to sustain the decision of the trial court.[145] An appeal from a negative verdict or judgment may, on the other hand, be raised on the ground that the decision is contrary to law, but here too the standard of review is rigid—only if the evidence is without conflict and leads to only one conclusion, and the trial court reached a contrary conclusion, will the decision be disturbed as contrary to law.[146] Upon such review, the appellate court must consider only the evidence most favorable to the decision of the trial court.[147] Thus, the bases of review of a negative judgment are limited and the standards applied are stringent. Indiana practitioners are reminded, however, that appeal of a negative judgment is unavailing on the ground of insufficiency of the evidence.

V. Constitutional Law

*James W. Torke**

The following discussion attempts to highlight court decisions, both federal and state, which have involved both constitutional issues and Indiana law. As could have been expected, the cases reflect a general concentration on problems of free speech, free press and equal protection.

A. The First Amendment

For a few years now, the general public has been acquainted with the controversy involving an unofficial student newspaper, the *Corn Cob Curtain*. During the 1971-1972 school year, four issues of the paper were published in various Indianapolis high schools. The distribution of a fifth issue was blocked by school authorities upon the grounds that the *Corn Cob Curtain* was obscene. Plaintiffs, as representatives of a class of high school students under the jurisdiction of the Indianapolis school system,

[145]Houser v. Board of Comm'rs, 252 Ind. 312, 247 N.E.2d 675 (1969); State Farm Life Ins. Co. v. Spidel, 246 Ind. 458, 202 N.E.2d 886 (1964); Engelbrecht v. Property Developers, Inc., 296 N.E.2d 798 (Ind. Ct. App. 1973); Columbia Realty Co. v. Harrelson, 293 N.E.2d 804 (Ind. Ct. App. 1973); Hiatt v. Yergin, 284 N.E.2d 834 (Ind. Ct. App. 1972).

[146]Senst v. Bradley, 275 N.E.2d 573 (Ind. Ct. App. 1971). *Accord*, Edwards v. Wyllie, 246 Ind. 261, 203 N.E.2d 200 (1964); Jones v. Greiger, 130 Ind. App. 526, 166 N.E.2d 868 (1960).

[147]Jones v. State, 244 Ind. 682, 195 N.E.2d 460 (1964); Senst v. Bradley, 275 N.E.2d 573 (Ind. Ct. App. 1971); Walting v. Brown, 139 Ind. App. 18, 211 N.E.2d 803 (1965).

*Associate Professor of Law, Indiana University Indianapolis Law School. J.D., University of Wisconsin, 1968.

gained relief from the ban in federal district court.[1] Defendants' appeal to the Court of Appeals for the Seventh Circuit, in *Jacobs v. Board of School Commissioners*,[2] was unsuccessful.

The initial ban emerged from a rule preventing sales or solicitation on school grounds without the express prior approval of the general superintendent. As indicated above, court approval was not forthcoming. However, Judge Steckler's expression that such a broad prior restraint was unconstitutional[3] caused school authorities to amend the rules in order to comply more closely with first amendment standards. These amended rules were the subject of the court of appeals' concern.

Judge Fairchild prefaced his discussion of the amended rules by noting that the severe sanctions, including suspension and even expulsion, to be visited upon violators of the new rules justified the court in subjecting the rules to the rigorous demands of precision associated with criminal penalties. Against such standards, the most general of the amended proscriptions was held to be both vague and overbroad. This rule provided that:

> No student shall distribute in any school literature that is . . . either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others.[4]

The above proscription seems clearly to have been an attempt to distill the holding of *Tinker v. Des Moines School District*,[5] which struck down a ban, in an Iowa high school, on the wearing of black arm bands to protest the Vietnam war.[6] This apparent source of the proposed rule was not lost upon the court of appeals. However, Judge Fairchild suggested that, merely because a regulation appears to track selected language of a Supreme Court opinion, there

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[1]Jacobs v. Board of School Comm'rs, 349 F. Supp. 605 (S.D. Ind. 1972).

[2]490 F.2d 601 (7th Cir. 1973), *cert. granted*, 94 S. Ct. 2638 (1974).

[3]Judge Steckler emphasized the holding of Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972), wherein an analogous general restraint upon Illinois high school pupils was deemed unconstitutional.

[4]490 F.2d at 604.

[5]393 U.S. 503 (1969).

[6]For example, Mr. Justice Fortas stated:

> Clearly, the prohibition of expression of one particular opinion, at least without evidence that *it is necessary to avoid material and substantial interference with school work or discipline*, is not constitutionally permissible.

Id. at 511 (emphasis added).

is no assurance that it will be sufficiently precise in the form of a regulation to satisfy first amendment due process standards. As a bare regulation, after all, it lacks the specific setting and context of a discrete case. Because the federal court lacks power authoritatively to construe the state regulation,[7] and because the rule came to the court fresh without the cartography of experience under it, the court felt the rule on its face too imprecise to give fair warning to students. For example, the court worried whether decorum in the lunchroom is a "normal educational . . . purpose," whether "strident discussion there" is a "disruption," and when such disruption becomes "significant."[8]

Yet, the dilemma of school authorities who feel compelled to regulate literature available in schools is emphasized by the court's own reference to the "*Tinker* standard." For instance, having projected the example of robust luncheon debate of an article criticizing a teacher, Judge Fairchild remarked that, in the absence of extraordinary circumstances, "school authorities could not reasonably forecast substantial disruption of or material interference with school discipline or activities arising from such incidents."[9] Likewise, such unknowns were found to highlight the defective nature of another regulation which sought to prohibit any distribution of literature when classes were in session in the school of distribution.[10] To some extent, then, the court seemed to be subjecting the regulations to the very standard it had found unacceptable in the form of a general ban. Perhaps the school authorities are asked for too much precision, at least in regard to the first general proscription discussed above. After all, the Supreme Court, in *Grayned v. City of Rockford*,[11] upheld a city ordinance which prohibited any "noise or diversion which disturbs or tends to disturb the peace or good order"[12] of a school in session. Therefore, while the flat ban on distribution while classes are in session may be fatally flawed for failure to impose any standards at all, the more general regulation incorporating the *Tinker* test may fare better in the Supreme Court.

Less troublesome was the court's invalidation of regulations which: (1) sought to ban any distribution of literature, except advertisements, not written by a student, teacher or school em-

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[7]490 F.2d at 606.

[8]*Id.* at 605. Similarly, Mr. Justice Douglas bemoaned an Arizona loyalty oath: "Would a teacher be safe and secure in going to a Pugwash Conference?" Elfbrandt v. Russell, 384 U.S. 11, 16-17 (1966).

[9]490 F.2d at 606.

[10]*Id.* at 609.

[11]408 U.S. 104 (1972).

[12]*Id.* at 108.

ployee,[13] (2) required that all literature bear the names of persons or organizations participating in publication,[14] and (3) barred the sale of all literature except by groups organized to benefit the school involved.[15] In regard to the last provision, the court recognized a legitimate interest in preserving school facilities from becoming centers of commercial activity, but felt that the teachings of *United States v. O'Brien*[16] demanded less intrusive modes of regulation when first amendment interests incidentally are affected.

Finally, the court invalidated a regulation which prohibited distribution of literature which is "obscene as to minors."[17] The court suggested that this ban failed to meet the demands of specificity found in *Miller v. California.*[18] In any case, it was clear to the court that the *Corn Cob Curtain,* if profane, was not obscene.[19]

Youth did not fare so well in its attempts to hold the "Erie Canal 'Soda' Pop Festival." The music festival, scheduled for late summer of 1972, was enjoined and, in *Smith v. State Board of Health,*[20] the Indiana Court of Appeals upheld the injunction. The promoters had claimed, *inter alia,* that the injunction violated the right of young people peaceably to assemble and, as the court put it, "do their thing."[21] The court found a sufficient showing of a "clear and present danger which was grave and immediate to the public interest on the basis of health hazards, and the interruption of police, fire, and emergency services."[22] Whether or not the court applied the proper first amendment test, it seems to have paid little heed to several fundamental issues implicit in the case.

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[13]490 F.2d at 606.

[14]*Id.* The court quite properly invoked Talley v. California, 362 U.S. 60 (1960).

[15]490 F.2d at 607.

[16]391 U.S. 367 (1968).

[17]490 F.2d at 609.

[18]413 U.S. 15 (1973). The court refused to consider the degree to which *Miller* may have affected the legitimacy of various obscenity regulations arguably sanctioned by Ginsberg v. New York, 390 U.S. 629 (1968). For a discussion of obscenity regulations, see text accompanying notes 30-41 *infra.* The court also refused to decide the question of whether school authorities might more readily regulate "profanity" in grade schools, specifically confining the reach of its decision to high schools. 490 F.2d at 610.

[19]490 F.2d at 610, *citing* Papish v. Board of Curators, 410 U.S. 667 (1973); Cohen v. California, 403 U.S. 15 (1971). *See also* Kois v. Wisconsin, 408 U.S. 229 (1972). It was on this matter that Judge Christensen's partial dissent most vigorously focused.

[20]307 N.E.2d 294 (Ind. Ct. App. 1974). *See also* Smith v. Indiana State Bd. of Health, 303 N.E.2d 50 (Ind. Ct. App. 1973).

[21]307 N.E.2d at 300.

[22]*Id.*

Initially, it seems pertinent for the court to have considered the extent to which rock festivals are entitled to first amendment protection. The underlying question of the place of music in the realm of protected speech is one which remains largely unsettled.[23] Resolution of that issue becomes important when one recalls that the government shoulders an especially onerous burden in the prior restraint of first amendment freedoms.[24] The matter becomes most sensitive when, as in the present case, the restraint springs from an ex parte hearing, a procedure which, except in the most exigent circumstances, is most inimical to notions of first amendment due process.[25] In this light, appellants' attack on the evidence supporting issuance of the injunction, which evidence seemed mainly to consist of dire happenings at other rock festivals around the nation, seems deserving of more probing analysis than the court saw fit to afford.

Gary realtors also found their assertion of first amendment rights unavailing in *Barrick Realty, Inc. v. City of Gary*.[26] Plaintiffs had challenged the validity of a 1972 city ordinance, backed by criminal sanctions, which forbade placement of "For Sale" signs in residential areas. The ordinance was designed to hamper "blockbusting" and hence to encourage "stable integrated neighborhoods."[27] The succinct opinion by Judge Cummings found conveniently at hand the Supreme Court's opinion in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[28] upholding the application to a newspaper of an ordinance which forbade the aiding of sexual discrimination in hiring practices. The core of the *Pittsburgh Press* decision rested on the weighty and legitimate governmental purpose of preventing discrimination, which purpose was found to overbalance any free speech interest involved. The commercial aspects of the want ads involved diluted the protection to be afforded the speech, especially "when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."[29] The court of appeals

[23]*See, e.g.*, Yale Broadcasting Co. v. FCC, 478 F.2d 594, 603 (D.C. Cir. 1973) (dissenting opinion of Bazelon, C.J.). *See also* Comment, *Drug Songs and the Federal Communications Commission*, 5 U. MICH. J.L. REFORM 334 (1972).

[24]*See, e.g.*, Carroll v. President & Comm'rs, 393 U.S. 175 (1968).

[25]*See* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). The court seemed more alert to the procedural issues in Smith v. Indiana State Bd. of Health, 303 N.E.2d 50 (Ind. Ct. App. 1973), another case involving the injunction of a proposed music festival.

[26]491 F.2d 161 (7th Cir. 1974).

[27]*Id.* at 165.

[28]413 U.S. 376 (1973).

[29]*Id.* at 389. Chief Justice Burger and Justices Stewart, Douglas and Blackmun dissented.

decision is informed with an almost identical rationale. While noting that the commercial aspects of the signs were alone not enough to meet the first amendment claim, the court found the high purpose of the ordinance sufficiently compelling to justify the incidental restriction on speech.

Indiana, as the rest of the nation, felt the impact of the recent United States Supreme Court obscenity decisions.[30] In *Mohney v. State,*[31] the Indiana Supreme Court, speaking through Chief Justice Arterburn, struck down the Indiana statute proscribing the sending of obscene literature into the state.[32] The *Mohney* case was one of two cases returned to the Indiana Supreme Court for reconsideration in light of the late cluster of obscenity cases.[33] The other case, *Stroud v. State,*[34] involved a conviction for the sale of obscene literature by an employee of Mohney. In brief opinions betraying just a hint of petulance, the Indiana Supreme Court found the Indiana statutes unconstitutional in that they were "too general in nature, [not setting] out specifically the sexual or obscene acts which, when depicted . . . constitute a violation of the statute."[35]

The provisions involved were cast in the general terms of "obscene, lewd, indecent or lascivious"[36] and, hence, lacked the type of specificity frequently deemed incumbent upon legislation, especially as it concerns speech. It is worth noting, however, that a certain hospitality toward extant state statutes can be found in the recent obscenity opinions by Chief Justice Burger. For example, the Chief Justice, in the course of detailing the permissible scope of regulation, several times (and one must assume, consciously) pointed out that, for a proscription to be acceptable, the type of material proscribed "must be specifically defined by the applicable state law, *as written or authoritatively construed.*"[37] Arguably, at least, the

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[30]*E.g.*, Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973).

[31]300 N.E.2d 66 (Ind. 1973).

[32]IND. CODE § 35-30-10-3 (IND. ANN. STAT. § 10-2803a, Burns Repl. 1956).

[33]See note 30 *supra.* Mohney's litigation may be traced in Mohney v. State, 257 Ind. 394, 276 N.E.2d 517 (1971), *vacated and remanded,* 413 U.S. 911 (1973).

[34]300 N.E.2d 100 (Ind. 1973). Stroud's conviction under IND. CODE § 35-30-10-1 (IND. ANN. STAT. § 10-2803, Burns Repl. 1956) had been upheld in Stroud v. State, 257 Ind. 204, 273 N.E.2d 842 (1971), *vacated and remanded,* 413 U.S. 911 (1973).

[35]This statement is found both in *Mohney,* 300 N.E.2d at 67, and in *Stroud,* 300 N.E.2d at 101.

[36]257 Ind. at 207, 273 N.E.2d at 844.

[37]Miller v. California, 413 U.S. 15, 24 (1973). The Chief Justice further stated:

> We do not hold, as Mr. Justice Brennan intimates, that all states other than Oregon must now enact new obscenity statutes. Other

Indiana statutes stricken in *Mohney* and *Stroud* could have been preserved for future application by sensitive and precise construction in light of the latest doctrine in the area of obscenity.[38]

In any case, and probably for the better, "the subject of obscenity [now] awaits the wisdom of the legislature."[39] Somewhat ironically, the most recent Indiana legislative session failed to produce any substitute obscenity legislation.[40] This lack, coupled with the fate of some local obscenity ordinances, has left some Indiana communities without any effective general restraints on pornography, except perhaps the Pornographic Nuisance Act which itself is of doubtful validity.[41]

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existing state statutes, *as construed heretofore or hereafter*, may well be adequate.

Id. at 24 n.6 (emphasis added).

[38]Some growing aversion to overbreadth analysis may be detected in such recent cases as Broadrick v. Oklahoma, 413 U.S. 601 (1973); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). It is noteworthy that the general run of federal obscenity legislation is couched in language as or more general than the Indiana provisions which were invalidated. *See, e.g.*, 18 U.S.C. §§ 1461, 1462, 1464 (1970); Hamling v. United States, 94 S. Ct. 2887 (1974).

Significantly, Justice DeBruler, who dissented to the original convictions of both Mohney and Stroud, agreed that the statutes, "read to incorporate the interpretations of the Supreme Court of the United States," were not unconstitutional on their faces. Stroud v. State, 257 Ind. 204, 218, 273 N.E.2d 842, 850 (1971). It may be contended that the statutes could have been reread to incorporate the latest features of obscenity doctrine and could thus have been preserved for future application.

With the Indiana statute stricken, compare a later legislative effort concerning sale of pornography to minors. IND. CODE §§ 35-30-11-1 *et seq.* (IND. ANN. STAT. §§ 10-817 *et seq.*, Burns Supp. 1974). This provision relates in some great detail its proscriptive ambit and explicitly sets forth the test found in Memoirs v. Massachusetts, 383 U.S. 413 (1966). While at least formally still in force, the latter statute might be less able to be saved by construction because of its very explicitness. *See, e.g.*, Walker v. Birmingham, 388 U.S. 307, 324 (1967) (Warren, C.J., dissenting).

[39]Thomas v. State, 303 N.E.2d 293, 294 (Ind. Ct. App. 1973). *Thomas* reiterated the constitutional infirmity of IND. CODE § 35-30-10-1 (IND. ANN. STAT. § 10-2803, Burns Repl. 1956).

[40]Several bills were introduced, *e.g.*, Ind. S. 106, 98th Gen. Assembly, 2d Sess. (1974), but failed to pass.

[41]IND. CODE §§ 35-30-10.5-1 to -10 (IND. ANN. STAT. §§ 9-2711 to -2720, Burns Supp. 1974). *See* Note, *Defects In Indiana's Pornographic Nuisance Act*, 49 IND. L.J. 320 (1974). For example, the Indianapolis ordinance drafted in 1973 in an effort to comply with recent obscenity standards has been enjoined by order of Judge Kuykendall. The temporary experience of surviving with no law regulating obscenity may provide the General Assembly with interesting data on the need for far-reaching regulation.

That earthy language alone is not obscene was reaffirmed by the United States Supreme Court in *Hess v. Indiana*,[42] a case arising from a street demonstration at Indiana University in Bloomington. Hess' conviction for disorderly conduct had originally been upheld by the Indiana Supreme Court.[43] Police had been called to clear an estimated 200 to 300 demonstrators from the front of a campus building. When the bulk of the demonstrators blocked a patrol car, police attempted to clear the street. Sometime during this operation, a sheriff reportedly heard Hess say in a loud voice, while in a position with his back to the police and facing the bulk of the demonstrators, "We'll take the fucking street later," or "We'll take the fucking street again."[44] Hess was arrested and convicted for violation of the Indiana disorderly conduct statute.[45]

Justice Givan, applying what he purported to be the clear and present danger test as reformulated in *Brandenberg v. Ohio*,[46] found that Hess' conduct surpassed the "theoretical advocation of violence," which the justice took to be the limit of protected speech under the circumstances.[47] Justice Givan also dismissed Hess' facial challenge on the basis that the statute "can only be applied if the speech has a tendency to lead to violence,"[48] a construction which Justice Hunter, in a lengthy dissent, properly pointed out would not pass constitutional muster.[49] Justice Hunter also took issue with the majority's determination that Hess intended violence or that the situation was so volatile that violence properly could be called imminent.

In a brief per curiam opinion,[50] the United States Supreme Court found Hess' words to be neither a nuisance, nor obscene, nor, since not directed to anyone, fighting words. The Court found that, at best, the words "could be taken as counsel for present modera-

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[42]414 U.S. 105 (1973).

[43]Hess v. Indiana, 297 N.E.2d 413 (Ind. 1973).

[44]*Id.* at 414.

[45]IND. CODE § 35-27-2-1 (IND. ANN. STAT. § 10-1510, Burns Supp. 1974) provides in pertinent part:

> Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct . . . .

[46]395 U.S. 444 (1969).

[47]297 N.E.2d at 415.

[48]*Id.* at 416.

[49]*Id.* at 421.

[50]Despite the per curiam mold of the majority, Chief Justice Burger and Justice Blackmun filed a dissent which took the majority to task for ignoring the finding of the lower courts that the situation was indeed highly charged.

tion" and, at worst, were "nothing more than advocacy of illegal action at some indefinite future time."[51] The Supreme Court did not consider the facial validity of the statute.

Less success attended the protest efforts of the defendants in *Cunningham v. State.*[52] These defendants were convicted for interfering with the lawful use of a public building, in this instance, a Selective Service office.[53] Appellants placed a rose on each desk in the office, distributed leaflets and, loudly and in unison, read the names of Indiana residents killed in Vietnam. Testimony indicated that appellants' conduct interfered with the normal service and regimen of the Selective Service office. After twice refusing requests to leave, including one request from a police officer, appellants were arrested.

The court, in rejecting appellants' first amendment challenge,[54] placed heavy reliance on the case of *Campbell v. State,*[55] wherein it was reasoned that the right of free expression is but one of a group of rights, "each of which can only be exercised to the extent that such does not encroach upon or erode the others."[56] Central to Chief Justice Arterburn's opinion, and to his reasons for distinguishing cases such as *Brown v. Louisiana,*[57] was the finding that appellants intended to, and effectively did, disrupt the normal business of the office.[58]

Two Indiana loyalty provisions fell before constitutional challenges mounted in federal courts. In *Communist Party of Indiana v. Whitcomb,*[59] the United States Supreme Court struck down a law requiring political parties and candidates to file affidavits avowing that the party "does not advocate the overthrow of local, state or national government by force or violence."[60] The application of the Communist Party of Indiana for a place on the 1972 national ballot

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[51]414 U.S. at 108.

[52]301 N.E.2d 638 (Ind. 1973).

[53]The statute violated was IND. CODE § 35-19-4-4 (IND. ANN. STAT. § 10-4534, Burns Supp. 1974).

[54]Appellants also contended that the statute was designed only to apply to university buildings, which contention the court dismissed. Appellants' argument that the statute violated IND. CONST. art. 4, § 19, by encompassing two separate subjects, namely trespass and boisterous conduct, was likewise deemed unavailing. The court held that the statute applied only to trespass, "defined as a going upon or remaining within a public building with the intent of disrupting the work that goes on in that building." 301 N.E.2d at 640.

[55]256 Ind. 630, 271 N.E.2d 463 (1971).

[56]*Id.*

[57]383 U.S. 131 (1966) (invalidating a conviction for a silent protest in a library).

[58]*See* Adderley v. Florida, 385 U.S. 39 (1966).

[59]414 U.S. 441 (1974).

[60]IND. CODE § 3-1-11-12 (Burns 1972).

was rejected because it lacked the pertinent affidavit. A three judge court rejected a challenge to the provision but ordered that the Communist Party be placed on the ballot if the affidavit were filed.[61] The Party accepted the invitation, but filed "a friend" in the form of an explanatory note confining "advocacy" to the limits the Party found in *Yates v. United States*.[62] The state rejected the annotated affidavit. The three judge court, to whom the Party again turned, refused relief.[63]

The Supreme Court, through Mr. Justice Brennan, reversed upon a finding that the challenged affidavit was facially invalid.[64] Citing *Brandenberg v. Ohio*[65] for principles deemed applicable to state regulation of ballots, the Court emphasized that advocacy, unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"[66] cannot be the subject of sanctions.[67] Therefore, the Communist Party would seem to have achieved more than it sought in its attempt to import the structure of *Yates*.

The federal district court in Indiana had little trouble disposing of the Indiana requirement that paid lobbyists submit an affidavit denying membership in the Communist Party, or any other subversive organization, and averring that the affiant had never refused to answer questions posed by a congressional committee con-

[61]The decision of the three judge court, dated September 28, 1972, is unreported.

[62]354 U.S. 298 (1957). The *Yates* case, according to the Communist Party, required a finding of advocacy of "concrete action" for forcible overthrow rather than a finding of mere exposition of principles.

[63]On September 28, 1972, the Court did, however, at the behest of the American Independent Party and the Indiana Peace and Freedom Party, as well as the Communist Party, strike down IND. CODE § 3-1-11-12 (Burns 1972), which required an affidavit denying affiliation or cooperation with foreign groups or governments. This decision was affirmed summarily in Whitcomb v. Communist Party, 410 U.S. 976 (1973).

[64]414 U.S. at 447-48.

[65]395 U.S. 444 (1969).

[66]414 U.S. at 448, *quoting from* Brandenberg v. Ohio, 395 U.S. 444, 447 (1969).

[67]The use of the *Brandenberg* test in this context arguably may be said to presage the extension of protection against anti-subversive oaths, affidavits and sanctions. Such regulations heretofore had seemingly been countenanced so long as they were directed to determining if the affiant was a knowing member of a subversive group and had a specific intent to further its illegal aims. So long as the group advocated imminent concrete action, that was enough. *See, e.g.*, Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971). A logical extension of the case under consideration may be seen to add a requirement of actual imminence to the elements of knowledge and specific intent. That is, the government will have to show that the group presents an actual and imminent threat to a legitimate government interest.

cerning party membership. In *Raphael v. Conrad,*[68] the three judge court found the required affidavit overbroad insofar as it sanctioned membership in a subversive group which membership was not both knowing and partaking of a specific intent to promote the group's illegal aims.[69] While recognizing that Communist Party membership is not per se illegal, the court found that the oath violated the privilege against self-incrimination, since "testimony concerning affiliation with the Communist Party could . . . subject a witness to criminal sanctions."[70]

B. Equal Protection

In *United States v. Board of School Commissioners,*[71] the Indianapolis school desegregation case, the proper remedy for a pattern of de jure segregation turned out to be the least tractable aspect of the litigation. Judge Dillin's 1973 opinion[72] noted at its outset that, since the time of his original opinion on the substantive issue of segregation, the percentage of Negro pupils in the Indianapolis public school system (IPS) had increased to over forty percent, a figure well beyond the point at which he found that white exodus from a school system accelerates, continues and becomes irreversible. Such trends and figures, coupled with "a clear preponderance of the expert opinion," led Judge Dillin to conclude that a remedy "cannot be accomplished within the present boundaries of IPS in a way that will work for any significant period of time."[73]

The key, critical to fashioning a truly efficacious remedy, was the court's finding that authority over the schools and school affairs "resides exclusively within the dominion of the legislature and the school system is a centralized and not a localized form of school government."[74] Therefore, the de jure segregation practiced in the Indianapolis school system was found properly imputable to the

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[68]371 F. Supp. 256 (S.D. Ind. 1974). The invalidated statute is IND. CODE § 2-4-3-2 (Burns 1972).

[69]The district court opinion relied mainly on Cole v. Richardson, 405 U.S. 676 (1972), and Elfbrandt v. Russell, 384 U.S. 11 (1966). This reliance, which seems sound, might be compared with the potential import of Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974), discussed at text accompanying notes 59-67 *supra.*

[70]371 F. Supp. at 259, *citing, inter alia,* Lefkowitz v. Turley, 414 U.S. 70 (1973).

[71]332 F. Supp. 655 (S.D. Ind. 1971), *aff'd,* 474 F.2d 81 (7th Cir.), *cert. denied,* 413 U.S. 920 (1973). In this case, it was determined that the Indianapolis Public School system (IPS) was guilty of illegal segregation of pupils in its public schools.

[72]368 F. Supp. 1191 (S.D. Ind. 1973).

[73]*Id.* at 1198.

[74]*Id.* at 1200.

state, of which local school corporations are but agents. In addition, the court found that the state itself had practiced de jure segregation through such omissions and acts as the approval of school sites which were found to have furthered discriminatory patterns.[75]

Having found that the onus of segregation must be shared by the state, the court deemed that the remedy need no more be bounded by school districts, or even county political boundaries, than is the state's power over the general management of schools.[76] It being "the duty of the General Assembly . . . to provide, by law, for a general and uniform system of Common Schools . . . equally open to all,"[77] the court concluded that it befell that body to devise a metropolitan plan of common school education within a reasonable time, failing which the court itself would act to do so.[78] As an interim measure, the court ordered, *inter alia*, the transfer of elementary school pupils within IPS to achieve a minimum fifteen percent black enrollment at each school.[79] The subsequent failure of the Indiana General Assembly to act[80] would seem to return to the court the responsibility to see that a viable remedy is fashioned.

Judge Dillin's finding of state responsibility was appealed to the Court of Appeals for the Seventh Circuit. While that appeal

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[75]*Id.* at 1205.

[76]The state-wide scope of the Indiana school system was a crucial factor which, the court found, distinguished the Indianapolis case from the Virginia case of Bradley v. School Bd., 462 F.2d 1058 (4th Cir.), *aff'd by an equally divided Court sub nom.* School Bd. v. State Bd. of Educ., 412 U.S. 92 (1973), which denied the remedial mandate of the district court calling for a desegregation plan which ignored county boundaries. Virginia's school system, unlike Indiana's, placed primary power in local governing bodies.

The Indianapolis case generally was thought to resemble more closely Bradley v. Milliken, 484 F.2d 215 (6th Cir. 1973), wherein the Court of Appeals for the Sixth Circuit upheld a metropolitan desegregation plan for Detroit, Michigan. The United States Supreme Court, however, reversed. Milliken v. Bradley, 94 S. Ct. 3112 (1974). See discussion at text accompanying notes 81-83 *infra*.

[77]IND. CONST. art. 8, § 1.

[78]368 F. Supp. at 1205.

[79]Other aspects of the interim relief included an order, which was stayed before becoming effective, directing transfer of IPS pupils to certain outlying metropolitan area school districts; an order to rearrange high school feeder patterns "so as to secure enrollment of Negro students in each school more nearly approaching their numbers in the system;" and an order requiring the institution of programs designed to orient the thinking of students and teachers toward solving the problem of segregation. *Id.* at 1209.

[80]In an order dated December 6, 1973, Judge Dillin reemphasized the duty of the General Assembly and opined that "a reasonable time within which the General Assembly should act [would] be the end of its January, 1974 session or February 15, 1974, whichever date is sooner." United States v. School Comm'rs, No. IP 68-C-225 (S.D. Ind., Dec. 6, 1973). As noted in the text, there was no response from the legislators, timely or otherwise.

was pending, the United States Supreme Court decided *Milliken v. Bradley*,[81] which decision undoubtedly retextures the Indianapolis case. In *Milliken*, a divided Court[82] rejected a metropolitan remedy for segregation existing in the Detroit school system. While not upsetting the findings of the lower courts that illegal segregation, perpetrated by local and state officials, existed in the Detroit school system, the majority, speaking through Chief Justice Burger, deemed that a metropolitan remedy, encompassing school districts wherein no illegal separation of races was found to exist, was beyond the equitable powers of federal courts. The proposition that "the scope of the remedy is determined by the nature and extent of the constitutional violation,"[83] coupled with a record which showed that the unlawful acts of state and local officials contributed to a dual school system only in Detroit and not in the outlying school districts included in the proposed remedy, led the majority to conclude that the duty of the federal court was to cure the violation in Detroit and Detroit only. The fact that a Detroit-only plan would produce a still predominantly black school system was of no consequence to the Court, which opined that a racial balance reflecting the metropolitan population was not part of the constitutional mandate of unitary school systems. Chief Justice Burger's opinion emphasized the long tradition of local school control, a tradition found likely to suffer from the upheaval which would accompany the creation of a "super" metropolitan school district.

Certain differences between the Detroit and Indianapolis situations, however, make the effect of the *Milliken* decision less than certain. Critical to the Supreme Court's reasoning in *Milliken* was the absence of findings that any of the outlying school systems were themselves unlawfully segregated. In the Indianapolis case, however, while it is true that Judge Dillin found "no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders,"[84] he also noted that the paucity of Negro residents in these outlying areas, coupled with the abundance of Negroes employed in these areas, suggested that

> at the very least . . . Negroes have consistently been deprived of the privilege of living within the territory of the added defendants by reason of the customs and usages of the communities embraced within such boundaries, and of the State.[85]

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[81] 94 S. Ct. 3112 (1974).

[82] Justices Douglas, Brennan, White and Marshall dissented.

[83] 94 S. Ct. at 3127.

[84] 368 F. Supp. at 1203.

[85] *Id.* at 1204-05.

While recognizing that the court was not considering a housing case, Judge Dillin remarked that "the discriminatory customs and usages mentioned have had a demonstrably causal relationship to segregation in the schools."[86]

More concretely, the Supreme Court noted that the invidious drawing of school district boundaries, of which there was no proof in the Detroit case, may provide a sufficient basis for ignoring those boundaries in fashioning a remedy. Judge Dillin at least twice suggested the possibility that invidious motives played a role in the present shape of IPS, a shape for which outlying Marion County districts may have been partially a cause.[87]

A figure potentially emerging as a key in the fate of the Indianapolis case is Mr. Justice Stewart, who concurred separately in the Detroit case. With characteristic caution, Mr. Justice Stewart noted that an interdistrict remedy might indeed be proper on a showing that "state officials had contributed to the separation of the races by drawing or redrawing school district lines . . . or by purposeful, racially discriminatory use of state housing or zoning laws . . . ."[88] However, because no showing was made that officials, state or local, had contributed to segregation in areas other than Detroit, "the formulation of an interdistrict remedy was . . . not responsive to the factual record before the District Court."[89]

This potentially crucial difference between the Detroit and Indianapolis cases was not lost on the Court of Appeals for the Seventh Circuit. In August, 1974,[90] the court upheld Judge Dillin's finding that state officials were themselves guilty of contributing to the illegal segregation extant in IPS.[91] While reversing, in accordance with *Milliken,* the district court's rulings pertaining to a metropolitan remedy beyond the confines of Uni-Gov, the court of appeals remanded the case for a determination of "whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov . . . ."[92]

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[86]*Id.* at 1205.

[87]*See* United States v. Board of School Comm'rs, 368 F. Supp. 1191, 1203 (S.D. Ind. 1973); United States v. Board of School Comm'rs, 332 F. Supp. 655, 675-76 (S.D. Ind. 1971).

[88]94 S. Ct. at 3132.

[89]*Id.* at 3133.

[90]United States v. Board of School Comm'rs, 43 Ind. Dec. 401 (7th Cir. 1974).

[91]*Id.*

[92]*Id.* The court of appeals affirmed Judge Dillin's decision on other miscellaneous matters, to wit: the institution of an interim remedy for the 1973-1974 school year following the rejection of a school board interim proposal as inadequate; the refusal of Judge Dillin to recuse himself for bias; the

In *State ex rel. Miller v. McDonald*,[93] the Indiana Supreme Court struck down an Evansville ordinance which limited municipal trash collection to houses and apartment complexes with four or less units. The suit, challenging the ordinance as a denial of equal protection,[94] was brought by a class of apartment owners whose properties were excluded from collection under the 1969 ordinance. While noting that the absence of any showing that the ordinance in question burdened a suspect class or affected a fundamental right meant that it would be valid upon a finding of "any rational or reasonable basis,"[95] the court, speaking through Justice Hunter, could discern no such minimal finding. The court detected two basic classifications: (1) between apartment complexes of four or less units and those of more than four units, and (2) between commercial and noncommercial enterprises. While it was obvious to the court that "the *quantity* of goods and services . . . varies with the number of units in the building," it was as clear that "the *nature* of the relationship remains the same."[96] Hence, the ordinance was found to apply "a double standard to those who, in reality, are in the same class without any reasonable justification."[97] Especially irrational was the unequal application of the ordinance between hotels which, because they generated "household refuse" as defined, would seem to be eligible for trash collection, and huge complexes which, while generating identical refuse, would not be eligible.[98] Chief Justice Arterburn dissented without opinion.

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addition of parties pending appeal; the rejection of state officials' eleventh amendent challenge; the determination that the finding of illegal segregation in IPS was res judicata so as to prevent added defendants from relitigating the issue; the lack of necessity for a three judge court; the exclusion of certain scientific evidence; and the award of attorneys' fees to certain plaintiffs. *Id.* at 416-25.

[93]297 N.E.2d 826 (Ind. 1973).

[94]Relief was sought on the basis of the fourteenth amendment and IND. CONST. art. 1, § 23, which provisions were, for the purposes of this case, deemed to be synonomous.

[95]297 N.E.2d at 829.

[96]*Id.* at 830.

[97]*Id.*

[98]The Indiana Supreme Court's standard of "base rationality" seems somewhat higher than that of the United States Supreme Court in, for example, Railway Express Agency v. New York, 336 U.S. 106 (1949). In *Railway Express*, the Court upheld a New York City ordinance prohibiting signs upon vehicles unless touting the vehicle owner's wares. Mr. Justice Douglas imagined that perhaps those "who advertised their own wares . . . do not present the same traffic problem," *id.* at 110, and Mr. Justice Jackson supposed the state may well prefer the owner to the hireling. *Id.* at 115. An equal tolerance might conjecture that Evansville reasonably prefers a lack of concentration of people, and of garbage—except in hotels.

In *Sturrup v. Mahan*[99] the Indiana Supreme Court was presented with the equal protection challenge of a high school student who was excluded from participating in interscholastic athletics through the application of an Indiana High School Athletic Association (IHSAA) rule. This rule prohibited a student's participation in any inter-school contest "until he has been enrolled in such school for one calendar year, unless the parents of such student actually change their residence to the second school district."[100]

Plaintiff had been living in Florida with his family. His mother was sick and he and ten sisters were crowded into a two bedroom house. His friends and fellow athletes were using drugs. Because of this "demoralizing" atmosphere, plaintiff moved to Bloomington to live with his brother.[101] The Indiana Court of Appeals granted the plaintiff relief upon the basis that the IHSAA rules had unconstitutionally burdened his fundamental right to travel.[102] While agreeing that plaintiff was entitled to relief, the Indiana Supreme Court considered the lower court's analysis faulty. Unlike the provisions involved in *Dunn v. Blumstein*[103] or *Shapiro v. Thompson*,[104] cases upon which the court of appeals mainly relied, the supreme court found that the IHSAA rules under attack treated alike all transferees, whether intrastate or interstate. Hence no special burden was found to fall upon persons, such as plaintiff, exercising their right to travel.[105]

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[99]305 N.E.2d 877 (Ind. 1974).

[100]IHSAA Rule 12, § 1, as set out at 305 N.E.2d at 878. Although on its face the rule would seem to apply only to transfers from member schools, this rule had consistently been construed to apply to persons transferring from outside the state. *Id.* at 878 n.2. Another relevant provision, IHSAA Rule 22, § 6, provides that a student who must, because of unavoidable circumstances, transfer without coming within the provision of section 1, may be declared eligible upon "proof that the change was necessary and that no undue influence was attached to the case in any way." 305 N.E.2d at 879.

[101]In his dissent, Chief Justice Arterburn questioned the purity of plaintiff's motives in changing his residence, noting that his brother had stated in a letter that, if he had known plaintiff would be barred from athletics, he "would have sent him home where he could have played with [no] difficulties what so ever." 305 N.E.2d at 882.

[102]Sturrup v. Mahan, 290 N.E.2d 64, 74 (Ind. Ct. App. 1973).

[103]405 U.S. 330 (1972).

[104]394 U.S. 618 (1969).

[105]The analysis of the court of appeals would seem to have received substantial support in a case reported one month after the Indiana Supreme Court opinion. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). The Court, per Mr. Justice Marshall, upheld a challenge to an Arizona statute requiring a one year residency in a county as a condition to receiving free non-emergency hospitalization or medical care. The state had contended, *inter alia*, that the provision was valid because it penalized intrastate and not interstate travel. Mr. Justice Marshall responded:

Nevertheless, the regulation under attack was found to be fatally defective. The first flaw, as described by Justice Hunter, lay in the fact that the rules limited

> eligibility to those who move with their parents free of undue influence and to those whose move is necessitated by "unavoidable circumstances" free of undue influence. All other transferring student-athletes, who cannot bring themselves within one of the above two categories, are *automatically* denied the opportunity to participate in interscholastic athletics for a period of one year. The by-laws, in essence, create an irrebuttable presumption that all other transferees have been victims of unscrupulous practices. This is precisely where the rules sweep too broadly, they create an over-inclusive class—those who move from one school to another for reasons wholly unrelated to athletics are grouped together with those who have "jumped" for athletic reasons. . . . The rules as presently constituted penalize a student athlete who wishes to transfer for academic or religious reasons or for any number of other legitimate reasons.[106]

Thus, the means chosen to further the otherwise legitimate state purpose of preventing school "jumping" for athletic reasons were deemed too imprecise.[107]

> Even were we to draw a constitutional distinction between interstate and intrastate travel, a question we do not now consider, such a distinction would not support the judgment of the Arizona court in the case before us. Appellant . . . has been effectively penalized for his interstate migration . . . .

Id. at 255-56. The situation of the plaintiff in *Sturrup* seems comparable.

[106]305 N.E.2d at 881.

[107]The court's opinion does not explain adequately the precise grounds for its holding. If the problem is one of a denial of equal protection, it is not clear what factor triggered the rather strict scrutiny applied. No suspect class appeared. The only possible fundamental right involved, the right to travel, had not, by the court's lights, been burdened. The phrase "irrebuttable presumption" suggests the court was following cases, such as Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), which invalidated certain irrebuttable presumptions applied to the employment of pregnant teachers, and Vlandis v. Kline, 412 U.S. 441 (1973), in which the Court held that the due process clause forbids a state to deny an individual college student resident tuition rates on the basis of the "permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Id.* at 452. *See also* Stanley v. Illinois, 405 U.S. 645 (1972). If this type of due process analysis is the basis for the court's holding, it might have been helpful for the court to have engaged in a discussion of the matters suggested by *Vlandis*, for example, the availability of alternative means, the extent to which an

The second imperfection noted by the court derived from the fact that, although plaintiff's brother had been appointed guardian by the Circuit Court of Monroe County and therefore stood in loco parentis to plaintiff, a relationship explicitly recognized by IHSAA by-laws as tantamount to parentage, the state officials still demanded a showing of unavoidable change of residence.[108] Such an attitude was characterized by the court as "patently arbitrary and capricious."[109]

Taylor v. State[110] presented a challenge to the use of an eligible voters list for the selection of the jury array in Daviess County. Defendant's appeal from his second degree murder conviction was premised on the fact that an eligible voters list would not include some two thousand Amish residents who did not register to vote. The court, through Justice Givan, held the selection process valid. In the first place, the court noted, the defendant had not shown that he was of the Amish faith or that the Amish were systematically excluded from jury service.[111] In the absence of a showing of purposeful exclusion, and in the face of what seemed a practical method of drawing a reasonable cross section of the community, the court held the selection process acceptable.

Justice DeBruler's dissent emphasized the "affirmative duty" of jury commissioners "to compile and use a list which does indeed represent a cross section of the community."[112] Defendant's showing that the Amish constituted eight percent of the adult population of Daviess County convinced Justice DeBruler that a "prima facie case of constitutional violations"[113] had been made out, thus requiring the state to shoulder the burden of rebutting the "presumption of unconstitutionality."[114]

"irrebuttable presumption" in fact exists, and the importance of the interest invaded given that *Vlandis* concerned travel, *LaFleur* concerned livelihood and procreation, and *Stanley* concerned sex and parentage. The IHSAA rule in question does provide room for proof of "no undue influence." The proper reading of that term, and of the "unavoidable circumstances" prompting the change, would seem critical to the question of whether the presumption is truly irrebuttable.

[108]305 N.E.2d at 882.

[109]*Id.*

[110]295 N.E.2d 602 (Ind. 1973). *Cf.* Lake v. State, 274 N.E.2d 249 (Ind. 1971); State *ex rel.* Brune v. Vanderburgh Circuit Court, 265 N.E.2d 524 (Ind. 1971) (concerning the use of property tax lists as a source of jurors).

[111]In fact, it appeared that five percent of the Amish population was registered to vote. 295 N.E.2d at 605.

[112]*Id.* at 611.

[113]*Id.*

[114]*Id. citing, inter alia,* Alexander v. Louisiana, 405 U.S. 625 (1972); Jones v. Georgia, 389 U.S. 24 (1967). Justice DeBruler also deemed defendant's standing unaffected by his lack of Amish affiliation. 295 N.E.2d at 611.

Practically, of course, there seems little to suggest that the state was purposefully discriminating in its selection process. Therefore, the state might be placed in a quandary as to what order of proof Justice DeBruler would have it bring forth. It might have been more advantageous to have suggested that statistical disparity affecting an identifiable religious group demands that the state show something more, such as a necessity for confining jury panels to registered voters. Viewed in this manner, the problem can be seen to provoke a more subtle inquiry into the reach of equal protection doctrine than is present in cases in which a charge of purposeful discrimination exists.[115]

C. Due Process

In *Brooks v. Center Township*,[116] the Court of Appeals for the Seventh Circuit found defendant's act of terminating rent and food assistance without notice, hearing or notice of appeal rights to be wanting in due process under the standards of *Goldberg v. Kelly*.[117] The class action had been dismissed by the federal district court upon a finding that plaintiffs had failed to exhaust available state post-termination remedies. The state remedies available, to which the district court would have relegated plaintiffs, provided for a review and hearing by the Board of County Commissioners of the termination decision of the township overseer.[118] As the court of appeals pointed out, however, plaintiffs' grievance was not with the express provision of the statute but with its failure and the failure of any other statute "to provide due process at the level of the initial termination of relief."[119] Therefore, the administrative procedures to which plain-

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There is substantial difficulty in measuring what kind of showing is sufficient to raise a presumption of discriminatory selection of jurors. However, it should be noted that the cases cited by Justice DeBruler present a somewhat more vivid portrait of discriminatory selection processes than was present in the instant case. For example, *Alexander* portrayed a selection system which, in a county containing a Negro population of over twenty-one percent, resulted in a venire of which only six and three quarters percent were Negro. Moreover, the selection process, which was conducted by an all white panel, involved racial identification at all critical stages. This factor, coupled with the statistical deviation of the panel composition from the likely result of a truly random process, prompted the Court to lay the burden of disproving impropriety upon the state. *See also* Whitus v. Georgia, 385 U.S. 545 (1967).

[115] *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535 (1972); Palmer v. Thompson, 403 U.S. 217 (1971).

[116] 485 F.2d 383 (7th Cir. 1973).

[117] 397 U.S. 254 (1970).

[118] IND. CODE § 12-2-1-18 (Burns 1973).

[119] 485 F.2d at 385.

tiffs had been consigned by the district court were part and parcel of the system, or lack thereof, under attack.

Moreover, the court of appeals noted the modern Supreme Court trend to find that the section 1983[120] civil rights remedy "is supplementary to any state administrative remedies and that federal jurisdiction may be invoked without exhaustion of state remedies."[121] The invocation of federal power was found to be all the more justifiable when no state proceedings were pending with which a federal court order might interfere and when the claimants would be under a substantial burden if required to resort to available state remedies.

Less hospitality was afforded an elementary school teacher who sought federal relief when the local school board, by whom she had been employed for three years, failed to renew her contract. In *Jeffries v. Turkey Run Consolidated School District*,[122] Judge Stevens characterized plaintiff's claim as one premised neither on allegations that she had been denied elements of procedural fairness[123] nor on allegations that tenure or some other special entitlement had been ignored, but rather on a claim that the reasons for the nonrenewal were arbitrary and capricious and, hence, a denial of substantive due process.

The court deemed itself bound by the holding of *Board of Regents v. Roth*,[124] in which respondent, a political science professor on a ten month contract, was found not entitled to a due process hearing when petitioners failed to renew his contract. The thesis of the *Roth* case, that due process protects only liberty and property, was found to apply with at least equal force to Mrs. Jeffries' dilemma. Because she made no claims of any specific entitlement, beyond desire and personal expectation, and because the reasons for her dismissal[125] did not appear to the court to amount to a special stigma or deprivation of the ability to practice her art in the future, she could therefore show no property or liberty interests entitled to protection.

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[120]42 U.S.C. § 1983 (1970).

[121]485 F.2d at 386. *See, e.g.*, Allee v. Medrano, 94 S. Ct. 2191 (1974); Gibson v. Berryhill, 411 U.S. 564 (1973); McNeese v. Board of Educ., 373 U.S. 668 (1963).

[122]492 F.2d 1 (7th Cir. 1974).

[123]She was, in fact, given written notice of the reasons for dismissal and a hearing at which she was represented by counsel.

[124]408 U.S. 564 (1972).

[125]The school board's statement did suggest that "Mrs. Jeffries exhibited highly unethical conduct," apparently by openly contradicting the directives of other teachers. This was said to have disrupted the school. As well, she was described as uncooperative in regard to the school's music program. 492 F.2d at 2 n.1.

A somewhat similar, although more problematic model, surfaced in *Indiana State Employees Association, Inc. v. Negley.*[126] Here, the plaintiffs, formerly employees of the Indiana Department of Public Instruction, claimed their discharges were caused by their political affiliations.[127] Hence, plaintiffs claimed that they had been denied equal protection and due process and that their rights of free association had been impermissibly trampled. The court denied relief[128] and noted that none of the plaintiffs "were within Indiana's statutory merit system, and each served at the pleasure of the Superintendent of Public Instruction."[129] The political patronage system, of which plaintiffs were victims, was considered by the court to be "a matter for executive and legislative rather than judicial reform."[130]

The greater portion of Judge Noland's opinion is devoted to a description of plaintiffs' duties as partaking of policy-making discretion, a characterization presumably gaining import from the case of *Illinois State Employees Union v. Lewis.*[131] The *Lewis* decision involved a challenge to the Illinois brand of political patronage which resulted in the discharge of several employees of the Secretary of State's office. While the court of appeals had harsh words for aspects of the political patronage system, the opinion purports to be confined to the question of the dismissal of non-policy-making employees.[132] Without exception, Judge Noland found plaintiffs to occupy policy-making positions. Hence, the court suggested that it "need not . . . determine whether the dismissals were politically motivated."[133] The court concluded that, at least for employees situated similarly to these plaintiffs, discharges need not be politically neutral. Considerations of loyalty, efficiency and political responsiveness, which are intertwined with party affiliation, were noted by the court as interests weighing in favor of making party affiliation a proper ground for employment.

It seems undeniable that, at some levels, public officials' employment may be made dependent upon party affiliation. At the same time, it has become clear that government may not in general deny benefits, such as employment, on an unconstitutional

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[126]365 F. Supp. 225 (S.D. Ind. 1973).

[127]Plaintiffs were described as Democrats and Independents. Defendant, the State Superintendent of Public Instruction, was a Republican.

[128]Plaintiffs had also sought relief under IND. CONST. art. 1, §§ 9, 12, 23.

[129]365 F. Supp. at 227.

[130]*Id.* at 233.

[131]473 F.2d 561 (7th Cir. 1972).

[132]*Id.* at 566. The court also noted that plaintiffs "properly do not challenge the public executive's right to use political philosophy or affiliation as one criterion in the selection of policy-making officials." *Id.* at 574.

[133]365 F. Supp. at 232.

basis. Thus, "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."[134] The problem facing Judge Noland has not yet been favored with authoritative principles delineating the line between employees whose jobs are properly at the mercy of politics and those whose jobs are not. A distinction drawn upon the existence vel non of some protected "property" interest, implicit in some recent cases,[135] may be sufficient for determining the right to a due process hearing, but is not necessarily appropriate for a case in which the government benefit expressly has been removed because of political association.

In *Pulos v. James*,[136] the Indiana Supreme Court struck down an Indiana statute which empowered the metropolitan planning commissions in counties with first class cities to vacate covenants or restrictions applicable to plats.[137] The cases which gave rise to the *Pulos* decision arose from the vacation by the Metropolitan Plan Commission of Marion County of restrictive covenants which prohibited commercial buildings in the plat where plaintiffs owned property. Defendants, owners of two lots in the same plat, had petitioned the plat committee of the plan commission to vacate the restrictive covenants, at least with regard to their two lots. The court cautioned at the outset that it was concerned, not with the considerations which warrant an equity court's refusal to enforce restrictive covenants, but only with the constitutionality of that portion of the statute which purportedly vests in the plain commission the authority to vacate subdivision restrictions.[138] With that parallax, the court deemed that the vacation of such restrictive covenants constituted the taking of private property for private use,[139] a taking prohibited by the Indiana and United States Constitutions.[140] The court concluded by observing that, even if the taking could have been considered to be for the public's benefit, it would

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[134]Perry v. Sinderman, 408 U.S. 593, 597 (1972).

[135]*E.g.*, Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

[136]302 N.E.2d 768 (Ind. 1973).

[137]IND. CODE § 18-5-10-41 (IND. ANN. STAT. § 48-916, Burns Supp. 1974).

[138]302 N.E.2d at 771.

[139]The court concluded that a restrictive covenant is a protected property right. *Id.* at 774.

[140]U.S. CONST. amend. XIV; IND. CONST. art. 1, §§ 21, 23. The court also noted that even the issuance of a zoning variance in violation of a restrictive covenant, while not in itself invalid, did not relieve property owners of their obligations, *inter se*, deriving from the covenants. *See* Suess v. Vogelgesang, 281 N.E.2d 536 (Ind. Ct. App. 1972).

still have been invalid since no provision was made for compensation.

Two final cases presented the courts with constitutional issues during the survey period. In *Livingston v. Lukasik,*[141] the federal district court found two Indiana statutes[142] concerning the imposition of imprisonment in place of fines to be wanting under the strictures of *Tate v. Short.*[143] The court granted summary judgment for plaintiff on both issues.[144] In *Poling v. State,*[145] the Indiana Court of Appeals upheld the trial court's refusal to stay suspension of a driver's license while an appeal was pending for conviction for driving under the influence of liquor and for public intoxication.[146]

VI. Contracts and Commercial Law

*Gerald L. Bepko**

The following is a cursory review of some of the year's most significant developments in Indiana contracts and commercial law. Because of the nature of the review, there are minimal efforts at

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[141]40 Ind. Dec. 544 (N.D. Ind. 1974).

[142]The statutes involved were ch. 280, §§ 1, 2, [1961] Ind. Acts 654 (repealed 1974); IND. CODE § 35-1-46-1 (IND. ANN. STAT. § 9-2228, Burns Repl. 1956). The former, held to be facially unconstitutional, provided for the imprisonment of a person adjudged guilty and punished by fine until "such fine is paid or replevied." This provision was subsequently repealed by the General Assembly. Ind. Pub. L. No. 147, § 2 (Feb. 19, 1974). The latter provision, held invalid as applied to indigents, provided that persons imprisoned for failure to pay a fine may "serve" their fine at the rate of five dollars for one day. *Cf.* IND. CODE § 35-4.1-4-16(a) (IND. ANN. STAT. § 9-1828a, Burns Supp. 1974), *as added by* Ind. Pub. L. No. 147, § 2 (Feb. 19, 1974). The new act provides that an indigent cannot be incarcerated for failure to pay a fine, but that one who is not an indigent may be incarcerated if he either refuses or fails to pay. The reason for his failure would seem to be significant.

[143]401 U.S. 395 (1971). This case nullified a Texas system which required the incarceration of persons unable to pay traffic fines. The system, which allowed a credit of five dollars for each day of incarceration, was held to be a denial of equal protection.

[144]The court, however, refused further relief requested by plaintiff, which relief would have required defendant to mail copies of the decision to all Indiana Justices of the Peace and would have required the Attorney General to issue an opinion acknowledging the force of the decision, as being an unnecessary and unwarranted violation of principles of federalism.

[145]295 N.E.2d 635 (Ind. Ct. App. 1973).

[146]License suspension in such circumstances is authorized by IND. CODE § 9-2-1-5 (Burns 1973).

*Associate Professor of Law, Indiana University Indianapolis Law School;