INDIANA CONSTITUTIONAL DEVELOPMENTS: INCREMENTAL CHANGE

JON LARAMORE*

During the survey period, there were few truly significant developments in state constitutional law in Indiana. Instead, during the survey period, as has been true in recent years, decisions relating to individual rights under the Indiana Constitution displayed incremental adjustments rather than groundbreaking action.[1] And in one area—free expression—an Indiana Supreme Court decision may be seen as backtracking on Indiana constitutional rights first set forth more than a decade ago.

During the past several years, Indiana's courts have made several important decisions interpreting the structural portions of Indiana's Constitution—the areas governing government power, authority, and responsibility and the relationship between the branches.[2] During the survey period, however, there were no such significant decisions.

I. DECISIONS RELATING TO INDIVIDUAL RIGHTS

A. Free Expression

The Indiana Supreme Court's decision in *J.D. v. State*[3] may indicate that the court is moving in a new direction regarding the free expression protections in article I, section 9 of the Indiana Constitution.[4] The Indiana Supreme Court previously developed Indiana constitutional law on free expression in *Price v. State*,[5] perhaps the decision with the most thorough rationale and deepest philosophical grounding in the modern era of state constitutional interpretation.[6]

J.D., a unanimous decision written by *Price* dissenter Justice Dickson, may indicate that the court is backing away from the wide berth *Price* gave to certain

---

* Partner, Baker & Daniels LLP, Indianapolis. Former chief counsel to Governor Frank O'Bannon and Governor Joseph Kernan. Adjunct professor, Indiana University School of Law—Indianapolis, 2002-2007.

1. This Article generally analyzes decisions under the Indiana Constitution in two categories: those dealing with individual rights (the "rights constitution") and those dealing with the structure of government (the "structural constitution"). This concept is elaborated in Jon Laramore, *Indiana Constitutional Developments*, 37 IND. L. REV. 929, 929 (2004).

2. *See, e.g.*, Nagy *ex rel.* Nagy v. Evansville-Vanderburgh Sch. Corp., 844 N.E.2d 481, 493 (Ind. 2006) (free public education); D & M Healthcare, Inc. v. Kernan, 800 N.E.2d 898, 900 (Ind. 2003) (governor's veto power); Mun. City of South Bend v. Kimsey, 781 N.E.2d 683, 697 (Ind. 2003) (special laws).

3. 859 N.E.2d 341 (Ind. 2007).

4. *Id.* at 342.

5. 622 N.E.2d 954 (Ind. 1993). The modern era in Indiana Constitutional interpretation began with the publication of Chief Justice Shepard's article, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

6. *Price*, 622 N.E.2d at 963-64.

types of expression.[7] *Price* addressed the disorderly conduct conviction of Colleen Price, who was arrested for her loud and profane shouting at police as they arrested her friend while breaking up a New Year's Eve party.[8] The court concluded that Price's speech was political in nature because it criticized police action, and the decision characterized political speech as a "core value" under the Indiana Constitution.[9] It held that the State could not punish or, in the court's formulation, "materially burden" political speech unless the speech was found to result in harm "analogous to that which would sustain tort liability" to an identifiable victim.[10] *Price* contains a meticulous discussion of the natural rights philosophy behind article I of the Indiana Constitution, and its holding rests on balancing the natural right of the speaker to discourse (however roughly) on political topics against the natural right of an identifiable listener not to be subjected to harm.[11]

J.D. has several elements in common with *Price*, but its result is different. J.D., a juvenile, resided at the Marion County Guardian Home.[12] J.D. was in a "discussion" with a Marion County deputy sheriff, who worked at the Guardian Home to maintain order.[13] The discussion concerned J.D.'s difficulties with a house parent.[14] The court wrote, however, that the discussion degenerated into shouting by J.D., who would not allow the deputy to speak to her.[15]

J.D.'s version, in contrast, was that she did not raise her voice but instead only tried to explain to the deputy the problems she had with the house parent.[16] (The Indiana Court of Appeals's opinion in the case stressed that some of J.D.'s comments were related to the conditions at the Guardian Home, including the fact that she had to keep her room door open because the room was too hot, but facility rules required the door to be closed at all times; the court of appeals concluded that J.D.'s comments were political in nature and therefore protected

---

7. *J.D.*, 859 N.E.2d at 342.

8. *Price*, 622 N.E.2d at 956-57.

9. *Id.* at 960-63.

10. *Id.* at 963-64. The court's analysis in *Price*, indicating that each portion of the Indiana Constitution is animated by a "core value," has been carried forward in only a few other decisions. The Indiana Supreme Court found a "core value" of group or corporate worship in article I in *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Department of Redevelopment*, 744 N.E.2d 443, 450 (Ind. 2001). No other "core values" have been identified, and the active, natural rights-based ethos of *Price* has shown up in few cases since.

11. *Price*, 622 N.E.2d at 958-64.

12. *J.D.*, 859 N.E.2d at 343. The Guardian Home is not a correctional facility. "The Children's Guardian Home has served the Indianapolis, Marion County areas for more than a century. Founded in 1898, the Guardian Home has traditionally offered shelter care for more than 150,000 dependent, neglected, battered and abused youngsters." Marion County Children's Guardian Home, http://www.guardianhome.org/about.htm (last visited Feb. 22, 2008).

13. *J.D.*, 859 N.E.2d at 343.

14. *Id.*

15. *Id.*

16. *Id.*

speech under *Price*).[17] Ultimately, the deputy told J.D. that she would be arrested if she did not quiet down, but J.D. did not do so.[18]

J.D. was arrested and became the subject of a delinquency proceeding; the juvenile court adjudicated her delinquent for conduct that would constitute the crime of disorderly conduct, a class B misdemeanor if committed by an adult.[19] On appeal, J.D. claimed that there was insufficient evidence to support her conviction because, under *Price*, her comments were protected political speech that could not support a disorderly conduct conviction.[20]

The Indiana Supreme Court directly addressed the relationship between J.D.'s claim and *Price*, noting that Price's "noisy protest about the police officer's conduct toward another person constituted political speech, that any harm suffered by others did not rise 'above the level of a fleeting annoyance,' and that . . . 'the link between her expression and any harm that was suffered' was not established."[21] The court concluded that J.D.'s case "is distinguishable from *Price*, where the defendant's speech did not obstruct or interfere with the police."[22]

In *J.D.*, in contrast, the speech "obstructed and interfered with" the deputy, and J.D.'s speech "clearly amounted to an abuse of the right to free speech and thus subjected her to accountability under Section 9."[23] The court concluded that J.D.'s speech was "not analogous to the relatively harmless speech in *Price*" and affirmed the juvenile adjudication.[24]

The court's analysis apparently turns solely on the degree of disruption caused by the speech, whatever may be its political content. The key to *Price* appeared to be the balancing of the speaker's right to discourse on political topics against a specific listener's right to be undisturbed.[25] *Price*'s outcome depended, at least in part, on the fact that Price's loud and profane epithets could not be said to have harmed any specific listener in the general commotion surrounding the breakup of the party and various arrests. In *J.D.*, in contrast, the identity of the listener was clear, and it was also clear that the speech had a direct and negative effect on the listener.

But *J.D.* did not analyze the content of the speech at issue. The court went directly to the conclusion that J.D.'s speech was "abuse," without reference to the content of the expression.[26] While section 9 protects expression "on any subject whatever," it also states that "for the abuse of that right, every person

---

17. J.D. v. State, 841 N.E.2d 204, 209 (Ind. Ct. App. 2006), *vacated*, 859 N.E.2d 341 (Ind. 2007).

18. *J.D.*, 859 N.E.2d at 343.

19. *Id.*

20. *Id.* at 344.

21. *Id.* (quoting Price v. State, 622 N.E.2d 954, 964 (Ind. 1993)).

22. *Id.*

23. *Id.*

24. *Id.*

25. *See, e.g.*, *Price*, 622 N.E.2d at 963-64.

26. *J.D.*, 859 N.E.2d at 344.

shall be responsible."[27] In *Price*, Justice Dickson's dissent also concluded that the speech at issue was "abuse," and he rejected *Price*'s elevated protection of political speech.

Absent some determination whether the speech is political and of other protected character, the section 9 right cannot be balanced against the disruption the listener experiences. The unanimous holding of *J.D.* appears to be that if the impact on the listener is sufficiently severe, the political content of the speech does not matter at all. No such analysis is explicit in *J.D.*, but it may be derived from the holding and the lack of any determination whether the speech was political or otherwise protected.

One judge of the Indiana Court of Appeals concluded that *J.D.* was inconsistent with *Price*. In *Blackman v. State*,[28] Judge James Kirsch concluded, in a separate concurrence, that "*J.D.* tacitly overrules *Price*," creating "a fundamental shift in Indiana's constitutional jurisprudence."[29] He concluded that *J.D.* adopted the rationale of Justice Dickson's *Price* dissent, that certain loud and vulgar speech is "an abuse of the right" that may be punished by the State.[30] Judge Kirsch wrote that "[t]here is no discussion in *J.D.* of core values or material burdens, only the conclusion that J.D. had abused the right of free expression."[31]

In *Blackman*, the court of appeals also analyzed a claim that conduct supporting a disorderly conduct conviction constituted protected political speech.[32] Blackman was sitting in a car when police arrested her brother, who was sitting next to her, on drug charges.[33] When police became suspicious of Blackman and asked her to get out of the car, she became "belligerent" and "loud," repeatedly shouting profanities at the police and stating "this [is] unconstitutional."[34] When police asked Blackman to leave, she "refused, shouting that 'she had every right to be there, that she did not have to leave the scene.'"[35] She was sufficiently loud that she drew a crowd, luring people from their homes nearby.[36] She eventually stepped close to an officer and wagged her finger in the officer's face.[37] Ultimately, Blackman was arrested for disorderly conduct.[38]

The Indiana Court of Appeals concluded that Blackman's speech was not

---

27. IND. CONST. art. I, § 9.

28. 868 N.E.2d 579 (Ind. Ct. App.) (Kirsch, J., concurring), *trans. denied*, 878 N.E.2d 211 (Ind. 2007).

29. *Id.* at 588.

30. *Id.* at 588-89.

31. *Id.* at 589.

32. *Id.* at 584 (majority decision).

33. *Id.* at 582.

34. *Id.* at 582-83.

35. *Id.* at 583.

36. *Id.*

37. *Id.*

38. *Id.*

protected under the *Price* standard.[39] Blackman, the court concluded, "made unreasonable noise and continued to do so after being repeatedly asked to stop."[40] It concluded that the situation did not entitle her to raise her voice beyond reasonable levels when doing so "disrupted the officers' investigation and attracted unwanted attention."[41]

The court concluded that Blackman met the first prong of *Price*'s analysis because the State restricted her expressive activity.[42] She could not meet the second prong, however, because her speech constituted an "abuse" that the State may restrict under section 9.[43] The court adopted the analysis in an earlier decision, *U.M. v. State* that expression "is political if its aim is to comment on government action," but "where the individual's expression focuses on the conduct of a private party, including the speaker himself, it is not political" and is therefore subject to rational review.[44] In this case, the court determined that some of Blackman's speech was political ("this [is] unconstitutional"), but some was not ("she had every right to be there, that she did not have to leave the scene").[45]

The court concluded that her speech was disruptive and, even if it began as political, it was not political by the time she was arrested.[46] "Blackman's speech was ultimately ambiguous as to whether she was commenting on her own conduct or that of the officers. Accordingly, we find that Blackman's expression was not political and is therefore subject to rational review."[47] The fact that Blackman's conduct interfered with a police investigation clearly influenced the court's view.[48] "Police officers conducting a legitimate investigation must be able to perform their duties without unreasonable interruption."[49]

In another post-*J.D.* case, however, the Indiana Court of Appeals required a trial court to instruct a jury on the state constitutional right to free expression as described in *Price*. In *Snell v. State*,[50] the defendant was convicted of disorderly conduct and resisting law enforcement.[51] Snell was at a friend's home when police came to arrest the friend for stealing a wallet.[52] Snell "began to call out to the officers to stop hurting" her friend.[53] She "continued screaming" as he was

---

39. *Id.* at 588.
40. *Id.* at 584.
41. *Id.*
42. *Id.* at 585.
43. *Id.* at 584, 586.
44. *Id.* at 585 (citing U.M. v. State, 827 N.E.2d 1190, 1192 (Ind. Ct. App. 2005)).
45. *Id.* at 585-86.
46. *Id.* at 586.
47. *Id.* The court discussed *J.D.* at length in its opinion.
48. *Id.* at 587.
49. *Id.* at 588.
50. 866 N.E.2d 392 (Ind. Ct. App. 2007).
51. *Id.* at 394.
52. *Id.* at 394-95.
53. *Id.* at 395.

put under arrest and did not stop when police told her to do so.[54] "When Snell did not comply with the police officer's order to be quiet and sit down, another officer placed Snell under arrest."[55]

Snell was convicted in a jury trial at which the trial judge declined her proffered instructions on speech protected by the Indiana Constitution.[56] One instruction included the constitutional text and the two-step analysis in *Price*, requiring the jury to determine (1) whether the State restricted Snell's expressive activity and (2) whether her activity was an abuse of the right.[57] The other instruction defined expressive activity, using language from the constitution and *Price*, and defined restriction on expressive activity, also drawing on *Price*.[58] The trial court declined the instruction, at least in part because the trial court concluded that the expressive activity likely constituted an abuse under section 9.[59]

Taking much of its approach from *Price*, the Indiana Court of Appeals decided that the trial court should have given the instructions because they correctly stated the law and there was evidence in the record that supported giving the instructions.[60] The court stated that "Snell's restricted expressive activity was political in nature, as her speech was an expression of her disagreement regarding the police actions" toward her friend.[61] The comments were "directed to the legality and appropriateness of police conduct. Thus, she was engaged in political expression."[62] The court declined the State's invitation to conclude that Snell would have been convicted even if the instructions had been given.[63]

A case currently under consideration by the Indiana Supreme Court may shed additional light on its view of what expression is protected by section 9. In *A.B. v. State*,[64] a trial court adjudicated a juvenile to be delinquent because of statements she posted about her middle school principal on a web page at myspace.com.[65] The postings included statements criticizing the principal's policy prohibiting body piercings, but it also included considerable profanity and

---

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 396.

58. *Id.* at 397.

59. *Id.*

60. *Id.* at 397-99. The court also decided that an Allen County local rule requiring that instructions be tendered before the first day of trial impermissibly conflicted with Trial Rule 51, which allows instructions to be tendered after the close of evidence. *Id.* at 399-401. Thus, the local rule was no impediment to Snell's proffered instructions, which were tendered after the time allowed by the local rule. *Id.*

61. *Id.* at 398.

62. *Id.*

63. *Id.* at 399.

64. 863 N.E.2d 1212 (Ind. Ct. App.), *vacated*, 878 N.E.2d 212 (Ind. 2007).

65. *Id.* at 1214.

the statement "die . . . gobert . . . die" directed at the principal.[66] The court of appeals's opinion indicated that access to at least some portions of the web page was limited to those allowed by the web page's owner, and the principal had to obtain assistance to get access.[67]

The Indiana Court of Appeals vacated the juvenile adjudication, finding that the State restricted A.B.'s expressive rights and that her expression was not an "abuse" because "her overall message constitutes political speech. Addressing a state actor, the thrust of A.B.'s expression focuses on explicitly opposing [the principal's] action in enforcing a certain school policy."[68]

By granting transfer, the Indiana Supreme Court vacated the court of appeals's decision described in the preceding paragraphs.[69] The supreme court's eventual opinion might shed further light on its view of section 9.

B. Education

The Indiana Court of Appeals examined the right to public education in *Indiana State Board of Education v. Brownsburg Community School Corp.*[70] A family that homeschooled its children sought to place their children in a small number of classes in the Brownsburg schools.[71] The school corporation declined, citing its rule that students (other than special education students) could not enroll in fewer than six courses.[72] The family appealed to the State Board of Education, which ordered Brownsburg to accept the students for the small number of classes they wanted.[73]

On judicial review of the State Board of Education's decision, the Indiana Court of Appeals determined that the school's policy declining to enroll students who were homeschooled or enrolled in private schools in fewer than six classes did not violate article VIII of the Indiana Constitution.[74] The court relied in part on the "Home Rule" statute for schools, which creates a presumption in favor of a school board's authority.[75] Moreover, the court found, the school's policy did not violate the putative students' right to a public education under article VIII.[76] The students could have availed themselves of a public education had they taken

---

66. *Id.* at 1214-15.

67. *Id.* at 1214.

68. *Id.* at 1218.

69. 878 N.E.2d 212; *see* IND. APP. R. 58.

70. 865 N.E.2d 660 (Ind. Ct. App. 2007).

71. *Id.* at 662.

72. *Id.*

73. *Id.*

74. *Id.* at 669. The provision of article VIII at issue in the case was the portion of section 1 commanding the General Assembly to set up a uniform system of common schools, "wherein tuition shall be without charge, and equally open to all." IND. CONST. art. VIII, § 1.

75. *Brownsburg Cmty. Sch. Corp.*, 865 N.E.2d at 666 (citing IND. CODE § 20-5-1.5-1 (1989) (amended and recodified IND. CODE § 20-26-3-1 (2007)).

76. *Id.* at 668.

additional courses at Brownsburg in compliance with the school's policy.[77]

C. Jury Trial

Indiana's appellate courts examined the right to jury trial in three cases during the survey period. In *Fuller v. State*,[78] the court of appeals affirmed a conviction that raised constitutional issues relating to the jury rules adopted by the Indiana Supreme Court in 2005.[79] The jury rules allow jurors to discuss a case among themselves before all evidence is in, so long as they do so as a group and reserve judgment about the outcome of the case until all the evidence is in.[80] The rules also allow jurors to ask questions, although the questions are first vetted by the trial court.[81] The defendant argued that these rules denied him an impartial jury under article I, section 13 and deprived him of due process.[82] The Indiana Court of Appeals rejected these arguments.[83] Fuller failed to convince the court that allowing the jurors to discuss the case before the trial was completed interfered with his right to an impartial jury.[84]

In *Jackson v. State*, the Indiana Supreme Court looked at the consequences of a defendant's absence at trial.[85] Jackson appeared at pretrial proceedings both with a lawyer and after he discharged the lawyer.[86] He received in open court a court order stating his trial date.[87] He was convicted in absentia when neither he nor any lawyer appeared on that date.[88] He then moved for a new trial, indicating that his lawyer "led him to believe" there was no trial date.[89] Although the trial court denied his motion, the court of appeals vacated his conviction because it found there was no showing that Jackson knowingly waived his right to counsel.[90]

The supreme court disagreed, holding that Jackson waived his right to be present at trial.[91] Because he had been informed of his trial date, the court concluded that his waiver of the right to be present was knowing and voluntary, even though Jackson had made clear to the trial court at a pretrial conference that

---

77. *Id.*
78. 852 N.E.2d 22 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).
79. *Id.* at 26.
80. *Id.* at 24 (citing IND. JURY R. 20).
81. *Id.*
82. *Id.* at 24-25.
83. *Id.* at 25.
84. *Id.*
85. 868 N.E.2d 494 (Ind. 2007).
86. *Id.* at 496.
87. *Id.*
88. *Id.* at 497.
89. *Id.*
90. *Id.*
91. *Id.* at 498.

he was having difficulty securing counsel.[92] Although Jackson had been informed of his right to appointed counsel if he was indigent, Jackson never invoked that right.[93] Although Jackson was not specifically warned of the dangers of self-representation, the court found such warnings irrelevant because Jackson never indicated that he intended to represent himself at trial.[94] The Indiana Supreme Court therefore affirmed the conviction.[95]

Justice Rucker dissented in *Jackson* because he believed Jackson should have been warned of the dangers of proceeding without counsel.[96] Jackson told the court he wanted to discharge counsel, and he indicated that he would hire new counsel, so he was not warned regarding self-representation.[97] Under those circumstances, Justice Rucker concluded, Jackson's waiver of his right to be present at trial could not have been knowing and voluntary.[98]

The Indiana Court of Appeals also upheld an in absentia conviction in *Holtz v. State*,[99] where Holtz did not appear for trial even after he was informed of his trial date in open court.[100] Although the trial court told Holtz that his trial could go forward even if he did not appear, he failed to appear and he offered no explanation of his absence.[101] Holtz's counsel did appear at trial, yet Holtz alleged ineffective assistance as a basis for reversing his conviction.[102] The court found that any failure of counsel to object to evidence (the ineffectiveness that was alleged) was harmless, as the evidence that could have been objected to was cumulative.[103] The court therefore affirmed the in absentia conviction.[104]

D. Sentencing

During the survey period, Indiana's appellate courts continued to exercise their authority under article VII, section 4 to review and revise criminal sentences.[105] The survey article on developments in criminal law discusses these

---

92. *Id.*
93. *Id.* at 499.
94. *Id.* at 500.
95. *Id.* at 501.
96. *Id.* at 501-02.
97. *Id.* at 502.
98. *Id.*
99. 858 N.E.2d 1059 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 452 (Ind. 2007).
100. *Id.* at 1060-61.
101. *Id.* at 1062.
102. *Id.* at 1063.
103. *Id.* at 1064.
104. *Id.*
105. IND. CONST. art. VII, § 4 states, in relevant part, "The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed." The Indiana Court of Appeals has the power to review and revise sentences under Indiana Appellate Rule 7.

cases at length.[106] This Article describes only one, the Indiana Supreme Court's opinion in *Anglemyer v. State*.[107] *Anglemyer* arose in the aftermath of Indiana's 2005 legislative change in sentencing procedures.[108] Before the legislative change, Indiana's statutes required judges to sentence within a statutory range and created a presumptive sentence for each class of crime.[109] A sentencing judge could issue a sentence within the range, but had to provide reasons for departing from the presumptive sentence.[110] After the statutory change, the statutory ranges remained in effect but the presumptive terms were abolished in favor of "advisory sentences," which are the same length as the former presumptive sentences.[111] These changes responded to U.S. Supreme Court rulings indicating that presumptive-sentencing arrangements, such as Indiana's former statute, violated the Sixth Amendment because they required judges (rather than juries) to find facts that could enhance penalties.[112] The Indiana legislature amended the statute again in 2007, but the change was not substantive, and that amendment was not at issue in *Anglemyer*.[113]

In *Anglemyer*, the Indiana Supreme Court ruled that trial judges still were required to issue sentencing statements, even after presumptive sentences were abolished, to allow appellate courts to effectively exercise their responsibility to review sentences on appeal.[114] Sentencing statements, the court said, guard against "arbitrary and capricious sentencing" and provide a "basis for appellate review" of sentences.[115] They also assist the "defendant and the public [to] understand why a particular sentence was imposed."[116] The court also ruled that if a sentencing statement identifies any mitigating or aggravating circumstances, it must fully identify and explain all such circumstances and explain why each is either mitigating or aggravating.[117]

E. Proportionality Clause

The survey period saw an increase in reported decisions applying the proportionality clause in article I, section 16 of the Indiana Constitution. Providing rights beyond those in the U.S. Constitution, section 16 states that in

---

106. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 960-73 (2008).

107. 868 N.E.2d 482 (Ind.), *aff'd on reh'g*, 875 N.E.2d 218 (Ind. 2007).

108. *Id.* at 484.

109. *Id.* at 485-86 (citing IND. CODE § 35-50-2-3 to -7 (West Supp. 1977)).

110. *Id.* at 486.

111. *Id.* at 487-88 (citing IND. CODE § 35-50-2-3 to -7 (Supp. 2007)).

112. *See* Smylie v. State, 823 N.E.2d 679, 682-90 (Ind. 2005) (applying Blakely v. Washington, 542 U.S. 296 (2004)).

113. IND. CODE § 35-50-2-3 (Supp. 2007).

114. *Anglemyer*, 868 N.E.2d at 490.

115. *Id.* at 489.

116. *Id.*

117. *Id.* at 491.

criminal matters "[a]ll penalties shall be proportioned to the nature of the offense."[118] In *Foreman v. State*,[119] the defendant claimed that the penalty for the crime with which he was charged, disclosure of confidential information related to the lottery, violated the proportionality clause.[120] The lottery-related crime is a Class A felony and thus in the highest class of felonies, along with homicides and violent crimes.[121] Foreman claimed that this classification was disproportionate and that his crime should be commensurate with other fraud crimes.[122] The Indiana Court of Appeals noted that classification of crimes is primarily a legislative responsibility.[123]

The court rejected the proportionality challenge, reasoning that the legislature could reasonably categorize the lottery-related crime as a Class A felony because it had multiple victims.[124] The crime with which Foreman was charged, disclosing secret lottery information to give a lottery player an advantage over others, undermines confidence in the lottery.[125] Revenue from the lottery goes to the teachers' retirement fund, police and firefighter pensions, tuition support, school technology, and local construction projects.[126] All these ventures would suffer if confidence in the lottery were undermined, justifying the harsher treatment of the lottery-related fraud.[127]

The court of appeals also applied the clause in *Poling v. State*,[128] in which the defendant was convicted of three counts of neglect of a dependent for severe mistreatment of her children.[129] The defendant argued that the statute was unconstitutionally vague.[130] The court determined that the provision enhancing the crime from a D to a C felony for "unusual" confinement of a child permitted a defendant to be convicted of either class of felony for the same conduct because it was impossible to determine what confinement was "unusual."[131] This problem, the court concluded, violated the proportionality clause because a defendant could be convicted of a C felony (with its longer sentence) for the same conduct that supported conviction of a D felony.[132] The court required Poling to be resentenced for the D felony, and its opinion effectively found the

---

118. IND. CONST. art. I, § 16.
119. 865 N.E.2d 652 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 209 (Ind. 2007).
120. *Id.* at 653.
121. *Id.* at 655 (citing IND. CODE ANN. § 4-30-14-4 (West 2002)).
122. *Id.* at 656.
123. *Id.* at 655.
124. *Id.* at 657.
125. *Id.* at 658.
126. *Id.* at 657.
127. *Id.* at 658-59.
128. 853 N.E.2d 1270 (Ind. Ct. App. 2006).
129. *Id.* at 1272-74.
130. *Id.* at 1274.
131. *Id.* at 1276.
132. *Id.* at 1277.

C felony provision facially unconstitutional.[133]

F. Search and Seizure[134]

During the survey period, Indiana's appellate courts continued to adjudicate search and seizure claims under article I, section 11, which, although it contains language almost identical to the Fourth Amendment, has been interpreted to convey greater protections than the Fourth Amendment. There were no groundbreaking section 11 cases during the survey period, but the contours of section 11 continued to develop through case law.

The Indiana Supreme Court produced two noteworthy section 11 cases during the survey period. In *Grier v. State*,[135] the defendant sought to suppress evidence in the form of cocaine, which the police had preserved by applying a choke-hold on Grier when he tried to swallow it.[136] The court, in a unanimous opinion by Justice Dickson, indicated that section 11 analysis involves a balancing between individuals' privacy interests and society's interest in "safety, security, and protection."[137] The court previously explained this balancing in *Litchfield v. State*,[138] which directed lower courts applying section 11 to balance the likelihood that a violation of law had occurred against the degree of intrusion the search would impose on a citizen's ordinary activities and law enforcement's needs.[139]

In this case, the court formulated a general rule that "the application of force to a detainee's throat to prevent swallowing of suspected contraband violates the

---

133. *Id.*

134. The Indiana appellate courts produced dozens of opinions analyzing search and seizure issues under the Indiana Constitution during the survey period, and deciding which to include in this survey is an exercise in judgment. Among those not featured in the text of this Article are *State v. Lucas*, 859 N.E.2d 1244, 1246 (Ind. Ct. App.) (affirming suppression of contents of locked box found in inventory search of automobile, under Indiana Constitution; officers should have obtained warrant to open box), *trans. denied*, 878 N.E.2d 204 (Ind. 2007); *Davis v. State*, 858 N.E.2d 168, 173 (Ind. Ct. App. 2006) (officer's investigatory stop of vehicle was unreasonable where only "suspicious" activity was that vehicle parked for several minutes at gas station that was known locus of criminal activity); *Jones v. State*, 856 N.E.2d 758, 763 (Ind. Ct. App. 2006) (inventory search in connection with impoundment of vehicle was reasonable under Indiana Constitution where leaving car on busy highway shoulder was dangerous), *trans. denied*, 869 N.E.2d 446 (Ind. 2007); and *Baird v. State*, 854 N.E.2d 398, 405 (Ind. Ct. App.) (officers' entry onto private property was reasonable under Indiana Constitution when they were investigating visible indications of an explosion and fire, and evidence of methamphetamine lab found on property did not have to be suppressed), *trans. denied*, 860 N.E.2d 597 (Ind. 2006).

135. 868 N.E.2d 443 (Ind. 2007).

136. *Id.* at 444.

137. *Id.*

138. 824 N.E.2d 356 (Ind. 2005).

139. *Id.* at 364.

constitutional prohibitions against unreasonable search and seizure."[140] In such situations, police could detain the individual until the drugs passed through his system or were absorbed into his blood stream so that the evidence could be obtained in a less harmful or violent manner.[141] The court concluded that the evidence should have been suppressed.[142]

The Indiana Supreme Court's other section 11 case was *Clarke v. State*,[143] in which the court held that a police officer who stops an individual to ask questions, and who neither implicitly nor explicitly communicates that the individual is free to go, is not required to provide advisement of rights under section 11 or the Fourth Amendment before questioning the person the officer has stopped.[144] In *Clarke*, an officer investigating a report of drug sales talked with Clarke, who was in a car, asking him if there was anything illegal in the car and asking for (and obtaining) his permission to search it.[145] The officer found marijuana and large quantities of cash during the search.[146] A drug-sniffing dog found cocaine in the car.[147]

Clarke challenged the search on state and federal constitutional grounds, seeking pretrial suppression.[148] The Indiana Supreme Court found no Fourth Amendment violation because Clarke consented to a search and the officer neither implicitly nor explicitly indicated that Clarke was required to consent.[149] On the state constitutional claim, the court determined that Clarke was not in custody when he was asked for consent to search (again because the officer did not indicate to Clarke that he was required to consent).[150] "Clarke's encounter with [the officer] involved neither suggestions that he should cooperate, nor the implication of adverse consequences for noncooperation, nor any suggestion that he was not free to go about his business."[151]

Clarke (and other cases during the survey period, discussed below) implicate *Pirtle v. State*,[152] the 1975 case establishing that section 11 requires a person in custody to explicitly waive the right to counsel before consent to search is valid.[153] *Pirtle* is another example of rights under the Indiana Constitution more extensive than those under the U.S. Constitution. The Indiana Supreme Court found no *Pirtle* violation in *Clarke* because Clarke had not been seized and was

---

140. *Grier*, 868 N.E.2d at 445.
141. *Id.*
142. *Id.*
143. 868 N.E.2d 1114 (Ind. 2007).
144. *Id.* at 1116.
145. *Id.* at 1116-17.
146. *Id.* at 1117.
147. *Id.*
148. *Id.*
149. *Id.* at 1119.
150. *Id.* at 1120.
151. *Id.*
152. 323 N.E.2d 634 (Ind. 1975).
153. *Id.* at 638.

not in custody when he was asked for consent to search the car.[154]

Justice Rucker dissented in *Clarke*.[155] He concluded that Clarke was in fact seized by the officer so that Clarke had to explicitly waive the right to counsel, as *Pirtle* requires, before he could validly consent to a search.[156] After initially questioning Clarke, the officer did not inform him he was free to leave, and she repeated her request to search the car.[157] "At this point," Justice Rucker wrote, "I am convinced that no Hoosier could reasonably assume that he or she could simply walk away."[158] Justice Rucker indicated that the *Pirtle* analysis should be: "whether the person is entitled to disregard police questioning and walk away. If not, then the person must be informed of the right to consult with counsel about the possibility of consenting to a search. Otherwise no valid consent can be given."[159]

The Indiana Court of Appeals also looked at rights under *Pirtle* in two cases. In *Peel v. State*,[160] the court examined a situation in which police were called to a hotel because an odor of marijuana was emanating from a room.[161] Police required the occupants of the room to go into a hallway; they were not arrested, but the police admitted they were not "free to wander off."[162] The occupants gave police permission to search the room, and the police found marijuana.[163] The court found the search unconstitutional and suppressed the results because police did not explicitly warn the occupants of their right to counsel before asking their permission to search.[164] The occupants were entitled to this warning under *Pirtle* because they were in custody.[165] Although neither handcuffed nor formally placed under arrest, they had admitted wrongdoing and were not free to go.[166] In such circumstances, the occupants were in custody and had to receive *Pirtle* warnings before being asked to consent to a search.[167]

Similarly, in *Friend v. State*,[168] the court of appeals concluded that amphetamine found in an automobile search had to be suppressed for lack of *Pirtle* warnings.[169] Friend was stopped for speeding, and the officer found he had

---

154. *Clarke*, 868 N.E.2d at 1120.

155. *Id.* at 1121 (Rucker, J., dissenting).

156. *Id.* at 1122.

157. *Id.* at 1121-22.

158. *Id.* at 1122.

159. *Id.* at 1123.

160. 868 N.E.2d 569 (Ind. Ct. App. 2007).

161. *Id.* at 572.

162. *Id.* at 573.

163. *Id.*

164. *Id.* at 577. The court also addressed an issue of which occupants had authority to consent to search. *Id.* at 575-79. That issue is not relevant to the constitutional analysis.

165. *Id.* at 577-78.

166. *Id.* at 577.

167. *Id.* at 577-78.

168. 858 N.E.2d 646 (Ind. Ct. App. 2006).

169. *Id.* at 651.

no valid driver's license.[170] Friend was "nervous [and] agitated," so the officer handcuffed him, although the officer stated he was not under arrest.[171] The officer asked Friend for permission to search his car, and after Friend consented the officer found the contraband.[172] Because Friend was in custody, he had to be given the *Pirtle* advisement before he could validly consent to the search.[173]

The Indiana Court of Appeals revisited the topic of trash searches in two cases during the survey period. The court approved trash searches in both *Washburn v. State*[174] and *Eshelman v. State*.[175] Trash searches have been litigated frequently under section 11 in the last several years and were the subject of *Litchfield v. State*, the Indiana Supreme Court case refining the standard for evaluating the reasonableness of law enforcement conduct under section 11.[176] In *Litchfield*, the Indiana Supreme Court ruled that trash searches ordinarily did not intrude significantly into the privacy of the person searched, usually because the person searched had already abandoned the trash to be picked up by public or private haulers.[177] The key issue in applying the *Litchfield* test in trash searches is therefore the degree of suspicion law enforcement officials possess that a crime has been committed and that the person at whom the search is directed was involved in the crime.[178]

In *Washburn*, the question revolved around the reliability of a tip.[179] The tipster's reliability was confirmed by one officer, and another officer interviewed the tipster extensively about his background (which included several arrests and convictions) and motives.[180] The court of appeals ruled that the informant was sufficiently reliable to support a trash search because police had investigated his reliability and partially corroborated his statements.[181] Similarly, in *Eshelman* the court of appeals found informants reliable enough to support the trash search.[182] Two different informants reported that Eshelman was manufacturing methamphetamine, and officers personally interviewed one and determined that he had no reason to fabricate his report.[183] The mutually corroborating reports

---

170. *Id.* at 649.

171. *Id.*

172. *Id.*

173. *Id.* at 651.

174. Washburn v. State, 868 N.E.2d 594, 596 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 219 (Ind. 2007).

175. Eshelman v. State, 859 N.E.2d 744, 745 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 450 (Ind. 2007).

176. 824 N.E.2d 356 (Ind. 2005).

177. *Id.* at 363.

178. *Id.* at 364.

179. *Washburn*, 868 N.E.2d at 598.

180. *Id.* at 599-600.

181. *Id.* at 600.

182. Eshelman v. State, 859 N.E.2d 744, 748-49 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 450 (Ind. 2007).

183. *Id.*

were sufficient to support the search.[184]

An otherwise unremarkable decision, *Meister v. State*, contains a particularly detailed application of the *Litchfield* analysis.[185] In *Meister*, an individual was stopped for driving without a license, and the search incident to arrest turned up a white powdery substance in a hollowed-out pen in his pocket.[186] This evidence led officers to search the passenger compartment of the vehicle, which turned up a pill bottle containing what later was found to be methamphetamine.[187] The legality of the vehicle search was litigated in the forfeiture case brought against the arrestee's mother, who owned the vehicle.[188] The Indiana Court of Appeals ruled that the search of the passenger compartment was reasonable under section 11.[189]

Applying the first *Litchfield* factor, the court concluded that searching the passenger compartment was justified because police found evidence of unlawful drugs on the person of the driver when they searched him, and police therefore could associate a high likelihood of crime with the vehicle.[190] As to the second factor, the search was not intrusive on the owner (who was contesting the search) because she was not even present.[191] On the third *Litchfield* factor, "'extent of law enforcement needs,'"[192] the court stated that because the stop occurred in the evening "prompt access to a magistrate to consider issuance of a warrant may have posed some difficulty."[193] The court balanced these factors to conclude that the search was reasonable.[194]

In *T.S. v. State*,[195] the Indiana Court of Appeals applied section 11 to a seizure of a student in high school.[196] A school police officer received an anonymous report that T.S. had marijuana in his pants pocket.[197] The officer removed T.S. from his gym class and required him to put on his street clothes.[198] When the officer asked T.S. if he had anything he should not have, T.S. removed a bag of marijuana from his pocket; the officer then reached into the pocket and found more marijuana.[199] In a lengthy opinion by Judge Robb, the court of

---

184. *Id.* at 749.

185. 864 N.E.2d 1137 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 214 (Ind. 2007).

186. *Id.* at 1139-40.

187. *Id.* at 1140.

188. *Id.* at 1140-41.

189. *Id.* at 1146.

190. *Id.* at 1145.

191. *Id.*

192. *Id.* (quoting Lichfield v. State, 824 N.E.2d 356, 361 (Ind. 2005)).

193. *Id.*

194. *Id.* at 1146.

195. 863 N.E.2d 362 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 461 (Ind. 2007).

196. *Id.* at 365.

197. *Id.* at 366.

198. *Id.*

199. *Id.* T.S.'s somewhat different account was that the officer removed his pants from his gym locker and went through the pockets, finding the marijuana. *Id.* This factual difference

appeals first ruled that the seizure of the student was reasonable under the Fourth Amendment, primarily because of the student's reduced expectation of privacy in the school setting and the officer's expressed intent only to take the student to the dean's office (although the officer in fact took the student to the police station).[200]

The court's brief Indiana constitutional analysis also concluded that the officer's actions were reasonable. The court stated that there was no indication that the tip on which the officer acted was reliable and that the officer made no effort to corroborate it.[201] But "what makes [the officer's] actions reasonable is not the reliability of the information that caused him to act, but the school setting in which he acted."[202] The court indicated that the student's lowered privacy interest in the school setting, balanced against "'the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds,'" justified the seizure and search.[203]

In contrast, the court of appeals invalidated a pretextual traffic stop search and excluded evidence because police went too far in *Turner v. State*.[204] Police suspected Turner in some burglaries, and an officer followed him one day in hopes of being able to stop him for a violation.[205] The officer stopped him for speeding, but did not ticket him.[206] The officer then told Turner he was free to leave, but also asked Turner if he would talk about the burglaries.[207] During that conversation, Turner denied knowledge of the burglaries.[208] The officer then questioned Turner's passenger, who said that Turner kept two guns in his apartment (apparently illegally because of Turner's prior record).[209] This exchange caused Turner to change his mind, and Turner confessed to some of the burglaries.[210]

The court of appeals, however, found that the traffic stop violated Turner's rights because the officer who stopped Turner for speeding could not testify to Turner's exact speed or to the speed limit in the area where Turner was stopped.[211] "[T]he stop was not reasonable in light of that and the other circumstances."[212] The other circumstances included the admittedly pretextual nature of the stop and the fact that an officer was following Turner, waiting for

---

probably leads to no different legal conclusion.

200. *Id.* at 377-78.

201. *Id.* at 378.

202. *Id.*

203. *Id.* at 379 (quoting Myers v. State, 839 N.E.2d 1154, 1159 (Ind. 2005)).

204. 862 N.E.2d 695, 697 (Ind. Ct. App. 2007).

205. *Id.* at 698.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 700.

212. *Id.*

him to violate a traffic law.[213] The court ruled that the evidence arising from the traffic stop, including Turner's confession, had to be suppressed.[214]

G. Double Jeopardy

Decisions during the survey period continued to apply Indiana's different standard for evaluating one type of double jeopardy—"multiple punishments" double jeopardy arising from a single incident. Indiana's standard, based on article I, section 14, is that two convictions violate this aspect of the guarantee against double jeopardy if there is a reasonable possibility that the facts used by the jury to establish the essential elements of one offense were also used to establish the essential elements of a second offense.[215]

The Indiana Supreme Court reaffirmed this analysis in *Bradley v. State*, in which the court of appeals had misapplied the standard.[216] Bradley was charged with several crimes. He was charged with criminal confinement as a Class B felony for confining an individual by use of a hammer that he used to inflict injury on his victim; he also was charged with aggravated battery as a Class B felony for inflicting serious injury on his victim with the hammer and a knife.[217] He was convicted of both charges.[218] After examining the charges and jury instructions, the Indiana Supreme Court concluded that it was reasonably possible that the jury used the same evidence—the victim's hammer-inflicted head wound—to convict Bradley of both offenses.[219] This reasonable possibility leads to the conclusion that the two convictions violate the double jeopardy clause because the jury might have used the same evidence to convict the defendant of two different crimes, and the result is that the battery conviction must be decreased to a D felony, the elements of which were supported without the duplicative evidence.[220]

The Indiana Supreme Court and Indiana Court of Appeals applied this analysis in several other cases during the survey year.[221] During the survey

---

213. *Id.*

214. *Id.* at 701-02.

215. *See* Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999).

216. 867 N.E.2d 1282 (Ind. 2007). The court of appeals misapplied the standard by focusing on whether there was a reasonable possibility that the jury focused on different evidentiary facts to convict the defendant of each crime; the proper focus is whether there is a reasonable possibility that the jury used *the same* evidentiary facts to convict the defendant of each crime.

217. *Id.* at 1284.

218. *Id.* at 1283.

219. *Id.* at 1285.

220. *Id.* at 1285-86.

221. *See, e.g.*, Strong v. State, 870 N.E.2d 442, 443 (Ind. 2007) (vacating enhancement to one conviction because enhancement was based on the same conduct that was the subject of a separate conviction); Scott v. State, 859 N.E.2d 749, 753-54 (Ind. Ct. App. 2007) (rejecting double jeopardy claim because conviction for resisting law enforcement was based on defendant's flight while conviction for attempted battery by use of a deadly weapon was based on separate conduct after

period, the court of appeals also found a double jeopardy violation sufficient to support vacating a conviction on application for post-conviction relief.[222] To do so, not only must the court find that the constitutional violation existed, but also that it was sufficiently obvious that trial counsel and appellate counsel were ineffective in failing to raise it. In other words, "the double jeopardy issue [was] significant and obvious from the face of the record and [was] clearly stronger than the issues raised by [the defendant]'s appellate counsel."[223] That Indiana's unique double jeopardy law may support post-conviction relief indicates the appellate courts' view that Indiana double jeopardy analysis is settled law that should be familiar to and used by all criminal defense counsel.

In another example, the court of appeals rejected a double jeopardy challenge in *McElroy v. State*,[224] in which the defendant was convicted of operating a vehicle with a 0.10 blood alcohol content causing death and also of failure to stop after an accident causing death.[225] The court concluded that these convictions were based on two separate acts (and therefore were not proved by the same evidence) because operating the vehicle to cause death was a different act than fleeing the scene after causing death.[226]

While the same evidence (the victim's death) was used to enhance each conviction, the court did not remove the enhancement from either conviction because the enhancement for the failure to stop offense was not based on the defendant's conduct.[227] Rather, it was based on the circumstance of the prior accident and "represent[ed] a policy decision by our legislature that failing to stop after an accident resulting in death is itself a very serious crime completely separate from whether the defendant caused the victim's death."[228] This approach appears to be in tension with Justice Sullivan's statement in *Richardson v. State*, which indicated that Indiana's double jeopardy principles are violated when a person is convicted and punished "for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished."[229] Justice Sullivan's taxonomy of double jeopardy categories has been widely accepted and applied,

---

defendant reached his home); Richardson v. State, 856 N.E.2d 1222, 1230 (Ind. Ct. App. 2006) (vacating conviction for possessing methamphetamine because it was a lesser included offense of dealing in methamphetamine, of which defendant also was convicted), *trans. denied*, 869 N.E.2d 448 (Ind. 2007); Scott v. State, 855 N.E.2d 1068, 1074 (Ind. Ct. App. 2006) (vacating enhancement of one conviction because it was based on the same conduct that was used to enhance another conviction).

222. McCann v. State, 854 N.E.2d 905, 915 (Ind. Ct. App. 2006), *habeas corpus dismissed*, McLann v. Buss, No. 1:07-cv-175-SEB-TAB, 2007 WL 1724905 (S.D. Ind. June 12, 2007).

223. *Id.*

224. 864 N.E.2d 392 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 204 (Ind. 2007).

225. *Id.* at 394.

226. *Id.* at 398.

227. *Id.*

228. *Id.*

229. Richardson v. State, 717 N.E.2d 32, 56 (Ind. 1999) (Sullivan, J., concurring).

and *McElroy* is one of the few cases to depart from its analysis by allowing two convictions to be enhanced by the same harm.[230]

In an additional example, *Rutherford v. State*,[231] the court of appeals further illustrated the analysis of double jeopardy claims. Rutherford had been convicted of attempted battery and criminal recklessness arising from an incident in which he fired shots at a car.[232] The court pointed out that the charging informations overlapped, as firing a gun into an occupied vehicle was stated as the basis for both charges.[233] While the State showed that there were two different spates of shooting, which might have supported two different convictions, the court concluded that the State did not separate the acts in its arguments to the jury.[234] Looking at the charges, the evidence, and the State's arguments, the court concluded that the jury reasonably could have used the same conduct to convict Rutherford of both offenses, so it ordered the lesser conviction vacated as a double jeopardy violation.[235] *Rutherford* is one of several recent cases in which appellate courts have attempted to instruct prosecutors how to plead and prove cases to avoid problems under Indiana's double jeopardy analysis.[236]

H. Due Course of Law

In *Israel v. Indiana Department of Correction*,[237] the Indiana Supreme Court ruled 3-2 that there could be no judicial review of an administrative decision by prison officials to take $2800 from a prisoner's trust account.[238] The money was taken to satisfy an order, imposed in a prison disciplinary proceeding, that Israel pay $8363 to a prison guard he had wounded in a knife attack.[239] Israel received the $2800 in settlement of an unrelated class action lawsuit.[240]

The supreme court ruled, in a decision by Justice Sullivan, that the trial court lacked subject matter jurisdiction because Israel's claim arose from a prison disciplinary matter. "Restitution here was a prison disciplinary sanction. It was 'agency action related to an offender within the jurisdiction of the department of correction' and, as such, not subject to judicial review" under prior precedent, *Blanck v. Indiana Department of Correction*.[241]

---

230. *See McElroy*, 864 N.E.2d at 398. For a case relying heavily on Justice Sullivan's concurrence, see *Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002).

231. 866 N.E.2d 867 (Ind. Ct. App. 2007).

232. *Id.* at 870; *see also* Stewart v. State, 866 N.E.2d 858 (Ind. Ct. App. 2007).

233. *Rutherford*, 866 N.E.2d at 872.

234. *Id.*

235. *Id.*

236. *See, e.g.*, Ransom v. State, 850 N.E.2d 491 (Ind. Ct. App. 2006).

237. 868 N.E.2d 1123 (Ind. 2007).

238. *Id.* at 1124.

239. *Id.*

240. *Id.*

241. *Id.* (quoting Blanck v. Ind. Dep't of Corr., 829 N.E.2d 505, 510 (Ind. 2005)).

Justice Boehm dissented, and Justice Dickson joined his opinion.[242] Justice Boehm did not quarrel with *Blanck* but indicated that *Blanck* did not govern this case.[243] *Blanck*, he indicated, was based in part on statutory exclusion of prison disciplinary proceedings from judicial review under the Administrative Orders and Procedures Act, and *Blanck* held that there was no subject matter jurisdiction of prison disciplinary decisions.[244] *Israel*, Justice Boehm wrote, improperly expands the statutory exception to "any claim tangentially related to prisoner discipline."[245]

Justice Boehm indicated that Israel's claim was for breach of contract—he claimed that he had an agreement that his prisoner trust account could not be tapped as it was in this case.[246] Justice Boehm indicated that this claim "may have no merit," but it was within the court's jurisdiction.[247] "There is no doubt that a common law breach of contract claim is within the jurisdiction of Indiana state courts."[248] He argued that the majority erred in expanding the lack of jurisdiction to any claim by a prisoner that is even tenuously related to discipline.[249]

The Indiana Court of Appeals's decision in *Anderson v. Eliot*[250] reaffirms the principle that the due course of law clause in article I, section 12 mandates judicial review of all administrative decisions, at least outside the prison disciplinary context.[251] In this case, an officer appealed the decision of the Marion County Sheriff's Pension Board that he was not entitled to line-of-duty

---

242. *Id.* (Boehm, J., dissenting). Justice Rucker concurred, noting that he had dissented from *Blanck*, believing it to be an incorrect decision. *Id.* (Rucker, J., concurring). "But *Blanck*, and the authority on which it rests, is now settled law, namely: the enforcement of prison disciplinary sanctions are not subject to judicial review." *Id.*

243. *Id.* at 1125 (Boehm, J., dissenting).

244. *Id.* at 1126.

245. *Id.* at 1125.

246. *Id.* at 1126.

247. *Id.*

248. *Id.*

249. *Id.*

250. 868 N.E.2d 23 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007). Neither *Blanck* nor any other authority on the subject explains why the due course of law clause extends to all administrative decisions except those of the Department of Correction as they apply to prisoners. *Blanck* relied in part on a statute excluding prison disciplinary proceedings from review under the Indiana Administrative Orders and Procedures Act. Blanck v. Ind. Dep't of Corr., 829 N.E.2d 505, 510 (Ind. 2005) (citing IND. CODE § 4-21.5-2-5(6) (2004)). But other administrative decisions excluded from AOPA review have been found subject to judicial review even when there is no adequate statutory mechanism provided for judicial review. *See, e.g.*, Bd. of Sch. Trs. of Muncie Cmty. Schs. v. Barnell *ex rel.* Duncan, 678 N.E.2d 799, 802 (Ind. Ct. App. 1997) ("It was settled long ago that in Indiana there is a constitutional right to judicial review of an administrative decision."); Mann v. City of Terre Haute, 163 N.E.2d 577, 579-80 (Ind. 1960).

251. *Anderson*, 868 N.E.2d at 30.

disability benefits.[252] The relevant statute conferred the decision on the board alone, with no provision for judicial review, and the Pension Board argued that the trial court therefore lacked subject matter jurisdiction.[253]

The Indiana Court of Appeals ruled that the "open courts" language in section 12 conveys subject matter jurisdiction on the Judicial Department to review the board's decision.[254] The court of appeals then reversed the trial court's determination that the disability occurred in the line of duty, ruling instead that the Pension Board's denial of the line-of-duty pension was supported by substantial evidence.[255]

In another prisoner case, *Smith v. Indiana Department of Correction*,[256] the Indiana Court of Appeals ruled that Indiana's statute precluding prisoners from filing new lawsuits once three of their previous lawsuits have been dismissed does not violate article I, sections 12 or 23.[257] Smith's lawsuit at issue in this appeal sought $300,000 in damages against prison personnel who had used chemical spray and force to extract him from his cell.[258] The trial court granted a motion to dismiss under Indiana Code section 34-58-2-1 and Indiana Code section 34-58-1-2, which states that a prisoner may not file a new complaint once three of the prisoner's prior complaints have been dismissed unless the prisoner alleges that he or she is in immediate danger of serious bodily injury.[259]

The court of appeals, in a decision by Judge Vaidik, noted that the statute at issue was one of several enacted in 2004 as a "direct response to the prolific offender litigation that has been occurring in our state courts."[260] The court recited facts indicating that at least three of Smith's prior cases had been dismissed.[261] The court also noted that the statute requires courts to determine sua sponte whether a prisoner-plaintiff has the requisite number of previously dismissed cases—before any defendant even becomes involved in the case.[262]

The court concluded that the statute does not violate the open courts clause in section 12. Drawing from the Indiana Supreme Court's decision in *Martin v. Richey*, the court recited that "there is a right of access to the courts and that the legislature cannot unreasonably deny citizens the right to exercise this right."[263] Indiana courts previously have held that prisoners have a right to bring and participate in civil litigation under article I, section 12.[264] But, the court said,

---

252. *Id.* at 25.
253. *Id.* at 29-30.
254. *Id.* at 30.
255. *Id.* at 31.
256. 853 N.E.2d 127 (Ind. Ct. App. 2006).
257. *Id.* at 134-36.
258. *Id.* at 129.
259. *Id.* at 130.
260. *Id.* at 130 n.3 (citing by name several prisoners who are notorious repeat litigators).
261. *Id.* at 131.
262. *Id.* at 132.
263. *Id.* at 133 (citing Martin v. Richey, 711 N.E.2d 1273, 1283 (Ind. 1999)).
264. *Id.* (citing Murfitt v. Murfitt, 809 N.E.2d 332 (Ind. Ct. App. 2004)).

those cases do not dispose of Smith's claim.

The statute, the court reasoned, "does not abrogate the right of a prisoner to bring a civil action; rather, it acts as a limiting device."[265] As the court wrote, "[a]n offender can bring as many civil actions as he wants, as long as three actions or claims have not been dismissed as being frivolous" or under the other statutory grounds.[266] The court analogized the statute limiting prisoner litigation to statutes of limitations, which are limits on bringing civil litigation that do not (in most cases) violate the constitution.[267] The court therefore rejected Smith's facial and as-applied challenges to the statute, potentially leaving the door open for as-applied challenges on other facts.[268]

The court also rejected Smith's equal privileges and immunities clause challenge to the statute because Smith did not negate every reasonable basis for the classification embodied in the statute.[269] It was reasonable for the General Assembly to enact this statute addressing only prisoners' claims because incarceration restricts prisoners' rights; because "it [has been] widely recognized that our legal system has been inundated with civil actions filed by offenders, many of which have been found to be frivolous or meritless"; and because the state has a legitimate interest in preserving valuable judicial resources.[270] The court ruled that the statute represents a reasonable balance of prisoners' rights to litigate against the interests in restricting frivolous litigation.[271]

The Indiana Court of Appeals also rejected an open courts clause challenge to the Qualified Settlement Offer statute, Indiana Code section 34-50-1-6, in *Hanninen v. Koch*.[272] The statute requires a trial court to award attorneys' fees, costs, and expenses (capped at $1000) to a litigant who makes a qualified settlement offer if the party receiving the offer does not accept it and the final judgment is less favorable than the terms of the offer.[273]

Hanninen argued that this statute violated the open courts clause by putting a price on choosing to take a claim to judgment rather than accepting settlement.[274] The court of appeals disagreed, concluding that the statute did not impede parties' access to courts.[275] The statute only gave parties incentives to look closely at legitimate settlement offers, but it prevented no one from

---

265. *Id.* at 134.

266. *Id.*

267. *Id. But see* Martin v. Richey, 711 N.E.2d 1273, 1282, 1284-85 (Ind. 1999) (finding statute of limitations unconstitutional as applied under article I, sections 12 and 23).

268. *Smith*, 853 N.E.2d at 135. Another panel of the court of appeals reached the same outcome in a similar case, rejecting a section 12 challenge. Higgason v. Ind. Dep't of Corr., 864 N.E.2d 1133, 1136 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 223 (Ind. 2007).

269. *Smith*, 853 N.E.2d at 135.

270. *Id.* at 136.

271. *Id.*

272. 868 N.E.2d 1137 (Ind. Ct. App. 2007).

273. IND. CODE § 34-50-1-6(a) (2004).

274. *Hanninen*, 868 N.E.2d at 1139.

275. *Id.*

obtaining a judicial decision.[276]

The court also analyzed the statute under the equal privileges and immunities clause in article I, section 23.[277] Hanninen argued that the Qualified Settlement Offer statute treated tort litigants differently than other litigants, violating section 23.[278] The Indiana Court of Appeals also rejected this challenge, reasoning that there are differences between tort litigants and other litigants that justify the different treatment.[279] For example, parties to a contract can agree to allocate attorneys' fees in the event of a dispute, but tort litigants cannot.[280]

I. Equal Privileges and Immunities

As in recent years, Indiana's courts entertained several claims that statutes violated the equal privileges and immunities clause of article I, section 23, but found no violations.[281] The decisions during the survey period continued that trend. First, to satisfy the standard in section 23, "the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated."[282] As one recent Indiana Court of Appeals decision put it, as a practical matter "statutes will survive [a]rticle 1, [section] 23 scrutiny if they pass the most basic rational relationship test."[283]

In *Giles v. Brown County ex rel. Board of Commissioners*,[284] the Indiana Supreme Court rejected an equal privileges and immunities challenge to the statutory immunity from tort claims that arose from the operation and use of enhanced emergency communications systems.[285] Emergency response systems are described as "enhanced" when they automatically provide emergency responders with information about and a map of the caller's location.[286] When the Giles family invoked an enhanced emergency communications system to call an ambulance, the response took forty-five minutes. The patient died shortly after the ambulance arrived.[287] The court found that it was reasonable for the General Assembly to immunize torts arising from the operation of enhanced emergency response systems (as compared to other emergency systems) to

---

276. *Id.* at 1139-40.

277. *Id.*

278. *Id.* at 1140.

279. *Id.*

280. *Id.*

281. Some claims under section 23 are treated in connection with cases decided under the open courts and due course of law provisions of IND. CONST. art. I, § 12. *See supra* Part I.H.

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

283. Morrison v. Sadler, 821 N.E.2d 15, 22 (Ind. Ct. App. 2005) (plurality).

284. 868 N.E.2d 478 (Ind. 2007).

285. *Id.* at 481-82.

286. *Id.* at 481.

287. *Id.* at 479.

further the legislative goal of encouraging development of enhanced emergency technology.[288]

The Indiana Court of Appeals also rejected a section 23 challenge brought by a convicted person, who argued that a county's failure to establish a forensic diversion program caused him to be treated differently than he would have been treated had he been convicted of operating while intoxicated in a county that had a forensic diversion program.[289] Forensic diversion programs, authorized by statute, provide treatment for individuals with alcohol addiction and, if successfully completed, may lead to treatment without entry of a judgment of conviction.[290] Only five counties in Indiana had established these programs.[291] The court ruled that this situation did not violate section 23 because the General Assembly did not create any classifications subject to the equal privileges and immunities clause.[292] Rather, the legislature gave counties an option to establish a program, and only some counties accepted the invitation: "committing a crime in a smaller county or one with limited financial resources as compared to committing a crime in a large or resource-rich county is not a classification for privileges and immunities purposes."[293]

Also in the criminal law context, the court of appeals upheld the statute increasing punishment for persons twenty-one or older operating a vehicle with Schedule I or II controlled substances in their blood.[294] Those under twenty-one received lesser punishment for the same crime. The State defended the classification with the argument that those older than twenty-one "are more mature than those under twenty-one and should therefore be more accountable for their actions," using the example that only those twenty-one or older are permitted to consume alcohol legally.[295] The court adopted this justification, concluding that persons twenty-one or older may be "held to a higher standard when it comes to operating a motor vehicle."[296]

The court of appeals additionally rejected a section 23 challenge to a city ordinance allowing higher storm water fees for larger commercial locations than for smaller commercial properties.[297] The court concluded that the size of the

---

288. *Id.* at 481-82. Justice Dickson dissented. *Id.* at 482 (Dickson, J., dissenting). His position was that the Giles' claim did not fall within the text of the statutory immunity because it did not result from the "operation of" the system, but rather from a separate decision not to send a particular ambulance to the Giles' residence. *Id.* at 482.

289. Lomont v. State, 852 N.E.2d 1002, 1006 (Ind. Ct. App. 2006).

290. *Id.* at 1004 n.4 (quoting IND. CODE § 11-12-3.7-11(b) (Supp. 2007)).

291. *Id.* at 1004.

292. *Id.* at 1008.

293. *Id.*

294. Rowe v. State, 867 N.E.2d 262, 268 (Ind. Ct. App. 2007). The court considered the constitutional challenge despite finding that Rowe waived the claim on appeal by failing to first raise the issue in the trial court. *Id.* at 267.

295. *Id.* at 267-68.

296. *Id.* at 268.

297. Brockmann Enters., LLC v. City of New Haven, 868 N.E.2d 1130, 1135 (Ind. Ct. App.),

property was an "inherent" characteristic for section 23 purposes and "[t]he City could reasonably have concluded that the cost of providing service to a large commercial location would vary from the cost of serving smaller commercial sites."[298] The court also rejected a section 23 challenge to the Child Wrongful Death statute, in which plaintiffs argued that the statute's provision for damages for the death of a child should be extended to cover the death of a viable fetus.[299] The court concluded that the different treatment was based on inherent differences between living children and viable fetuses, including the existence of the child independent of the mother, and that the different statutory treatment was "reasonably related" to the inherent differences.[300]

II. Decisions Relating to Governmental Structure and Powers

Indiana's appellate courts decided a small number of cases relating to government structure and powers during the survey period.

A. Distribution of Powers[301]

The Indiana Court of Appeals used distribution of powers principles to act on an election case originating in Martin County, *Nolan v. Taylor*.[302] When the Martin County Clerk resigned, the chair of the clerk's political party called a caucus of precinct committee chairs and vice-chairs to select a replacement.[303] The caucus was governed by statute and by rules promulgated by the Indiana Democratic Party.[304]

The caucus vote resulted in a tie, which the county chair broke by voting a second time, as state statute provided, resulting in the selection of John Hunt.[305] Nolan, the loser of the tiebreaker, filed a petition to challenge the caucus results.[306] The trial court rejected the challenge and affirmed Hunt's election.[307]

The court of appeals decided that the trial court lacked subject matter jurisdiction because the dispute was political, outside the purview of the Judicial Department.[308] In a unanimous opinion by Judge Robb, the court ruled that the dispute was "purely political," and "absent statutory authority, the courts are

---

trans. denied, 878 N.E.2d 215 (Ind. 2007).

298. *Id.* at 1134.

299. McVey v. Sargent, 855 N.E.2d 324, 328 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 447 (Ind. 2007).

300. *Id.* at 327.

301. Article III of the Indiana Constitution is entitled "Distribution of Powers." This phrase equates to the "separation of powers" concept discussed in federal constitutional law.

302. 864 N.E.2d 419 (Ind. Ct. App. 2007).

303. *Id.* at 420.

304. *Id.*

305. *Id.* at 421 (citing Ind. Code § 3-13-11-8 (2005)).

306. *Id.*

307. *Id.* at 424.

308. *Id.*

without the power to issue injunctions or restraining orders or to otherwise interfere with the results of a caucus."[309] The court pointed out that no statute provides judicial review of the results of a caucus.[310]

The caucus is not an election, but rather a process for appointing a temporary successor to the elected officeholder—a process ceded by statute to a political party rather than to voters.[311] The court stated that there should not be judicial review (absent statutory command) of whether a political party complied with its own rules.[312] "Although statutory rules govern the caucus procedure, it is still the province of the political party to ensure enforcement of those rules, and courts will not interfere by way of injunction or restraining order absent specific statutory authority."[313] The court stated that party rules provide a procedure for remedying problems such as those Nolan raised.[314]

Distribution of powers principles animate this decision. The Judicial Department declined to intervene in a political controversy, which implicated statutory law but was at heart a dispute about whether a political party properly applied the statutes and internal party rules governing appointment of a temporary county clerk.[315] The court held that, unless the General Assembly explicitly provided that the judiciary had a role in settling this kind of dispute, the dispute had to be handled within the political party structure because it was otherwise outside the purview of the judicial branch.[316]

The Indiana Court of Appeals also looked at distribution of powers issues in *Combs v. Daniels*, a case arising from the closure of a state facility for disabled children.[317] After state officials in the Executive Department chose to close the Silvercrest Children's Developmental Center, children residing there and employees working there brought suit, arguing that the state officials lacked authority to close the center.[318] The state officials argued that the center no longer provided appropriate treatment and that the population cared for at the center would receive better (and less expensive) care in community placements, often nearer to the children's homes.[319]

The statute establishing the center stated that "[t]he state department [of health] shall administer the center. The state health commissioner, subject to

---

309. *Id.* at 422-23.

310. *Id.* at 423.

311. *Id.*

312. *Id.*

313. *Id.* at 424 (citing State *ex rel.* Coffin v. Superior Court of Marion County, 149 N.E. 174, 177 (Ind. 1925)).

314. *Id.*

315. The constitution describes the "Departments" of Indiana government as Legislative, Executive (including Administrative) and Judicial, and this article adopts that language. IND. CONST. art. III, § 1.

316. *Nolan*, 864 N.E.2d at 423-24.

317. 853 N.E.2d 156 (Ind. Ct. App. 2006).

318. *Id.* at 158-59.

319. *Id.* at 159.

[Indiana Code section] 20-35-2, has complete administrative control and responsibility for the center."[320] Those opposing closure, however, argued that the center was established by statute and that Executive Department officials could not close the center, consistent with distribution of powers principles, until the General Assembly repealed the statute establishing the center.[321]

The state officials argued that the statute conveying "'complete administrative control'" of the center to the health commissioner also conveyed the power to close the center.[322] Those opposing closure argued that statutes establishing the center contained mandatory language; moreover, they argued, complete administrative control should not be read to include the power to close the center, which would leave nothing left to administer.[323]

The Indiana Court of Appeals read the relevant statutes to allow the commissioner to close the center.[324] The court concluded that the legislative grant of "'complete administrative control'" had to include the power to close the center.[325] Also, in situations in which the Executive Department chose to close other state facilities, the legislature intervened by forbidding closure or imposing conditions; no such intervention occurred in this case, signaling lack of legislative opposition to closure.[326]

Those opposing closure also argued that closure violated article IX, section 1, which requires the legislature "'to provide, by law, for the support of institutions for the education of the deaf, the mute, and the blind; and for the treatment of the insane.'"[327] The court concluded that this constitutional provision allows the legislature to delegate operation of these institutions to the Executive Department and that the authority delegated in the case of the center included the authority to close the center.[328]

In *Jones v. Womacks*,[329] the Indiana Court of Appeals invalidated a statute on separation of powers grounds, but the Indiana Supreme Court vacated the court of appeals's decision without a published decision after the General Assembly amended the statute to respond to the court of appeals' opinion.[330] The case addressed Indiana Code section 6-1.1-20-3.2 (Supp. 2007), governing petition and remonstrance proceedings for political subdivisions's building projects.[331] While the merits of the case were decided under the United States Constitution,

---

320. IND. CODE § 16-33-3-4 (Supp. 2007).

321. *Combs*, 853 N.E.2d at 160.

322. *Id.* (quoting IND. CODE § 16-33-3-4 (Supp. 2007)).

323. *Id.* at 161.

324. *Id.*

325. *Id.* (quoting IND. CODE § 16-33-3-4 (Supp. 2007)).

326. *Id.*

327. *Id.* (quoting IND. CONST. art. IX, § 1).

328. *Id.*

329. 852 N.E.2d 1035 (Ind. Ct. App. 2006), *trans. granted and opinion vacated*, 869 N.E.2d 459 (Ind. 2007).

330. *Id.* at 1036.

331. *Id.*

the treatment of mootness by both Indiana appellate courts and the court of appeals's remedy implicated distribution of powers principles under article III.

The case arose in the context of proposed capital improvements for Indianapolis Public Schools totaling $800 million in several phases.[332] Under the challenged statute, several steps had to occur before a political subdivision could levy property taxes to pay debt for capital improvements.[333] First, the political subdivision had to publish notice indicating that property owners wishing to initiate a petition and remonstrance process against the debt service had to file a petition not more than thirty days after publication.[334] The petition had to include the signatures of "'the lesser of . . . one hundred (100) owners of real property within the political subdivision' or 'five percent (5%) of the owners of real property within the political subdivision.'"[335] If the county auditor did not certify that an adequate number of property owners have signed, then the building project may go forward.[336]

If the county auditor did certify the petitions as bearing the signatures of an adequate number of property owners, a further thirty-day process would take place in which supporters of the project (called "petitioners" in the statute) gather signatures of property owners and opponents of the project ("remonstrators") gather signatures against it.[337] If this petition-remonstrance procedure is invoked, the county auditor again tallies the signatures.[338] If the petitioners have more valid signatures, the project goes forward.[339] If the remonstrators have more valid signatures, the building project cannot go forward, and the political subdivision cannot propose a substantially similar project for at least one year.[340]

Jones, a renter, challenged the requirement that only property owners could be signatories to the petitions and remonstrances.[341] He had children in Indianapolis Public Schools, but he rented property rather than owning it.[342] He argued that although he had children in the schools (and therefore an interest in the petition-remonstrance process), he was statutorily precluded from taking part in the process because he was not a property owner.[343] The Indiana Court of Appeals ruled that excluding renters from the petition-remonstrance process

---

332. *Id.*

333. *See* IND. CODE § 6-1.1-20-3.1 (Supp. 2007). Although the statute directly governed levying property taxes to pay off capital debt, in practice the debt itself could not be issued until there was a method in place for paying the debt. Thus, in practice, the statutory procedures had to be followed before the debt could be issued in the first place. *Jones*, 852 N.E.2d at 1037.

334. *Jones*, 852 N.E.2d at 1037.

335. *Id.* (quoting IND. CODE § 6-1.1-20-3.1(4) (Supp. 2007)).

336. *Id.*

337. *Id.* at 1037-38.

338. *Id.* at 1038.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 1034.

343. *Id.*

violated the Equal Protection Clause of the United States Constitution because the process constituted an "election," and states may not exclude voters from elections without a compelling reason.[344]

To reach the merits of the issue, however, the court of appeals first had to address the State's argument that the case was moot and should be dismissed.[345] By the time Jones's case reached the appellate stage, the petition-remonstrance process was long since completed (the school building program was overwhelmingly approved).[346] The court of appeals recognized that cases usually are dismissed as moot when any ruling would not change the status quo.[347] But it also recognized that Indiana courts are not restricted by a "case or controversy" requirement, and "Indiana courts have long recognized that a case may be decided on its merits under an exception to the general rule when the case involves questions of 'great public interest.'"[348] The court found that the issue Jones raised was likely to recur in other cases, but that the statutory time constraints on the petition-remonstrance process meant that no such future litigation could be resolved before the petition-remonstrance process was concluded.[349] The court also concluded that Jones's issue was substantial and important.[350] The court therefore decided to address the issue on the merits despite mootness.[351]

After ruling that the statute unconstitutionally excluded Jones, the court stated that it was "not inclined to overstep our judicial role and attempt to re-draft [s]ection 3.2 to remedy the constitutional infirmities we perceive."[352] Instead, the court stayed the effectiveness of its holding "until such time as the General Assembly adjourns from its next regularly-scheduled session."[353] Thus, the court of appeals gave wide berth to the legislative branch to address the constitutional problem by re-drafting the statute. If the legislature did not act by the court's deadline, however, the court's decision would go into effect and future petition-remonstrance processes would be governed by it.[354]

The General Assembly changed the statute in response to the court of appeals's decision by permitting all registered voters to participate in the petition-remonstrance process.[355] The Indiana Supreme Court, by a 3-2 vote, then granted transfer and dismissed the appeal without opinion. The court's docket entry indicates that the appeal was dismissed because the statutory change

---

344. *Id.* at 1050.
345. *Id.* at 1040.
346. *Id.* at 1039.
347. *Id.* at 1040.
348. *Id.* (quoting *In re* Lawrance, 579 N.E.2d 32, 37 (Ind. 1991)).
349. *Id.* at 1042.
350. *Id.* at 1044.
351. *Id.* at 1048.
352. *Id.* at 1050.
353. *Id.*
354. *Id.*
355. *See* IND. CODE § 6-1.1-20-3.1 (Supp. 2007).

mooted the case.[356]

B. Dual Lucrative Offices

The much discussed but seldom litigated prohibition against holding more than one lucrative office was addressed by the Indiana Court of Appeals in *Thompson v. Hayes*.[357] Thompson sued Hayes, alleging that Hayes was holding two lucrative offices, deputy sheriff and county commissioner.[358] Article II, section 9 states that "no person may hold more than one lucrative office at the same time, except as expressly permitted in this Constitution."[359]

The court of appeals repeated that an office is lucrative if it involves compensation for services rendered.[360] It also repeated the definition of office, "'a position for which the duties include the performance of some sovereign power for the public's benefit, are continuing, and are created by law instead of contract.'"[361] Someone working for government may be an employee (whose duties are created by contract) or an officer (whose duties are created by law and include some portion of sovereign authority).

The parties agreed, and the court confirmed, that the position of county commissioner is a lucrative office.[362] It is compensated, and its duties are created by law and involve some portion of the sovereign power. The parties disagreed about whether a deputy sheriff was a lucrative officeholder.[363] Drawing some assistance from past decisions, the court concluded that a deputy sheriff is not a public officeholder.[364] The statutes establishing county police forces (also known as sheriffs' deputies) make deputies subordinate to the elected sheriff.[365] The court concluded that deputies' duties are imposed by contract, and sheriffs supervise and control deputies, meaning that while a sheriff is a public officer, a sheriff's deputies are not.[366] Hayes's employment as a deputy and election as a county commissioner therefore did not violate article II, section 9.[367]

---

356. *See* Jones v. Womacks, 869 N.E.2d 459 (Ind. 2007). Transfer occurred as a result of a very unusual process. No party sought transfer, but after the court of appeals's ruling was final, several schools and local governments were permitted to intervene in the litigation. Only those post-decision intervenors petitioned for transfer.

357. 867 N.E.2d 654 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 210 (Ind. 2007).

358. *Id.* at 656.

359. IND. CONST. art. II, § 9.

360. *Thompson*, 867 N.E.2d at 657.

361. *Id.* (quoting Gaskin v. Beier, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993)).

362. *Id.*

363. *Id.*

364. *Id.* at 658-59 (citing Rush v. Carter, 468 N.E.2d 236, 237 (Ind. Ct. App. 1984); Gaskin v. Beier, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993)).

365. *Id.* at 658 (citing IND. CODE § 36-8-10-4(a) (2007)).

366. *Id.* at 658-59.

367. *Id.* at 659.

C. Pardon

The Indiana Court of Appeals explored the effect of a gubernatorial pardon in *Blake v. State*.[368] Blake was pardoned in 2005 for a 1992 conviction, and he petitioned a trial court for expungement of his arrest, conviction, and incarceration records to ease his effort to become a member of the bar.[369] The court of appeals concluded that the law requires expungement of all conviction records when a pardon is issued because the effect of a pardon is as if the conviction never existed.[370] The court then looked at expunging arrest records, a process governed by statute, and found that the statutory terms for expunging arrest records were not met by the pardon.[371] The statute allows expungement of arrest records only when no charges are filed or charges are dropped for certain enumerated reasons.[372] After examining case law from other jurisdictions, the court concluded that in the absence of statutory authority to the contrary, the pardon itself provided no basis for expunging arrest records.[373]

D. Taxation

The Indiana Tax Court applied the principles of article X, section 1 in affirming an administrative decision to deny a property tax exemption in *Department of Local Government Finance v. Roller Skating Rink Operators Ass'n*.[374] The association sought an exemption for "Roller Skating University," where rink operators could take various courses.[375] The Indiana Tax Court ruled that the facility was not entitled to an educational purpose exemption because of the specialized nature of its course offerings.[376] The educational exemption is available for facilities that provide education or training that otherwise would be provided in tax supported schools, so that the facilities seeking exemption relieve the taxpayers of a burden they would otherwise bear.[377] Because the courses at Roller Skating University were limited to professional development for roller rink owners, they did not meet this standard.[378]

---

368. 860 N.E.2d 625 (Ind. Ct. App. 2007).
369. *Id.* at 626.
370. *Id.* at 627.
371. *Id.* at 626-27.
372. *Id.* (citing IND. CODE § 35-38-5-1 (2004)).
373. *Id.* at 628-31.
374. 853 N.E.2d 1262, 1267 (Ind. 2006).
375. *Id.* at 1263-64.
376. *Id.* at 1266-67.
377. *Id.* at 1265.
378. *Id.* at 1266.