INDIANA CONSTITUTIONAL DEVELOPMENTS: LACHES, SENTENCES, AND PRIVACY

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Indiana's appellate courts addressed important issues arising under the Indiana Constitution during the survey period. The courts addressed several structural provisions of the constitution, including two claims relating to the Special Laws Clauses, claims for modification of criminal sentences, and distribution of powers claims.[1]

The courts also addressed important claims regarding individual rights, including a challenge to a statute regulating access to abortion and a claim that Indiana's statute barring same-sex marriage violated the Indiana Constitution.[2] The Indiana Supreme Court also issued an important decision providing further explanation of the test applicable to claims of unreasonable search, and the Indiana Court of Appeals continued to develop the case law applying Indiana's unique standards for evaluating searches and double jeopardy.[3]

I. DEVELOPMENTS REGARDING THE STRUCTURAL CONSTITUTION

A. Article IV, Sections 22 and 23

The Indiana Supreme Court applied the special laws provisions[4] in *State ex rel. Attorney General v. Lake Superior Court*,[5] another in the line of constitutional cases relating to the 2002 property tax assessment.[6] A group of Lake County taxpayers challenged the constitutionality of a statute under which their county's property tax assessment took place, alleging that it violated the

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1. *See infra* Part I; *see also* Jon Laramore, *Indiana Constitutional Developments*, 37 IND. L. REV. 929, 929-30 (2004) (differentiating the structural provisions of the Indiana Constitution (generally articles III through XV) from the rights constitution (generally articles I, II, and XVI)).

2. *See infra* Part II.A-B.

3. *See infra* Part II.C-L; *see also* Jon Laramore, *Indiana Constitutional Developments*, 38 IND. L. REV. 963, 981-87 (2005) (describing earlier court of appeals cases in the search and double jeopardy areas).

4. IND. CONST. art. IV, §§ 22-33.

5. 820 N.E.2d 1240 (Ind.), *cert. denied*, 126 S. Ct. 398 (2005).

6. State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657 (Ind. 2001); State Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034 (Ind. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 695 N.E.2d 123 (Ind. 1998); Boehm v. Town of St. John, 675 N.E.2d 318 (Ind. 1996); Town of St. John v. State Bd. of Tax Comm'rs, 729 N.E.2d 242 (Ind. Tax Ct. 2000); Town of St. John v. State Bd. of Tax Comm'rs, 698 N.E.2d 399 (Ind. Tax Ct. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 691 N.E.2d 1387 (Ind. Tax Ct. 1998); Town of St. John v. State Bd. of Tax Comm'rs, 690 N.E.2d 370 (Ind. Tax Ct. 1997); Town of St. John v. State Bd. of Tax Comm'rs, 665 N.E.2d 965 (Ind. Tax Ct. 1996).

special law provisions and other parts of the Indiana Constitution.[7] The Indiana Supreme Court's decision not only illuminated those two sections but also plowed new ground in other areas of Indiana constitutional doctrine.

The taxpayers challenged a statute that directed the Department of Local Government Finance, a state agency, to contract with a private company to perform the property tax assessment in Lake County.[8] Normally, property tax assessments are supervised by elected county and township assessors, not by a state agency.[9] The court surmised that the special treatment accorded Lake County stemmed from its long history of "uneven assessments and generally lower assessed valuations than those in other parts of the state for similar properties."[10] The taxpayers' challenge to this special treatment met success in the trial court, which enjoined the assessment on five separate constitutional grounds.[11]

The Indiana Supreme Court first ruled that the trial court lacked jurisdiction because the taxpayers had failed to exhaust administrative remedies.[12] The relief the taxpayers sought was a decrease in their assessments, and Indiana's statutes provide a multi-level administrative and judicial process to provide that relief. Under those statutes, administrative remedies must be pursued regardless of the basis of the taxpayer's claim, even when the taxpayer seeks a remedy beyond the administrative agency's competence, such as invalidating a statute.[13] Because the applicable statutes required that administrative remedies be exhausted and Indiana's courts consider exhaustion be a necessary component of subject matter jurisdiction, the court ruled that the trial court lacked jurisdiction over the taxpayers' claims.[14]

The court nevertheless addressed the taxpayers' claims on the merits because resolution of the issue was in the public interest.[15] Hundreds of thousands of property owners had received assessments under the challenged system in Lake County, and the state-directed reassessment had led to substantial changes in

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7. *State ex rel. Att'y Gen.*, 820 N.E.2d at 1244.

8. IND. CODE § 6-1.1-4-32 (2004). The author of this Article was Commissioner of the Department of Local Government Finance and its predecessor agency in 2001-2003 and participated in decisions relating to the Lake County reassessment.

9. IND. CODE § 6-1.1-4-13.6 (2002).

10. *State ex rel. Att'y Gen.*, 820 N.E.2d at 1244-45.

11. *Id.* at 1243.

12. *Id.* at 1246-47.

13. *Id.* at 1246 (citing State Bd. of Tax Comm'rs v. Mixmill Mfg. Co., 702 N.E.2d 701 (Ind. 1998); State v. Sproles, 672 N.E.2d 1353 (Ind. 1996)).

14. *Id.* at 1246-47.

15. *Id.* at 1247. The Indiana Constitution contains no "case or controversy" requirement. Indiana courts thus have authority to issue advisory opinions (such as the one in this case). The Indiana Supreme Court, however, has directed courts to be abstemious in doing so in order to avoid intruding into the realms of the other branches of government. *See, e.g.*, Pence v. State, 652 N.E.2d 486, 488 (Ind. 1995).

some assessments and the resulting tax bills.[16] In particular, the reassessment shifted the tax burden from certain older businesses to homeowners, especially owners of older homes.[17] By addressing the arguments on the merits, the court could potentially forestall widespread public discontent over the reassessment that could simmer for years while individual claims made their way through the administrative adjudication system.

The court next addressed whether the statute violated article IV, section 22, which precludes "local or special laws" in sixteen enumerated categories, including those "providing for the assessment and collection of taxes."[18] The court concluded that the statute was indeed special.[19] It applied to counties with populations between 400,000 and 700,000 and was in effect for a limited period of time.[20] In operation, it could apply only to Lake County.[21]

The court further concluded that the statute violated section 22 on its face because it was a special law "providing for the assessment" of taxes.[22] It treated one county differently than every other county in the manner of assessing property.[23] Although every county was required to use the same assessing rules as a matter of substance, the statute nevertheless treated Lake County differently as a matter of assessing procedure because the statute directed Lake County's assessment to be supervised in a different manner than any other county's assessment.[24] The state argued that the provision would be violated only if the special law related to *both* assessment *and* collection of taxes, but the court rejected that construction as overly literal.[25] The court also pointed to statements from the constitutional debates showing the importance the delegates placed on uniform assessment practices.[26]

Before addressing the proper remedy, the court detoured through a discussion of article IV, section 23.[27] This analysis was not necessary to the court's result

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16. *State ex rel. Att'y Gen.*, 820 N.E.2d at 1258 (Rucker, J., concurring in part and dissenting in part) (regarding changes in tax bills); IND. FISCAL POLICY INST., STATEWIDE PROPERTY TAX EQUALIZATION STUDY REPORT 52 (2005) (parcel count), *available at* www.indianafiscal.org/report.pdf [hereinafter STUDY REPORT].

17. STUDY REPORT, *supra* note 17, at Foreword.

18. IND. CONST. art. IV, § 22.

19. *State ex rel. Att'y Gen.*, 820 N.E.2d at 1248-49.

20. *Id.* at 1248.

21. *Id.*

22. *Id.* at 1249.

23. *Id.* The court already had addressed this portion of section 22 in *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996), stating that although the "assessment or collection of a tax" language did not apply in *Hoovler* (which addressed a special law governing tax rates, not tax assessments), the language would apply to a different system of attaching assessed values to property, precisely the circumstance of *State ex rel. Attorney General.*

24. *State ex rel. Att'y Gen.*, 820 N.E.2d at 1249.

25. *Id.* at 1248.

26. *Id.* at 1249.

27. *Id.* at 1249-50.

because the court already held that the statute violated section 22; therefore, it could not be saved by section 23, which requires that "where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."[28] The court concluded that the special law might survive scrutiny under section 23 because Lake County's history of poor assessments was the worst in the State, perhaps justifying unique treatment.[29] The court pointed out that the *Town of St. John* litigation, which led to a revamping of assessment practices statewide, arose from complaints by Lake County residents that their assessments were intolerably disuniform.[30] Moreover, the court noted that the state assessment agency had tried to conduct a reassessment of Lake County in 1998 because of the county's documented poor assessment practices, but the Indiana Tax Court ruled that the state agency lacked authority to hire a contractor to reassess.[31] Immediately after that decision, the General Assembly enacted the statute at issue in this case, giving the state assessment agency authority to hire a contractor to reassess Lake County.[32] Because the case was decided based on section 22, the court did not reach a conclusion regarding the application of section 23, but it strongly implied that the statute would pass muster under that provision because of Lake County's special circumstances.[33]

The court unanimously held that the trial court lacked jurisdiction because the taxpayers failed to exhaust administrative remedies, but it was not unanimous as to any other matters. Chief Justice Shepard and Justice Sullivan concurred only in the portion of the opinion finding no jurisdiction and concluded that the portions of the opinion applying article IV were "unnecessary to the determination of this case."[34] They would have ended the case by instructing the taxpayers to go through the appropriate administrative channels before they could present their constitutional claim to the courts.[35]

Justice Boehm, who wrote the court's opinion, joined by Justice Dickson, concluded that a later statute passed by the General Assembly cured the constitutional problem. The later statute, in effect at the time of the court's decision, gave the state assessment agency authority to take over the assessment in any county that was falling behind or failing to follow proper assessment practices.[36] It gave specific authority for the state agency to hire a private

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28. IND. CONST. art. IV, § 23.

29. *State ex rel. Att'y Gen.*, 820 N.E.2d at 1249-50.

30. *Id.* at 1250 (citing Boehm v. Town of St. John, 675 N.E.2d 318, 324 (Ind. 1996)).

31. *Id.* (citing Matonovich v. State Bd. of Tax Comm'rs, 705 N.E.2d 1093, 1098 (Ind. Tax Ct. 1999)).

32. *Id.*

33. *See id.* The court also rejected arguments that the statute violated the Uniformity Clause, article X, section 1 (because that provision does not address the system of assessment) and the Equal Privileges and Immunities Clause, article I, section 23 (because different treatment of Lake County residents was justified by its unique history of poor assessing practices). *Id.* at 1250-51.

34. *Id.* at 1257-58 (Sullivan, J., concurring).

35. *Id.* at 1257.

36. *Id.* at 1252 (plurality opinion) (citing IND. CODE § 6-1.1-4-35 (2004)).

contractor to take over the assessment in any such county, just as the Lake County legislation had permitted.[37] These two justices found that the newer statute "acts as curative legislation by authorizing actions taken pursuant to an unconstitutional statute."[38] These justices compared the initial law covering Lake County and the later law extending nearly identical provisions to the other ninety-one counties and concluded that the later law ratified the actions taken under the earlier law and corrected the constitutional problem in the earlier law pertaining only to Lake County.[39] But this view did not draw a third vote.

In a separate opinion, Justice Rucker strongly took issue with the notion that the later statute cured the defect in the earlier one.[40] He noted that the reassessment conducted under the special law "had a devastating impact on the ability of many homeowners to meet their monthly mortgage payment obligations" by raising tax bills by hundreds of percent.[41] He found that nothing in the text of the 2004 legislation indicated that it was intended to cure defects in the Lake County special legislation.[42] He also found the two statutes sufficiently different in substance that he could not conclude that, taken together, they gave the state assessment agency identical powers in all ninety-two counties.[43]

Nevertheless, three justices, Boehm, Dickson, and Rucker, concurred in the portion of the court's opinion entitled "Appropriate Relief," which stated that injunctive relief against the assessments was not an appropriate remedy "for reasons apart from lack of jurisdiction."[44] The opinion pointed out that there was "no basis [in the record] to conclude" that any of the assessments issued in Lake County under the special law were invalid or incorrect or that different assessments would have been placed on the properties by elected assessors.[45] The court also noted that if it invalidated the assessments in Lake County, the 2004 statute would permit the state assessment agency to step in again, hire a contractor, and redo the assessment independent of locally elected assessors (at additional cost to Lake County).[46] The court stated that as a matter of equity, an injunction under such circumstances would be futile and contrary to the public interest.[47]

Justices Boehm, Dickson, and Rucker further subscribed to the conclusion

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37. *Id.*

38. *Id.*

39. *Id.* at 1254.

40. *Id.* at 1258 (Rucker, J., concurring in part and dissenting in part). Although Justice Rucker attributes the "curative legislation" analysis to "the majority" opinion, only two justices actually subscribed to the analysis. *Id.* at 1259.

41. *Id.* at 1258.

42. *Id.* at 1259.

43. *Id.* at 1260.

44. *Id.* at 1255 (majority opinion).

45. *Id.*

46. *Id.* at 1255-56.

47. *Id.* at 1256.

that laches barred an equitable remedy.[48] Although the plaintiffs knew about the special law since it was enacted in 2001, they did not go to court until the assessment was completed in 2004.[49] Had they acted sooner, the General Assembly presumably could have corrected the problem by enacting a valid general law.[50] The plaintiffs' inexcusable delay therefore precluded them from obtaining relief in the action.[51]

In sum, although a majority concluded that the statute violated section 22, the taxpayers obtained no relief because three justices agreed that the claim was barred by laches.[52] The substantive application of sections 22 and 23 fit the court's established special law jurisprudence, which mandates a three-step inquiry.[53] First, a court must determine whether the statute is special as applied, however it may be written to attempt to avoid special-law analysis. Second, if the law is special and fits a section 22 category, it is invalid. Third, if the statute passes muster under section 22, courts examine whether special circumstances in a locale justify special statutory treatment. The Indiana Supreme Court previously applied the third step of this inquiry to invalidate an annexation statute in *Municipal City of South Bend v. Kimsey*,[54] and *State ex rel. Attorney General* brings symmetry to the jurisprudence by providing an example of a statute invalid under section 22.

In another special law challenge under article IV, the Indiana Supreme Court also invoked laches. In *SMDfund, Inc. v. Fort Wayne-Allen County Airport Authority*,[55] citizens challenged the statute under which the airport authority was created, arguing that it was an unconstitutional special law.[56] Although a general law existed allowing counties to create airport authorities, the Fort Wayne-Allen County Authority was created under a special law applying only to counties with a population of 300,000 to 400,000, a category into which only Allen County fit at the time.[57] Since its creation, the Authority operated airports, spent public funds, and issued debt.[58] The plaintiffs brought this action challenging the Authority's constitutional legitimacy when it moved to close an airport, an action

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48. *Id.*

49. *Id.*

50. *See id.*

51. *Id.*

52. *Id.*

53. The three-step inquiry arises from two different Indiana Supreme Court decisions. The first step may be found in *Indiana Gaming Commission v. Moseley*, 643 N.E.2d 296, 300-01 (Ind. 1994). The second and third steps may be found in *State v. Hoovler*, 668 N.E.2d 1229, 1233 (Ind. 1996).

54. 781 N.E.2d 683 (Ind. 2003).

55. 831 N.E.2d 725 (Ind. 2005), *cert. denied sub nom.* Tocci v. Fort-Wayne-Allen County Airport Auth., 126 S. Ct. 1051, *and reh'g denied*, 126 S. Ct. 1459 (2006).

56. *Id.* at 727-28.

57. *Id.* at 727.

58. *Id.* at 727, 729, 731.

the plaintiffs opposed.[59]

Without analysis of the constitutional question, the court ruled unanimously that the lawsuit seeking the equitable remedy of declaratory relief was barred by laches.[60] Justice Boehm wrote the opinion. The court found that the elements of laches were met because the plaintiffs' delay was inexcusable, they waived their claim by acquiescing in the Authority's existence, and the Authority had been prejudiced.[61] The Authority had issued debt and acquired property in reliance on the statute.[62] Moreover, had the lawsuit been brought sooner, the General Assembly could have acted to correct the problem before the Authority took actions in reliance on the statute.[63]

The plaintiffs argued that they had no reason to sue until the authority chose to close the airport they wanted to remain open.[64] But they did not sue to stop the closing. Rather, they sued on a claim that had been available to them for almost twenty years—that the authority itself was illegally constituted.[65] That claim did not depend on the Authority's decision to close the airport.

The court's application of laches to bar special law claims in these two cases may be related to how the court's special law jurisprudence has recently evolved. The court began to outline this doctrine in *Indiana Gaming Commission v. Moseley*,[66] a 1994 case rejecting special law challenges to the riverboat gaming statute. It continued to evolve the case law in *State v. Hoovler*,[67] a 1996 case upholding a special law permitting a tax rate increase in Tippecanoe County. In these cases, the court established the three-step framework for special law analysis. But only when the court actually invalidated a statute in *Municipal City of South Bend v. Kimsey*[68] did plaintiffs and their counsel come out of the woodwork to challenge various statutes as potentially contrary to the Special Law Clauses.

Before modern special law doctrine was put in place, the court allowed statutes creating laws that were special in practice to pass scrutiny under article IV so long as the laws designated locations through population categories, under the ruse that multiple locations could move in and out of the categories and therefore were not special.[69] In fact, as populations changed, the General Assembly simply changed the population categories so that the same locations

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59. *Id.* at 727.
60. *Id.* at 732.
61. *Id.* at 729-31.
62. *Id.* at 731.
63. *Id.*
64. *Id.* at 730.
65. *Id.* at 727-28.
66. 643 N.E.2d 296 (Ind. 1994).
67. 668 N.E.2d 1229 (Ind. 1996).
68. 781 N.E.2d 683 (Ind. 2003).
69. *See, e.g.*, N. Twp. Advisory Bd. v. Mamala, 490 N.E.2d 725 (Ind. 1986), *abrogated on other grounds by Kimsey*, 781 N.E.2d 683 (approving as general law statute regulating park in township with population of 180,000 to 204,000 in county with two second-class cities).

remained covered by the same special laws despite changes in population.[70]

In both *SMDfund* and *State ex rel. Attorney General*, the Indiana Supreme Court created a procedural safe harbor for at least some of these older special laws. For laws passed before the current rules were entirely clear, laches can be asserted to bar claims under sections 22 and 23 when there has been significant reliance on the special laws—in *SMDfund*, issuance of debt, and in *State ex rel. Attorney General*, expenditure of tens of millions of dollars for an assessment that appeared to be an improvement over past practices. Applying laches in this context appears to be a fair way to balance the reliance on statutes enacted under then-prevailing precedents against the inaction of plaintiffs who allow inordinate time to pass before raising their claims. The court is likely to give teeth to its recent special law precedents by continuing to apply them to more recently enacted statutes and in situations where there has not been significant reliance on the unconstitutional special law.

B. Distribution of Powers

In *Pinkston v. State*,[71] the Indiana Court of Appeals used the distribution of powers concepts in article III to analyze a creative trial court stratagem to cope with changing sentencing rules. When the U.S. Supreme Court decided *Blakely v. Washington*,[72] it became clear that portions of Indiana's criminal sentencing system did not comply with the Sixth Amendment.[73] *Blakely* held that, in a system like Indiana's where presumptive sentences could be increased based on specific factual findings, the Sixth Amendment required those factual findings to be made by juries (with certain enumerated exceptions).[74] Indiana made no provision for a jury determination of aggravating factors for sentencing; rather, Indiana left that question to judges alone, contrary to *Blakely*'s construction of the Sixth Amendment.[75]

A Marion County Superior Court judge addressed this problem in a case

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70. *See, e.g.*, 1992 Ind. Legis. Serv. page no. 12-1992 (West) (changing population categories in dozens of statutes).

71. 836 N.E.2d 453 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006). Judge Friedlander dissented on a specific sentencing issue also addressed by the opinion, but he agreed that "there was no error in conducting a hearing for the purpose of asking the jury to determine the existence of aggravating circumstances, for sentencing purposes." *Id.* at 466.

72. 542 U.S. 296 (2004). The Indiana Supreme Court applied *Blakely* to Indiana's system in *Smylie v. State*, 823 N.E.2d 679, 681-82 (Ind.), *cert. denied*, 126 S. Ct. 545 (2005).

73. *Pinkston*, 836 N.E.2d at 458.

74. *Id.* (citing *Blakely*, 542 U.S. 296).

75. The General Assembly amended Indiana's sentencing statutes to address *Blakely* by passing Public Law 71-2005. P.L. 71-2005, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2005). This amendment abolished "presumptive" sentences and the requirement for specific factual findings to impose sentences greater than presumptive. The amendment allows judges to use their discretion to impose sentences within a range, a practice that does not violate *Blakely*'s construction of the Sixth Amendment. *See, e.g.*, IND. CODE § 35-50-2-4 (outlining sentences for Class A felonies).

decided shortly after *Blakely* by empanelling a jury to address sentencing aggravators after conviction.[76] The jury determined that the "State proved both of the charged aggravators beyond a reasonable doubt," and the trial court imposed a greater-than-presumptive sentence based on those findings.[77] Pinkston challenged his enhanced sentence, arguing that article III mandated that only the General Assembly, not individual courts, could prescribe the methods to be used to sentence criminal defendants.

The Indiana Court of Appeals disagreed.[78] First, the court stated that the Indiana Supreme Court explicitly authorized the use of a jury to determine whether the State proved aggravating factors beyond a reasonable doubt in one of its cases analyzing *Blakely*.[79] Second, the court "fail[ed] to see how the addition of an aggravator phase to a defendant's trial usurps an official duty assigned to the legislature."[80] No statute precluded such an additional hearing, and "trial courts have the inherent authority to control the conduct of trials."[81] Moreover, the legislature's assignment to trial courts of the sentencing duty also delegates the authority to use necessary procedures to determine what those sentences should be.[82] The court of appeals found that the sentencing procedure did not violate article III.[83]

The Indiana Constitution's provision giving the Indiana Supreme Court exclusive jurisdiction over lawyer discipline was used as a defense in litigation to collect legal fees in *Alvarado v. Nagy*.[84] The plaintiff claimed punitive damages, and the attorney moved to dismiss on the theory that punitive damages constituted lawyer discipline, the responsibility for which is exclusively the supreme court's under article VII, section 4.[85] The court of appeals disagreed with the constitutional claim, reasoning that the plaintiff actually was alleging legal malpractice.[86] It concluded that punitive damages are an available remedy for malpractice (and not a remedy for professional misconduct that may be meted out by the supreme court) so that the relief the plaintiff sought was not equivalent to attorney discipline.[87]

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76. *Pinkston*, 836 N.E.2d at 455-56.

77. *Id.* at 456.

78. *Id.* at 457. The State also argued that Pinkston waived his argument based on article III because he failed to raise it in the trial court. *Id.* The Indiana Court of Appeals nevertheless addressed the argument on the merits. *Id.*

79. *Id.* at 457-58 (citing Smylie v. State, 823 N.E.2d 679, 685 (Ind.), *cert. denied*, 126 S. Ct. 545 (2005).

80. *Id.* at 458.

81. *Id.* (internal quotation marks omitted) (quoting Fugett v. State, 812 N.E.2d 846, 850 (Ind. Ct. App. 2004)).

82. *Id.*

83. *Id.*

84. 819 N.E.2d 520 (Ind. Ct. App. 2004).

85. *Id.* at 522.

86. *Id.* at 525.

87. *Id.*

C. Sentence Modifications

The Indiana Supreme Court used its constitutional authority to modify criminal sentences several times during the survey period, although the Indiana Court of Appeals used its authority to do so more sparingly. The current court rule guiding appellate courts' discretion in sentence revision allows modification "if, after due consideration of the trial court's decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."[88]

In *Frye v. State*,[89] the Indiana Supreme Court examined a forty-year total sentence for burglary, theft, and false informing. The trial court cited Frye's "extensive criminal history and questionable character" in assigning this above-presumptive sentence.[90] The supreme court noted that the offense was non-violent and committed when the victim was away from her home, lessening the possibility of confrontation.[91] Little of value was taken, and most items were returned to the victim.[92] Although Frye had a number of past sentences, most were alcohol-related, and his last violent offense was more than five years earlier.[93] The court stated that "we cannot conclude that those transgressions even when aggregated demonstrate a character of such recalcitrance or depravity to justify a sentence of 40 years."[94] By a 4-1 vote, the court reduced the sentence from forty to twenty-five years.[95] Justice Dickson dissented, emphasizing the facts of the crimes and concluding that the "due consideration of the trial court's decision"[96] mandated by the applicable appellate rule required that the sentence be undisturbed as "quite commensurate with the offense and the offender."[97]

The court's analysis was more extensive in *Cotto v. State*,[98] in which the defendant was sentenced to fifty years for possessing methamphetamine. Indiana's sentencing system required trial judges to identify aggravating and mitigating circumstances and increase or decrease the presumptive sentence based on those factors.[99] In Cotto's case, the trial court found five aggravators

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88. IND. APP. R. 7(B).

89. 837 N.E.2d 1012 (Ind. 2005), *reh'g denied* (Ind. 2006).

90. *Id.* at 1013 (citing Frye v. State, 822 N.E.2d 661 (Ind. Ct. App.), *aff'd in part, vacated in part*, 837 N.E.2d 1012 (Ind. 2005)).

91. *Id.* at 1014.

92. *Id.*

93. *Id.* at 1014.

94. *Id.* at 1015.

95. *Id.*

96. *Id.* at 1016 (Dickson, J., dissenting) (quoting IND. APP. R. 7(b)).

97. *Id.*

98. 829 N.E.2d 520, 522 (Ind. 2005).

99. *Id.* at 524; *see, e.g.*, IND. CODE § 35-50-2-4 (2004). Indiana's sentencing statutes were amended to eliminate the requirement that judges use specific aggravators and mitigators to justify departure from the presumptive sentence by P.L. 71-2005.

including his "criminal history, his likelihood of reoffending," the likelihood he was "involved in a substantial drug operation," his need for rehabilitation provided in a penal facility, and that reducing the sentence would "depreciate the seriousness of the crime."[100] The trial court found no mitigating circumstances.[101] On appeal, the State conceded that the last two aggravating factors listed in the previous sentence were used improperly by the trial court, leaving three aggravating circumstances.[102]

The Indiana Supreme Court analyzed the aggravators and mitigators it believed to be present. Although the trial court found no mitigators, the court found that Cotto's guilty plea was entitled to mitigating weight.[103] It showed that he accepted responsibility for the crime, and the court concluded that Cotto received no other bargained-for benefit from his plea (in contrast to cases in which the plea is traded for reducing or dismissing charges).[104] The court also believed that Cotto showed remorse by apologizing for his crime and acknowledging his drug addiction.[105] The court also gave less weight to the aggravating factors, finding that Cotto's criminal history consisted of only "five alcohol-related misdemeanors" that were "only marginally significant" in relation to sentencing for a Class A felony.[106] The court then rebalanced the aggravating and mitigating factors and, by a 3-2 vote, reduced the sentence from fifty years to the presumptive thirty-year term.[107] Justice Dickson, joined by Justice Boehm, dissented on the basis that "the trial court was in the best position to determine whether mitigating consideration should be given to Cotto's eventual guilty plea . . . and to his claim of remorse."[108]

The Indiana Supreme Court went through similar analyses in other cases. In *Estes v. State*, [109] the court unanimously revised a 267-year sentence for child molesting to 120 years because the sentence was "outside the typical range" for similar crimes.[110] "Estes had no criminal history, and he expressed remorse."[111] In *Francis v. State*,[112] the court reduced a fifty-year child molesting sentence to the presumptive sentence of thirty years, again finding that the trial court should have given mitigating weight to Francis's guilty plea and apology and finding that his criminal history was minimal.[113] The Indiana Supreme Court found that

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100. *Cotto*, 829 N.E.2d at 524.
101. *Id.*
102. *Id.*
103. *Id.* at 525.
104. *Id.*
105. *Id.* at 526.
106. *Id.*
107. *Id.* at 527.
108. *Id.* (Dickson, J., dissenting).
109. 827 N.E.2d 27 (Ind. 2005).
110. *Id.* at 29.
111. *Id.*
112. 817 N.E.2d 235 (Ind. 2004).
113. *Id.* at 237-39.

the trial court erred in determining that the victim's age, under twelve, supported the enhanced sentence because the victim's age was an element of the offense.[114] Even though the victim's age was "taken into account to some extent by the fact that the offense [was] a Class A felony," the fact that the victim was only six was still entitled to low to medium weight as an aggravating circumstance.[115] Justice Dickson dissented without opinion.

In *Ruiz v. State*,[116] the supreme court unanimously reduced the maximum twenty-year sentence for child molesting to the ten-year presumptive sentence.[117] The court found that Ruiz had minimal criminal history (the only aggravating factor cited by the trial court) and that his guilty plea and apology should be weighed as mitigators.[118] In *Neale v. State*,[119] the defendant received the fifty-year maximum sentence for child molesting. The Indiana Supreme Court looked at the three aggravating and four mitigating factors the trial court found, depreciated the weight of the defendant's all-misdemeanor criminal history, and rebalanced the factors to cut the term to forty years, plus ten years of probation.[120] The court stated: "When we made the change to the language of [Appellate Rule 7], we changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied."[121]

The Indiana Supreme Court's activism in sentence revision during the survey period, along with the recent relaxation of the appellate rule that permitted such revisions, may indicate increased interest by the supreme court in setting more uniform sentencing standards for application by the trial courts. It remains to be seen whether the court of appeals will abandon its longstanding reluctance to second-guess trial court sentences to join the supreme court's potential trend.

II. THE RIGHTS CONSTITUTION

Indiana's appellate courts issued many decisions applying the protections of the Bill of Rights in the Indiana Constitution during the survey period. These addressed new issues, including a potential right to privacy under article I, section 1, and new claims under the Equal Privileges and Immunities Clause of section 23. The Indiana Court of Appeals also continued its recent trend by continuing to develop caselaw applying the unique provisions of article I, section 11, governing searches and article I, section 14, governing double jeopardy, and

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114. *Id.* at 238.

115. *Id.*

116. 818 N.E.2d 927 (Ind. 2004).

117. *Id.* at 928.

118. *Id.* at 928-29.

119. 826 N.E.2d 635 (Ind. 2005).

120. *Id.* at 638-39. Justice Dickson dissented because he believed that the trial court's decision was entitled to greater deference under Appellate Rule 7(B). *Id.* at 639 (Dickson, J., dissenting).

121. *Id.* at 639.

other provisions of the Bill of Rights.

A. Privacy Under Article I, Section 1

In *Clinic for Women, Inc. v. Brizzi*,[122] the Indiana Supreme Court developed Indiana constitutional law in two ways: it took an additional step to elucidate a possible right to privacy, and it clarified the general analytical framework for looking at individual rights. Justice Rucker wrote the majority opinion, joined by Chief Justice Shepard and Justice Sullivan.

The court analyzed Indiana Code section 16-34-2-1.1, the abortion waiting period statute.[123] The statute requires that, at least eighteen hours before an abortion is performed, the physician performing the abortion or another qualified health care professional must "orally" and "in the presence of the pregnant woman" provide specified information to the woman.[124] The mandatory information includes "[t]he name of the physician performing the abortion"; the nature of the procedure, its risks and possible alternatives; "[t]he probable gestational age of the fetus"; "medical risks associated with carrying the fetus to term"; and the availability of various techniques that would allow the woman to see an image of the fetus and hear its heartbeat.[125] The woman must also be informed of the availability of financial assistance to pay for childbirth, that the child's father is legally required to provide financial support, and about adoption alternatives.[126] When there is a serious medical risk to the woman's life or health, the eighteen-hour delay is not required.[127] The federal courts previously rejected a challenge to this statute.[128]

The plaintiffs in the state-court challenge to the statute argued that it interfered with a woman's right to make private medical decisions under article

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122. 837 N.E.2d 973 (Ind. 2005).

123. The court first analyzed this statute in *A Woman's Choice—East Side Women's Clinic v. Newman*, 671 N.E.2d 104 (Ind. 1996), in which it answered a question certified by the United States District Court for the Southern District of Indiana seeking an interpretation of the medical necessity exception in the statute. In *Newman*, the court held that the medical emergency language allowed a physician to dispense with the waiting period when the physician determined, in a good faith exercise of clinical judgment, that all relevant factors led the physician to conclude that medical complications required therapeutic abortion to avoid serious and permanent physical or mental health consequences. *Id.* at 11. The author of this Article defended the statute in the United States District Court and argued the State's position on the medical emergency provision in the Indiana Supreme Court.

124. IND. CODE § 16-34-2-1.1(a)(1) (2005).

125. *Id.*

126. *Id.* § 16-34-2-1.1(a)(2).

127. *Id.* § 16-34-2-1.1(a).

128. A Woman's Choice—East Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002), *reversing in part*, 132 F. Supp. 2d 1150 (S.D. Ind. 2001). The United States Supreme Court affirmed similar restrictions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

I, section 1 of the Indiana Constitution.[129] This section states, in relevant part:

> WE DECLARE, 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.[130]

The plaintiffs also made a substantive due process challenge under the state constitution and alleged that the mandated information violated the rights of plaintiffs and their physicians to free interchange of thought and opinion.[131]

As detailed in last year's developments, the Indiana Court of Appeals invalidated the statute when it addressed this case, finding that it intruded upon a woman's right to make medical decisions.[132] The court of appeals found a privacy right in article I, section 1 and concluded that the privacy right protected an individual's right to make basic medical decisions, including the decision to have an abortion.[133] The court of appeals remanded to the trial court for fact-finding as to whether the statutes imposed a "material burden" on that right.[134] Judge Baker, concurring, would have held that the statute facially violated article I, section 21 because it imposed a special burden on a medical procedure used only by women.[135]

The Indiana Supreme Court began its analysis of the statute by noting that no right to privacy has previously been found in the Indiana Constitution.[136] Defending the statute, attorneys for the State argued that the Indiana Constitution contains no such right.[137] The State went further, arguing that article I, section 1 contains no judicially enforceable rights.[138] The court did not decide whether

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129. Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 973, 977 (Ind. 2005).

130. IND. CONST. art. I, § 1.

131. *Clinic for Women*, 837 N.E.2d at 977.

132. Clinic for Women, Inc. v. Brizzi, 814 N.E.2d 1042 (Ind. Ct. App. 2004), *vacated by* 831 N.E.2d 735 (Ind. 2005).

133. *Id.* at 1048-49.

134. *Id.* at 1050-52 (Baker, J., concurring).

135. *Id.* at 1057-60.

136. *Clinic for Women*, 837 N.E.2d at 978. Previously, *Doe v. O'Connor*, 790 N.E.2d 985, 991 (Ind. 2003), declined to decide whether article I, section 1 presented an independently enforceable substantive right to privacy.

137. *Clinic for Women*, 837 N.E.2d at 978.

138. *Id.* Previous reported decisions found enforceable rights in article I, section 1, including the right to pursue a lawful occupation and the right to purchase and consume intoxicating liquor. *See, e.g.*, Dept. of Ins. v. Schoonover, 72 N.E.2d 747 (1947) (lawful occupation); Herman v. State, 8 Ind. 545 (1855) (intoxicating liquor). Article I, section 1, also was the source of the right to scalp tickets to the Indiana high school basketball championship competition (ruled to be a lawful occupation because it harmed no one). Kirtley v. State, 84 N.E.2d 712 (Ind. 1949). In *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005), the Indiana Court of Appeals cast doubt on the

article I, section 1 contains privacy protections. Instead, it ruled that if there is such a right in the Indiana Constitution, the restrictions of the abortion waiting-period statute would not violate it.[139]

Both parties and the court agreed that the statute had to be analyzed using the framework of *Price v. State*,[140] the 1993 case stating that each portion of the Indiana Constitution contains a "core constitutional value" that the State, in the exercise of its police power, cannot "materially burden."[141] *Price* involved a criminal conviction for disorderly conduct arising from the defendant's noisy complaints about police behavior in breaking up a party.[142] In what is arguably the case inaugurating the modern era of interpretation of the Indiana Constitution, the Indiana Supreme Court ruled that Price's profane comments were political speech because they related to police conduct; that political speech was a "core value" of article I, section 9 (the Free Expression Clause); and that the disorderly conduct statute could not be applied to condemn Price's words because to do so would "materially burden" the "core value" of political speech.[143] The court defined "material burden" as a restriction on a core value of sufficient magnitude that the value "would no longer serve the purpose for which it was designed."[144] Since *Price*, the court has recognized only one other "core value," the right to corporate worship elucidated in *City Chapel Evangelical Free Inc. v. City of South Bend.*[145]

Price also introduced the Indiana Supreme Court's case-specific application of "core values," a principle that turned out to be dispositive in *Clinic for Women*. The court found that "[u]nless the court concludes that the statute before it is incapable of constitutional application, it should limit itself to vindicating the rights of the party before it."[146] In *Clinic for Women*, the challenge occurred before the statute went fully into effect, and the courts were presented with no individual woman's claim that the statute impeded her right to obtain an abortion.[147] The court thus sidestepped the controversy in federal case law over what standard to apply in adjudicating facial challenges to abortion cases.[148] The Indiana Supreme Court clarified that plaintiffs have a "heavy burden" in facial challenges under Indiana law because they must show "that

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validity of those decisions, lumping them in the category of discredited *Lochner*-era economic rights decisions of the United States Supreme Court. *Id.* at 31-33.

139. *Clinic for Women*, 837 N.E.2d at 975.

140. *Id.* at 978; 622 N.E.2d 954 (Ind. 1993).

141. *Price*, 622 N.E.2d at 960.

142. *Id.* at 956-57.

143. *Id.* at 961-64.

144. *Id.* at 960 n.7.

145. 744 N.E.2d 443 (Ind. 2001).

146. *Price*, 622 N.E.2d at 958.

147. Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 937, 979 (Ind. 2005).

148. *See, e.g.*, Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 142-43 (3d Cir. 2000) (noting difference between standards under United States v. Salerno, 481 U.S. 739 (1987), and Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992)).

there are no set of circumstances under which the statute can be constitutionally applied."[149]

Applying this standard, the court in *Clinic for Women* concluded that the plaintiffs had failed to make allegations sufficient to support a claim that the eighteen-hour-waiting-period statute is invalid on its face.[150] The court found that concerns for a woman's health raised by plaintiffs did not show facial invalidity because the medical emergency language in the law permitted judicial circumvention of the waiting period for all abortions deemed medically necessary.[151] The court also ruled that the other potential consequences alleged by plaintiffs—that women will delay abortions, "travel to other states to obtain abortions, [c]arry pregnancies to term, or . . . [seek] alternatives to legal abortions"—are insufficient to facially invalidate the statute: "the fact that some unknown number of women may be adversely affected by the delay obviously means that not all or perhaps not even most will be so affected."[152] The court's standard thus dictated its result—because it could not invalidate the statute so long as it could be applied in a constitutional manner to any set of facts, the law survived pre-application scrutiny.

The court went on to reject the dissent's claim that the complaint at least stated a set of facts requiring trial, concluding instead that the statute could not constitute a "material burden" under article I, section 1.[153] For purposes of this analysis, the court equated the federal "undue burden" standard outlined in *Casey* ("placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"[154]) with the "material burden" standard enunciated in *Price* (if the core value "as impaired, would no longer serve the purpose for which it was designed, it has been materially impaired"[155]). The court concluded that the two standards were "virtually indistinguishable" for purposes of evaluating the eighteen-hour-waiting-period statute.[156] The court stated "[b]oth tests avoid weighing the relative interests of the constitutional right and of the state regulation at issue in the case."[157] "Instead, they measure the extent to which the state regulation impinges upon the central principle that the constitution protects."[158] The court reinforced this conclusion by indicating that the right protected by *Casey* is similar to the article I, section 1 right plaintiffs alleged to be infringed in *Clinic for Women* because both rights address a woman's inherent

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149. *Clinic for Women*, 837 N.E.2d at 980 (citing Baldwin v. Reagan, 715 N.E.2d 332, 337 (Ind. 1999)).

150. *Id.* at 981.

151. *Id.* (citing A Woman's Choice—East Side Women's Clinic v. Newman, 671 N.E.2d 104, 110 (Ind. 1996)).

152. *Id.*

153. *Id.* at 982.

154. *Id.* (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 877 (1992)).

155. *Id.* at 983.

156. *Id.* at 983-84.

157. *Id.* at 984.

158. *Id.*

right to autonomy in reproductive choice.[159]

Because the court equated "material burden" with "undue burden," it next looked to other jurisdictions' applications of the "undue burden" standard to eighteen-hour waiting period statutes like Indiana's.[160] The court began with *Casey*, which held that a twenty-four-hour-waiting-period statute did not constitute an undue burden.[161] *Casey* concluded that the waiting period created a burden on the abortion right by requiring women to visit a medical facility twice, just as plaintiffs alleged in *Clinic for Women*.[162] But *Casey* concluded that the burden was not undue because "a State is permitted to enact persuasive measures which favor childbirth over abortion" and the statute presented no real medical risk in light of the medical emergency exception.[163] The Indiana Supreme Court also had before it the Seventh Circuit's review of the Indiana statute under the "undue burden" standard in *A Woman's Choice*, in which the Seventh Circuit found that the eighteen-hour waiting period was not an "undue burden."[164]

Because the Indiana Supreme Court previously had ruled that the federal "undue burden" standard and state "material burden" standard were essentially identical in this context, the court's application of *Casey* and the federal decisions addressing the Indiana statute made its conclusion foregone. The court concluded that the statute did not violate any privacy right that may reside in article I, section 1.[165] The court also concluded that it could reach this decision without the factual inquiry mandated by the Indiana Court of Appeals' decision, but its reasoning on that point is less clear. It relied on the Seventh Circuit's decision to conclude that no trial was required to determine the extent of impairment the waiting period might entail.[166] This reliance apparently stemmed from its equation of the "undue burden" and "material burden" standards, coupled with the Seventh Circuit's emphasis on creating a uniform national standard.[167] Because the federal and state standards were essentially the same, the Indiana Supreme Court needed no factual inquiry to determine that the statute did not sufficiently burden any privacy right to be facially invalid.[168]

Justice Dickson wrote a lengthy concurrence in the result based on a more far-reaching theoretical basis: He found no right to abortion in the Indiana

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159. *Id.*

160. *Id.* at 984-87.

161. *Id.* at 985 (analyzing Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 846-87 (1992)).

162. *Id.* (discussing *Casey*, 505 U.S. at 885-87).

163. *Id.* (quoting *Casey*, 505 U.S. at 886).

164. *Id.* at 986 (analyzing A Woman's Choice—East Side Women's Clinic v. Newman, 305 F.3d 684, 692 (7th Cir. 2002)).

165. *Id.* at 986-88.

166. *Id.* at 986.

167. *Id.* (citing *A Woman's Choice*, 305 F.3d at 688, 691-92).

168. *Id.*

Constitution.[169] He also found the State's desire to protect unborn life to be entirely consistent with article I, section 1's declaration of an inalienable right to life.[170]

Using his common approach, Justice Dickson approached the question historically.[171] He found it "inconceivable . . . that our Constitution's framers intended to create a right to abortion."[172] At the time of ratification and thereafter, abortion was a crime in Indiana.[173] He also found that a right to abortion is inimical to the expressed protection for life and the delegation to government to provide for "the peace, safety, and well-being" of its citizens, both in article I, section 1.[174] He found the eighteen-hour waiting period to be "important protection[] for the safety and well being of pregnant women contemplating an abortion," citing articles regarding harmful psychological consequences of abortion.[175] He concluded that "[b]ecause of my firm conviction that the Indiana Constitution does not recognize or protect any right to abortion, these issues regarding how and whether the material burden test applies do not arise and are unnecessary to address."[176]

Justice Boehm dissented, finding in article I, section 1 a liberty right "includ[ing] the right of a woman to choose for herself whether to terminate her pregnancy, at least where there is no viable fetus or her health is at issue."[177] He would have affirmed the court of appeals' disposition, requiring a trial to determine whether the waiting period presented a "material burden" on rights protected by the Indiana Constitution.[178]

Justice Boehm first disputed the State's contention that article I, section 1 lacks substantive content.[179] He found both textual and historical support for the proposition that the liberty right in section 1 is "intended to limit legislative discretion and [is] judicially enforceable."[180] Indiana's current Bill of Rights was adopted after the right to judicial enforcement of constitutional rights and judicial review of statutes were well established at the federal level.[181] Justice Boehm also cited excerpts from the constitutional debates indicating that delegates wanted a strong statement of natural rights in the first section of the

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169. *Id.* at 988 (Dickson, J., concurring).

170. *Id.*

171. *See, e.g.*, City Chapel Evangelical Free, Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001) (illustrating Justice Dickson's historical approach); Richardson v. State, 717 N.E.2d 32 (Ind. 1999) (same).

172. *Clinic for Women*, 837 N.E.2d at 989.

173. *Id.*

174. *Id.* at 990.

175. *Id.* at 991 & n.4, 992.

176. *Id.* at 994 (Boehm, J., dissenting).

177. *Id.*

178. *Id.* at 995.

179. *Id.* at 996.

180. *Id.* at 996-98.

181. *Id.* at 996-97.

Constitution.[182] He also cited the early cases of *Herman v. State*[183] and *Beebe v. State*,[184] as well as later cases applying article I, section 1, for the principle that the Constitution protects a liberty right.[185] Justice Boehm concluded that "Article I, section 1 does indeed have substance and is designed to assure all persons in this state 'certain inalienable rights' which are enforceable by the courts."[186]

He went on to conclude that the Framers' notion of "liberty" as of 1851 is not "frozen."[187] Various rights, including a woman's right to own property, have developed since the current Constitution was written.[188] Justice Boehm also noted that the constitutional debates themselves contemplated that rights would continue to develop and expand.[189] He pointed to *In re Lawrance*,[190] a case implicating the "right to die," as an example of the expansion of the liberty right beyond what the Framers might have imagined.[191]

Justice Boehm noted that although the United States Constitution contains no enumerated protection for "liberty," the Indiana Constitution does spell out that right in article I, section 1.[192] The roots of the Indiana Constitution—often mentioned in other cases[193]—in frontier Jacksonianism caused the Framers to emphasize individual rights more, and more explicitly, than the Federal Constitution does. Justice Boehm stated that the Framers of the Indiana Constitution "would have readily embraced the 'right to be let alone' [Justice Brandeis's phrase, not yet coined in 1851] as a fair summary of one incident of what they were getting at in assuring the rights to 'life, liberty, and the pursuit of happiness.'"[194] He also linked the Framers' emphasis on liberty to the natural rights philosophy that served as a basis for the Indiana Bill of Rights.[195]

Justice Boehm further stated that because the abortion decision is "intensely personal" and each individual's decision will weigh and value different factors, it is less amenable to state regulation than areas in which there is a basic social consensus.[196] He argued, "I believe one of these core values [under the Indiana Constitution] is the right to be free from legislation that restricts individual

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182. *Id.* at 997.

183. 8 Ind. 545 (1855).

184. 6 Ind. 501 (1855).

185. *Clinic for Women*, 837 N.E.2d at 998 n.17.

186. *Id.* (quoting IND. CONST. art. I, § 1).

187. *Id.* at 999.

188. *Id.*

189. *Id.* at 1000.

190. 579 N.E.2d 32 (Ind. 1991).

191. *Clinic for Women*, 837 N.E.2d 1000-01 (Boehm, J., dissenting) (citing *In re Lawrance*, 579 N.E.2d at 44).

192. *Id.* at 1001-02.

193. *See, e.g.*, D&M Healthcare, Inc. v. Kernan, 800 N.E.2d 898, 901 n.3 (Ind. 2003); Price v. State, 622 N.E.2d 954, 961-62 (Ind. 1993).

194. *Clinic for Women*, 837 N.E.2d at 1002.

195. *Id.* at 1003-04.

196. *Id.* at 1004.

liberty based on essentially philosophical or religious views as to which there is no general consensus."[197] He drew support for this assertion from the debates over the 1851 Constitution.[198] Because the abortion decision involves the exercise of an individual's conscience, a right respected by the Framers, Justice Boehm concluded that the right to make one's own decision about abortion is protected by the Constitution.[199]

Justice Boehm concluded his opinion by analyzing whether the waiting-period statute burdens that protected right. Contrary to the majority's equation of the federal standard with the state standard, Justice Boehm concluded that the "material burden" standard of Indiana law is a stronger protection of individual rights than the federal standard and, therefore, *Casey* provides unreliable guidance.[200] Citing *Price*, he concluded that core values are not subject to balancing against the State's interest in regulation.[201] Instead, the "material burden" analysis looks only at the burden a restriction places on the core constitutional right.[202] He concluded that the allegations of the complaint, if proven, were sufficient to show material burden, and he therefore would have affirmed the court of appeals' decision to remand the matter for trial as to whether the statute would create a material burden as applied.[203]

Clinic for Women illustrates the current state of analysis under the Indiana Bill of Rights. First, *Price*'s requirement that the Constitution be applied only to actual facts presented by a specific plaintiff makes it nearly impossible to facially invalidate a statute. As discussed in more detail in Part II.B below, this framework limits the courts' ability to imagine or address circumstances where likely violations of the Bill of Rights occur, outside the circumstances of the particular plaintiff who happens to be before the court.

Moreover, the court's decision to equate the federal "undue burden" standard with Indiana's "material burden" dictated the case's outcome. The two standards arise from quite different contexts, and it is not obvious why they would apply identically in this case. The court's choice to equate the standards implied that "core values" under the Indiana Constitution ("a cluster of essential values which the legislature may qualify but not alienate"[204]) are equivalent to a woman's right to choose abortion under the Federal Constitution, a right that has been progressively qualified over the years since *Roe v. Wade* as the U.S. Supreme Court permitted various state actions to promote the countervailing value of protecting fetal life. Equating the right to choose abortion (which is qualified by the states' interest in protecting fetal life) to the right to political speech or to group worship is not an obvious conclusion, and the court's choice to do so may

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197. *Id.* at 1005.
198. *Id.*
199. *Id.*
200. *Id.* at 1006-07.
201. *Id.* at 1006.
202. *Id.* at 1007.
203. *Id.* at 1007-08.
204. Price v. State, 622 N.E.2d 954, 960 (Ind. 1993).

expose existing and yet-to-be-identified "core values" to a degree of restriction beyond that implied in *Price* and *City Chapel*.

Also, the concept of "core value" remains largely inchoate. *Price* and *City Chapel* enumerated the core values of political speech and corporate worship, but both the framework for discovering core values, and the actual identification of those values, remains an infant enterprise. If ours is to remain a state constitutional jurisprudence of original intent, it is difficult to disagree with Justice Boehm's assertion that privacy is a core value.[205] Imbued with Jacksonian idealism and individualism as the framers were, it is difficult to conceive that they would countenance many of the intrusions on privacy permitted in today's society. The lack of significant discussion of privacy-type concerns in the debates on the Constitution is as likely attributable to the framers' inability to conceive of the scope of government invasion of the personal sphere that exists today as it is to any other cause. The framers' world view was characterized by distrust of government, and it is difficult to imagine that they would support governmental interference with significant private choices.[206]

B. Equal Privileges

The Indiana Court of Appeals applied the Equal Privileges and Immunities Clause of article I, section 23 in *Morrison v. Sadler*,[207] a case that will not be reviewed by the Indiana Supreme Court because neither party sought transfer. The case upheld Indiana's "Defense of Marriage" statute,[208] which provides that marriage must be between a man and a woman and thus outlaws same-sex marriage.[209] Judge Barnes wrote the opinion, in which Chief Judge Kirsch and Judge Friedlander concurred in result (with only Judge Friedlander writing separately).[210] This array means that there is no majority for the opinion's reasoning, only for its result.

The plaintiffs based their state constitutional challenge primarily on article I, section 23.[211] Indiana's well-established standard for adjudicating such claims

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205. The Indiana Supreme Court has stated that interpreting the Indiana Constitution requires "a search for the common understanding of both those who framed it and those who ratified it. Furthermore, the intent of the framers of the Constitution is paramount in determining the meaning of a provision." City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 447 (Ind. 2001) (internal quotation marks omitted) (quoting McIntosh v. Melroe Co., 729 N.E.2d 972, 986 (Ind. 2000) (Dickson, J., dissenting)).

206. This conclusion does not mean that the framers would have voted the other way in *Clinic for Women*. Justice Dickson correctly counterbalances any privacy concern against protection of fetal life, another interest the framers might have held dear.

207. 821 N.E.2d 15 (Ind. Ct. App. 2005).

208. IND. CODE § 31-11-1-1 (2005).

209. *Morrison*, 821 N.E.2d at 35.

210. *See id.* at 18, 35 (Friedlander, J., concurring).

211. *Id.* at 21 (plurality opinion). The court of appeals noted that "[t]here is binding United

involves a two-part test initially set forth in *Collins v. Day*.[212] First, the disparate legislative treatment given to one group "must be reasonably related to inherent characteristics" that distinguish the group.[213] Second, the different treatment "must be uniformly applicable and equally available to all persons similarly situated."[214] As a final step, this test is applied with deference to legislative classifications.[215] The court of appeals also noted that, under binding precedent, only disparate treatment—not legislative purpose—is at issue on judicial review, and legislative motives do not become an issue unless the lines drawn by the General Assembly appear arbitrary or manifestly unreasonable.[216]

The court of appeals further summarized the test as follows:

> The practical effect of *Collins* and cases following it is that statutes will survive Article 1, § 23 scrutiny if they pass the most basic rational relationship test. In fact, our research has revealed that of the approximately ninety reported "Equal Privileges and Immunities" cases following *Collins* and its clarification of Article 1, § 23 analysis, only three have finally resulted in holdings (after supreme court review) that a particular statute violated Article 1, § 23 [all as applied]. . . . No statute or ordinance has ever been declared facially invalid under the *Collins* test.[217]

The court analyzed the plaintiffs' claims under this relaxed formulation.

The plaintiffs argued that Indiana's ban on same-sex marriage was not reasonably related to differences between the two statutory classifications—same-sex couples and opposite-sex couples.[218] The court indicated that it had only to find one reasonable basis on which the classes could

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States Supreme Court precedent indicating that state bans on same-sex marriage do not violate the United States Constitution" because an appeal in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), was dismissed for want of a substantial federal question. Baker v. Nelson, 409 U.S. 810 (1972). Under rules effective at that time, the Supreme Court's dismissal of the appeal on that ground represented a determination on the merits that the federal claim was insubstantial that is binding on the lower courts. *Morrison*, 821 N.E.2d at 20. The court of appeals noted that the U.S. Supreme Court's more recent decision invalidating anti-sodomy legislation explicitly declined to address same-sex marriage. *Id.* at 20 (citing Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

212. 644 N.E.2d 72 (Ind. 1994).

213. *Morrison*, 821 N.E.2d at 21 (citing *Collins*, 644 N.E.2d at 80).

214. *Id.*

215. *Id.*

216. *Id.* at 21-22 (citing Dvorak v. City of Bloomington, 796 N.E.2d 236, 239 (Ind. 2003); *Collins*, 644 N.E.2d at 80).

217. *Id.* at 22. The three cases invalidating statutes on an as-applied basis under article I, section 23 are *Martin v. Richey*, 711 N.E.2d 1273, 1285 (Ind. 1999) (invalidating medical malpractice statute of limitations as to particular plaintiff); *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999) (same); and *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 270-71 (Ind. 2003) (invalidating statutory ban on Medicaid payment for abortions as applied to a class of women).

218. *Morrison*, 821 N.E.2d at 22.

be treated differently to uphold the statutory classification.[219] The court noted two of the plaintiffs' arguments—that recognizing same-sex marriages would not harm opposite-sex marriages and that recognizing same-sex marriages would promote the purpose of Indiana's Family Law Code to protect children—but found that neither addressed the section 23 claim.[220]

The court found justification for the legislative classification in "the key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption or assisted reproduction."[221] The methods same-sex couples must use to obtain children, including assisted reproduction techniques and adoption, require preparation, planning, and financial investment.[222] In contrast, reproduction through sexual intercourse may occur without "foresight or planning."[223]

These differences affect "the State of Indiana's clear interest in seeing that children are raised in stable environments."[224] The State may assume that same-sex couples, who already have taken time to plan and finance a child through adoption or assisted reproduction, will provide a stable and safe home "without the 'protections' of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place."[225]

Because heterosexual couples may conceive, in contrast, "without any thought for the future," the State "may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from 'casual' intercourse."[226] In other words, the court concluded, marriage provides an incentive for opposite-sex couples to stay together to raise unplanned children in a stable environment.[227]

The court of appeals concluded that this difference was sufficient to support the statutory classifications.[228] The court further concluded that studies showing a growing number of same-sex couples raising children were irrelevant to its decision, such facts falling within the legislature's province to address.[229]

The court next addressed the plaintiffs' argument that "it is irrational to justify opposite-sex only marriage on procreative grounds because there is no

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219. *Id.* at 23.
220. *Id.*
221. *Id.* at 24.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 24-25.
228. *Id.* at 27.
229. *Id.* at 27-28.

requirement that couples wishing to marry prove their fertility or willingness to procreate" and couples clearly unable to procreate are permitted to marry.[230] The court dismissed the argument, stating that legislative classifications are not to be condemned because they are overbroad.[231] The court also discussed and distinguished opinions from other states finding a right to same-sex marriage or civil union under state constitutions.[232] In summary, the court of appeals concluded that the State's interest in protecting a child born from heterosexual relations is sufficient to justify different treatment of same-sex and opposite-sex marriages.[233]

The court of appeals also rejected the plaintiffs' claim based on a right to privacy in article I, section 1.[234] The court expressed doubt that this section is "capable of independent judicial enforcement."[235] The court then looked at several cases in which the Indiana Supreme Court had found enforceable rights in article I, section 1, including the right to pursue a lawful occupation.[236] The court expressed some affinity with the State's argument that these cases, all of which are more than fifty years old, may have fallen into desuetude with the U.S. Supreme Court's *Lochner*-era rulings expressing outdated views on economic regulation.[237]

The court did not resolve these questions, but instead determined that even if a right to privacy is a "core value" under the Indiana Constitution, it does not convey a right to same-sex marriage.[238] The court could find nothing in Indiana's constitutional history indicating that the right to marry is a "core value," and it found no support in decisions from other jurisdictions for giving any special, "core value"-type, protection to same-sex marriage.[239] The court concluded, "[t]o the extent that Article 1, § 1, may contain some guarantee of minimal governmental interference in private affairs, the Plaintiffs have failed to convince us that it contemplates as a 'core value' that the government must act affirmatively to extend the benefits of marriage to any particular couple."[240]

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230. *Id.* at 27.

231. *Id.* (citing Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994)).

232. *Id.* at 27-29 (addressing Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003), and Baker v. State, 744 A.2d 864 (Vt. 1999)). The court of appeals found support for its ruling in *Standhardt v. Superior Court, County of Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003), and two Canadian cases, *EGALE Canada, Inc. v. Canada*, 225 D.L.R. 472, and *Halpern v. Toronto*, 225 D.L.R. 529.

233. *Morrison*, 821 N.E.2d at 30-31.

234. *Id.* at 34.

235. *Id.* at 31 (citing Doe v. O'Connor, 790 N.E.2d 985, 991 (Ind. 2003), for the proposition that article I, section 1 may not provide a standard allowing for judicial enforcement of privacy).

236. *Id.* at 31-32.

237. *Id.* at 32 (citing Lochner v. New York, 198 U.S. 45 (1905)).

238. *Id.* at 33-34.

239. *Id.* at 33.

240. *Id.* at 34. The court also rejected a claim under a state constitutional substantive due process theory. *Id.* at 34-35.

The court therefore found no basis—either in the provision governing classifications or the provision potentially containing a right to privacy—for extending marriage to same-sex couples as a state constitutional right. Judge Friedlander wrote separately to clarify that the court's opinion related only to the legality, not the morality, of same-sex marriage and that the court was prohibited from inquiring into the legislative motives for the statute restricting marriage to opposite-sex couples.[241]

Although the conclusion the court of appeals reached is unsurprising, two items within its analysis bear further discussion. First, the court's dismissive analysis of the "overbreadth" argument may fail to fully apply the provisions of the *Collins* test (perhaps because the parties did not assert the point). The court quoted *Collins* for the proposition that overbreadth does not condemn a statutory classification, but that statement seems inconsistent with the second step of *Collins*'s two-part analysis, requiring that "preferential treatment . . . be uniformly applicable and equally available to all persons similarly situated."[242]

If the "inherent characteristic" justifying different treatment of opposite-sex couples under the first prong of the test is their ability to procreate without planning, how does the requirement of uniform applicability to "all persons similarly situated" under the second prong stretch to those who are plainly unable to procreate? The characteristic justifying the disparate treatment, procreation without assistance, is not possessed by everyone in the category receiving the benefit. In other words, as to the trait at issue, opposite-sex couples who are unable to procreate without assistance are more similar to same-sex couples than to opposite-sex couples who can procreate without help, yet all the opposite-sex couples receive the benefit. Perhaps the court of appeals applied the *Collins* test correctly, but an explanation addressing this apparent inconsistency would have made the court's conclusion easier to understand.

Second, and more broadly, the court's general discussion of the *Collins* standard points out its toothlessness since it was implemented in 1994. *Collins* gave life to section 23 independent of the federal Equal Protection Clause, and the two-part standard avoided the problems arising from the multi-tiered "levels of scrutiny" analysis in the federal standard. For a time, it appeared that the *Collins* standard would generate a cognate problem, arising from how to define the classes to be compared for section 23 purposes.[243] That problem has not presented itself in the past couple of years.

Instead, as Judge Barnes's opinion indicates, what appeared to be the key innovation in the *Collins* standard—the requirement that "inherent differences" between the classes support different legislative treatment—has transformed into mere rational basis review.[244] Thus, the standard under section 23 is the same as the less exacting of the two standards applied to evaluate claims under the Due Process Clause.

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241. *Id.* at 36 (Friedlander, J., concurring).

242. Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994).

243. *See* Laramore, *supra* note 1, at 961-62.

244. *Morrison*, 821 N.E.2d at 22.

This degradation of the standard has been compounded by the supreme court's instruction in *Price* that courts should not look beyond the facts presented by a given plaintiff in evaluating the constitutionality of a statute unless there is no conceivable circumstance in which the statute may be applied constitutionally.[245] With this approach, it is no surprise that no statute has ever been found facially invalid using the *Collins* standard. In his seminal 1989 article, Chief Justice Shepard stated that several sections of the Indiana Constitution lacking direct federal constitutional cognates "clearly provide occasions when a litigant who would lose in federal court may win in state court."[246] In the intervening seventeen years, this promise has occasionally been fulfilled.[247] But section 23 has not proved to be a consistent source of individual rights or of limitations on legislative authority, as the cases decided during the survey period show.

The court of appeals addressed section 23 in several other cases decided during the survey period, applying a standard similar to that elucidated in *Morrison*. In *Bloomington Country Club, Inc. v. City of Bloomington Water & Wastewater Utilities*,[248] the court approved a separate "irrigation rate" charged to the country club for water use that was higher than the ordinary rate for water use.[249] The court rejected the country club's argument that the rate violated section 23, ruling that the disparate treatment was reasonably related to the country club's different water use history.[250] *Gray v. Daimler Chrysler Corp.*[251] analyzed a claim that the three-year claim period in the worker's compensation statute violated section 23 because it penalized individuals whose occupational diseases had long latency periods (here, silicosis with an onset more than ten years after employment ended).[252] The court declined to invalidate the statute, finding that it was legitimate for the General Assembly to treat long-onset illnesses differently than those with shorter latency periods:

> Here, our legislature has struck an economic balance between the interests of individuals who suffer from occupational diseases and their employers. The statute of repose . . . reflects the legislative determination that disablement occurring more than three years after the employee's last work-related exposure to silica dust is not an injury for

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245. *See* Price v. State, 622 N.E.2d 954, 958 (Ind. 1993).

246. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 583 (1989).

247. For example, in claims involving article I, sections 11 and 14, rights broader than those the Federal Constitution provides have been established under the Indiana Constitution. *See, e.g.*, *infra* Part II.C-D.

248. 827 N.E.2d 1213 (Ind. Ct. App. 2005), *trans. dismissed* (Ind. 2006).

249. *Id.* at 1216-17.

250. *Id.* at 1221.

251. 821 N.E.2d 431 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005).

252. *Id.* at 438-41.

which employers should be liable.[253]

Horn v. Hedrickson[254] addressed another wrongful death claim, analyzing whether parents could recover for the death of a viable fetus.[255] The Indiana Court of Appeals ruled that it was bound by the supreme court's ruling in *Bolin v. Wingert*[256] to hold that parents of viable fetuses have no right to recover under the child wrongful death statute.[257] In an opinion by Judge Najam, the court went on to analyze this limitation under section 23.[258] It concluded that there was no "inherent difference" for section 23 purposes between parents of viable fetuses wrongfully killed (who cannot recover damages) and parents of live children wrongfully killed (who can).[259] Thus, absent the Indiana Supreme Court's controlling precedent, the court would have ruled that the statute precluding damages for wrongfully killed viable fetuses violated section 23.[260] The court urged the supreme court to reconsider *Bolin* on section 23 grounds.[261]

C. Search

The Indiana Supreme Court substantially clarified the analysis used in determining what constitutes a reasonable search under article I, section 11 in *Litchfield v. State*,[262] a unanimous opinion written by Justice Boehm. *Litchfield* analyzed a search of trash belonging to individuals identified as potential drug dealers.[263] The garbage was taken from the area where it was ordinarily picked up, and a search of its contents revealed items relating to marijuana.[264] A subsequent search of the Litchfields' home uncovered fifty-one marijuana plants being cultivated on the back deck.[265]

The Litchfields challenged the search as violating the Fourth Amendment and section 11. The court quickly disposed of the federal constitutional argument, noting that there is no reasonable expectation of privacy in garbage left out for pickup under *California v. Greenwood*.[266]

The court went on to perform the separate analysis required by the Indiana Constitution, noting that Indiana has explicitly rejected the "expectation of

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253. *Id.* at 441.

254. 824 N.E.2d 690 (Ind. Ct. App. 2005).

255. *Id.* at 693.

256. 764 N.E.2d 201 (Ind. 2002).

257. *Horn*, 824 N.E.2d at 694 (citing *Bolin*, 764 N.E.2d at 201).

258. *Id.* at 701-03.

259. *Id.* at 702-03.

260. *Id.*

261. *Id.* at 703. Judge Mathias concurred in result, stating that *Bolin* was an adequate basis for the court's decision and did not merit reconsideration. *Id.* at 704-05 (Mathias, J., concurring).

262. 824 N.E.2d 356 (Ind. 2005).

263. *Id.* at 357.

264. *Id.* at 357-58.

265. *Id.* at 358.

266. 486 U.S. 39 (1988).

privacy" approach embodied in the federal test.[267] Instead, "[t]he legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances."[268] But, the court noted, "we have not explicitly addressed whether 'reasonableness' is to be evaluated from the perspective of the investigating officer . . . or the subject of the search . . . or both."[269]

The court indicated that the determination of reasonableness "requires consideration of both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizure."[270] Citing several past decisions, the court indicated that arbitrary selection of the subject is likely to make the search unreasonable.[271] Because the reasonableness determination involves balancing the degree of intrusion against other factors, a search may be unreasonable even if there is some indication of criminal activity while another may be reasonable even if there is no such indication (specifically, in the case of random drug tests of certain high school students).[272] As another example of balancing, when a violation of law is established most seizures will be upheld.[273] The court restated the balancing test as involving: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs."[274]

The court then specifically addressed trash searches. The court discussed *Moran v. State*,[275] in which the majority affirmed a search of trash left at the curb.[276] *Moran* noted that "Hoosiers are not entirely comfortable with the idea of police officers casually rummaging through trash left at curbside."[277] The dissent in *Moran* argued that the search was unreasonable because trash may reveal intimate details of an individual's life and there is no way to dispose of

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267. *Litchfield*, 824 N.E.2d at 359.

268. *Id.* (citing Moran v. State, 644 N.E.2d 536, 539 (Ind. 1994)).

269. *Id.* at 360.

270. *Id.*

271. *Id.* (citing State v. Gerschoffer, 763 N.E.2d 960, 966 (Ind. 2002) (discussing neutral criteria for stopping motorists at drunk driving roadblock); Baldwin v. Reagan, 715 N.E.2d 332, 334 (Ind. 1999) (holding that motorists may not be stopped arbitrarily under authority of seatbelt law and may be stopped only when violation is observed)).

272. *Id.* (citing State v. Bulington, 802 N.E.2d 435 (Ind. 2004) (finding search unreasonable even though some indication of criminal activity was present); Linke v. Nw. Sch. Corp., 763 N.E.2d 972, 985 (Ind. 2002) (approving random drug tests of some high school students under certain circumstances)).

273. *Id.* at 361 (citing Mitchell v. State, 745 N.E.2d 775, 787 (Ind. 2001)).

274. *Id.*

275. 644 N.E.2d 536 (Ind. 1994).

276. *Id.* at 542.

277. *Id.* at 541.

trash other than through public collection.[278] The court also discussed more recent trash search decisions by the court of appeals, some of which sought to draw a bright line invalidating searches that required law enforcement personnel to trespass to obtain the discarded trash.[279]

The court rejected the bright-line approach and also rejected the approach taken by some other states that ruled all trash searches unconstitutional.[280] The court concluded, however, that searching trash left out for pickup involves no intrusion on an owner's liberty or property interests.[281] Once trash is set out to be discarded, the owner invites the trash collector to remove it and dispose of it.[282] A police officer can perform a search with no greater intrusion than the trash collectors picking up trash in the ordinary course of their job.[283] Thus, the balancing test puts no weight on intrusion in the context of trash abandoned for collection.

But the determination that searching trash set out for collection involves no intrusion is not the end of the matter because, under the court's formulation, it matters how the police chose which trash to search. "[I]t is not reasonable for law enforcement to search indiscriminately through people's trash."[284] The court determined that "a requirement of articulable individualized suspicion, essentially the same as is required for a 'Terry stop' of an automobile, imposes the appropriate balance between the privacy interests of citizens and the needs of law enforcement."[285] Random searches of garbage would be unreasonable.[286]

The court remanded *Litchfield* for additional fact-finding about how the police chose to search the trash in question.[287] Because the trash had been set out for pickup, the owners had abandoned possessory interest in it and police could access it in the same manner as trash collectors.[288] But police could do so only if they had "articulable individualized suspicion" of drug activity at the Litchfield household.[289]

This analytical framework considerably advances the former "totality of the circumstances" approach to the reasonableness of searches under section 11.[290] The court spelled out in some detail the framework to be used in judging the reasonableness of trash searches, and Indiana's appellate courts can spawn similar formulae for other types of searches. The case articulated two or three

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278. *Id.* at 543 (Dickson, J., concurring and dissenting).
279. *Litchfield*, 824 N.E.2d at 362.
280. *Id.* at 362-63.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.* at 364.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *See id.* at 359.

factors to be balanced when judging reasonableness, but it remains to be seen how well these factors can be adapted to the diverse circumstances in which questions arise under section 11.

The Indiana Court of Appeals applied Indiana's developing search doctrine in several cases, decided both before and after *Litchfield*. These cases continue the trend, noted in last year's article, of court of appeals cases applying article I, section 11 to give additional depth and meaning to the reasonableness test enunciated by the Indiana Supreme Court and to differentiate rights under the Indiana Constitution from Fourth Amendment rights.[291]

The court of appeals applied *Litchfield* quite directly in *Edwards v. State*,[292] analyzing a search of trash left out for pickup. The marijuana detritus found in the trash allowed police to obtain a search warrant for the home, where they found more contraband leading to a marijuana possession conviction.[293] The court relied on *Litchfield*'s conclusion that trash put out for pickup is abandoned by its owner so that a search intrudes on none of the owner's interests.[294] The court went on to analyze whether police had a "reasonable, articulable suspicion" to justify the trash search.[295] Police targeted Edwards based on information from a confidential informant.[296]

Analyzing all the facts, the court determined that "the [informant's] tip was lacking in indicia of reliability and the credibility of the informant was not established, [so] the tip was inadequate to support the reasonable suspicion necessary, under *Litchfield*, to search the trash."[297] The court nevertheless did not suppress the evidence from the trash search because it determined that police had a good faith belief, under pre-*Litchfield* law in effect at the time of the search, that the warrant was based on probable cause.[298] The court therefore affirmed the conviction.[299]

The court looked at an automobile search in *Cheatham v. State*.[300] An officer stopped Cheatham for a seat belt violation, and Cheatham pulled over into a service station.[301] After learning that Cheatham did not have a valid license, the officer refused to let Cheatham drive away.[302] While Cheatham was trying to find someone who would move his car, the police used a drug-sniffing dog on the car, and the dog indicated the presence of drugs. Cheatham left the scene, and

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291. *See* Laramore, *supra* note 3, at 984-87.

292. 832 N.E.2d 1072 (Ind. Ct. App. 2005).

293. *Id.* at 1074.

294. *Id.* at 1075.

295. *Id.*

296. *Id.*

297. *Id.* at 1076.

298. *Id.* at 1077.

299. *Id.* at 1080.

300. 819 N.E.2d 71 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 744 (Ind. 2005).

301. *Id.* at 73.

302. *Id.*

police found various controlled substances when they searched the car. The court found the warrantless search permissible under the automobile exception to the Fourth Amendment.[303] Under section 11, the court found the police conduct reasonable because, although there was little danger that Cheatham would move the car before police could get a warrant, the car was parked near the gas pumps and a service station attendant asked police to move it.[304] The search had to be done quickly because the car was blocking a commercial (although not public) way, and it was therefore reasonably done without a warrant.[305]

In contrast, the court found an automobile search invalid in *Bell v. State*.[306] Officers pulled Bell over for reasons not entirely clear on the record.[307] Police questioned Bell and removed a handgun from the car after Bell indicated that he had one.[308] Although Bell testified that he told police he had a permit for the gun, they never checked his wallet (Bell was handcuffed).[309] Instead, police searched the car and dismantled the glove compartment, reaching into the chassis of the car to find cocaine.[310] The court invalidated this search as unreasonable for several reasons.[311] First, the search was not incident to a lawful arrest because police had no grounds for an arrest at the time they took Bell into custody.[312] Second, police were in no danger from anything in the car because Bell was handcuffed and had been patted down, and they removed the gun he said was inside the car.[313] Finally, the search went well beyond the passenger compartment of the car, extending to the chassis after officers dismantled the glove compartment: "we do not believe that citizens of Indiana would countenance this type of warrantless search that occurred here."[314] The court ruled that the evidence should be suppressed.[315]

Under different circumstances, the court approved a car search in *Abran v. State*.[316] Conservation officers stopped Abran's truck, after a chase, because there was a warrant for his arrest.[317] Police found a substance appearing to be methamphetamine in Abran's pocket when they searched him. They then

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303. *Id.* at 75-76.
304. *Id.* at 77.
305. *Id.* at 78.
306. 818 N.E.2d 481 (Ind. Ct. App. 2004).
307. *Id.* at 482.
308. *Id.* at 483.
309. *Id.*
310. *Id.*
311. *Id.* at 485.
312. *Id.*
313. *Id.* at 486.
314. *Id.*
315. *Id.*
316. 825 N.E.2d 384 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005).
317. *Id.* at 388

searched the truck as part of the procedure for impounding it. This procedure included searching closed containers in the truck, and that search yielded equipment and materials used to manufacture methamphetamine. Although most of the analysis in this case applies the Fourth Amendment, the court of appeals briefly discussed section 11 and found the search reasonable.[318] Materials used in the manufacture of methamphetamine were visible in the truck's bed, so under section 11 police were justified in searching it immediately because of the "volatile and dangerous nature" of various methamphetamine precursors.[319]

The defendant in *Best v. State*[320] was involved in an auto accident, and investigating officers discovered that there was an outstanding warrant for Best from another county.[321] In arresting Best, police discovered a gun in his car that led to his conviction for carrying a handgun without a license.[322] Best challenged the arrest because the warrant was old—he had been arrested on the warrant three previous times, and each time the county issuing the warrant had taken no action to obtain custody of Best.[323] The court ruled that when Best was detained under the warrant for the first time and no action was taken to enforce the warrant, it "was satisfied and therefore lost its validity as a proper basis for future arrests."[324] The arrest based on an invalid warrant was itself invalid, so the handgun found in the search of Best's car had to be suppressed, and his conviction was reversed.[325]

The Indiana Court of Appeals had two occasions during the survey period to apply *Pirtle v. State*,[326] which gives an individual in police custody the right to consult with counsel before consenting to a search.[327] In *Polk v. State*,[328] the defendant was a passenger in a car pulled over for a traffic violation, and police asked for permission to search his "fanny pack."[329] The court ruled that under the circumstances, including the fact that Polk was not placed in handcuffs and was not told that he was under arrest or that he could not leave the scene, he was not in custody for *Pirtle* purposes and therefore had no right to consult with counsel before giving permission for the search.[330] In *Schmidt v. State*,[331] the court ruled that *Pirtle* does not apply to situations in which an officer asks an individual to

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318. *Id.* at 391.
319. *Id.*
320. 817 N.E.2d 685 (Ind. Ct. App. 2004).
321. *Id.* at 686.
322. *Id.*
323. *Id.* at 686-87.
324. *Id.* at 689.
325. *Id.*
326. 323 N.E.2d 634 (Ind. 1975).
327. *Id.* at 640.
328. 822 N.E.2d 239 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).
329. *Id.* at 242-43.
330. *Id.* at 249-50.
331. 816 N.E.2d 925 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).

submit to a chemical breath test.[332] The court premised this conclusion on the statutory requirement that an officer must have probable cause to believe that an individual has committed an alcohol-related driving offense before administering a chemical breath test.[333] Because *Pirtle* was intended as a safeguard against an individual's allowing a general search when there may be no probable cause, its purpose is not served in a situation where probable cause already has been established and the search is narrow rather than general.[334]

Finally, the court handled two cases applying section 11 in the context of police roadblocks. *Sublett v. State*[335] involved an arrest arising from a drunk driving roadblock.[336] Police set up a roadblock in an area of frequent drunk driving arrests, and the roadblock was marked with a sign in a location allowing drivers to avoid the roadblock.[337] Drivers were stopped randomly, and each was required to produce registration and identification, giving officers an opportunity to converse with drivers and observe signs of intoxication.[338] Sublett could not produce a license because his driving privileges had been suspended for life, and he was convicted of driving after his license had been suspended.[339] The court examined the roadblock against the guideposts established by *State v. Gerschoffer*,[340] in which the Indiana Supreme Court applied section 11 to drunk driving roadblocks.[341] The court of appeals concluded that *Gerschoffer* set forth "factors to be weighed and considered, not required elements" for analyzing the reasonableness of roadblocks under section 11.[342] The court concluded that the roadblock was adequately marked.[343]

Also, despite *Gerschoffer*'s statement that a citizen should not be "compelled to show his papers" in order to drive,[344] the court validated the police practice of asking drivers for identification and registration as an opportunity for police to detect signs of intoxication in this situation, so long as the roadblock was established at a location and time where drunk driving was common.[345]

> Given this lack of discretion [as to which motorists would be stopped], and the scripted, consistent manner in which the police officers conducted themselves, we are unable to say that the practice of

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332. *Id.* at 943.
333. *Id.* at 943-44.
334. *Id.* at 944.
335. 815 N.E.2d 1031 (Ind. Ct. App. 2004).
336. *Id.* at 1033.
337. *Id.* at 1032-33.
338. *Id.* at 1033.
339. *Id.* at 1033-34.
340. 763 N.E.2d 960 (Ind. 2002).
341. *Id.* at 965-66.
342. *Sublett*, 815 N.E.2d at 1036.
343. *Id.* at 1037.
344. *Gerschoffer*, 763 N.E.2d at 968 (internal quotation omitted).
345. *Sublett*, 815 N.E.2d at 1038.

> requesting the driver's license and vehicle registration of the stopped motorists was so intrusive and unrelated to the objective of the checkpoint as to render the checkpoint constitutionally unreasonable.[346]

Finding the checkpoint's procedures reasonable, the court affirmed Sublett's conviction.[347]

In *Howard v. State*,[348] the defendant was pulled over at a seat-belt checkpoint designed so that one officer observed passing cars, then radioed another officer further ahead who pulled over cars in which the first officer observed that the driver was not wearing a seat-belt.[349] The officer who spoke to Howard determined that he gave a false name and that his license was suspended, and the officers found methamphetamine in an inventory search.[350] Howard's challenge to the stop was rejected, as the court reasoned that *Gerschoffer*'s criteria did not apply because the first officer's observation that a driver was not wearing a seat-belt constituted probable cause for a stop.[351]

D. Double Jeopardy

As with searches, the Indiana Court of Appeals decided a number of cases requiring application and development of the law under article I, sec. 14, the Double Jeopardy Clause of the Indiana Constitution. The Indiana Supreme Court previously clarified that the standard for double jeopardy in the multiple punishments context is different under the Indiana Constitution than the Federal Constitution in a 1999 case, *Richardson v. State*.[352] Indiana's analysis is bifurcated. First, a court determines whether any offense of which the defendant has been convicted has the same elements as another offense of which he has been convicted, and if it does there is a violation (this test appears to be identical to the federal test for multiple punishment double jeopardy described in *Blockburger v. United States*[353]). Second, the court examines whether the evidence used to convict a defendant of one offense is identical to the evidence used to convict the defendant of another crime, and if it is there is a violation of the Double Jeopardy Clause.[354] The second step has no federal analogue. Lower courts also refer to Justice Sullivan's concurrence in *Richardson*, where he spells out five more specific tests (concededly applying both constitutional and common-law principles) for double jeopardy.[355]

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346. *Id.*

347. *Id.* at 1039.

348. 818 N.E.2d 469 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d (Ind. 2005).

349. *Id.* at 472.

350. *Id.* at 473.

351. *Id.* at 474-75.

352. 717 N.E.2d 32 (Ind. 1999).

353. 284 U.S. 299 (1932).

354. *Richardson*, 717 N.E.2d at 50-54.

355. *Id.* at 55-57 (Sullivan, J., concurring). Some of the specific tests in Justice Sullivan's taxonomy involve common law, not just constitutional principles. *See, e.g.*, Gross v. State, 769

Indiana's analysis is illustrated by *Caron v. State*,[356] in which the defendant was convicted of possession of methamphetamine in excess of three grams and manufacturing methamphetamine in excess of three grams.[357] The State proved the possession offense by introducing evidence that the defendant constructively possessed methamphetamine.[358] The State proved the manufacturing conviction with the same methamphetamine along with apparatus used for manufacture.[359] Because the only evidence used for the first conviction was exactly the same as evidence used for the second, there was a double-jeopardy violation and the court ordered that the lesser conviction be vacated.[360] The court noted that if the State had more clearly segregated the evidence, so that some was clearly used to prove one offense and different evidence was used to prove the other, there might be no violation.[361]

In a similar case, *Jarrell v. State*,[362] the court found a double-jeopardy violation for convictions of possession of a firearm by a serious violent felon and carrying a handgun without a license. [363] Each of these crimes has at least one element different than the other, so the convictions passed the federal double-jeopardy test and the first step of Indiana's test.[364] To prove the first offense, the State had to show that Jarrell possessed the gun and had certain past convictions.[365] To prove the second, the State had only to show that Jarrell possessed the firearm because Jarrell had the burden to prove the affirmative defense that he had a license.[366] Thus, the only evidence to prove the second charge was exactly the same as evidence used to prove the first charge, violating the Double Jeopardy Clause and requiring that one conviction be vacated.[367]

Holden v. State[368] required double-jeopardy analysis of convictions for two counts of robbery and two counts of conspiracy to commit robbery. Holden argued that the jury likely relied on the evidence of the robbery itself to prove the overt act element required to show the conspiracy.[369] The court reviewed the trial court's instructions and the charging instruments.[370] The court noted that "significant and detailed facts [were] presented to the jury with regard to all of

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N.E.2d 1136, 1139 (Ind. 2002) (acknowledging common law aspect of double-jeopardy analysis).

356. 824 N.E.2d 745 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 747 (Ind. 2005).

357. *Id.* at 748.

358. *Id.* at 749, 753.

359. *Id.*

360. *Id.* at 754.

361. *Id.* at 754 n.6.

362. 818 N.E.2d 88 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 737 (Ind. 2005).

363. *Id.* at 93.

364. *Id.* at 92-93.

365. *Id.* (citing IND. CODE § 35-47-4-5(c) (2001)).

366. *Id.*

367. *Id.* at 93.

368. 815 N.E.2d 1049 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 733 (Ind. 2005).

369. *Id.* at 1055.

370. *Id.* at 1055-57.

the events constituting the planning of the robberies."[371] Instead, "the jury was instructed to focus upon the actual events of the robbery as the overt act of the conspiracy."[372] The court therefore concluded "that there is a reasonable possibility that the jury relied upon the same facts—that Holden provided the handgun and waited for one of the cohorts to commit the robbery—for both the robbery and conspiracy to commit robbery convictions."[373] The court found a double-jeopardy violation and vacated the conspiracy convictions.[374]

The Indiana Court of Appeals came to a different conclusion regarding the conspiracy conviction in *Waldon v. State*.[375] The defendant was convicted of multiple crimes including burglary and conspiracy to commit burglary.[376] Unlike *Holden*, however, the charging instruments and the State's argument clarified that meetings among the conspirators, not the crime itself, were the overt acts proving the conspiracy.[377] "The jury did not have to rely upon any actual evidence of the breaking and entering of any businesses to find Waldon guilty of conspiracy," so the convictions did not violate double-jeopardy principles.[378]

Similarly, the court looked at convictions for battery and resisting law enforcement in *Ankney v. State*.[379] Ankney injured three officers in an attempt to escape from custody.[380] He was charged with battery for injuring the three officers.[381] The resisting law enforcement charge also alleged that he forcibly resisted the three officers, injuring them.[382] The court therefore found that "there is a reasonable possibility that the jury used the same evidence to convict Ankney of resisting law enforcement and each of the batteries."[383] The court therefore ordered that the resisting conviction be vacated as a double-jeopardy violation.[384]

E. Section 13 Impartial Jury Clause

The Indiana Court of Appeals addressed the right to impartial jury arising from article I, section 13 in *Black v. State*.[385] Black was convicted of murder

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371. *Id.* at 1058.

372. *Id.*

373. *Id.*

374. *Id.* at 1058-59.

375. 829 N.E.2d 168 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 191 (Ind. 2005).

376. *Id.* at 172.

377. *Id.* at 180-81.

378. *Id.* at 181.

379. 825 N.E.2d 965 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 175 (Ind. 2005).

380. *Id.* at 968.

381. *Id.* at 972.

382. *Id.*

383. *Id.*

384. *Id.*

385. 829 N.E.2d 607 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 185 (Ind. 2005).

despite his defense of self-defense.[386] During pre-trial hearings, the trial court granted the State's motion precluding any mention of self-defense "until such time as that defense is raised, either by the testimony of the defendant or any statements."[387] The court of appeals agreed with Black's argument that the trial court's order precluding him from questioning prospective jurors about self-defense denied him a fair trial.[388] "[T]he ability to question prospective jurors regarding their beliefs and feelings concerning the doctrine of self-defense, so as to determine whether they have firmly-held beliefs which would prevent them from applying the law of self-defense to the facts of the case, is essential to a fair and impartial jury."[389] This error, tied explicitly to "the right to a fair and impartial jury provided by Article 1, Section 13 of the Indiana Constitution,"[390] caused reversal and remand for a new trial.[391]

F. Taxation

The Indiana Supreme Court analyzed the property tax uniformity clause, article X, § 10, in *Department of Local Government Finance v. Commonwealth Edison Co. of Indiana*.[392] Edison sought an adjustment to its 1995 property tax assessment, claiming it was entitled to equalization because county assessment officials valued its property artificially high in comparison to residential and commercial property in the county.[393] It sought to prove its case by showing that its property was assessed at a much higher proportion of its market value than was residential or commercial property.[394]

The court first addressed whether Edison was entitled to equalization relief based on applicable statutes and constitutional principles.[395] It concluded that Edison was entitled to such relief if it could show "that its property taxes were higher than they would have been had other property been properly assessed."[396] The court rejected the State's argument, based on language in *State Board of Tax Commissioners v. Town of St. John*,[397] that no taxpayer has a constitutional right to a perfectly uniform assessment.[398] That language notwithstanding, the court stated, Indiana's statutes and administrative rules provide processes for obtaining relief from an assessment that is too high because of unequal assessing

386. *Id.* at 609.
387. *Id.*
388. *Id.* at 611.
389. *Id.*
390. *Id.* at 610.
391. *Id.* at 612.
392. 820 N.E.2d 1222 (Ind.), *reh'g denied* (Ind. 2005).
393. *Id.* at 1225.
394. *Id.* at 1228.
395. *Id.* at 1225-28.
396. *Id.* at 1226.
397. 702 N.E.2d 1034, 1043 (Ind. 1998).
398. *Commonwealth Edison Co.*, 820 N.E.2d at 1227.

practices.[399] The court nevertheless rejected Edison's substantive claim, holding that because market value was not the standard for value at the time in question, Edison could not prove inequality through its evidence comparing its assessment-to-market-value ratio with the same ratio for other classes of property.[400] Rather, Edison could prove its entitlement to equalization only by showing that assessors failed to properly apply the valuation standards then in effect.[401]

A hospital challenged the denial of a property tax exemption for its fitness facility in *Indianapolis Osteopathic Hospital, Inc. v. Department of Local Government Finance*.[402] The hospital itself was exempt, and it sought to extend the exemption to the fitness facility, which contained tennis courts, a basketball court, a track, weight training and other facilities.[403] Individuals could join the fitness facility for a fee, and fee-paying members accounted for fifty-nine percent of the facility's use.[404] The remaining use was by hospital patients for rehabilitation and for other purposes, including community use. The Tax Court adopted a broad construction of "charitable purpose" for property tax exemption purposes: "'Charity,' as used in Indiana's property tax exemption statutes, is favored with the broadest constitutional definition allowable" shown by "evidence of relief of human want."[405] It concluded, however, that "the promotion of health through physical activity" was not a charitable purpose; therefore, the fitness facility did not qualify for the exemption.[406] The Tax Court also rejected the hospital's argument, based on article I, § 23, that its fitness facility was treated differently than another fitness facility in the same area that had been given an exemption.[407] The court concluded that the other facility was fundamentally different because it contained many other features and facilities, and the hospital had failed to prove that the similarities between the facilities required identical tax treatment.[408]

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399. *Id.* at 1226.

400. *Id.* at 1230.

401. *Id.* The *Town of St. John* litigation, of course, mandated a new statewide assessment based on market-oriented valuation principles. *Town of St. John*, 702 N.E.2d at 1041. In effect, the Indiana Supreme Court held that Edison could not obtain relief for bad assessments under the old, pre-*Town of St. John* standard, even though *Town of St. John* held that the very problem for which Edison sought individual relief did exist, violated the Indiana Constitution, and required the remedy of a new assessment based on objective standards. *See Commonwealth Edison Co.*, 820 N.E.2d at 1231. The only taxpayers who received the relief Edison sought were the named plaintiffs in the *Town of St. John* litigation.

402. 818 N.E.2d 1009 (Ind. Tax Ct. 2004), *trans. denied*, 831 N.E.2d 744 (Ind. 2005).

403. *Id.* at 1011-12.

404. *Id.* at 1012.

405. *Id.* at 1014-15 (quoting Indianapolis Elks Bldg. Corp. v. State Bd. of Tax Comm'rs, 251 N.E.2d 673, 682 (Ind. App. 1969)).

406. *Id.* at 1017-18. Because the facility was not used for a charitable purpose, the court did not address "predominant use." *Id.* at 1018 n.12.

407. *Id.* at 1020-21.

408. *Id.*

The Tax Court also rejected a uniformity argument relating to riverboats used for gaming in *Majestic Star Casino, LLC v. Blumenburg*.[409] Under the requirement of uniform and equal taxation in article X, § 1, the riverboat challenged the statutory requirement that riverboats used for gaming be taxed as real property whereas other commercial watercraft are taxed based on tonnage.[410] The court noted that "[b]y taxing riverboats as real property and commercial vessels as something else, the Indiana legislature has created a statutory classification based upon whether gambling occurs on the vessel."[411] The court concluded that this different treatment does not violate the Indiana Constitution because it is legitimate for the legislature to treat property with similar physical characteristics differently based on its use. [412] Moreover, the gambling boats placed particular burdens on local governments that could properly be compensated by property taxes.[413] The court therefore found that the different treatment did not violate the uniformity and equality provisions of article X, § 1.[414]

G. Jury Trial

In *Cunningham v. State*, [415] the Indiana Court of Appeals ruled that article I, section 20 gave a defendant a right to a jury trial for a speeding ticket.[416] The constitutional provision states that "[i]n all civil cases, the right of trial by jury shall remain inviolate."[417] Indiana's courts have long interpreted this provision to provide the right to a jury trial "in actions where the right existed at common law."[418] Reviewing the history of traffic tickets, the court noted that before 1981, traffic offenses were criminal.[419] But the General Assembly passed a statute effective September 1, 1981, converting traffic offenses to the status of infractions governed by the Rules of Civil Procedure.[420] The court stated that "[o]ur legislature removed the protections afforded to criminal defendants when it decided that the Indiana Rules of Trial Procedure govern infractions and, in doing so, directed that we now treat infractions as civil matters," governed by

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409. 817 N.E.2d 322 (Ind. Tax Ct. 2004).

410. *Id.* at 325.

411. *Id.* at 326.

412. *Id.* at 327-28.

413. *Id.* at 327.

414. *Id.* at 328.

415. 835 N.E.2d 1075 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

416. *Id.* at 1079.

417. IND. CONST. art. I, § 20; *Cunningham*, 835 N.E.2d at 1076.

418. *Cunningham*, 835 N.E.2d at 1077 (citing Songer v. Civitas Bank, 771 N.E.2d 61, 63 (Ind. 2002)).

419. *Id.* at 1078.

420. *Id.* at 1076-77 (citing IND. CODE § 34-4-21-1 (now § 34-28-5-1); Wirgau v. State, 443 N.E.2d 327, 329 n.1 (Ind. Ct. App. 1982)).

section 20.[421]

History governs whether there is a jury trial right when analyzing causes of action that existed in 1852.[422] But historical analysis is unhelpful in this context "because the earliest versions of today's speed zone statutes were not codified until 1939."[423] When such situations arise, the right to jury trial is determined by whether the action is fundamentally equitable (and therefor not jury triable) or legal (and jury triable).[424] The court determined that "from the time of their inception until 1981, when . . . the Indiana Rules of Trial Procedure began to govern the enforcement of infraction violations, such offenses were criminal actions and, as such, were not equitable in nature."[425] Because criminal actions for traffic violations were fundamentally legal in nature, their current descendent, the "quasi-criminal" traffic infraction, are also legal and therefore triable to juries.[426]

The court of appeals also examined the jury's role under article I, section 19 in *Gantt v. State*,[427] a child molesting case. During deliberation, the jury presented the trial court with this question: "[t]here is a disagreement as to whether you must believe one witness or the other. Can you reach a verdict if you don't believe either party?"[428] The trial court gave a lengthy answer, ending: "[y]ou must decide which witnesses you will believe and which you will disbelieve."[429] This response was incorrect and usurped the jury's role under section 19 to judge the facts and the law, indicating that the jury is the sole judge of credibility.[430] The instruction invaded the jury's province by indicating that the jury had to believe one of two conflicting witnesses, when in fact the jury could choose to believe neither.[431] Finding this error was not harmless, the court reversed the verdict.[432]

H. Jury Role in Sentencing

The Indiana Supreme Court provided further explanation of the jury's role in sentencing in *Smith v. State*, [433] which addressed the Repeat Sexual Offender Statute.[434] When Smith was convicted of his third unrelated rape, he was subject

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421. *Id.* at 1077.
422. *Id.* at 1078.
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.* at 1078-79.
427. 825 N.E.2d 874 (Ind. Ct. App. 2005).
428. *Id.* at 875.
429. *Id.* at 877-78.
430. *Id.* at 878.
431. *Id.*
432. *Id.* at 879.
433. 825 N.E.2d 783 (Ind. 2005).
434. IND. CODE § 35-50-2-14 (2005).

to a sentence enhancement under the Repeat Sexual Offender Statute.[435] The statute allowed the court to examine an offender's criminal record and determine whether the offender satisfied the elements of the statute.[436] Smith challenged this sentencing methodology, arguing that article I, section 19's provision that in criminal cases, "the jury shall have the right to determine the law and the facts" [437]meant that the jury had to adjudicate the sentencing enhancement.[438] In an earlier case, *Seay v. State*,[439] the Indiana Supreme Court had ruled that the jury, not a judge, had to determine whether a defendant satisfied the conditions of the habitual offender statute.[440]

In *Smith*, the court explained that the Constitution does not require a jury determination that an individual satisfies the prerequisites for a sentencing enhancement.[441] The basis for the holding in *Seay* was particular statutory language committing the habitual offender determination to the jury.[442] In contrast, the Repeat Sexual Offender Statute explicitly stated that the judge was to determine whether the statutory prerequisites for sentencing enhancement existed.[443] The court ruled that nothing in section 19 precluded the assignment of this sentencing task to the judge.[444] The court explicitly declined to say whether the right to jury trial in section 13 included jury sentencing, a claim Smith did not raise.[445]

I. Damages for Constitutional Violations

Federal and state courts in Indiana have grappled with whether parties may pursue actions for damages for violations of the Indiana Constitution, and the Indiana Supreme Court has accepted a certified question from a federal court on that issue that was undecided at the time this article was written.[446] The Indiana

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435. *Smith*, 825 N.E.2d at 784.

436. *Id.*

437. IND. CONST. art. I, § 19.

438. *Smith*, 835 N.E.2d at 784.

439. 698 N.E.2d 732 (Ind. 1998).

440. *Id.* at 737.

441. *Smith*, 825 N.E.2d at 786.

442. *Seay*, 698 N.E.2d at 733-34 (citing IND. CODE 35-50-2-8(d) (Supp. 1982)). Because the statute committed the decision to the jury, article I, section 19 permitted the jury to find that the prerequisites to an enhanced sentence existed but still to decline to impose the enhancement. *Id.* at 737.

443. *Smith*, 825 N.E.2d at 786.

444. *Id.* This holding is not affected by *United States v. Booker*, which applied the Sixth Amendment to require jury determinations of most factual predicates for sentencing enhancements. 545 U.S. 220 (2005). *Booker* allows enhancements based on past convictions to be given by judges without jury involvement. *Id.* at 233-34.

445. *Smith*, 825 N.E.2d at 787.

446. *See* Cantrell v. Morris, No. 2:04-CV-364 (N.D. Ind. Sept. 14, 2005) (order denying Motion to Stay Proceedings), 2005 WL 2240074 (slip copy).

Court of Appeals looked at a procedural issue relating to damage actions under the Indiana Constitution in *Irwin Mortgage Corp. v. Marion County Treasurer*.[447] In this case, a bank alleged that penalties the county assessed to the bank's mortgagees for late tax payments were unconstitutional.[448] The bank sought a refund of the penalties.[449]

The court of appeals affirmed the trial court's dismissal of the damages claim because the bank had not filed a notice of tort claim under the Indiana Tort Claims Act.[450] There was no dispute that the bank had failed to give the local authorities the notice required by the statute within the prescribed time (in part because the bank had pursued administrative remedies that were ultimately fruitless).[451] The bank argued that its claims did not sound in tort, but the court rejected that view.[452] Because the claim was for tort damages, the court ruled, the bank was required to provide notice as required by the tort claims act, and its failure to substantially comply was fatal to its claim for damages under the Indiana Constitution.[453]

This decision is notable because it assumes that a party seeking damages under the Indiana Constitution is entitled to pursue its claims under the tort claims act. It is not a holding on the question because the procedural issue precluded the court from reaching the ultimate issue of entitlement to damages. Nevertheless, it is one more relevant precedent on the issue of damages remedies under the Indiana Constitution.

J. Due Course of Law

The court of appeals invoked article I, section 12 against prosecutorial vindictiveness in *Owens v. State*.[454] Owens was convicted of dealing in cocaine, but his conviction was reversed in part on appeal and remanded for new trial.[455] On remand, the prosecuting attorney sought to amend the charges to a higher level felony, and Owens appealed the trial court's grant of that motion on an interlocutory basis.[456] The court indicated that article I, section 12 "prohibit[s] prosecutorial vindictiveness."[457] The court cited precedents indicating that increased charges on remand raise a presumption of prosecutorial

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447. 816 N.E.2d 439, 440 (Ind. Ct. App. 2004).

448. *Id.* at 441.

449. *Id.*

450. *Id.* at 447.

451. *Id.*

452. *Id.* at 446.

453. *Id.* at 447. The bank also sought damages for violation of its federal civil rights under 42 U.S.C. § 1983 (2000), which has no notice requirement. The court reinstated the bank's claim for damages under § 1983. *Id.* at 448.

454. 822 N.E.2d 1075 (Ind. Ct. App. 2005).

455. *Id.* at 1076.

456. *Id.*

457. *Id.* at 1077.

vindictiveness.[458] The prosecutor admitted that there was no new evidence on which to base the increased charge and that the charge was increased because Owens did not accept a plea bargain.[459] These facts did not overcome the presumption of prosecutorial vindictiveness, and the court of appeals reversed the trial court's order allowing the increased charges.[460]

K. Death Penalty

In *Corcoran v. State*,[461] the supreme court looked at whether a deadline limiting capital defendants' time to file post-conviction proceedings violated article I, section 23. Corcoran had initially refused to seek post-conviction relief, then changed his mind, but his petition was barred by the time limit for filing post-conviction petitions in capital cases of thirty days after direct review is completed.[462] Corcoran alleged that the time limit on capital post-conviction filings violated section 23 because no time limit exists for post-conviction petitions in non-capital cases.[463] The court stated that the claim "does not require extended treatment" and that "a separate set of procedural requirements for the collateral review of the convictions and sentences of capital and non-capital litigants easily meets the rational basis and reasonableness requirements necessary to pass . . . state Equal Privileges and Immunities Clause muster."[464] In another capital case, *Baird v. State*,[465] the court ruled that Baird's claim that the Cruel and Unusual Punishments Clause of article I, section 16 does not bar the execution of individuals with serious mental illness.[466] The court held that because Indiana law permits a jury to find a defendant guilty but mentally ill and mental illness can be considered in sentencing, Indiana law gives sufficient consideration to mental illness in capital cases.[467]

L. Free Expression

The court of appeals applied the holding in *Price v. State*[468] to reverse a juvenile adjudication in *Matter of U.M.*[469] U.M. was one of a group of juveniles

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458. *Id.*

459. *Id.*

460. *Id.* at 1078.

461. 827 N.E.2d 542 (Ind. 2005).

462. *Id.* at 543.

463. *Id.* at 546.

464. *Id.*

465. 831 N.E.2d 109 (Ind.), *cert denied*, 126 S. Ct. 312 (2005).

466. *Id.* at 116.

467. *Id.* Baird's sentence was eventually commuted to life without parole by the Governor. Executive Order 05-23, *available at* http://www.in.gov/gov/media/eo/eo_05_23_clemency_Arthur_Baird_II.pdf.

468. 622 N.E.2d 954, 967 (Ind. 1993).

469. 827 N.E.2d 1190 (Ind. Ct. App. 2005).

arrested for spray-painting graffiti.[470] While in the police car, one of the group did not hold up his hands as instructed by police.[471] U.M. yelled at an officer that the other juvenile was unable to hold his arms up because they hurt. He added profanity to his statement, and he continued making derogatory statements about the police relating to his pained comrade for several minutes. U.M. was charged with disorderly conduct for his statements.[472] As in *Price*, the court concluded that U.M.'s statements were political in nature because they embodied criticism of police, however crudely expressed.[473] Under *Price*, the statements therefore could not be punished unless they were shown to harm identifiable individuals.[474] Because the State produced no proof of such harm, the court vacated the juvenile adjudication.[475]

Also applying section 9, the court of appeals analyzed landlords' claims for an injunction against leafleting in *Aberdeen Apartments. v. Cary Campbell Realty Alliance, Inc.*[476] The realtor sought to market new homes by dropping copies of its publications on the doorsteps of apartments owned by the landlords. The landlords sought an injunction, arguing that the realtor was trespassing. The realtor countered that it was exercising its right to free expression by distributing information, some of which was in newspaper form. The court of appeals rejected the realtor's argument that an injunction would constitute unconstitutional prior restraint on speech.[477] An injunction would not preclude distribution of the information, only trespass on the apartments' land to do so; the realtor had other methods to disseminate the information, including mail or leaving it to be picked up as a free publication in various locations.[478] The court of appeals ruled that the trial court abused its discretion in denying a preliminary injunction.[479]

M. Impairment of Contract

SCI Indiana Funeral Services, Inc. v. D.O. McComb & Sons, Inc.,[480] analyzed the relationship between a cemetery operator (SCI) and funeral home (McComb) and the constitutionality of the Exclusive Rights Act, a statute enacted in 1997

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470. *Id.* at 1191.

471. *Id.*

472. *Id.* at 1192.

473. *Id.* at 1193.

474. *Id.*

475. *Id.*

476. 820 N.E.2d 158, 161 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 178 (Ind. 2005).

477. *Id.* at 168.

478. *Id.* at 169.

479. *Id.* at 170. Judge Baker dissented, concluding that an injunction would be an impermissible prior restraint under both the Indiana and Federal Constitutions. *Id.* at 172 (Baker, J., dissenting).

480. 820 N.E.2d 700 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005).

to give cemetery owners the exclusive right to open and enter the graves in their cemeteries.[481] SCI's predecessor and McComb contracted before the law was passed to allow McComb to sell, open, and close the graves at the cemetery.[482] When SCI acquired the cemetery after the law was passed, it stated that it would not honor the contract, and McComb sued.[483] In the lawsuit, McComb challenged the Exclusive Rights Act as an unconstitutional impairment of its contract.[484] The court of appeals ruled that the act is reasonably necessary to protect the health, safety and welfare of the general public and therefore is not an unconstitutional contract impairment.[485] The trial court had ruled that the statute did not protect the "general public," but only protected those citizens with family members buried in SCI's cemetery, so that the statute fell outside the State's police power.[486] The court of appeals disagreed, concluding that the statute seeks to limit problems affecting the general public such as damage to existing gravesites and that the statute therefore does not constitute an unlawful contract impairment.[487]

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481. *Id.* at 703 (citing IND. CODE § 23-14-46-7 (2005)).
482. *Id.* at 702.
483. *Id.* at 703.
484. *Id.* at 709.
485. *Id.* at 710.
486. *Id.*
487. *Id.*