State and Federal Constitutional Law Developments Affecting Indiana Law

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INTRODUCTION

As the United States Supreme Court continues to narrow the scope of the federal constitution, there has been a movement across the country to explore state constitutions as a largely untapped source for the protection of individual liberty.[1] Indiana has been no exception, and in fact, Chief Justice Shepard has admonished Indiana practitioners over the past few years to re-examine the Indiana Constitution.[2] Because there has been some significant movement in this direction, Part I of this Article explores recent developments under the Indiana Constitution. Part II focuses on state and federal court cases which raise significant federal constitutional issues implicating Indiana law and Indiana litigants.

I. RECENT DEVELOPMENTS UNDER THE INDIANA CONSTITUTION

Most of the litigation under the Indiana Constitution during the survey period involved the rights of criminal defendants. Many courts cited the Indiana Constitution as a supplemental ground for their rulings,[3] but in a growing number of cases, the Indiana Constitution was held to provide a separate and independent source of rights.

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1. *See, e.g.*, Daniel R. Gordon, *Progressive Retreat: Falling Back from the Federal Constitution to State Constitution*, 23 ARIZ. ST. L.J. 801 (1991).

2. Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499, 504-07 (1991); Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

3. Waters v. State, 574 N.E.2d 911 (Ind. 1991) (the right to counsel in post-conviction proceedings is not guaranteed by either the Indiana or the U.S. Constitutions); Humphries v. State, 568 N.E.2d 1033 (Ind. Ct. App. 1991) (state and federal constitutions guarantee persons who are detained for investigatory stop the right to question and argue with the police); Gould v. State, 578 N.E.2d 382 (Ind. Ct. App. 1991) (there is no requirement of a public trial during a hearing on a post-conviction remedy under either the U.S. or the state constitutions); Scrougham v. State, 564 N.E.2d 542 (Ind. Ct. App. 1991) (the double jeopardy guarantee under the Indiana Constitution is identical to that under the U.S. Constitution); Hastings v. State, 560 N.E.2d 664 (Ind. Ct. App. 1990) (Indiana and federal law require that defendant knowingly and intelligently waive his right not to incriminate himself).

In *Brady v. State*,[4] the Supreme Court of Indiana relied upon the Indiana Constitution to invalidate a state statute which allowed children to testify via videotape in a molestation case.[5] The court reasoned that although this method did not violate the federal Constitution, Indiana's constitutional guarantee in article I, section 13[6] of face-to-face confrontation was more specific and thus more protective than the federal guarantee.[7] In two cases, Indiana appellate courts interpreted article I, section 13 to guarantee the defendant a right to be present during all proceedings. In *Harrison v. State*,[8] the court held that a communication between the judge and the jury regarding instructions that took place without notice to the defendant violated this section and that a violation creates a presumption of harm.[9] Similarly, in *Brownlee v. State*,[10] the court held that the trial court committed reversible error by failing to disclose to the defendant the fact that the jury requested replay of recorded alibi testimony.[11] Another portion of this section guarantees that the trial take place in the county in which the offense was committed.[12]

Other cases invoked the Indiana constitutional guarantee prohibiting excessive bail or fines[13] and the requirement that the penal code shall be founded on "principles of reformation, and not of vindictive justice."[14] As to the former, Indiana courts have recognized that although penal sanctions are primarily legislative considerations, a criminal defendant

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4. 575 N.E.2d 981 (Ind. 1991).

5. *Id.* at 988.

6. Article I, § 13 provides in pertinent part: "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof . . . ."

7. Article 1, § 13 provides in pertinent part: "In all criminal prosecutions, the accused shall have the right . . . to meet witnesses face to face . . . ." *Cf.* Hart v. State, 578 N.E.2d 336 (Ind. 1991), which held that the right to meet witnesses face-to-face is in the nature of a privilege which may be waived by a defendant who fails to raise the state constitutional claim at trial. Although such failure may be overlooked by the appellate court when the error is deemed fundamental, the court reasoned that failure to comply with the face-to-face requirement by allowing videotaped testimony of a child molestation victim outside of the physical presence of the defendant did not substantially impair his opportunity for the ascertainment of truth, and thus, failure to assert the right at trial precluded the claim of reversible error. *Id.* at 338.

8. 575 N.E.2d 642 (Ind. Ct. App. 1991).

9. *Id.* at 649.

10. 555 N.E.2d 505 (Ind. Ct. App. 1990).

11. *Id.* at 507.

12. *See* Kuchel v. State, 570 N.E.2d 910 (Ind. 1991).

13. IND. CONST. art. I, § 16.

14. *Id.* § 18.

has a right to have the proportionality of his penalty reviewed under the Indiana Constitution because it is possible that application of an otherwise constitutional statute may be invalid as applied in a particular instance. In *Clark v. State*,[15] the Supreme Court of Indiana explained that section 16 is violated when a prison term is deemed "so severe and so entirely out of proportion to the gravity of the offenses actually committed as 'to shock public sentiment and violate the judgment of a reasonable people.'"[16] In that case the court found that the enhancement of a sentence to thirty-five years under the habitual felony offender law, which was triggered by a conviction for conduct that the legislature classified as a misdemeanor, was entirely out of proportion to the gravity of the offense.[17] Similarly, in *Best v. State*,[18] the court held that although the defendant, convicted of driving while intoxicated and while his driving privileges were suspended, had a history of prior, more serious convictions, "[g]iven the modest nature of the present offense . . . it was manifestly unreasonable to add twenty years" — the Indiana Constitution would allow at most a ten year enhancement.[19] Finally, in *May v. State*,[20] the court ruled that a judge must evaluate the probation officer's sentencing report and not merely adopt a suggested sentence. This is necessary to insure that no vindictiveness, contrary to the constitutional guarantee prohibiting "vindictive justice," has occurred in sentencing.[21]

Outside the criminal law area, litigation under the Indiana Constitution has been rather sparse. In several cases, the Indiana Court of Appeals noted that parallel Indiana constitutional provisions should be interpreted in tandem with their federal constitutional counterparts.[22]

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15. 561 N.E.2d 759 (Ind. 1990).

16. *Id.* at 765.

17. *Id.* at 766. The defendant was convicted of operating a motor vehicle while intoxicated, which normally carries a one year term, and for driving with a suspended license.

18. 566 N.E.2d 1027 (Ind. 1991).

19. *Id.* at 1032. *Cf.* Nettles v. State, 565 N.E.2d 1064 (Ind. 1991) (imposition of two 60-year sentences to be served consecutively was proportional in light of the mutilation murder of a five-year-old and her mother); Wolfe v. State, 562 N.E.2d 414 (Ind. 1990) (281-year sentence was not excessive under either U.S. or Indiana Constitutions).

20. 578 N.E.2d 716 (Ind. Ct. App. 1991).

21. *Id.* at 724.

22. *See, e.g.*, Fordyce v. State, 569 N.E.2d 357 (Ind. Ct. App. 1991) (obscenity is no more protected speech under article I, § 9 of the Indiana Constitution than it is under the U.S. Constitution); Vanderburgh County Bd. of Comm'rs v. Rittenhouse, 575 N.E.2d 663 (Ind. Ct. App. 1991) (article I, § 21's guarantee of a right to just compensation triggers the same deferential approach as under the federal constitution;

In a few cases, however, Indiana courts have pointed to the state constitution as providing an independent source of rights. Thus, in *Center Township v. Coe*,[23] the court invoked article I, section 4, which provides that "no person shall be compelled to attend . . . any place of worship . . . against his consent,"[24] and section 6, which prohibits the expenditure of state dollars "for the benefit of any religious or theological institution," to invalidate a township trustee's practice of providing emergency shelter for the homeless through the use of religious missions.[25] Although suggesting that the use of shelters owned and operated by religious institutions is not per se invalid, the court noted that attendance at religious services was made a condition of receiving given shelter, and thus, violated both federal and state constitutions.[26]

In another case, *In re Lawrance*,[27] the Supreme Court of Indiana addressed whether Indiana law permits family members of an incompetent patient in a persistent vegetative state to authorize withdrawal of artificial nutrition and hydration without first seeking court authority to do so. In exploring Indiana's common law on this issue, the court invoked article I, section 1 of the Indiana Constitution which guarantees "inalienable rights" including "life, liberty, and the pursuit of happiness."[28] Citing the 1850 constitutional debates, the court noted the drafters' belief that liberty includes "the opportunity to manage one's own life except in those areas yielded up to the body politic."[29] Although this section was cited merely to buttress its interpretation of Indiana's Health Care Consent Act to operate without court intervention when

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thus, plaintiffs must rebut a presumption of constitutionality and all reasonable use of property must be denied in order to find a taking); Metro Holding Co. v. Mitchell, 571 N.E.2d 580 (Ind. Ct. App. 1991) (neither the contract clause of the state or federal constitution is violated by reduction, from two years to one year, of the period of redemption after a tax sale because the period of redemption did not create a contract between the taxpayer and the state).

23. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

24. *Id.* at 1353.

25. *Id.* at 1360.

26. *Id.* The court observed that the trustee made no effort "to separate the missions' sectarian purpose from the statutory benefit," and thus the article I, § 6 prohibition against payment of public funds to religious missions to be used for religious purposes was violated. *Id.*

27. 579 N.E.2d 32 (Ind. 1991).

28. *Id.* at 36. Article I, § 1 provides in pertinent part: "That all people are created equal; that they are endowed by their *CREATOR* with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being." IND. CONST. art. I, § 1.

29. *Lawrance*, 579 N.E.2d at 39.

none of the interested parties disagree, the supreme court's invocation and analysis of article I, section 1 suggests that this provision may be used in the future to protect the right to die or, more broadly, a right of privacy.[30]

In at least two recent cases, the Indiana Constitution provided the focal point in the court's analysis. In *Kellogg v. City of Gary*,[31] the Supreme Court of Indiana held that article I, section 32 creates a guaranteed right on behalf of Indiana citizens to bear arms for their own self-defense and for the defense of the state.[32] This finding was critical in establishing a property and a liberty interest triggering the Fourteenth Amendment due process protection of the federal Constitution.[33] The court held that although the right to bear arms is subject to regulation, and in fact, the Indiana Firearms Act imposes limitations on the substantive right to carry weapons, there is nonetheless a state-created right to carry a handgun provided the requirements of state law are met.[34] Thus, a mayor's decision to suspend all future handgun applications deprived Indiana citizens of a "federally protected, state created, substantive right to carry a handgun with a license."[35]

In its most extensive constitutional analysis, the Supreme Court of Indiana, in *Bayh v. Sonnenburg*,[36] explored the meaning of article I, section 21, which guarantees that "[n]o person's particular services shall be demanded, without just compensation."[37] A group of former mental patients sought compensation under this provision for work performed while they were committed to state mental hospitals. Plaintiffs were required to work full-time jobs as kitchen workers, grounds keepers, barbers, maintenance workers, secretaries, launderers, mechanics, hospital workers, and janitors. Although the Indiana Court of Appeals disallowed prejudgment interest, which cut the trial court's

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30. Note that the lower court judge specifically ruled that "the liberty interest of the individual, as set forth in Article I, Sec. 1 of the Indiana Constitution, does include the right of Sue Ann Lawrance to be free from unwanted medical treatment and that said Article further requires the State to give effect to the decision of Sue Ann's surrogate decisionmakers." *Id.* at 36.

31. 562 N.E.2d 685 (Ind. 1990).

32. *Id.* at 694. Article I, § 32 provides, "The people shall have a right to bear arms, for the defense of themselves and the State." IND. CONST. art. I, § 32.

33. The court reasoned that "the framers of the Indiana Constitution gave the citizens of this state the 'extra' liberty or property interest in bearing arms for their own self defense and for the defense of their state which the Due Process Clause of the Fourteenth Amendment will protect." *Kellogg*, 562 N.E.2d at 695.

34. *Id.* at 695-98.

35. *Id.* at 702.

36. 573 N.E.2d 398 (Ind. 1991), *cert. denied*, 60 U.S.L.W. 3481 (U.S. Feb. 24, 1992).

37. IND. CONST. art. I, § 21.

judgment in half to about $14 million, it found that the plaintiffs were entitled to just compensation under article I, section 21.[38] The Indiana Supreme Court reversed this judgment, finding that: (1) the term "particular services" could not be applied to labor performed by mental patients because section 21 was not intended to invalidate historical practices such as the use of patient labor without paying wages and because patient work was "general" and not "particular" services;[39] (2) the work requirement was reasonably related to the patients' hospitalization;[40] and (3) even if a taking could be found, just compensation was received by the patients in the form of benefits, such as food, shelter, and care, which exceeded the value of the services demanded.[41]

In reaching its holding, the court noted that its task in interpreting the Indiana Constitution was to "search for the common understanding of both those who framed it and those who ratified it."[42] The court cited an 1871 decision of its predecessors, admonishing courts to "look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted."[43] Applying this historical approach, the court reasoned that in choosing the phrase "particular services" the delegates to the 1850-1851 Indiana constitutional convention did not intend "to create new rights to compensation for services provided to the State that had gone historically uncompensated."[44] Although noting that unconstitutional acts do not become constitutional through age or repetition, the specific history suggesting that the framers intended to preserve the "particular services" clause from the earlier constitution as a reaffirmation of historical practice, disallowed payment in this context.[45] The court's emphasis on history suggests the significance of re-examining the report of the debates and proceedings of the 1850 convention as a means of rejuvenating and providing substance to Indiana's Bill of Rights.[46]

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38. *Sonnenberg*, 573 N.E.2d at 401.
39. *Id.* at 412-16.
40. *Id.* at 416-17.
41. *Id.* at 418-21.
42. *Id.* at 412.
43. *Id.* (citing State v. Gibson, 36 Ind. 389, 391 (1871)).
44. *Id.* at 413. *Compare* Justice Dickson's dissenting opinion citing to an 1854 decision requiring compensation to be paid to attorneys assigned by courts to represent poor persons as evidence that § 21 did create a right to compensation for services even if such services had gone "historically uncompensated." *Id.* at 425 (Dickson, J., dissenting). Justice Dickson also rejects the majority's focus on extrinsic benefits received by the patients, relying on case precedent to suggest that absent a legislative determination, "extrinsic benefits are not a necessary constitutional component of 'just compensation.'" *Id.* at 426.
45. *Id.* at 415.
46. *See* DEBATES IN INDIANA CONVENTION (1850).

II. Recent Developments Under the Federal Constitution

A. Freedom of Expression: Nude Dancers, Attorneys, and Government Employees

In *Barnes v. Glen Theatre, Inc.*,[47] the United States Supreme Court held that Indiana's public indecency statute[48] could be constitutionally applied to prohibit non-obscene nude dancing.[49] The Seventh Circuit, in a seven to four en banc ruling, held that (1) non-obscene nude dancing performed as entertainment is expression and thus entitled to First Amendment protection[50] and (2) that Indiana's public indecency statute, which provides for a total ban on nudity in public places, is unconstitutional as applied to prohibit such dancing.[51] Although eight members of the Court agreed with the Seventh Circuit's first decision, the Justices in a five to four ruling overturned the second holding.[52]

As to the first ruling, eight Justices agreed that nude dancing is entitled to First Amendment protection. Even the conservative members of the Court conceded that nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."[53] Only Justice Scalia rejected First Amendment coverage. He found that because Indiana's public nudity statute is a general law regulating conduct, and is not specifically directed at expression, it is not subject to First Amendment scrutiny.[54] He stated

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47. 111 S. Ct. 2456 (1991).

48. Ind. Code § 35-45-4-1(a)(3) (1988) makes public indecency, including appearing nude in public, a crime. Nudity is defined in the statute as:

> the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernible turgid state.

Id. § 35-45-4-1(b).

The Supreme Court of Indiana, in State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), *cert. denied sub nom.* Clark v. Indiana, 446 U.S. 931 (1980), interpreted the statute to apply to nude entertainment in theaters, nightclubs, and other establishments open to the public, although it carved out an exception for performances having an expressive character.

49. *Barnes*, 111 S. Ct. at 2463.

50. Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990), *rev'd on other grounds sub nom.* Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991).

51. *Id.* at 1089.

52. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

53. *Id.* at 2460.

54. *Id.* at 2465 (Scalia, J., concurring). This was the position urged by Judge Easterbrook below. *Miller*, 904 F.2d at 1121-22 ("a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause").

that the First Amendment does not protect expressive conduct, and thus, the government need not show an important interest to preclude such conduct. He reasoned that it is only when the government prohibits conduct because of its communicative attributes — when the target of the statute is to suppress the idea being communicated — that First Amendment concerns become relevant.[55]

By accepting the communicative value of nude dancing, the Court was forced to determine whether the Indiana statute was an impermissible infringement of that protected activity. Here, although five Justices sustained application of the Indiana nudity law, it took three diverse opinions to reach a consensus. As stated earlier, Justice Scalia withheld First Amendment protection entirely from nude dancing.[56] Three other members of the Court, in an opinion authored by Chief Justice Rehnquist, held that government interference with nude dancing would have to meet heightened scrutiny.[57] Applying the standard set forth in *United States v. O'Brien*,[58] which is used to assess the government's power to limit expressive conduct, they concluded that the moral disapproval of the people of Indiana was a sufficiently important government interest to sustain the indecency ban found in Indiana statutes since 1831.[59] The plurality reasoned that this interest was unrelated to the suppression of free expression because it barred nudity whether or not accompanied by expressive activity.[60] When Indiana applied its statute to nude dancing in nightclubs and theaters, it was not proscribing nudity because of the erotic message conveyed by the dancers, nor was it suppressing the message by requiring that dancers wear pasties and G-strings — "it simply makes the message slightly

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55. *Barnes*, 111 S. Ct. at 2466-67. Justice Scalia analogized to the Court's approach with regard to the free exercise clause in which it was held that general laws not specifically targeted at religious practices do not require heightened First Amendment scrutiny even though such laws "diminished some people's ability to practice their religion." *Id.* at 2467. Note that the same analysis was applied this term by Justice White in Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991), which held that the First Amendment does not prohibit a source from recovering damages under promissory estoppel law for a publisher's breach of a promise of confidentiality given in exchange for information. Because this was only a law of general application, it did not offend the First Amendment nor trigger strict review simply because its enforcement against the press had incidental effects on the ability to gather and report the news.

56. *Cohen*, 111 S. Ct. at 2463-71.

57. *Id.* at 2458-63.

58. 391 U.S. 367 (1968). *See also* Webb v. State, 575 N.E.2d 1066 (Ind. Ct. App. 1991) (state prostitution law proscribing autoerotic deviate sexual conduct engaged in for money is justified under *O'Brien* analysis despite regulation's incidental limitation on the expressive part of the activity).

59. Barnes v. Glen Theatre, Inc., 111 S. Ct. at 2456 (1991).

60. *Id.* at 2463.

less graphic."[61] In short, the perceived evil that Indiana sought to address was not erotic dancing, but merely public nudity.

The most controversial aspect of the plurality's reasoning is its conclusion that Indiana's concerns are unrelated to speech.[62] Arguably, it is the communicative impact of nude dancing, the "anti-moral message" being conveyed, that is the real object of the law. Justice Souter, concurring only in the judgment, tried to avoid this problem by stating that Indiana's primary concern was not in banning the message, but in seeking merely to halt the secondary effects of nude dancing — namely, increased prostitution and other criminal sexual activity.[63] Conceding that such concerns were not voiced by the Indiana Legislature, Justice Souter concluded nonetheless that such interests could be assumed and are sufficient under *O'Brien* to justify enforcement of the nudity law in this context.[64] Because the state interest is triggered by the nudity and not the expressive component of the dance, Justice Souter found that the state had met its burden of articulating an interest unrelated to the suppression of free expression.[65] He disagreed, however, that "preserving morality" constitutes a sufficiently important state interest to justify the incidental effect on expression, choosing instead to focus on the "secondary effects" concerns of the state to meet the *O'Brien* test.[66]

Four dissenters found the state's bar to be a content-based restriction on speech, triggering strict scrutiny. Distinguishing the draft card destruction law in *O'Brien*, the dissent argued that the Indiana statute was not a general prohibition; rather, the key purpose of the proscription is "to protect viewers from what the State believes is a harmful message" communicated by nude dancing.[67] Because the emotional or erotic impact of dance is intensified by the nudity of the performers, the state is seeking to prohibit expression, and, even assuming that the state's interests are important, the law is not narrowly tailored.[68] If, as Justice Souter argued, the concern was with prostitution or other criminal acts, it could criminalize such acts. The state could prohibit nude dancing in barrooms pursuant to the Twenty-First Amendment, and it could require that performances occur at a certain minimum distance from spectators, that they be limited to certain hours, or that

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61. *Id.*
62. *Id.* at 2452.
63. *Id.* at 2469 (Souter, J., concurring).
64. *Id.* at 2470.
65. *Id.* at 2470-71.
66. *Id.* at 2468-69.
67. *Id.* at 2473 (White, J., dissenting).
68. *Id.* at 2474-75.

they occur in certain parts of the city. It is the flat ban that triggered the dissent's objection.[69]

The Supreme Court's holding and analysis in *Barnes* are not surprising. The four different positions adopted by the various Justices were all discussed by members of the en banc panel of the Seventh Circuit.[70] Although the current Court is not so bold as to deny the communicative element in expressive conduct such as nude dancing, in a series of cases it has employed the *O'Brien* analysis to sustain government regulation of expressive conduct by finding purported substantial government interests unrelated to the suppression of ideas that outweigh the expressive element of the activity. Without openly relegating sexually explicit material to a lower standard of review, as some Justices have suggested,[71] the Court has achieved the same result by justifying restrictions on this speech based on a generalized concern for public morality or "secondary effects" unsubstantiated in the record. The key point of dissention between the majority and dissenting Justices is on the question of the state's purpose for the regulation. If the purpose of applying Indiana's nudity statute to the plaintiff's expressive conduct was in reality to suppress the ideas being communicated, the regulation would have been subjected to strict scrutiny. Indiana would have been required to show a compelling interest and that the regulation was no more restrictive than necessary — a standard which the en banc panel believed the state failed to meet.[72] By focusing on the nudity law, rather than the expressive dancing, five Justices overcame this hurdle.

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69. *Id.* at 2475.

70. *See* Rosalie B. Levinson, *Nude Dancing and Political Speech as Protected Expression*, 24 IND. L. REV. 697, 698-705 (1991).

71. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 258 (1990) (Scalia, J., dissenting) (establishments that exhibit public nudity are engaged in the business of pandering and the Constitution should not foreclose a state or city from prohibiting businesses that "intentionally specializ[e] in . . . live human nudity"); FCC v. Pacifica Found., 438 U.S. 726, 743 (1978) (although FCC regulation prescribing broadcast of "indecent" material is overbroad because provision will affect only references to sexual activity, i.e., references that lie at the periphery of the First Amendment, the regulation should be sustained; the overbreadth doctrine should not be used to "preserve the vigor of patently offensive sexual and excretory speech"). *Cf. id.* at 761 (Powell, J., concurring) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."). Justice Brennan has similarly noted "the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content." *Id.* at 763 (Brennan, J., dissenting).

72. Miller v. Civil City of South Bend, 904 F.2d 1081, 1089 (7th Cir. 1992), *rev'd on other grounds sub nom.* Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991).

Perhaps the most far-reaching aspect of *Barnes* is Justice Rehnquist's holding that the state's interest in imposing its moral views on society justified the interference with expressive conduct. Justice Scalia points out that previous Supreme Court decisions relied on "concerns of decency and morality" to provide a rational basis for government regulation, but that these concerns had never been characterized as particularly "important or substantial."[73] Similarly, Justice Souter obviously felt uncomfortable resting his concurrence on the state's generalized interest in promoting morality and instead chose to rely upon "the State's substantial interest in combating the secondary effects of adult entertainment establishments."[74] Because the "morality" argument was espoused by only three Justices, its precedential value remains unclear. What is clear is that a growing body of the Court stands ready to sustain greater governmental regulation on expressive conduct, especially when such conduct does not implicate core political speech.

In two cases decided last term, the Supreme Court dealt with government regulation and punishment of "pure speech." In both, the Supreme Court sustained the government restrictions by focusing on the special status of the speaker. In *Gentile v. State Bar of Nevada*,[75] the Court applied the accepted principle that lawyers have less protection than the general public or the media in commenting publicly on their own pending cases. Whereas a contempt citation for obstructing justice can be leveled against the press only upon a showing of a clear and present danger that fair trial rights might be jeopardized, the Court upheld the validity of Nevada Supreme Court Rule 177 which bars attorneys' statements to the press that have "a substantial likelihood of materially prejudicing an adjudicative proceeding."[76] The Nevada rule tracks ABA Model Rule of Professional Conduct 3.6 which is in effect in thirty-one other states, including Indiana.[77] The majority found that the lesser "substantial likelihood," rather than the more stringent "clear and present danger of actual prejudice" standard, is appropriately applied to lawyers who have long been subject to regulation as "key participants in the criminal justice system."[78]

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73. Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456, 2467 (1991) (Scalia, J., concurring).

74. *Id.* at 2468-69 (Souter, J., concurring).

75. 111 S. Ct. 2720 (1991).

76. *Id.* at 2723. The rule prohibits an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if a lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.*

77. IND. RULES OF PROFESSIONAL CONDUCT § 3.6 (1987).

78. *Gentile*, 111 S. Ct. at 2744.

In addition to the lengthy history of control over attorneys' speech, the Court noted the unique threat that lawyers' comments pose to the fairness of a pending proceeding because of their special access to information through discovery and client communications.[79] Although recognizing that the claim involved "pure speech in the political forum" which lies at the core of First Amendment doctrine, because the speech rights of attorneys collide with the fundamental right to a fair trial by impartial jurors, the state struck the appropriate balance. The majority held that the restraint on speech was narrowly tailored, being limited to speech that is "substantially likely to have a materially prejudicial effect, it [was] neutral as to points of views . . . and it merely postponed the attorney's comments until after trial."[80]

The holding in *Gentile* was not surprising, and in fact, even the dissenters found that there was nothing per se wrong with the substantial likelihood test because the drafters of the Model Rule apparently thought that the test approximated the clear and present danger standard.[81] The dissent's concern, however, was that the record failed to support the Court's finding that Gentile's speech created a substantial likelihood of materially prejudicing the proceedings because none of the comments included evidence which would have been inadmissible at trial and the attorney was merely trying to counteract some of the adverse publicity regarding his client.[82] In any event, a different majority of five Justices concluded that the Nevada Rule, as interpreted by its supreme court, was void for vagueness because it included a "safe harbor" provision allowing attorneys to "state without elaboration . . . the general nature of the . . . defense."[83] The rule failed to provide fair notice to attorneys as to what may be said at a press conference without fear of discipline and was so imprecise that it created a real possibility for discriminatory enforcement.[84]

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79. *Id.* at 2745.

80. *Id.*

81. *Id.* at 2725.

82. *Id.* at 2726-31 (Kennedy, J., dissenting). At a press conference six months before trial, the attorney charged that his client was being used as a "scapegoat" for a theft that had most likely been committed by a police officer. He also charged that the state witnesses were known drug dealers and convicted money launderers.

83. *Id.* at 2731. The rule listed a number of statements that could be made without fear of discipline.

84. *Id.* at 2731-32. The rule suggested that a lawyer describing the "general nature" of the defense without "elaboration" need not fear discipline even if he knows or reasonably should know that his statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Because the terms "general" and "elaboration" are vague, the lawyer is left with little guidance as to when his remarks pass from the permissible to the forbidden. *Id.*

Much more controversial was the Supreme Court decision limiting the speech rights of employees in federally funded clinics. In *Rust v. Sullivan*,[85] the Court sustained the validity of Title X regulations which prohibit projects from engaging in counseling, referrals, and other activities which advocate abortion as a method of family planning.[86] The regulations further require that there be strict physical and fiscal separation between the federally funded activities of the family planning clinics and their privately funded activities, so that in essence, abortion cannot be spoken of in a neutral or favorable light anywhere on the federally funded site.[87] The regulations require recipients to say, if asked, that abortion is not an approved method of birth control. In addressing the government "employee speech" question, the Court reasoned that physicians and staff who are voluntarily employed by a Title X project can be required to perform their duties in accordance with the regulations' restrictions on abortion counseling and referral because Congress is merely refusing to fund such activities out of the public fisc.[88]

The notion that government should have broad discretion in allocating funds, even if such discretionary allocation has an effect on the marketplace of ideas, clashes head-on with the competing constitutional theory that government cannot condition its largesse on relinquishing constitutional rights.[89] While recognizing the line of Supreme Court decisions which hold that the existence of a government "subsidy" does not justify all restrictions on speech, the Court nevertheless reasoned that in this context, the employees' freedom of expression was limited only during the time that the employees actually worked for the project and that this limitation was merely "a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."[90] This conclusion conflicts with earlier Supreme Court decisions protecting the speech of government employees regardless of whether such speech occurs on the

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85. 111 S. Ct. 1759 (1991).

86. *Id.* at 1776.

87. *Id.* at 1765-66. The regulation required recipients to say, if asked, that abortion is not an approved method of birth control.

88. *Id.* at 1775.

89. *Compare* Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983) (while there is a right to lobby, there is no right to a government subsidy for lobbying activities and thus government may, subject to only minimal rationality review, deny a subsidy to lobbying groups) *with* FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) (government cannot condition federal funds to public television stations on their relinquishing the right to editorialize).

90. Rust v. Sullivan, 111 S. Ct. 1759, 1775 (1991).

premises. For example, in *Rankin v. McPherson*,[91] the Supreme Court held that the employee's communication, which her employer sought to punish, was entitled to protection even though it occurred during business hours.[92] Although recognizing that government employee speech which creates material disruption in the workplace is unprotected, the Court subjected the government action to heightened scrutiny, rather than the rationality standard which the majority imposed in *Rust*.[93]

The use of a rationality standard in sustaining this restriction on speech is especially problematic because the restriction was both viewpoint discriminatory, and it involved speech regarding a fundamental right. The fact that the regulation allowed speech recommending childbirth while prohibiting the mention of abortion can hardly be characterized as a viewpoint neutral determination. Yet, the majority found that the regulations did not amount to viewpoint discrimination, but merely reflected the government's decision to selectively subsidize one activity, i.e., the activity of family planning and counseling, while refusing to subsidize other activities.[94] This characterization appears disingenuous at best. Moreover, the fact that the prohibition prevents physicians from giving patients information regarding their fundamental right to terminate a pregnancy is especially troublesome. Because the federal government in essence has a monopoly over the provision of medical services to the poor, the Court's ruling creates a "two-tier system of constitutional rights, one for the rich and one for the poor."[95]

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91. 483 U.S. 378 (1987).

92. *Id.* at 391.

93. *See id.* at 384. Although the "speech" was a rather inflammatory statement by a deputy constable following the attempted assassination of President Reagan, ("If they go for him again, I hope they get him"), the Court held that the remark "plainly dealt with a matter of public concern," and thus was protected absent evidence that it interfered "with the efficient functioning of the office." *But cf.* Campbell v. Porter County Bd. of Comm'rs, 565 N.E.2d 1164 (Ind. Ct. App. 1991) (because shift captains' grievance addressed internal administrative matters and not matters of public concern, their speech was not entitled to First Amendment protection); Phegley v. Indiana Dep't of Highways, 564 N.E.2d 291 (Ind. Ct. App. 1990) (where the record failed to disclose that plaintiff's conversation with party chairmen was "a matter of legitimate public concern about which free and open debate would be vital to informed decision-making by the electorate," the speech was entitled to little if any protection, and it did not gain protected status simply because the subject matter might be of general interest to the public). These cases follow the Supreme Court decision in Connick v. Myers, 461 U.S. 138 (1983), that only speech which is a matter of public concern triggers First Amendment protection.

94. *Rust*, 111 S. Ct. at 1772.

95. *See* 60 U.S.L.W. 2253 (Oct. 22, 1991) (Kathleen M. Sullivan, Comments at the Symposium of the U.S.L.W. Constitutional Law Conference). "Both the purpose and result of the challenged Regulations is to deny women the ability voluntarily to

Although on one level the decision may simply reflect the Supreme Court's growing hostility to the *Roe* decision, its fatuous discussion of viewpoint neutrality and its broad conferral of authority on government to regulate speech through the power of the purse strings portend potentially dire consequences for First Amendment jurisprudence.

In sharp contrast to the Court's failure to protect the free speech rights of those on the public payroll, the Supreme Court has been exceedingly protective of the free association rights of government employees. Last term in *Rutan v. Republican Party of Illinois*,[96] the Supreme Court held that the First Amendment protects not only employees who are dismissed based on political affiliation, but also those who are not hired or who lose a promotion, transfer, or other opportunity because of political affiliation.[97] Imposing a strict scrutiny standard, the Supreme Court held that there is no compelling government interest justifying any form of political patronage decisionmaking. The Supreme Court has clarified that the only exception to the patronage prohibition is when the employer is able to demonstrate that party affiliation is an appropriate requirement for the performance of the specific job in question.[98] In *Matlock v. Barnes*,[99] the Seventh Circuit held that the city of Gary failed to show how an investigator in the law department could constitutionally be terminated from his position due to his political affiliation.[100] The court reasoned that the investigator was not a policymaking or confidential employee because he had little authority, he did not supervise anyone, and he was supervised by other attorneys.[101] There was no area regarding his duties where political affiliation would affect job performance.[102]

Despite *Rutan*, the Seventh Circuit has refused to afford First Amendment protection to independent contractors who lose their gov-

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decide their procreative destiny. For these women, the Government will have obliterated the freedom to choose as surely as if it had banned abortions outright." Rust v. Sullivan, 111 S. Ct. 1759, 1785 (1991) (Blackmun, J., dissenting).

96. 110 S. Ct. 2729 (1990).

97. *Id.* at 2730.

98. Branti v. Finkel, 445 U.S. 507 (1980).

99. 932 F.2d 658 (7th Cir.), *cert. denied,* 112 S. Ct. 304 (1991).

100. *Id.* at 665.

101. *Id.*

102. *Id.* at 662-65. *See also* Upton v. Thompson, 930 F.2d 1209, 1217 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992) (noting that the Seventh Circuit has examined factors such as "'the specific position of power involved' the 'customary intimacy of association with the office' and the 'need for mutual trust and confidence'" in determining whether political affinity is an appropriate job requirement).

ernment contracts because of political affiliation. Prior to *Rutan*, the Seventh Circuit, as well as other appellate courts, ruled that the First Amendment does not protect independent contractors from adverse decisions based on partisan political reasons because the coerciveness associated with public employees carries diminished weight when an independent contractor simply loses one "customer" due to the patronage practice.[103] The argument is that an independent contractor normally would feel a lesser sense of dependency, and thus First Amendment rights are more attenuated and insufficient to justify tampering with political institutions.[104] To the extent that the Seventh Circuit's position on independent contractors relies on the argument that loss of one contract is not so significantly penalizing as to trigger constitutional protection, the Supreme Court's holding in *Rutan* would appear to require a critical re-evaluation. If loss of a transfer or promotion is considered a significant penalty triggering strict scrutiny, loss of a lucrative government contract should evoke the same analysis. This conclusion is buttressed by the earlier Supreme Court holding in *Lefkowitz v. Turley*,[105] invalidating a state statute which required public contractors to waive their Fifth Amendment immunity from self-incrimination in any proceeding relating to their government contract or face a five year ban on doing further business with the government.[106] The Court rejected the argument that there was "a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor."[107]

Unpersuaded by this case precedent, the Seventh Circuit in a recent decision reaffirmed its position that independent contractors are not shielded from patronage practices. In *Downtown AutoParks, Inc. v. City of Milwaukee*,[108] the court conceded that "the scope of *Rutan*, and rationale behind it, seem to be at odds with the [earlier] hold-

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103. Triad Assocs., Inc. v. Chicago Housing Auth., 892 F.2d 583 (7th Cir. 1989), *cert. denied,* 111 S. Ct. 129 (1990). *See also* Horn v. Kean, 796 F.2d 668, 673-75 (3d Cir. 1986) (permitting those who hold public office to employ independent contractors based on political party affiliation provides an effective method to implement the administration's program that outweighs the lesser burden imposed when it is a contractor rather than a state employee whose rights are at stake); Sweeney v. Bond, 669 F.2d 542, 545 (8th Cir.), *cert. denied,* 459 U.S. 878 (1982) (politically motivated dismissal of Missouri Department of Revenue fee agents, classified as independent contractors, does not violate the First Amendment).

104. *Horn*, 796 F.2d at 674-75.

105. 414 U.S. 70 (1973).

106. *Id.* at 83.

107. *Id.*

108. 938 F.2d 705 (7th Cir.), *cert. denied*, 112 S. Ct. 640 (1991).

ing[s].''[109] *Rutan* rejected the Seventh Circuit's concern that extending First Amendment protection beyond termination decisions would unnecessarily flood the federal courts with new patronage claims. Nevertheless, the appellate court decided to limit the Supreme Court case to its own facts, and therefore, it refused to extend First Amendment protection beyond the context of government employment.[110] Because *Rutan* was a five-four decision, authored by Justice Brennan, his absence from the Court, coupled with that of Justice Marshall, arguably signals the end of the expansionist approach to providing First Amendment protection from political patronage practices, and thus, the Seventh Circuit's position on independent contractors is likely to remain the law.[111]

B. Freedom of Religion

Proceeding on the premise that the proper position of government is to maintain a position of neutrality vis-a-vis religion, the Supreme Court has interpreted the Establishment Clause of the First Amendment to require that all government programs share three characteristics: (1) the program must have a secular purpose; (2) the primary effect must neither advance nor inhibit religion; and (3) the program cannot create excessive entanglement between church and state.[112] This three-pronged analysis has been referred to as the *Lemon* test. Most of the cases alleging an Establishment Clause violation involve either the grant of public aid to religious institutions or the injection of religion into the public sector through prayer or the display of religious symbols by the government. Both types of cases were brought by Indiana litigants this past term.

In *Center Township v. Coe*,[113] the Indiana Court of Appeals held that the township trustee could not utilize private religious mission shelters to provide emergency housing to the homeless because the religious entities required attendance at religious services as a condition of being given shelter.[114] As noted earlier, the Indiana Court of Appeals relied primarily on two sections of Indiana's Bill of Rights—article I,

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109. *Id.* at 709.

110. *Id.* at 710. The Seventh Circuit noted that the Sixth Circuit in a post-*Rutan* case similarly refused to prohibit the government from considering political criteria in awarding public contracts. *Id.* at 709 (citing to Lundblad v. Celeste, 874 F.2d 1097, 1102 (6th Cir. 1989), *cert. denied*, 111 S. Ct. 2889 (1991)).

111. Justice Scalia, dissenting in *Rutan*, indeed predicted that the unmanageable flood of litigation that inevitably would be triggered by the new decision would lead the Court "to reconsider [its] intrusion into this entire field." Rutan v. Republican Party of Ill., 110 S. Ct. 2729, 2758-59 (Scalia, J., dissenting).

112. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

113. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

114. *Id.* at 1360.

section 6, which prohibits the flow of tax dollars to religious institutions, and article I, section 4, which provides that no person shall be compelled to attend any place of worship against his consent.[115] The court thereby avoided discussion of the federal Establishment Clause. In reaching its conclusion, however, the court also relied upon the federal free exercise law which dictates that government cannot condition receipt of a statutory benefit on mandatory attendance at religious services.[116]

As to cases involving the infiltration of religion into the public sector, the Supreme Court has been especially wary of allowing religious activity to take place in the public school setting because of the Court's concern that public school officials not give the impression of endorsing religion. Nonetheless, in *Berger v. Rensselaer Central School Corp.*,[117] the District Court for the Northern District of Indiana ruled that the school corporation's policy of allowing the distribution of Gideon Bibles and other religious literature in classrooms does not violate the First Amendment.[118] The facts indicated that the Gideons visited the school corporation annually and distributed Gideon Bibles to fifth graders during regular school hours after explaining who they were, what their organization stood for, and that the Bibles would be distributed free of charge. Although a teacher was present in the classroom, at no time did the teacher say anything or participate in handing out the Bibles. The practice dated back at least thirty-five years, and the Bibles were to be distributed only to fifth graders whose parents consented, although in recent years permission slips had not been used.

The court applied a modified *Lemon* test in reaching its decision that although difficult questions of constitutional law were raised by the school's practice, the regime under which the materials were made available to students did not violate the Establishment Clause.[119] The modification stems from the Supreme Court's assertion in several recent cases that the most critical question in assessing claims brought under the Establishment Clause is whether the actual purpose of the government practice is to endorse religion and whether the government action is likely to be perceived as state endorsement of religion.[120] The district court reasoned that the purpose for allowing Bible distribution was not to endorse religion and that because of the large number of distributions made to students by various groups, it was unlikely that

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115. *See supra* notes 23-26 and accompanying text.

116. *Cole*, 572 N.E.2d at 1360.

117. 766 F. Supp. 696 (N.D. Ind. 1991).

118. *Id.* at 707.

119. *Id.* at 704.

120. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

it would be perceived by an objective viewer as an endorsement of religion.[121] In fact, the court reasoned that disallowing this practice would send a message of religious hostility to the students.[122] Finally, the court found that neither the annual nature of the event, the fact that the principal was the special guest at a Gideon banquet for cooperating with its representative, nor the fact that the Bibles of objecting parents were to be returned to the children's teacher, created "excessive entanglement."[123] The court emphasized the teacher's non-involvement, the absence of any public funding, and the fact that this occurred only one time during each school year to support its conclusion that the involvement with religion was "merely incidental."[124]

Although the Supreme Court in recent years has taken a much more accommodationist approach to Establishment Clause questions, it is difficult to reconcile the district court's conclusion with Supreme Court decisions involving religious activity in public schools. In *Board of Education of Westside Community Schools v. Mergens*,[125] the Court upheld the validity of the Equal Access Act which prohibits federally assisted, public secondary schools from discriminating against any group on the basis of religion when the school otherwise permits extracurricular student groups to meet on school premises.[126] *Mergens* sustained the right of student religious groups to utilize school facilities for the purpose of conducting prayer sessions, but the Court emphasized the fact that the religious speech was entirely student-initiated.[127] In sharp contrast, in *McCollum v. Board of Education*,[128] the Court held that permitting representatives to conduct religious school classes on school premises had the impermissible effect of advancing religion.[129] The Court stated, "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . ."[130] Other Supreme Court decisions have

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121. *Berger*, 766 F. Supp. at 705-06 ("The defendant's policy offering school students exposure to the many facets of their local community (including the religious) does not constitute the school's imprimatur as to each such facet.").

122. *Id.* at 706.

123. *Id.*

124. *Id.* at 706-07.

125. 110 S. Ct. 2356 (1990).

126. *Id.* at 2373.

127. *Id.* ("a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion").

128. 333 U.S. 203 (1948) (per curiam).

129. *Id.* at 231.

130. *Id.* at 210.

similarly stressed that young students are impressionable and particularly susceptible to indoctrination by adults, that schools are tax-supported institutions, and that children find themselves captive audiences in these public institutions because of mandatory attendance laws.[131]

The district court's decision in *Berger* is currently on appeal to the Seventh Circuit. In determining how much interaction between church and state is permitted in the school context, the Seventh Circuit will perhaps be provided with some guidance by the Supreme Court, which has recently heard argument in the case of *Weisman v. Lee*.[132] In *Weisman*, the Court has been asked to decide whether a benediction delivered by clergy at a public school ceremony has the impermissible effect of advancing religion. Both lower courts held that the practice violated all three prongs of the *Lemon* analysis, but amicus briefs filed by the Bush administration and others have urged the Court to abandon *Lemon* for a more accommodationist approach to the religion clause which would allow government interaction between church and state in the absence of government coercion regarding religious liberty.[133] Although the questions of school prayer and Bible distribution are not identical, in both cases third parties, whose sole function is religious, are being given the opportunity to deliver their sectarian message to public school students. On the other hand, in both cases the event occurs but once a school year and it involves no expenditure of public dollars, with only nominal participation by school officials. Thus, the analysis the Court adopts in *Lee* should prove to be instructive.

C. Procedural and Substantive Due Process Claims

The due process guarantee continues to be one of the most litigated constitutional provisions, as demonstrated by the large number of state

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131. *See* School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 383 (1985) (invalidating two programs in which public school employees taught secular subjects to non-public school students based on the school's concern for the "sensitive relationship between government and religion in the education of our children"); *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring) ("[t]hat a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school . . . [t]he law of imitation operates, and non-conformity is not an outstanding characteristic of children").

132. 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

133. The coercion test was first formulated by Justice Kennedy in County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989), a case involving public display of religious symbols. Justice Kennedy stated that the government must directly compel someone to participate in a religious program, to make significant government expenditures, or to engage in "an exhortation to religiosity that amounts to proselytizing" of particular religious beliefs in order to find a violation of the establishment clause." *Id.* at 660. *See also* 60 U.S.L.W. 3351 (U.S. Nov. 12, 1991) (discussion of oral argument in the *Lee* case).

and lower federal court decisions that address both procedural and substantive due process issues.[134] Because the Due Process Clause protects only against deprivations of life, liberty, or property, analysis often begins by identifying a liberty or property interest. Federal, state, or local law, including contract or custom, dictates whether government has created a liberty or property interest.[135] This aspect of due process analysis triggered an extensive discussion in the case of *Kellogg v. City of Gary*.[136] In an effort to curb crime and violence on the streets, an agreement was reached between the mayor and the acting chief of police to no longer make applications for handguns available to the citizens of Gary. A group of city residents contended that this action deprived them of a liberty or property interest without due process. Although rejecting a Second Amendment claim because this guarantee has never been incorporated into the Fourteenth Amendment and made applicable to the states,[137] the court found that article I, section 32 of the Indiana Constitution, entitled "Bearing Arms," created a right to bear arms on behalf of Indiana citizens.[138] The court described the interest as one of liberty "to the extent that it enables law-abiding citizens to be free from the threat and danger of violent crime," as well as a property interest "at stake . . . in protecting one's valuables when transporting them."[139] Although recognizing that litigants cannot claim a liberty or property interest in the state's licensing *procedure* with regard to handguns, in this case Gary citizens were absolutely denied a handgun license application form, and thus a substantive right rooted in the state constitution was adversely affected.[140] The court concluded that "the framers of the Indiana Constitution gave the citizens of this state the 'extra' liberty or property interest in bearing arms for their own self defense and for the defense of their state which

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134. Procedural due process dictates the manner in which the government may proceed when affecting an individual's legal interest or status, while substantive due process serves as a more general bar against arbitrary government action. Daniels v. Williams, 474 U.S. 327, 337 (1986).

135. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (a legitimate claim of entitlement is created and its dimensions defined "by existing rules or understandings that stem from an independent source such as state law"). *See also* Woods v. City of Mich. City, 940 F.2d 275, 281 (7th Cir. 1991) (a state creates a liberty interest by mandating the outcome to be reached upon a finding that relevant criteria have been met; thus, the court assumes without deciding that Ind. Code § 9-4-1-131(a) (1988) creates a liberty interest on behalf of an arrestee charged with a misdemeanor traffic offense to be released if not taken immediately before a judge).

136. 562 N.E.2d 685 (Ind. 1990).

137. *Id.* at 692.

138. *Id.* at 694.

139. *Id.*

140. *Id.* at 696-97.

the Due Process Clause of the Fourteenth Amendment will protect."[141]

Less successful have been procedural due process claims involving loss of employment. Most Indiana employees continue to be viewed as "at-will" workers whose jobs may be terminated without any procedural protection. Thus, in *Phegley v. Indiana Department of Highways*,[142] the Indiana Court of Appeals held that professional engineers employed by the Department are "demotable for any reason or no reason whatsoever" because they have no property interest in further employment.[143] Similarly, in *Reed v. Shepard*,[144] the Seventh Circuit held that Reed was a civilian jailer whose employment was "at will" despite evidence that she was issued and wore a uniform of a sheriff's deputy and was given a copy of a rules and regulations manual that governed deputies, whose jobs were protected.[145] The court concluded that Reed's position as jailer was not intended to be equivalent to that of a deputy, and thus, she was not entitled to notice and a hearing prior to her termination.[146]

The only federal constitutional recourse for at-will employees seeking procedural protection is through invocation of a "liberty" interest. The Supreme Court has held that if the government defames an individual in connection with a termination even from an at-will job, deprivation of a federally protected liberty interest in pursuing one's career may be implicated.[147] The Court in *Siegert v. Gilley*,[148] recently clarified that in order to avail oneself of this federal guarantee, a plaintiff must prove contemporaneous loss of current employment and damage to reputation by the government employer.[149] In *Siegert*, a federal employee voluntarily left his job, but was subsequently defamed in a "recommendation" letter that he requested from his former employer in order to secure a new position with the federal government. It was conceded that the letter led to his failure to be "credentialed" as a qualified psychologist and thus, seriously impaired his future

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141. *Id.* at 695.
142. 564 N.E.2d 291 (Ind. Ct. App. 1990).
143. *Id.* at 295.
144. 939 F.2d 484 (7th Cir. 1991).
145. *Id.* at 488.
146. *Id.* at 489.
147. Board of Regents v. Roth, 408 U.S. 564, 573 (1972). *See also* Speckman v. City of Indpls., 540 N.E.2d 1189, 1193-94 (Ind. 1989) (because at the time of Speckman's discharge, statements made to the press and others indicated that he had been dishonest or even criminal in handling city funds, the trial court erred in dismissing the claims without determining whether the alleged defamation was so slanderous as to prevent Speckman from continuing in the same occupation).
148. 111 S. Ct. 1789 (1991).
149. *Id.* at 1794.

employment prospects. Nonetheless, because "the alleged defamation was not uttered incident to the termination," the plaintiff failed to state an actionable "liberty" violation.[150]

Once a protected liberty or property interest is identified, constitutionally required procedural safeguards are determined by balancing the following factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest.[151] Applying this standard in *Kellogg v. City of Gary*,[152] the Indiana Supreme Court found that the private interests of Gary residents to be able to apply for and receive a handgun license in order to protect themselves were important enough to require additional safeguards.[153] Because termination of the application process was effectuated by executive decree without any hearing before the city council, which alone possessed legislative authority to pass ordinances for the benefit of the city, plaintiffs were deprived of their liberty and property without due process of law.[154]

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150. *Id.*

151. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). The Supreme Court's most recent application of *Mathews* is found in Connecticut v. Doehr, 111 S. Ct. 2105 (1991), which invalidated a state statute which authorized prejudgment attachment of real property upon plaintiff's *ex parte* assertion of probable cause, without a further showing of extraordinary circumstances. The Court reasoned that the interests affected were significant because attachment clouds title, impairs the ability to sell or otherwise alienate property, taints credit ratings, and may place an existing mortgage in technical default when there is an insecurity clause. Even though the property owner would not be deprived of complete physical or permanent use, the encumbrance was deemed sufficient to merit due process protection. Further, the Court reasoned that the risk of erroneous deprivation is great when a reviewing judge receives only a one-sided, self-serving, and conclusory affidavit, and the safeguards provided by the state, namely an expeditious post-attachment adversary hearing and double damages if the original suit was commenced without probable cause, did not adequately reduce the risk. Finally, the state interest was minimal because no allegations were made that the defendant was about to transfer or encumber the real estate. Note that Indiana's pre-judgment attachment statute is unaffected by *Doehr* because it permits attachment only in exigent circumstances. IND. CODE § 34-1-11-4.1 (1988). *Cf.* Avco Fin. Servs. v. Metro Holding Co., 563 N.E.2d 1323 (Ind. Ct. App. 1990) (sustaining provisions of Indiana's tax sale statute which requires notice be given only to holders of a property interest recorded more than 60 days from the date of sale).

152. 562 N.E.2d 685 (Ind. 1990).

153. *Id.* at 702.

154. *Id. Cf.* Smith v. Town of Eaton, 910 F.2d 1469 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991) (although an employee possessing a property interest in his job must be given notice and an opportunity to be heard prior to being subjected to final disciplinary action, the procedure need not be elaborate and can be satisfied with less than a full evidentiary hearing).

In addition to procedural due process, the Supreme Court continues to recognize that the Due Process Clause also contains a substantive component that bars certain arbitrary, wrongful government action regardless of the fairness of the procedures invoked.[155] However, when the government action does not affect so-called fundamental rights,[156] the Supreme Court has held that due process is not violated unless the government's action is totally arbitrary and capricious.[157] The deferential approach dictated by this standard is reflected in *Stewart v. Fort Wayne Community Schools*,[158] in which the Indiana Supreme Court held that although a school psychometrist had a property interest in her status as a tenured teacher, substantive due process was not violated when she was terminated while nontenured teachers were retained.[159] The court reasoned that the school board had a legitimate justification because the nontenured teachers who were retained had classroom teaching certificates and thus could perform dual roles for the school.[160] Although the 1983 employment policy rescinded the dual certification requirement explicit in the 1981 policy statement, the board's interest in retaining personnel with dual certification was not irrational.[161]

Despite this deferential approach to substantive due process, the Indiana Supreme Court in *Kellogg v. City of Gary* found that however noble the mayor's purpose in suspending the handgun license application process, his conduct arbitrarily deprived Gary residents of a right guaranteed them under the Indiana Constitution.[162] The court emphasized that the mayor clearly exceeded his authority by suspending the application process through executive decree, bypassing the city council which was vested with legislative authority. The conduct "lacked a reasonable basis," and thus, plaintiffs proved a substantive due process violation.[163]

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155. Zinermon v. Burch, 110 S. Ct. 975, 983 (1990).

156. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a fundamental right to marital privacy, which triggered the beginning of modern substantive due process analysis). This right to privacy has been extended to include the controversial right to terminate a pregnancy, Roe v. Wade, 410 U.S. 113 (1973), as well as the right to make basic familial decisions, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

157. *Zinermon*, 110 S. Ct. at 983. *See also* Collins v. City of Harbor Heights, 112 S. Ct. 1061, 1070 (1982) (city's alleged failure to train its employees or to warn them about known risks of harm was not "an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense").

158. 564 N.E.2d 274 (Ind. 1990), *cert. denied*, 112 S. Ct. 169 (1991).

159. *Id.* at 279.

160. *Id.*

161. *Id.* at 280.

162. Kellogg v. City of Gary, 562 N.E.2d 685, 699 (1990).

163. *Id.* at 700.

The question of when, if ever, government abuse of power is sufficiently egregious to support a substantive due process claim has generated significant discussion and confusion in the lower courts. Some appellate courts have limited protection to individuals claiming violation of a federally protected liberty interest or to situations in which the state fails to provide a remedy for a state-created interest.[164] The Supreme Court last winter agreed to decide whether the arbitrary, capricious denial of a construction permit to a developer constitutes a substantive due process claim. In *PFZ Properties, Inc. v. Rodriguez*,[165] the First Circuit found that even if government officials engaged in delaying tactics and refused to issue a permit based on considerations outside the scope of their jurisdiction under state law, such conduct, without more, does not rise to the level of a violation of federal law.[166] The Supreme Court's determination of this issue would have been critical not only to land developers, but also to government employees and licensees whose jobs or licenses are terminated for arbitrary reasons, school children who are victims of unduly harsh, arbitrary corporal punishment, and pretrial detainees who have been subjected to arbitrary, capricious mistreatment or malicious prosecution.[167] The Supreme Court, however, recently dismissed the cert petition as having been improvidently granted.[168]

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164. Rosalie Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 345-48 (1991). For recent cases debating the meaning of substantive due process, see Santiago de Castro v. Morales Medina, 943 F.2d 129, 130-31 (1st Cir. 1991) (substantive due process violation occurs only when the claim involves a specific property or liberty interest deeply rooted in fundamental principles or when conduct of government officials shocks the conscience; federal court should not become embroiled in workplace disputes when only state-created property interests are implicated); Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 683-85 (3rd Cir. 1991) (in challenging denial of a license as contrary to substantive due process guarantee, plaintiff must prove either that the city's licensing scheme was not rationally related to a legitimate government interest or that the city's action in denying the application based on community objection was improperly motivated; city's consideration of public sentiment that reflects legitimate concerns and has an adequate factual basis cannot be deemed per se arbitrary and irrational); Temkin v. Frederick County Comm'rs, 945 F.2d 716, 719-723 (4th Cir. 1991) (although circuits have adopted standards of care ranging from "gross negligence" to "deliberate indifference" to "recklessness" for substantive due process claims, in a case involving injury caused by policeman's operation of a vehicle while acting in the line of duty, the more stringent "shocks the conscience" standard should be utilized).

165. PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir.), *cert. dismissed*, 112 S. Ct. 1151 (1992).

166. *Id.* at 31-32.

167. Levinson, *supra* note 164 at 353-59.

168. *PFZ Properties*, 112 S. Ct. 1151 (1992).

The Supreme Court in recent years has imposed significant limitations on the reach of substantive due process by holding that claims of merely negligent deprivation of liberty or property are no longer actionable under the Due Process Clause[169] and by providing that in the absence of a "special custodial relationship," the Due Process Clause imposes no affirmative duty on the part of government to provide protective services.[170] In *Tittle v. Mahan*,[171] the estate of a pretrial detainee who committed suicide in the county jail sued local officials, alleging violation of the deceased's constitutional rights. Although, in this context, the requisite custodial relationship existed so as to trigger due process rights,[172] the court held that the plaintiffs failed to show how the government entity or its officials acted with "reckless disregard" or "reckless indifference" toward the detainee.[173] It reasoned that prison custodians cannot be guarantors of a prisoner's safety and that liability should not be imposed for a prison suicide unless the officers themselves take affirmative action directly leading to the suicide or prison officials actually knew or should have known of the suicidal tendencies of the prisoner and failed to take reasonable precautions to prevent the suicide.[174] Although the deceased had made a prior suicide attempt, the evidence was undisputed that jail officials were unaware of this information, and their failure to follow up on the deceased's psychological history was, at most, negligent.[175] Even if the jailers failed to monitor the deceased as often as required by their

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169. Daniels v. Williams, 474 U.S. 327, 328 (1986) ("[w]e conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property").

170. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989). The Court rejected a due process claim brought against a county welfare department for failing to intervene to protect a child against the arguably known risk of violence at his father's hands, reasoning that the "State's failure to protect . . . against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 1004.

171. 566 N.E.2d 1064 (Ind. Ct. App.), *aff'd in part*, 582 N.E.2d 796 (Ind. 1991).

172. *Id.* at 1069.

173. *Id.* at 1071-72.

174. *Id.* at 1069-70. *See also* McGill v. Duckworth, 944 F.2d 344, 349-50 (7th Cir. 1991) (inmate's claim against Indiana prison officials and prison guards that he was raped by a fellow inmate fails to state an Eighth Amendment claim absent evidence that jail officials had actual knowledge of impending harm easily preventable so that conscious, culpable refusal to prevent the harm could be inferred; ordinary negligence and even "gross negligence" is insufficient absent evidence that officials put inmate in segregation unit "because of, rather than in spite of, the risk to him"); Salazar v. City of Chicago, 940 F.2d 233, 241-42 (7th Cir. 1991) (neither police officers nor paramedics could be held liable for death of pretrial detainee who died after his arrest for D.W.I. following a traffic accident where there was no evidence that they exhibited deliberate indifference to the deceased's serious medical needs).

175. *Tittle*, 566 N.E.2d at 1071.

own guidelines, this failure also could not be characterized "as anything more than negligent."[176] To the contrary, the jail officials' concern about the detainee and his alcohol and drug problems led them "to place him in isolation, give him medication, and place him under periodic observation" — all of which negated a finding of deliberate indifference which is required to impose liability.[177]

III. Conclusion

This past year, Indiana litigants presented state and federal courts with a host of novel federal and state constitutional claims. Several Indiana litigants, heeding the advice of Chief Justice Shepard, looked to the Indiana Constitution as a source for such significant civil liberties as the right to die, the right to religious liberty, the right to bear arms, the right to just compensation for services performed for the state, and as a source for several criminal procedural safeguards. In the federal realm, Indiana's nudity law became the focus of national attention as the United States Supreme Court assessed the expressive value of nude dancing, as well as the state's right to control this expressive conduct. Religious activities in public schools, patronage practices, and speech rights of government employees posed extremely difficult, controversial questions. Finally, while many due process claims were resolved under well-established legal doctrine, other cases challenged traditional doctrine and raised difficult questions regarding the

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176. *Id.*

177. *Id.* at 1071-72. *See also* Colburn v. Upper Darby Township, 946 F.2d 1017 (3d Cir. 1991) (in order to impose liability on prison officials, likelihood that pretrial detainee will commit suicide must be so obvious that a layperson would easily recognize the necessity for preventive action; jail custodian's knowledge that detainee was intoxicated, had argued with her boyfriend, tried to ingest pills, and had a bullet in her pocket did not support an inference of custodian's deliberate indifference to detainee's welfare); Belcher v. Oliver, 898 F.2d 32 (4th Cir. 1990) (failure of officers to remove belt and shoelaces from detainee who committed suicide and failure to provide him with medical treatment for his psychological disorder does not rise to the level of deliberate indifference); Popham v. City of Talladega, 908 F.2d 1561 (11th Cir. 1990) (failure to prevent suicide does not constitute deliberate indifference where authorities had no knowledge of detainee's suicidal tendencies). *Cf.* Simmons v. City of Philadelphia, 947 F.2d 1042, 1074-75 (3d Cir. 1991) (evidence that statistical profiles of detainees likely to commit suicide were widely available and that police departments commonly trained officers responsible for detainees to recognize suicide tendencies and to take preventive measures supported jury's verdict that the need to train officers in suicide detention and prevention should have been apparent to city policymakers despite the extremely small number of suicides relative to the large number of intoxicated persons detained each year).

meaning and breadth of substantive due process as a guarantee against abuses of government power.