plaintiffs' burden at trial to prove the personal responsibility of the individual defendants.

¹⁰¹715 F.2d at 273.

¹⁰²Named defendants were the warden, the commissioner, and the director of classification and treatment. No damages were sought or awarded against the state or its agency which are immune under the eleventh amendment. See *Edleman v. Jordan* 415 U.S. 651 (1974).

¹⁰³715 F.2d at 275. The Seventh Circuit has held that the personal responsibility requirement for an unconstitutional deprivation is established "if [the official] acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Crowder v. Lash*, 687 F.2d 996, 1005 (7th Cir. 1982) (citations omitted), cited in *Wellman*, 715 F.2d at 275.

¹⁰⁴*Duncan v. Duckworth*, 644 F.2d 653 (7th Cir. 1981).

E. Constitutional Rights of Public Employees

1. *First Amendment and Public Employees.*—The Seventh Circuit, in an en banc decision in *Egger v. Phillips*,¹⁰⁵ upheld the transfer of an employee whose exercise of concededly protected first amendment rights had made him a disruptive presence in the office, holding that although a public employee has a right to free speech in the workplace, he may have to bear the employment-related costs of exercising that right.

Egger was an FBI agent assigned to the Indianapolis office. Based on information discovered in an investigation of organized gambling, he accused a fellow agent of wrongdoing. The accusation received wide circulation within the office, in the local law enforcement community, and, eventually, in the press. As a result of these accusations and cross-accusations and the distrust and resentment among agents which ensued, the Indianapolis FBI office allegedly suffered a loss of efficiency and morale. Egger was transferred, at the instigation of Indianapolis office head Phillips, to the Chicago FBI office. When he refused to report for duty in Chicago, he was dismissed.

In an action for damages brought by Egger, the district court granted summary judgment in favor of the defendant Phillips:

“Egger’s activities substantially contributed to creating havoc in the Indianapolis Field Office of his employer. . . .

Even assuming that Phillips’ efforts to have Egger transferred were in part motivated by Egger’s attempts to uncover what he considered to be wrongdoing by other agents, the substantial legitimate basis for Egger’s transfer supplants any element of causation between the assumed wrong motive and the transfer.”¹⁰⁶

A panel of the Seventh Circuit initially reversed the district court,¹⁰⁷ finding that Egger’s conduct implicated significant first amendment values and concluding that summary judgment was not a proper vehicle for determining whether Phillips’ actions were motivated by legitimate employer concerns or were simply retaliation for Egger’s protected conduct.¹⁰⁸ On rehearing, however, the court sitting en banc rejected the panel’s reasoning and affirmed the district court’s grant of summary judgment.

The en banc court affirmed the district court’s decision on two grounds.¹⁰⁹ It found first that Phillips was entitled to summary judgment

¹⁰⁵710 F.2d 292 (7th Cir. 1983).

¹⁰⁶710 F.2d at 295. (quoting *Egger v. Phillips*, No. 78-508-C, slip op. at 48 (S.D. Ind. Sept. 22, 1980)).

¹⁰⁷*Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1982), *vacated*, 710 F.2d at 294 n.1 (7th Cir. 1983).

¹⁰⁸669 F.2d at 503.

¹⁰⁹In reaching its decision, the court plurality considered and rejected other claims

on his defense of qualified immunity. The court relied on the Supreme Court's decision in *Harlow v. Fitzgerald*,¹¹⁰ which was decided after the original panel decision. Under *Harlow*, a public official is immune from suit for damages unless his conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."¹¹¹ Under the objective test of *Harlow*, the question of qualified immunity can be decided on summary judgment since it does not require inquiry into a defendant's subjective intent. The Seventh Circuit concluded that Phillips was entitled to summary judgment under the objective test for qualified immunity because the legal standards governing the constitutionality of his conduct were uncertain at the time he obtained Egger's transfer:¹¹² "We believe that one in Phillips' position would reasonably view the relation between Egger and others in the office as strained and, notwithstanding the root cause of the strained relations, it would appear to a reasonable person that a transfer recommendation would be lawful."¹¹³ Because Egger's action was solely for damages against Phillips, the finding that Phillips was entitled to immunity as a matter of law justified by itself the summary judgment in his favor.

The court, nevertheless, also considered the first amendment issue and decided it against Egger.¹¹⁴ In evaluating Egger's first amendment claims, the court followed the balancing test governing public employee free speech rights as set out by the Supreme Court in *Pickering v. Board of Education*.¹¹⁵ The *Pickering* standards recognize the special interest

asserted by the defendant in support of the grant of summary judgment. The court ruled that Congress' decision not to include FBI agents within the administrative appeal system available to other federal employees did not evidence an intent to preclude a right of action for direct constitutional deprivations under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). 710 F.2d at 297-300. See also *Bush v. Lucas*, 103 S. Ct. 2404 (1983). The plurality also rejected claims that FBI agents were subject to heightened constraints on their exercise of first amendment rights because the FBI is a "paramilitary organization." 710 F.2d at 311-12. Judge Cudahy concurred in these sections only, and in the result. Four judges entered separate concurrences declining to join in these two portions of the court's decision.

¹¹⁰457 U.S. 800 (1982).

¹¹¹*Id.* at 818 (citations omitted).

¹¹²Specifically, the court concluded that there was legal authority at the time for the conclusion that (1) an employee's on-the-job expressions were unprotected; (2) Egger's speech did not touch sufficiently on matters of public concern to be entitled to first amendment protection; and (3) the disruptive impact of employee speech justifies adverse action, including discharge. 710 F.2d at 315. Judge Cudahy, concurring separately in the result, reluctantly agreed that *Harlow* required this conclusion. He noted, however, that observance of the completely objective approach to qualified immunity impedes the development of the law in this area because defendants under the *Harlow* formulation are liable only in cases where the law was already clearly established at the time of their actions. 710 F.2d at 324 n.1.

¹¹³710 F.2d at 315 (citation omitted).

¹¹⁴*Id.* at 314 n.27.

¹¹⁵391 U.S. 563 (1968).

of the state as employer in regulating its employees' speech which does not exist in regulating the speech of the public at large. The court formulated the problem as a balance of interests: "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹¹⁶ The Seventh Circuit recognized that the rationale of *Pickering* protected public employees' private intra-office statements as well as public expressions, but that the balance between competing interests may be struck differently where only internal communications are at stake.¹¹⁷

The court struck the balance in this case through a detailed factual review of the evidence and an analysis of three factors: (1) the substance of the communications (2) the time, place, and manner of communication, and (3) the interests of the government as employer. The court concluded that the initial accusation by Egger that a fellow agent had engaged in serious wrongdoing was clearly a matter of public concern. The court also found, however, that much of the voluminous record of Egger's actions after the accusation involved speech which was related principally to "institutional," that is, work-related, concerns. The court concluded that even the initial accusation against his fellow agent was distinguishable from general public criticism.¹¹⁸ The accusation implicated internal matters in that it was directed against an individual rather than against the institution, and, therefore, necessarily involved a legitimate employment concern about relationships between coworkers. Also, the accusation was based on the result of a work-related investigation, which the agency as an employer had a right to evaluate for accuracy and judgment.¹¹⁹ The court also observed that much of the disruption in the Indianapolis office following Egger's accusation was due to his own behavior in disclosing his findings to a coworker who, predictably, revealed it to the accused agent. Moreover, Egger, in the court's view, went beyond the bounds of reasonable behavior by deluging his superiors for months with lengthy and repetitive written and oral communications.

Finally, in view of the nature and manner of Egger's speech-related conduct, the court concluded that Phillips was justified in transferring Egger out of the Indianapolis office. All of the governmental interests which dictate disciplinary action against an employee were found to be strongly supported by the evidence in this case, including the need for

¹¹⁶*Id.* at 568. In *Pickering*, the Court held that a school board could not terminate a teacher for writing a letter to the newspaper criticizing the manner in which the Board allocated its budget between academic activities and sports.

¹¹⁷710 F.2d at 314 n.26, 316. See *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

¹¹⁸710 F.2d at 317-18.

¹¹⁹*Id.* at 319.

harmony between coworkers, confidentiality, competent performance of daily duties, and a close and personal working relationship between an employee and his supervisors.¹²⁰ While these factors did not render Egger's communication unprotected, they tipped the balance, under the *Pickering* standards against unfettered protection of Egger from reasonable employment-related decisions.

The balance in favor of the employment action in this case was held to be sufficiently strong to justify a grant of summary judgment, without a separate inquiry into Phillips' subjective motivation. In the court's view, Egger was asking not only for protection for his right to speak but immunization from the natural consequences of it: "The First Amendment protects the right of a government employee to make good faith accusations of malfeasance in office against fellow workers, but the First Amendment does not guarantee the employee a cost-free exercise of that right."¹²¹ The court found the transfer of Egger out of the Indianapolis office was simply a natural consequence of the disruption and bad feeling caused by Egger's initial accusation. Where the transfer is fully justified by legitimate employment-related needs, the fact that Egger bears the natural and possibly inevitable cost of his speech does not violate the first amendment.¹²²

The Seventh Circuit's en banc decision in *Egger v. Phillips* was handed down soon after the Supreme Court's decision on the same issue in *Connick v. Myers*.¹²³ In *Connick* the Court ruled that a public employee could be discharged for circulating a questionnaire among coworkers which her superiors deemed to be potentially inflammatory and disruptive. The approach followed by the Supreme Court in *Connick*, while ostensibly preserving the balancing test in *Pickering*, appears to restrict the protection of first amendment rights to a greater degree than the *Egger* decision. *Connick* takes a very narrow view of the range of statements which touch on "public concerns" and which are thus entitled to protection against work-related sanctions. The Seventh Circuit in *Egger*, although agreeing that only statements on matters of public concern will generally merit protection, recognized a mixture of public, institutional,

¹²⁰Thus, the court concluded:

In this case, the *Pickering* balance is clear—the mutual distrust between Egger and many of his colleagues is undisputed, and the need for such trust is vitally important in the specific employment context in the case. Egger had lost his effectiveness in the Indianapolis office and the challenged action—the transfer—was tailored to vindicate the specific state interest at stake.

Id. at 323 (citations omitted).

¹²¹*Id.* at 322.

¹²²*Id.* at 323.

¹²³103 S. Ct. 1684 (1983). The Seventh Circuit noted that *Connick* was handed down after the *Egger* decision was authored and approved by the court, and that it supported the *Egger* result. 710 F.2d at 294 n.*.

and personal aspects in a single statement. Although the court seems inclined to hold these statements protected, such statements are easily outweighed by competing interests. In addition, *Connick* permits an employee to be discharged on the spot, based on, at most, a reasonable fear of disruption. In *Egger*, the court only approved the transfer of an employee upon evidence of real and substantial adverse consequences resulting from the employee's continued presence on the job.

While the Supreme Court's latest pronouncement is controlling where inconsistent with *Egger*, litigants in this circuit can, nevertheless, expect some adherence by the Seventh Circuit to the general approach so carefully worked out in *Egger* in cases arising on the same issue.

2. *Due Process and Public Employees*.—Numerous cases have been decided this past year in the federal and state courts concerning the procedural due process rights of public employees subjected to disciplinary action. In deciding these cases, a court is required first to determine whether or not an employee has a constitutionally recognized property or liberty interest at stake.¹²⁴ It next must decide whether or not the employee has been deprived of that right without due process. In this inquiry, the court must delve into the procedures followed by the public employer and their adequacy under due process standards. State and federal cases arising in Indiana have addressed all of these issues.

a. *Right to confront accusers*.—In *Green v. Board of School Commissioners*,¹²⁵ the Seventh Circuit held that procedures adopted by a school board were adequate to satisfy the due process rights of a school bus driver whose employment was terminated for making sexual advances to female school children riding his bus. Before his termination, the school board sent him notice of the charges against him and afforded him a hearing to contest the charges. At the hearing, however, the children who accused him of misconduct were not present and, as a result, Green was unable to challenge their credibility. Green claimed that for this reason he was deprived of his due process right to a fair hearing.

The court found the hearing adequate under the circumstances, despite the absence of the key witnesses. The school board supplied Green with unsigned copies of the children's handwritten statements, which had been provided in individual interviews with a police investigator retained by the school board. Further, these statements were signed by each child's parent, who reviewed it in the presence of the child and the investigator. In view of the school board's legitimate interest in protecting the children from exposure in an open hearing, the court concluded that the procedure met the requirements of due process.

¹²⁴*Board of Regents v. Roth*, 408 U.S. 564 (1972).

¹²⁵716 F.2d 1191 (7th Cir. 1983).

While the court decided the case on the question of the adequacy of the procedures afforded, it questioned whether or not any property or liberty interest was involved so as to trigger the due process requirements. Green claimed a property right based on his contract of employment with the school board. The court questioned whether or not an employment contract would in all cases be a property right justifying full procedural protection,¹²⁶ further, whether or not a liberty interest had been established. Although recognizing that an individual has a liberty interest in "associating with members of his community and in being employed,"¹²⁷ which can be infringed by "stigmatizing" publicity,¹²⁸ the court did not believe that these interests were implicated here because the school board did not make public its reasons for terminating Green's contract. The court, however, did not rule on these issues, which present more substantial legal questions, because it found the procedures afforded Green unquestionably adequate.

b. Deprivation of liberty or property in employment transfer.—In *Lawson v. Sheriff of Tippecanoe County*,¹²⁹ the plaintiff claimed a deprivation of liberty based on her discharge for publicly disclosed charges of dishonesty. The plaintiff was a radio dispatcher for the county sheriff's department. When her husband was arrested for alleged participation in an auto theft ring, Lawson was discharged from her job. The sheriff made statements to the press that she was discharged because she had access through her job to automobile registration information with which she might have tampered.

Lawson, as an "at-will" employee, had no property interest in her particular job.¹³⁰ However, the court recognized a possible infringement of her liberty interest in her ability to follow a chosen "trade, profession, or other calling."¹³¹ The court defined the constitutional significance of this interest:

[W]hen a state fires an employee for stated reasons likely to make him all but unemployable in the future, by marking him as one who lost his job because of dishonesty or other job-related moral turpitude, the consequences are so nearly those of

¹²⁶In *Vail v. Board of Education*, 706 F.2d 1435 (7th Cir. 1983), *aff'd*, 104 S. Ct. 2144 (1984), the court held that a teacher's contract with the school board created a property right through "legitimate expectations of continued employment" and that the teacher was therefore entitled to a pretermination hearing. *Id.* at 1440. The Supreme Court granted certiorari and affirmed the decision without opinion by an equally divided Court, with Justice Marshall not participating. 104 S. Ct. 2144 (1984).

¹²⁷716 F.2d at 1192 (citation omitted).

¹²⁸*See Board of Regents v. Roth*, 408 U.S. 564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, (1971); *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976).

¹²⁹725 F.2d 1136 (7th Cir. 1984).

¹³⁰*Id.* at 1138.

¹³¹*Id.*

formally excluding him from his occupation that the law treats the state's action the same way, and insists that due process be provided.¹³²

The district court had granted summary judgment on the ground that no liberty interest was violated in this case because the plaintiff had not been fired, but, according to the sheriff's affidavit, was offered a different job with the department within a few days of her discharge as a radio dispatcher.¹³³

The Seventh Circuit agreed with the district court that the determinative inquiry in this case was whether or not Lawson had been fired. If fired, her discharge together with the public accusations of dishonesty gave rise to a protected liberty interest. If she was not fired, the public statements by themselves did not give rise to a liberty interest requiring due process protection.¹³⁴ The appeals court, however, disagreed with the district court's conclusion that the offer of another job necessarily meant that she had not been discharged. In the court's view, only the offer of a job commensurate with her previous work would preclude the loss of her liberty interest:

In our view an employer cannot avoid liability by offering the employee a job far beneath the one he had. To be demoted from a responsible and well-paid job to a menial and low-paying one is to be as effectively excluded from one's trade or calling as by being thrown out on the street.¹³⁵

Because the sole affidavit before the district court did not identify the nature of the job offered to Lawson, the court reversed the district court's grant of summary judgment and remanded the case for further factual inquiry.

c. Time for holding a hearing.—The districts of the Indiana Court of Appeals conflict as to whether or not a full disciplinary hearing must be held prior to a public employee's dismissal. In *Hunt v. Shettle*, the Indiana Court of Appeals for the Third District considered the adequacy of disciplinary procedures afforded a state police officer.¹³⁶ Sergeant Danny Hixenbaugh was charged with giving a false statement to a fellow officer. After notice of the charge, Hixenbaugh appeared before State Police Superintendent Shettle where he was questioned about the relevant events and given an opportunity to explain his conduct.¹³⁷ Shettle found

¹³²*Id.* at 1139.

¹³³537 F. Supp. 918, 922 (1982), *rev'd*, 725 F.2d 1136 (7th Cir. 1984).

¹³⁴The court observed that to hold otherwise would swallow up the common law concepts of defamation within the federal constitutional scheme. 725 F.2d at 1138.

¹³⁵*Id.* at 1139.

¹³⁶452 N.E.2d 1045 (Ind. Ct. App. 1983).

¹³⁷IND. CODE § 10-1-1-6 (1982) establishes the procedure for disciplinary actions against state police officers. This procedure gives the officer the right to answer the charges

Hixenbaugh guilty of the charges and ordered him demoted from sergeant to trooper. Hixenbaugh requested review of the Superintendent's decision by the State Police Board. The Board's review procedure includes a full evidentiary hearing with an opportunity to confront witnesses and a right to counsel. However, in Hixenbaugh's case, in spite of his timely request for review, the Board's hearing was not held until more than fourteen months after his demotion.¹³⁸

The court of appeals held that the fourteen month delay in affording the plaintiff a full evidentiary hearing on his demotion violated his constitutional right to procedural due process. The court recognized that a state statute providing for demotion of state police officers "for cause" created a property interest entitled to due process protection.¹³⁹ In the court's view, due process requires the state to conduct a full hearing in connection with the demotion.¹⁴⁰ However, the court stated that, while some form of hearing is ordinarily required prior to deprivation of a property interest, the full hearing need not in all circumstances precede the demotion.¹⁴¹

Hixenbaugh's "appearance" before Shettle prior to his demotion did not satisfy due process requirements. His subsequent hearing before the State Police Board was procedurally adequate, but because it was delayed for fourteen months after the demotion, it did not meet the constitutional standards for due process. As the court found, for a post deprivation hearing to be adequate it must be held within a reasonable time after the deprivation by summary proceedings. A fourteen month delay, in the court's view, was not reasonable.¹⁴²

against him at a personal appearance before the Superintendent held within five days after the charges have been delivered. The officer may have the determination reviewed through an evidentiary hearing before the State Police Board, at which hearing he may be represented by an attorney. The statute also provides for judicial review of the decision of the State Police Board.

¹³⁸452 N.E.2d at 1051.

¹³⁹*Id.* at 1050. *Accord* Natural Resources Comm'n v. Sullivan, 428 N.E.2d 92 (Ind. Ct. App. 1981). IND. CODE § 10-1-1-6 (1982) provides in relevant part: "The superintendent may discharge, *demote* or temporarily suspend any employee of the department, *for cause*, after preferring charges in writing." (emphasis added).

¹⁴⁰The court stated: "A hearing is a proceeding of relative formality held in order to determine issues of fact or law in which evidence is presented and witnesses are heard. The party responding to the charges made by the agency must be given an opportunity to rebut evidence and cross-examine witnesses." 452 N.E.2d at 1050. (citation omitted).

¹⁴¹The court relied on *Parratt v. Taylor*, 451 U.S. 527 (1981), where the Supreme Court held that a state tort action was adequate post deprivation due process for a prisoner who claimed that his personal property had been negligently destroyed by prison officials. *See also* Natural Resources Comm'n v. Sullivan, 428 N.E.2d 92 (Ind. Ct. App. 1981) (The Fourth District of the Indiana Court of Appeals held that a post deprivation full evidentiary hearing can cure the failure to provide a public employee an opportunity to rebut charges prior to his demotion.).

¹⁴²*Compare* Natural Resources Comm'n v. Sullivan, 428 N.E.2d 92 (Ind. Ct. App. 1981) (The court found due process satisfied by an evidentiary hearing held a year after a demotion, even though the predemotion procedures were concededly inadequate. The

In *City of Terre Haute v. Brighton*,¹⁴³ however, the Indiana Court of Appeals for the Fourth District held that similar provisions in the policemen and firemen's tenure act required notice and a full hearing *before* the city could demote three firemen protected by the "just cause" provisions of the Indiana Act.¹⁴⁴ According to the court, the Indiana statute created a property interest in retention of rank, and the nature and extent of the property interest is defined by the state statute. On this basis, the court concluded that the failure to provide a hearing *prior* to the demotion of the three firemen violated procedural due process. Relying on the procedural requirements of the statute, the court did not consider whether or not the constitution might permit the lesser protection of a post deprivation hearing.¹⁴⁵

d. Adequate notice that conduct is subject to disciplinary action.— In *Korf v. Ball State University*,¹⁴⁶ the Seventh Circuit considered the termination of a tenured university professor, whose discharge was challenged on the grounds of substantive due process. Dr. Korf was discharged on a finding by a faculty review committee that he engaged in unethical conduct by soliciting and maintaining homosexual relations with his students. The conduct was found to violate provisions of the American Association of University Professors (AAUP) Statement of Professional Ethics, adopted by the university and included in the faculty handbook. The AAUP Guidelines provide in relevant part:

As a teacher, the professor encourages the free pursuit of learning in his students. . . . He demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor. . . . He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them.¹⁴⁷

delay, according to the court, was unexplained, but the court did not discuss the possible effect of the delay on the due process analysis.).

¹⁴³450 N.E.2d 1039 (Ind. Ct. App. 1983).

¹⁴⁴IND. CODE § 18-1-11-3 (repealed 1982) provided in relevant part:

Every member of the fire . . . forces . . . shall hold office *or grade* until they are removed by [the Board of Public Works and Safety]. They may be removed for any *cause* other than politics, after written notice . . . notifying him or her of the time and place of hearing, and after an opportunity for a hearing is given. . . . On . . . a decision of the board that any member has been or is guilty of neglect of duty . . . such commissioners shall have power to punish the offending party by . . . reducing him or her to a lower grade and pay.

IND. CODE § 18-1-11-3 (repealed 1982)(emphasis added)(similar version at IND. CODE § 36-8-3-4 (Supp. 1984)).

¹⁴⁵From its earlier decision in *Natural Resources Comm'n v. Sullivan*, 428 N.E.2d 92 (Ind. Ct. App. 1981), it appears that the adequacy of due process post deprivation remedies depends, in the eyes of this court, upon the procedures established by the governing state law. See *supra* note 142.

¹⁴⁶726 F.2d 1222 (7th Cir. 1984).

¹⁴⁷726 F.2d at 1224 n.2 (quoting *Ball State University, Faculty Handbook*, at II-7 (court's emphasis deleted)).

Dr. Korf asserted, and it was not disputed, that this language had never been applied to private consensual sexual activity between a teacher and student, nor had any professor ever been discharged at Ball State because of sexual activity.¹⁴⁸

Korf's substantive due process claim was based generally on alleged arbitrariness in the enforcement of the faculty code with respect to his termination. More specifically, Korf asserted that the absence of any language in the ethical guidelines relating to sexual conduct and the lack of any previous enforcement of the guidelines against sexual activity rendered the sudden enforcement against him unconstitutional. According to Korf, the lack of clear guidelines and prior enforcement precluded him from receiving adequate notice that his conduct could subject him to termination.

The court, however, disagreed fundamentally with Korf's characterization of his own conduct. Relying on its own reading of the administrative record, the court noted that Korf's sexual advances were often unwelcome and annoying to students, and that Korf offered money and favors to students with whom he was sexually involved. In the court's view, this conduct went beyond the bounds of "private consensual sexual activity" and was so patently unethical by its nature that "he should have understood both the standards to which he was being held and the consequences of his conduct."¹⁴⁹ Because the court further concluded that the university's conduct with respect to Korf's discharge was "reasonable and rationally related to the duty of the University to provide a proper academic environment,"¹⁵⁰ the court found no violation of the plaintiff's substantive due process rights as a matter of law and affirmed the district court's grant of summary judgment in favor of the defendant university.

¹⁴⁸Korf asserted that his discharge violated the equal protection clause as well as substantive due process. The court rather summarily rejected this claim. While Korf asserted in his affidavit that many Ball State professors maintained private consensual heterosexual and homosexual relationships with students and were not subject to discipline for this activity, the court concluded that this general allegation did not create a factual issue because Korf was discharged for exploitation of students for private purposes, not for private sexual activity. In the court's view, Korf failed to establish any class based discrimination subject to protection under the equal protection clause. 726 F.2d at 1229.

¹⁴⁹*Id.* at 1228.

¹⁵⁰*Id.* at 1229.