

IV. Constitutional Law

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A. First Amendment

1. *School Mail Systems.*—In *Perry Education Association v. Perry Local Educators' Association*,¹ a sharply divided² United States Supreme Court held that the first amendment³ was not violated when a union, which had been elected the exclusive bargaining representative for public schoolteachers in Perry Township (PEA), was granted access to the interschool mail system while access was denied to a rival union (PLEA).⁴ The majority categorized the school mail facilities as “[p]ublic property which is not by tradition or designation a forum for public communication.”⁵ Therefore, the majority held, the state has the power to reserve the use of its property for its intended purposes as long as the regulation on speech is reasonable and is not a form of viewpoint discrimination.⁶ The dissenters rejected the majority’s “public forum” approach, finding the crucial issue to be that of equal access.⁷ They would have struck down the restricted-access policy as an impermissible form of viewpoint discrimination.⁸

The majority of the Court rejected arguments by PLEA, the rival union, that the school system had created, by granting access to groups

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¹103 S. Ct. 948 (1983).

²Justices Brennan, Marshall, Powell, and Stevens joined, dissenting. *Id.* at 960 (Brennan, J., dissenting).

³“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. The first amendment applies to the states through the fourteenth amendment. *Bridges v. California*, 314 U.S. 252 (1941); *Hague v. CIO*, 307 U.S. 496 (1939); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

⁴103 S. Ct. at 958-59.

⁵*Id.* at 955. The Court described three types of public property: (1) places which have by long tradition or government fiat been dedicated to assembly and debate, such as streets and parks, (2) public property which the state has opened up for use as a place for expressive activity, such as university meeting facilities, and (3) public property which is not by tradition or designation a public forum, such as military installations. *Id.* at 954-55.

⁶*Id.* at 955 (citing *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 131 n.7 (1981)).

⁷103 S. Ct. at 961 (Brennan, J., dissenting).

⁸*Id.* at 969.

such as the Cub Scouts and YMCA, a "limited public forum" from which it could not later exclude PLEA. Any forum which might have been created by such grants of access, the Court stated, would have been limited to groups of "interest and educational relevance to students" and teachers and would not thereby necessitate a grant of access to a union concerned only with the terms of teacher employment.⁹

Nor did a prior grant of access to PLEA prohibit later exclusion of the union. When the schoolteachers elected PEA as their exclusive bargaining representative, the status of PLEA and PEA changed. No longer did PLEA represent any of the teachers in the school system. Thus, the exclusion of PLEA was a result of the union's changed status rather than an attempt to discriminate against any viewpoint of the union.¹⁰ The Court emphasized that in a non-public forum the state may restrict access on the basis of subject matter and speaker identity if such restrictions "are reasonable in light of the purpose which the forum at issue serves."¹¹ Because the purpose of the internal mail system is "to facilitate internal communication of school related matters to teachers,"¹² the Court found it reasonable for the school board to limit access to PEA in order for the union to fulfill its official responsibilities as bargaining representative for the teachers, while permitting the rival union access only to alternative channels of communication such as bulletin boards, meeting facilities, and the U.S. Postal Service.¹³

The arguments of PLEA fared no better under an equal protection analysis. Because the Court found that PLEA had no fundamental right of access, it subjected the school's restrictions only to a "rational basis" level of scrutiny.¹⁴ Once again, the decision to restrict access to the exclusive bargaining representative was found to rationally further a legitimate state purpose.¹⁵

Justice Brennan, joined by Justices Marshall, Powell, and Stevens, dissented. In the view of the four dissenting justices, the claim presented was an "equal access" claim which should not turn on whether the school mail system was a public forum.¹⁶ Distinguishing a series of cases upholding content-based exclusions on government property,¹⁷ Justice Bren-

⁹*Id.* at 956.

¹⁰*Id.* at 956-57.

¹¹*Id.* at 957 (citing *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114 (1981); *Greer v. Spock*, 424 U.S. 828 (1976); *Adderley v. Florida*, 385 U.S. 39 (1966)).

¹²*Id.* at 956.

¹³*Id.* at 958-59.

¹⁴*Id.* at 959-60.

¹⁵*Id.* at 960.

¹⁶*Id.* at 961 (Brennan, J., dissenting).

¹⁷*Id.* at 963 (citing *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (prison could regulate union organizing activities); *Greer v. Spock*, 424 U.S. 828 (1976) (military can ban partisan political demonstrations on military bases); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city transit system could prohibit political advertising on buses)).

nan described previous exclusions as evenhanded and viewpoint neutral.¹⁸ In contrast, Justice Brennan found that the schools had opened their mail system for discussion of the subject of labor relations in the schools, and by restricting access later to the exclusive bargaining representative the schools were engaging in impermissible viewpoint discrimination.¹⁹

Justice Brennan approved the equal protection analysis of the United States Court of Appeals for the Seventh Circuit, subjecting the exclusionary access policy to strict scrutiny because viewpoint discrimination implicates core first amendment values.²⁰ Justice Brennan found no reason for denying access to other labor groups, dismissing the state's asserted interest in preserving labor peace because there was no evidence to support the contention that granting access to rival labor organizations would promote labor instability.²¹ The failure of the school board to establish even a substantial state interest in limiting access to the school mail system would, in the opinion of the four dissenting justices, render the policy constitutionally infirm.²²

2. *Student Demonstrations.*—The first amendment rights of high school students were seriously curtailed in *Dodd v. Rambis*.²³ On Wednesday, September 30, 1981, fifty-four students of Brazil Senior High School protested school discipline procedures by staging a walkout from classes. They gathered across the street from the school, within the sight and hearing of persons inside the building. That evening, five students met to discuss the walkout and drafted a leaflet calling for a meeting of students at a local restaurant on Thursday evening and proposing another walkout at 9:00 a.m. on Friday. The leaflet also advised participants in the proposed walkout to stay off school property. These five students distributed the leaflets at school on Thursday, the day after the first walkout. That afternoon, all five students were suspended and, after a hearing, were later expelled for the remainder of the semester²⁴ for violations of Indiana Code sections 20-8.1-5-4(a) and (1),²⁵ and Brazil Senior High School Student Handbook, page 12, section II, paragraph I, which prohibits “[a]ny conduct which causes or which creates a reasonable likelihood that it will cause a disruption or material interference with any school function . . . or that interferes or [sic] a reasonable likelihood that it will interfere with the health, safety, or wellbeing or the rights of other students.”²⁶ The suspensions and expulsions were based on the action of

¹⁸103 S. Ct. at 963 (Brennan, J., dissenting).

¹⁹*Id.* at 965-66.

²⁰*Id.* at 966.

²¹*Id.* at 968.

²²*Id.* at 969.

²³535 F. Supp. 23 (S.D. Ind. 1981).

²⁴*Id.* at 25-26.

²⁵IND. CODE § 20-8.1-5-4(a), (1) (1982).

²⁶535 F. Supp. at 26.

the students in distributing the leaflet and on the objectionable content of the leaflet in advocating the student walkout.²⁷

The "material interference" language of the Student Handbook substantially parallels the language of the Supreme Court in *Tinker v. Des Moines Independent Community School District*,²⁸ in which the Court struck down a school prohibition against the wearing of black armbands in protest of the Vietnam War. The *Tinker* standard permits prohibition or regulation of student expression where school officials can demonstrate facts which could reasonably have led them to forecast substantial disruption of or material interference with school activities.²⁹ This standard was utilized by the United States District Court for the Southern District of Indiana to review the actions of Brazil Senior High School officials.³⁰ The court held that the principal could reasonably have forecast material disruption because of the previous day's walkout accompanied by a general atmosphere of excitement in the school, and because of the specific date, time, and location of another walkout proposed in the leaflets.³¹

The Brazil Senior High School principal made no effort to evaluate

²⁷*Id.* at 28.

²⁸393 U.S. 503 (1969).

²⁹*Id.* at 513-14.

³⁰535 F. Supp. at 27-31.

³¹*Id.* at 29-30. The deferential approach taken by the court in sustaining the actions of the school officials is markedly different from that of the Fifth Circuit Court of Appeals in *Butts v. Dallas Indep. School Dist.*, 436 F.2d 728 (5th Cir. 1971). In *Butts*, the court reversed the suspension of students wearing black armbands despite much stronger evidence of potential disruption. The students involved were participating in a nationwide Vietnam moratorium which had caused Dallas police officials to predict trouble and call schools in order to offer police assistance. Disruptive sit-ins had already occurred in nearby communities; a non-student had phoned in a bomb threat; and students of a differing viewpoint were wearing white armbands and had already clashed with participants in a student demonstration across the street from the school. *Id.* at 729-30. Nevertheless, the court found no support for the school officials' contention that they could reasonably have forecast a material disruption. The court interpreted *Tinker* to be a declaration of

a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them *no practical alternative*. As to the existence of such circumstances, they are the judges, and if within the range where reasonable minds may differ, their decisions will govern. But there must be some *inquiry*, and establishment of *substantial* fact, to buttress the determination.

Id. at 732 (emphasis added).

Because the Dallas school administrators had not conferred with student leaders regarding their intentions and had not utilized school machinery for the voicing of opinions, the court held that the mere *ex cathedra* pronouncement of the superintendent, even in light of the volatile environment, would not suffice to meet the requirement of *Tinker*. *Id.* There is support for this approach in the language of *Tinker* itself. "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is *necessary* to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." 393 U.S. at 511 (emphasis added). Thus, the prohibition of expression would satisfy the Constitution only if it were necessary, rather than merely expedient.

the actual threat posed by the leaflets. The District Court accepted the prediction of the principal based almost exclusively on the experience of the first walkout. The court could have required some showing of an inquiry such as giving the students an opportunity to present grievances within the school environment, attending the proposed Thursday evening meeting to determine student interest in a second walkout, or at least making some inquiry into the plans for the walkout.³² A boycott of classes would not necessarily be disruptive to the school. No mention is made of whether the 9:00 walkout time³³ was during classes or during a passing period, which would tend to minimize disruption. In addition, the admonition in the leaflet to stay off school property³⁴ could have been seen as evidence of an attempt not to disrupt classes. Such inquiries would have enabled the principal to make an informed prediction as to the actual likelihood of material disruption from the proposed walkout.³⁵ Instead, the district court accepted the prediction made only on the basis of the previous walkout and the bare content of the leaflet.³⁶

In sustaining the expulsion as an acceptable form of discipline, rather than limiting the school's remedy to a restraint on the students' speech, the district court discussed the case of *Karp v. Becken*,³⁷ permitting discipline where school officials can point to a violation of a school rule, such as the rule in the Brazil Senior High School Student Handbook.³⁸ However, the Ninth Circuit Court of Appeals invalidated the entire suspension in *Karp* because there was no way to determine what part of the suspension was for protected activities.³⁹ In *Dodd*, the district court explicitly found that the discipline was imposed both for the leaflet distribu-

³²See *Butts*, 436 F.2d at 732.

³³535 F. Supp at 25.

³⁴*Id.*

³⁵The Court in *Tinker* recognized that

[a]ny word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk

. . . [S]chool officials . . . must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

393 U.S at 508-09 (citation omitted).

³⁶536 F. Supp. at 29. In the statement of "facts offered by the defendants as justifying a reasonable forecast of material disruption," *id.*, reference is made to an "investigation" by the principal which helped lead him to his forecast. However, in the court's finding of facts, the only investigation referred to is one which led the principal to identify two of the plaintiffs as the students responsible for distributing the leaflets. *Id.* at 26. Any further "investigation" by the principal appears to have been limited to a discussion of the incident with the students involved. See *id.*

³⁷477 F.2d 171 (9th Cir. 1973).

³⁸*Id.* at 176, cited in *Dodd*, 535 F. Supp at 30.

³⁹477 F.2d at 176.

tion and for the objectionable content of the leaflet.⁴⁰ Rather than invalidating the expulsions because they were based in part upon the students' protected right to express an unpopular point of view,⁴¹ the court affirmed the expulsions as being within the discretion of school officials, once the *Tinker* standard was met, and within the range of punishment authorized by statute.⁴²

The court did, at least, express a warning to school officials not to prohibit constitutionally protected activity, emphasizing the significance of the first walkout in the court's decision.⁴³ However, this warning may be of little effect in light of the court's deference to school officials and the court's willingness to uphold discipline imposed even when protected speech is implicated.

3. *Juror Interviews*—The interplay between the first amendment rights of freedom of speech and freedom of the press, and judicial authority under Article III of the Constitution of the United States⁴⁴ was carefully analyzed in *United States v. Franklin*,⁴⁵ a decision in which Judge Sharp of the United States District Court for the Northern District of Indiana modified his previous order enjoining *all* post-trial interrogation of jurors⁴⁶ in the trial of Joseph Franklin, acquitted of violating the civil rights of National Urban League President Vernon Jordan.⁴⁷

In re-examining the propriety of that order with regard to the press, Judge Sharp acknowledged the widespread judicial concern with the problem of post-verdict inquiry into jury deliberations, which has resulted in

⁴⁰535 F. Supp. at 28.

⁴¹See IND. CODE § 20-8.1-5-4(a) (1982). After enumerating some illustrations of the sort of student conduct that constitutes grounds for expulsion or suspension, subsection (a) states: "This subsection shall not . . . be construed to make any particular student conduct a ground for expulsion where such conduct is constitutionally protected as an exercise of free speech or assembly or other under the Constitution of Indiana or the United States." *Id.* The *Dodd* court might have eased its apparent doubts about the propriety of the punishment imposed in this case by interpreting the above-quoted language as instruction from the legislature to resolve doubtful cases in favor of protecting the first amendment right in question. See 535 F. Supp. at 30-31. The court, however, apparently did not view the plaintiff's actions as being "constitutionally protected." See *id.*

⁴²535 F. Supp. at 30-31.

⁴³*Id.* at 31.

⁴⁴U.S. CONST. art. III, §§ 1-2.

⁴⁵546 F. Supp. 1133 (N.D. Ind. 1982).

⁴⁶*Id.* at 1136.

⁴⁷After the jury had returned a verdict of not guilty on the night of August 17, 1982, Judge Sharp discharged them with these words: "It is the normal practice of this Court to enjoin those who are participants in this trial, [and] all others, from attempting to interrogate you about the contents of your deliberations or the reasons for your verdict. And that is now done in this case." *Id.* at 1136. A group of news organizations petitioned the court to reconsider and vacate the injunction. Judge Sharp set a hearing date for September 9, 1982, but upon the petitioner-news organizations' "Emergency Petition for Writ of Mandamus" filed on August 23 in the Seventh Circuit Court of Appeals, Judge Sharp was ordered to render a judgment on the petitioner's motion for reconsideration of his injunction against juror interviews by August 30, 1982. *Id.* at 1136-37.

substantial authority both upholding and denying the power of the courts to enjoin such interrogations.⁴⁸ The particular circumstances surrounding post-verdict interrogation of jurors appear to be a significant factor in determining the power of the court to enjoin such questioning. For example, the decision in *Franklin* is specifically limited by the fact that this defendant was acquitted.⁴⁹ In addition, counsel for the petitioners explicitly conceded the court's power to permanently enjoin the parties and counsel from interrogating jurors and to enjoin any interrogation on the premises of the court house.⁵⁰ In a similar vein, the news-gathering rights of the press may be restrained in order to ensure a fair trial⁵¹ or to protect jurors from harassment.⁵²

Balancing the competing interests of the jurors, the press, and the courts, Judge Sharp conceded that his initial order might arguably have infringed on first amendment rights. He permitted public and press interviews with the jurors so long as the jurors desired to be interviewed and so long as the interviewing did not constitute harassment of the jurors.⁵³ In so doing, Judge Sharp recognized the persuasive authority of *United States v. Sherman*,⁵⁴ involving a similar injunction against juror interrogation; at the same time, Judge Sharp emphasized that *Sherman* is not binding precedent in the Seventh Circuit.⁵⁵ In overturning the injunction of the trial court, the Ninth Circuit Court of Appeals in *Sherman* stated, "The government in order to sustain the order must show that the activity restrained poses a clear and present danger or a serious and imminent threat to a protected competing interest."⁵⁶ This reasoning would support Judge Sharp's reservation of the authority to "handle" any harassing interrogation of jurors.⁵⁷ Sound policy reasons support prevention of juror harassment: jurors may be called back for other cases, and they may be influenced in their deliberations by anticipated questioning.⁵⁸ Where interrogation of jurors rises to the level of harassment, the restraint of such interrogation may be justified under the *Sherman* rationale as necessary

⁴⁸See *id.* at 1139-44 and cases cited therein.

⁴⁹*Id.* at 1138.

⁵⁰*Id.* at 1141-42.

⁵¹*Id.* at 1143 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

⁵²546 F. Supp. at 1140-41 (citing *Bryson v. United States*, 238 F.2d 657 (9th Cir. 1956); *Rakes v. United States*, 169 F.2d 739 (4th Cir. 1948)).

⁵³546 F. Supp. at 1145.

⁵⁴581 F.2d 1358 (9th Cir. 1978). The *Sherman* decision was also cited with approval in *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982).

⁵⁵546 F. Supp. at 1144.

⁵⁶581 F.2d at 1361.

⁵⁷"Any conduct by anyone which constitutes harassment of any member of this jury panel in regard to such interviews will be handled appropriately by this Court." 546 F. Supp. at 1145.

⁵⁸See *id.* at 1140 (citing *Rakes v. United States*, 169 F.2d 739 (4th Cir. 1948)). For a comprehensive discussion of the policy issues involved in juror interviews, see Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886 (1983).

to prevent a "serious and imminent threat" to the government's "competing interest" in the orderly administration of justice.

The order of Judge Sharp, as modified, also satisfies the requirements expressed by the United States Supreme Court in *Globe Newspaper Co. v. Superior Court*.⁵⁹ In striking down a Massachusetts statute barring press and public access to criminal sex offense trials during the testimony of victims under age eighteen, the Court stated, "Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."⁶⁰ Although the Court emphasized the narrowness of its decision in *Globe Newspapers*, in light of the mandatory nature of the Massachusetts rule,⁶¹ Judge Sharp's modified order would probably comply with this test in that it prohibited access to jurors only to the extent that the access would tend to obstruct the orderly administration of justice.

4. *Provocation/Fighting Words*.—In overturning a conviction under the Indiana provocation statute,⁶² the Indiana Court of Appeals in *Evans v. State*⁶³ applied the rationales of *Gooding v. Wilson*,⁶⁴ and *Chaplinsky v. New Hampshire*⁶⁵ to include an "immediacy" requirement in the Indiana statute.⁶⁶ The defendant in *Evans* had been convicted of provocation after she called a police officer "fucking pig" or "fucking prick"⁶⁷ while she was walking down a street, and the police officer was driving in the opposite direction with his car window rolled up. Believing the woman might need help, the officer then stopped his vehicle, backed up, got out, and arrested Evans for provocation: "recklessly, knowingly, or intentionally engag[ing] in conduct that is likely to provoke a reasonable man to commit battery"⁶⁸

The court agreed with Evans that the statute must require the showing of an immediacy of a battery in order not to be unconstitutionally

⁵⁹457 U.S. 596 (1982).

⁶⁰*Id.* at 606-07. See also *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 104 S. Ct. 819 (1984). The Court applied the *Globe* standard in determining the propriety of closed voir dire proceedings. *Id.* at 824. In holding that these particular proceedings should not have been closed, the Court balanced juror privacy interests against the need for openness in judicial proceedings. *Id.* at 824-26.

⁶¹457 U.S. at 611 n.27.

⁶²IND. CODE § 35-42-2-3 (1982). See *infra* text accompanying note 68.

⁶³434 N.E.2d 940 (Ind. Ct. App. 1982).

⁶⁴405 U.S. 518 (1972) (Georgia statute prohibiting "opprobrious words or abusive language, tending to cause a breach of the peace" held unconstitutionally overbroad because encompassed more than fighting words).

⁶⁵315 U.S. 568, 572 (1942) (first amendment does not protect "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

⁶⁶434 N.E.2d at 942-43.

⁶⁷"[The officer] testified that he saw Evans lean towards the street where he partially heard her say and partially read her lips to say 'fucking pig' or 'fucking prick.'" *Id.* at 941.

⁶⁸IND. CODE § 35-42-2-3 (1982).

overbroad.⁶⁹ In reviewing the facts of this case, the court found no showing that the police officer had the immediate capacity to commit a battery against Evans. The court accorded special weight to the fact that these words were spoken to a police officer, who should be able to control his actions while on duty.⁷⁰ This concept that words may not be "fighting words" only because they are spoken to a policeman finds support in the concurring opinion of Justice Powell in *Lewis v. City of New Orleans*.⁷¹ "[W]ords may or may not be 'fighting words,' depending upon the circumstances of their utterance. . . . [A] properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"⁷² Thus, the Indiana court upheld the constitutionality of the provocation statute in *Evans* by narrowly interpreting it so as to require a showing that the words uttered are likely to immediately provoke a battery, but overturned this conviction because the circumstances did not demonstrate a likelihood that a policeman would be provoked to commit battery under the circumstances presented in this case.⁷³

B. Fourth Amendment—Search and Seizure

1. *The Automobile Exception*.—In *Fyock v. State*,⁷⁴ the Indiana Supreme Court vacated the decision of the Indiana Court of Appeals and affirmed the trial court's decision that a search of the passenger compart-

⁶⁹434 N.E.2d at 942-43.

⁷⁰*Id.* at 943 n.2.

⁷¹415 U.S. 130 (1974).

⁷²*Id.* at 135 (Powell, J., concurring).

⁷³In another first amendment case of note, the United States District Court for the Northern District of Indiana issued a preliminary injunction prohibiting the city of Fort Wayne from conditioning continued employment of a municipal worker upon payment of union dues or an equivalent "agency fee." *Perry v. City of Fort Wayne*, 542 F. Supp. 268, 275 (N.D. Ind. 1982). The court issued the injunction after finding a reasonable likelihood that the plaintiff would succeed on the merits of her claim that an "agency shop agreement" was unconstitutional on its face as a violation of her first amendment rights, and after finding it unlikely that the defendant-city would be able to show a sufficiently strong governmental interest to justify the infringement of those rights. *Id.* at 273. Although the court made repeated reference to "First Amendment rights" and "First Amendment violations," it never identified precisely which of the plaintiff's first amendment rights were violated, beyond the statement that plaintiff's persistent protests against "the use of her fees for political purposes show that she had her First Amendment rights in mind when she refused to pay." *Id.* at 272. However, the court's reliance on *Abod v. Detroit Board of Education*, 431 U.S. 209 (1977), makes it apparent that the first amendment right in question is "an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Id.* at 222; *see id.* at 233-35. For a more complete discussion of the *City of Ft. Wayne* case, see Archer, *Labor Law, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 245, 247 (1984).

⁷⁴436 N.E.2d 1089 (Ind. 1982). For a further discussion of this case, see Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 131 (1984).

ment of an automobile is permissible as a contemporaneous incident of a lawful custodial arrest of the occupant of that automobile if initially there was probable cause to effect a warrantless arrest of the occupant.⁷⁵

The warrantless search occurred after an off-duty police officer observed a subject he was watching pass a "sock type thing" to Fyock through the driver's side window of a car in which Fyock and other occupants were observed smoking a cigarette. The officer smelled the odor of burning marijuana coming from the car. After the officer identified himself, Fyock started the car, and the subject and the other occupants of the car fled on foot. Fyock stopped the car when the officer drew his gun, then was pulled from the car, patted down, and handcuffed while police officers searched a sweatsock lying on the rear passenger floor of the car.⁷⁶ The search revealed tablets of methaqualone inside the sock; Fyock was subsequently convicted upon that evidence of possession of a controlled substance.⁷⁷

The Indiana Court of Appeals reversed the conviction holding that although there might have been probable cause to effect the warrantless search of Fyock's person, the search and seizure of the sock on the rear floor of the car violated his fourth amendment rights.⁷⁸ The search was not within the scope of a search incident to arrest,⁷⁹ and, further, the search could not be justified under the automobile exception as most recently defined by *New York v. Belton*,⁸⁰ without creating constitutional issues of retroactivity and ex post facto application.⁸¹

The United States Supreme Court in *Belton* permitted a search of the passenger compartment of an automobile as a contemporaneous incident of arrest.⁸² A container within the passenger compartment may also be searched "whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."⁸³

The crucial issue for the courts was whether *Belton's* holding should be applied "to a search conducted over a year earlier in light of the fact

⁷⁵*Id.* at 1093.

⁷⁶*Id.* at 1092-93. Note that as a container search it was a search within a search. Defendant did not contest the first search, that of the person and the automobile, but he did object to the second search when the officer turned the sock inside out thus revealing the drugs. *Id.* at 1093-94.

⁷⁷*Id.* at 1091.

⁷⁸428 N.E.2d 58, 64 (Ind. Ct. App. 1981).

⁷⁹*Id.* See *Chimel v. California*, 395 U.S. 752 (1969) (a search incident to arrest allows for a search of the arrestee's person and the area within his immediate control). *But cf.* *Johnson v. State*, 413 N.E.2d 335 (Ind. Ct. App. 1980) (search of defendant's purse without a warrant was improper fifteen minutes after the defendant had been arrested and restrained).

⁸⁰453 U.S. 454 (1981).

⁸¹428 N.E.2d at 63.

⁸²453 U.S. at 462-63.

⁸³*Id.* at 461.

that the Indiana Supreme Court, previous to *Belton*, had assigned a more narrow scope to similar searches.”⁸⁴ The Indiana Court of Appeals held that to give *Belton* retroactive application without plain and unequivocal direction by the United States Supreme Court would violate the spirit of ex post facto limitation.⁸⁵ Hence, the search in *Fyock* had to be governed by the automobile exception interpretations existing at the time of the search.⁸⁶

The Indiana Supreme Court did not agree that *Belton* had established a new constitutional principle in search and seizure law and claimed *Belton* merely elaborated on what was already a well settled principle of law.⁸⁷ The court, without dissent, held that there could be no question of retroactive application of *Belton*, and therefore, no ex post facto issue.⁸⁸ Moreover, the court believed the decision would have been the same if *Belton* had never been decided.⁸⁹

In recent years Indiana’s case law has paralleled the litigious activity nationally in automobile search law.⁹⁰ Unfortunately, despite the opportunity for clarification and definition, the litigation has resulted mostly in irreconcilable opinions differentiated only by a few facts.⁹¹ To justify the search in *Fyock*, the Indiana Supreme Court cited *Henry v. State*,⁹² where a search, upon an informant’s tip, of a cigarette package on an automobile’s floor revealed heroin. In both *Henry* and *Fyock* the officer had probable cause to believe not only that the car contained contraband but also that an item turned up in the search of the car would contain contraband. However, in *Henry* the belief was supported by a tip by a reliable informant as well as the officer’s observations.⁹³ In *Fyock* probable cause was based only on the personal observations of the police officer. Still, the court found the officer had probable cause to believe the sock contained contraband and that alone, under the circumstances, justified the warrantless search.⁹⁴

⁸⁴428 N.E.2d at 62; see, e.g., *Bradford v. State*, 401 N.E.2d 77 (Ind. 1980); *Johnson v. State*, 413 N.E.2d 335 (Ind. Ct. App. 1980).

⁸⁵428 N.E.2d at 62-63.

⁸⁶*Id.* at 63.

⁸⁷436 N.E.2d at 1092.

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰See, e.g., *Nicaud v. State*, 401 So. 2d 43 (Ala. 1981); *Hinkle v. Anchorage*, 618 P.2d 1069 (Alaska 1980); *State v. Helm*, 89 Ill. 2d 34, 431 N.E.2d 1033 (1981); *Louisiana v. Cunningham*, 412 So. 2d 1329 (La. 1982); *State v. Compton*, 293 N.W.2d 372 (Minn. 1980); *Horton v. State*, 408 So. 2d 1197 (Miss. 1982); *State v. Jose Roman*, 53 N.Y.2d 39, 422 N.E.2d 554, 439 N.Y.S.2d 894 (1981); *Christian v. State*, 592 S.W.2d 625 (Texas Crim. App. 1980).

⁹¹See, e.g., *Rogers v. State*, 396 N.E.2d 348 (Ind. 1979); *Henry v. State*, 269 Ind. 1, 379 N.E.2d 132 (1978); *Montague v. State*, 266 Ind. 51, 360 N.E.2d 181 (1977).

⁹²269 Ind. 1, 379 N.E.2d 132 (1978).

⁹³*Id.* at 8, 379 N.E.2d at 137.

⁹⁴436 N.E.2d at 1095. Moreover, the court dismissed the appellant’s expectation of

Fyock goes beyond what any previous Indiana case permitted in automobile search and opens the interior of the car and the interior of containers within that car to the inspection of an arresting officer. The expansiveness of *Fyock* is caused in part by the incorporation of *Belton* rationale; however, the decision also appears prompted by the United States Supreme Court opinion in *United States v. Ross*,⁹⁵ less than one month earlier, which spoke with the same tongue on the appropriateness of the search of an automobile if supported by probable cause.

In *Ross*, the Supreme Court granted certiorari in an attempt to prescribe clear guidelines for conducting warrantless searches involving automobiles and containers.⁹⁶ The Court acknowledged a lack of uniformity in their previous decisions in *New York v. Belton*⁹⁷ and *Robbins v. California*.⁹⁸ The *Belton* rule authorized a search incident to arrest even when there was no cause to believe that the container searched held evidence,⁹⁹ while the *Robbins* rule disallowed a search even when probable cause existed, if the owner had a reasonable expectation of privacy in the contents of the package or container.¹⁰⁰ The conflicting holdings of *Belton* and *Robbins* set the stage for *Ross*.

In *Ross*, police officers acting upon an informant's tip, stopped Ross in his automobile, instructed Ross to step out of the vehicle, and then conducted a warrantless search of the passenger compartment, glove compartment, trunk and a paper bag within the trunk. Later, at the police station, the officers reopened the trunk, and found and searched a zippered leather pouch.¹⁰¹ The officers uncovered heroin in the closed paper bag and \$3,200 in the zippered leather pouch. Ross was convicted on this evidence.¹⁰²

The United States Supreme Court held that once a legitimate search is under way, practical considerations and interests of "prompt and efficient completion of task at hand," take priority over the fine distinctions between glove compartments, trunks, upholstered seats, and wrapped packages.¹⁰³ The Court held that the scope of the warrantless search "is

privacy arguments, holding the appellant did not have an actual expectation of privacy in the sock and society was not prepared to recognize one's privacy expectation in a sock as reasonable. *Id.*; see *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁹⁵456 U.S. 798 (1982).

⁹⁶*Id.* at 800.

⁹⁷453 U.S. 454 (1981).

⁹⁸453 U.S. 420 (1981).

⁹⁹453 U.S. at 460-61.

¹⁰⁰453 U.S. at 428. The irony of this juxtaposition is evidenced further by the Justices' positions in *Robbins* and *Belton*. Justices Blackmun, Rehnquist, and Stevens upheld the searches in both cases. Justices Brennan, White, and Marshall invalidated both searches. Only the Chief Justice, Justice Stewart, and Justice Powell reached the curious conclusion that a citizen has a greater privacy right in a package of marijuana enclosed in a plastic wrapper (*Robbins*), than in the pocket of a leather jacket (*Belton*). 453 U.S. at 444 n.1.

¹⁰¹456 U.S. at 800-01.

¹⁰²*Id.* at 801.

¹⁰³*Id.* at 821.

not defined by the nature of the container in which the contraband is secreted," but "by the object of the search and the places in which there is probable cause to believe it may be found."¹⁰⁴

In reviewing the automobile exception and upholding the search of containers found within automobiles, the majority found the doctrine was born of practicality, and not of the mobility of the automobile or a person's lesser expectation of privacy in the automobile.¹⁰⁵ Further, the majority stated that a warrant would be unnecessary when the circumstances demand prompt action and obtaining a warrant would be impractical.¹⁰⁶ The only limitations placed by the majority upon their expansive holding include probable cause and a reasonable belief that the object searched will contain the items sought.¹⁰⁷ Probable cause to believe that a container placed in the trunk of a taxicab contains contraband or other incriminating evidence will not justify a search of the entire cab.¹⁰⁸ The requirement could pose little restriction. In practice, the Court's rule may amount to a wholesale authorization for police to search any car from top to bottom when they have suspicion, whether localized or general, that it contains contraband or other such evidence.

The dissent in *Ross* decried the decision as violating the warrant rationale and obviating the automobile exception.¹⁰⁹ According to the dissent, the *Ross* majority endows police with the same authority of a magistrate whenever exigent circumstances require an immediate search of a container.¹¹⁰ The determination of probable cause, traditionally made by a neutral and detached magistrate, will now be judged by the officer engaged in the enterprise of ferreting out crime.¹¹¹

¹⁰⁴*Id.* at 824. The Court posited the example that "probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase." *Id.* Although a search for some objects may be curtailed by this limitation, it has no effect on searches for small items such as narcotics.

¹⁰⁵*Id.* at 820. The dissent, however, noted that in *Carroll v. United States*, 267 U.S. 132 (1925), the grandfather of the automobile exception, the item searched was the car itself, i.e., the upholstered seats were torn apart in search of whiskey; no *movable container* was ever searched in *Carroll*. 456 U.S. at 836 n.7. Where a container is an integral part of the car, mobility is a practical consideration. However, where the container can be removed, practical considerations are minimal. A container presents little administrative burden if seized and taken to the station while a warrant is obtained. See *United States v. Dall*, 608 F.2d 242 (1st Cir. 1979).

¹⁰⁶456 U.S. at 806-08. Although "impractical" is never precisely defined, one senses that few searches will be deemed unreasonable in a post hoc judicial review.

¹⁰⁷*Id.* at 807-08. Thus, the Court held that "the scope of the warrantless search authorized by [the *Carroll*] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant." *Id.* at 825.

¹⁰⁸*United States v. Chadwick*, 433 U.S. 1 (1977), seemingly survives under this holding, if only tenuously. However, where probable cause to search the entire automobile exists, then every container within it is also subject to search if it is reasonable to believe the items sought may be contained within.

¹⁰⁹456 U.S. at 828.

¹¹⁰*Id.*

¹¹¹*Id.* at 829.

The dissent's analysis of the automobile exception found a warrantless search justified, not on probable cause alone, but on *probable cause coupled with the mobility of the automobile* which is the exigent circumstance justifying the exception to the warrant requirement.¹¹² "The practical mobility problem—deciding what to do with both the car and the occupants if an immediate search is not conducted—is simply not present in the case of movable containers, which can easily be seized and brought to the magistrate."¹¹³ The dissent alleged that in equating a police officer's estimation of probable cause with a magistrate's and in excising the mobility rationale from the automobile exception, the majority had violated the principles of the fourth amendment and had taken the first step toward an unprecedented probable cause exception to the warrant requirement.¹¹⁴ In truth, the majority's holding probably does not create a new exception, but diminishes the need for an exception. By extinguishing mobility as the underlying basis for the automobile exception, the exception loses the persuasive justification for its existence. Thus, without exigent circumstances and without a warrant, the officer's determination of probable cause combined with a reasonable belief that items searched will yield contraband is sufficient.

The *Ross* decision is based largely on matters of expediency and practicality for law enforcement. The significance of *Ross* and *Fyock* lies in the apparent willingness of courts to accept any intrusive warrantless search provided probable cause is present. Past arguments such as expectation of privacy, or mobility, may have little effect in the future on courts faced with a warrantless search of a container within an automobile.

2. *Community Caretaking Exception.*—In *United States v. Pichany*,¹¹⁵ the seventh circuit held that the community caretaking exception did not extend to a warrantless search of a warehouse undertaken by police officers investigating an unrelated burglary. The exception generally allows officers engaged in a community caretaking function, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute, to observe, note and introduce evidence acquired purely because of their role as a police officer in their contact with the public.¹¹⁶ The defendant in *Pichany* was storing stolen tractor

¹¹²*Id.* at 833.

¹¹³*Id.* at 832. Mobility of the container had little persuasive or conclusive force for the majority. Indeed, the *Ross* court seems to adopt the same rationale as applied in *Chambers v. Maroney*, 399 U.S. 42 (1977). If a container may be searched under the automobile exception, then it may still be searched later though the justification for the search may have disappeared.

¹¹⁴456 U.S. at 827 (White, J., dissenting).

¹¹⁵687 F.2d 204 (7th Cir. 1982). This case is also discussed in Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 130 (1984).

¹¹⁶See *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Cady v. Dombroski*, 413 U.S. 433 (1973). The exception is justified by three distinct considerations: "the protection of the owner's property while it remains in police custody, the protection of police against

and farm equipment in a leased warehouse which was one of a series of warehouses in an industrial park.¹¹⁷ Police officers called to the park to investigate a burglary in an adjacent warehouse entered defendant's unlocked warehouse and noted the serial numbers on three suspicious-looking vehicles stored inside. Upon later discovering the vehicles were stolen in an unrelated burglary, the officers obtained a search warrant, returned to the warehouse, seized the vehicles and arrested the defendant.¹¹⁸

The government argued on appeal, following the trial court's granting of the defendant's motion to suppress the evidence found in the warehouse, that the search was justified under the community caretaking exception and therefore evidence discovered during the warrantless search should not be suppressed.¹¹⁹ The government contended that the officers were not investigating the defendant's involvement in any crime and entered his warehouse only to search for a person connected with the unrelated burglary. Therefore, because they were acting in the community caretaking role, evidence obtained from that entry should not have been suppressed.¹²⁰

The seventh circuit dismissed these arguments, noting the community caretaking exception applies only to automobiles taken into police custody.¹²¹ The caretaking exception is justified by concerns for the uninterrupted flow of traffic on the highways, or for preservation of evidence.¹²² Neither of these concerns should have prompted the officers' actions in *Pichany*. The seventh circuit was unwilling to allow the community caretaking exception unless it could be shown that: (1) the officers exercised control or dominion over the property; (2) the officers were under an obligation to secure the warehouse or preserve its contents where a threat of damage or theft was immediately present; or (3) the officers entered the warehouse to protect the defendant or the public from potential danger.¹²³

The reluctance of the court to extend the community caretaking exception beyond the automobile context seems proper given the constitu-

claims of disputes over lost or stolen property, and the protection of the police from potential danger." *Opperman*, 428 U.S. at 368.

¹¹⁷687 F.2d at 205-06.

¹¹⁸*Id.* at 206.

¹¹⁹*Id.* at 207. The government appealed the district court's decision to suppress the evidence pursuant to 18 U.S.C. § 3731 (1976) which permits an appeal from a decision or order suppressing evidence if the appeal is "not made after the defendant had been put in jeopardy and before the verdict or finding on an indictment or information." 687 F.2d at 205, n.1.

¹²⁰*Id.* at 207.

¹²¹*Id.* at 208-09. Although no Indiana court has ever alluded to the community caretaking exception, let alone defined its application, the seventh circuit's decision that it applies only to automobiles is consistent with other circuit decisions. *See* *United States v. Markland*, 635 F.2d 174 (2d Cir. 1980); *United States v. Coleman*, 628 F.2d 961 (6th Cir. 1980); *United States v. Staller*, 616 F.2d 1284 (5th Cir. 1980); *United States v. Newbore*, 600 F.2d 452 (4th Cir. 1979).

¹²²687 F.2d at 207 (citing *South Dakota v. Opperman*, 428 U.S. 364 (1976)).

¹²³687 F.2d at 207-08.

tional difference between houses and cars.¹²⁴ Only when exigent circumstances prevent the officer from first obtaining a warrant should the search be excepted.¹²⁵ In the absence of cases applying the exception to private homes or business, the seventh circuit properly refused to extend the community caretaking exception beyond the automobile search context.

3. *Plain View*.—In another warehouse case, the seventh circuit held that the incriminating nature of items seized during a search of a warehouse may be immediately apparent and therefore the seizure is properly within the scope of the plain view doctrine.¹²⁶ Generally, for evidence seized during a search to qualify for the plain view exception to the warrant requirement, “it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent.”¹²⁷

In *United States v. Thomas*,¹²⁸ when the warehouse lessor, a former police officer, collected rent from the defendant-lessee, he observed men cutting apart an automobile. Upon the lessor’s tip, FBI agents began surveillance, watching stolen cars being driven into the warehouse. Agents entered with a warrant to seize specific stolen cars and found parts from numerous autos.¹²⁹ The defendant moved to suppress the evidence not listed in the warrant, but which was seized by the agents while executing the warrant.¹³⁰ The defendant argued the incriminating nature of those items—disassembled stolen automobile parts—was not immediately apparent.¹³¹

The seventh circuit found the incriminating nature of the parts seized was immediately apparent and the seizure was within the scope of the plain view doctrine.¹³² Although officers may not use the pretext of “plain view” to conduct general inventory searches for items that may have a suspect character,¹³³ in the present case agents knew that stolen cars were being driven into the warehouse, and that cars were being cut up inside

¹²⁴Although automobiles are “effects” and are protected against unreasonable searches under the fourteenth amendment, automobile searches may be excepted under the warrant requirement for reasons that would not justify a similar search of home or office. The distinction between car and home seems based on the mobility of the automobile and the lesser expectation of privacy one has in an automobile. See *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

¹²⁵The government did not even argue exigent circumstances on appeal. 687 F.2d at 209. However, the government did raise a “good faith” argument for the first time on appeal, but it was denied for failure to advance it first in the lower court. *Id.* at 209-10.

¹²⁶*United States v. Thomas*, 676 F.2d 239 (7th Cir. 1980), cert. denied, 450 U.S. 931 (1981).

¹²⁷*United States v. Schire*, 586 F.2d 15, 17 (7th Cir. 1978) (citations omitted).

¹²⁸676 F.2d 239 (7th Cir. 1980), cert. denied, 450 U.S. 931 (1981).

¹²⁹676 F.2d at 241.

¹³⁰*Id.* at 243.

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.* (citing *United States v. Schire*, 586 F.2d 15, 18 (7th Cir. 1978)).

the building. With this information the incriminating nature of the items seized was immediately apparent and was properly within the scope of the plain view doctrine.¹³⁴

C. Eighth Amendment and Section 1983

“Persons are sent to prison as punishment, not for punishment.”¹³⁵

1. *Prison Conditions.*—Civil rights actions and eighth amendment challenges to conditions of prison life have become increasingly prevalent in recent years.¹³⁶ *French v. Owens*,¹³⁷ the most recent case of this trend, was a class action brought under 42 U.S.C. § 1983 by four inmates in the Indiana Reformatory on behalf of themselves and the plaintiff class, defined as “all persons who are or in the future may be confined in the Indiana Reformatory, Pendleton, Indiana.”¹³⁸ The inmates complained of poor living conditions, inadequate medical care, lack of safety and security, bad food services, inadequate educational and vocational programs, an arbitrary system of prison discipline, and insufficient access to the courts.¹³⁹ The inmates maintained that the overcrowding of the prison, coupled with all other conditions constituted cruel and unusual punishment in violation of the eighth amendment.¹⁴⁰ Plaintiffs sought to

¹³⁴676 F.2d at 244.

¹³⁵*Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977).

¹³⁶See generally *Estelle v. Gamble*, 429 U.S. 97 (1976); *Anderson v. Redman*, 429 F. Supp. 1105 (D. Del. 1977); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

¹³⁷538 F. Supp. 910 (S.D. Ind. 1982).

¹³⁸*Id.* at 911.

¹³⁹*Id.*

¹⁴⁰*Id.* Specifically, the plaintiffs alleged the following deficiencies:

1. The Indiana Reformatory had three cellhouses and two dormitories. In those units, only 860 cells were available for inmate occupation in January, 1978. However, the prison population at that time was 1,297 and by January of 1982 it had risen to 1,972. Consequently the cells did not provide an adequate amount of living space for the individuals incarcerated therein.
2. The cells were inadequately lit, inadequately ventilated and heated, did not contain hot water and were infected with disease carrying vectors, including birds, due to lack of such basics as screened windows in the cellhouse.
3. Each cell contained an uncovered toilet which often leaked as did the sink. The cells did not contain any chairs or area within which the inmate could walk or exercise.
4. The shower areas were unfit for humans due to the inadequate number of shower heads, the decrepit conditions of the showers, and the filth and mold that accumulated.
5. The Reformatory had a doctor who could not adequately speak English, an untrained and inadequate staff, a crumbling and antiquated facility, and misdiagnosed, leaving the inmate in pain for lengthy periods or with permanent damage.
6. The Reformatory failed to reasonably protect an inmate from the constant threat of violence and sexual assault by his fellow inmates.
7. The Reformatory failed to provide inmates with food prepared in sanitary conditions or to provide for special diets.

enjoin the responsible state officials from further violations of their constitutional rights.¹⁴¹

Judge Dillin of the United States District Court for the Southern District of Indiana heard evidence in this case for over a month during the summer of 1978, and again for five days in March of 1982.¹⁴² In addition, the Judge, in the presence of counsel, inspected the cellblocks, infirmary and other areas of the prison on March 5, 1982.¹⁴³

Lacking a precise definition of cruel and unusual punishment and mechanical standards to apply, Judge Dillin invoked the "evolving standards of decency that mark the progress of a maturing society" against which the punishment could be measured.¹⁴⁴ The court determined that the conditions alleged by the plaintiffs should not be viewed in isolation, but that the "totality of conditions" must be examined in evaluating eighth amendment claims.¹⁴⁵

Based upon findings of fact that the medical care and mental health treatment were inadequate;¹⁴⁶ that academic and vocational education opportunities for those in idle hold and self-lockup were not in compliance with state law;¹⁴⁷ that because of overcrowding, lack of planning and fund-

8. Vocational training shops lacked adequate or proper equipment and did not provide worthwhile or practical training for inmate participants.

9. The Reformatory lacked sufficient personnel to deal with the mental health needs of the prisoners.

10. The procedures utilized for violation of the disciplinary rules provided for pre-hearing confinement. At a hearing the inmate's right to call a witness was not always respected.

11. The Reformatory failed to provide an adequate program of exercise and recreation for many participants.

12. The Reformatory failed to provide reasonable access to the law library or to trained legal staff whereby the inmates might gain access to the courts.

See Plaintiff's Post Trial Memorandum and Plaintiff's Proposed Findings of Facts.

The last allegation coupled with the allegation that inmates at Pendleton were treated more harshly than inmates at the Indiana State Farm, formed the plaintiffs' fourteenth amendment challenge. The court found no merit in these allegations and dismissed them. 538 F. Supp. at 924.

¹⁴¹538 F. Supp. at 911.

¹⁴²*Id.* at 911-12. In the interim period, Judge Dillin reserved ruling pending submission by the parties of proposed findings of fact and conclusions of law, and the filing of post-trial briefs. *Id.* The opinion does not explain the delay of nearly four years between the original trial in 1978 and the reopening of the cause to hear additional evidence in 1982.

¹⁴³*Id.* at 912.

¹⁴⁴*Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). In the past, courts have looked mainly to whether the punishment to which an individual or prison population has been subjected are so far below civilized norms as to be cruel and unusual. See, e.g., *O'Brien v. Moriarity*, 489 F.2d 941 (1st Cir. 1974).

¹⁴⁵538 F. Supp. at 912 (citing *Gates v. Collier*, 501 F.2d 129 (5th Cir. 1974)).

¹⁴⁶538 F. Supp. at 919.

¹⁴⁷*Id.* at 920. Idle hold consists of prisoners not yet given a permanent job assignment. Prisoners in self-lock up are under protective custody in the administrative segregation unit and are confined for an indeterminate period of time which may last over two years.

ing, prisoners were denied proper exercise and recreation;¹⁴⁸ and that the institution failed to meet state and federal health sanitation, safety and fire laws,¹⁴⁹ Judge Dillin held the defendants, in their official capacity, had violated numerous relevant Indiana statutes.¹⁵⁰

To remedy these violations the court ordered that the facilities be brought into compliance with the standards of the State Board of Health and the State Fire Marshal; that each inmate be given opportunity and facilities to engage in recreation; that medical care facilities, proper equipment and qualified medical personnel be obtained for proper diagnosis and treatment of medical and mental health problems; that efforts be taken through staff operations to ensure the safety and security of inmates; and that each inmate be provided with an education, vocation, or job assignment.¹⁵¹

No Indiana statute specifically addressed the issue of overcrowding,¹⁵² thus leaving the court to rely upon case law analysis.¹⁵³ Although there was no constitutional prohibition against the use of the double celling or double bunking policies which led to the crowded conditions,¹⁵⁴ and despite previous case law which found double celling was not a violation of the constitutional ban on cruel and unusual punishment,¹⁵⁵ the court found that the overcrowding of the institution *when coupled with* all of the other conditions, constituted cruel and inhuman treatment in violation of the eighth amendment.¹⁵⁶

The court distinguished those cases where the prisoners were housed

¹⁴⁸*Id.* at 916.

¹⁴⁹*Id.* at 921-22.

¹⁵⁰*Id.* at 924. See IND. CODE §§ 11-10-3-2(c), 11-10-4-2, 11-10-5-1, 11-10-6-2, 11-10-6-3, 11-10-11-1, 11-10-11-2, 11-11-6-1, and 11-11-6-2(a) (1982). The blow of this abysmal record was hardly softened by the court's findings that the plaintiff's had not carried their burden of proving violations of either state or federal law in the areas of prison discipline and access to courts. 538 F. Supp. at 924. The federal court's jurisdiction over the plaintiff's state law claims was pendent to its jurisdiction over the federal § 1983 cause of action. *Id.* at 911.

¹⁵¹538 F. Supp. at 927-28.

¹⁵²See *id.* at 924.

¹⁵³In determining the constitutionality of crowded conditions in prisons, the courts most often look at:

- 1) the design capacity of the institution;
- 2) the number of inmates housed in excess of capacity;
- 3) the square footage per inmate for sleeping and living; and,
- 4) the type of housing (cell or dormitory).

See, e.g., *Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1976), *vacated*, 539 F.2d 547 (5th Cir. 1976); *Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972).

¹⁵⁴538 F. Supp. at 924-25.

¹⁵⁵*Id.* at 925 (citing *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Bell v. Wolfish*, 441 U.S. 520 (1979)).

¹⁵⁶*Id.* at 926.

in relatively modern, bright, clean spacious cells.¹⁵⁷ Inmates occupying cells at the Indiana Reformatory were provided from 22 to 23.8 square feet of space, less that taken up by the beds, the lavatory and the commode.¹⁵⁸ The court pointed out that even a penned animal must be given at least 24 square feet for exercise under the Indianapolis City Code,¹⁵⁹ and that expert witnesses, including the defendant's experts, testified that the "minimum amount of square feet per man thought to be necessary . . . is 50 square feet."¹⁶⁰

The overcrowding led to more than just aggravation. Severe forms of violence, including stabbings, bludgeoning, and homosexual rapes, occurred with distressing frequency. Gambling commenced and racial tensions increased. Nightly disturbances and noise frequently prevented quiet until 2:30 or 3:30 a.m.¹⁶¹ These considerations prompted the court to order the population at the Reformatory limited to 1,950 and decreased in incremental amounts on a yearly schedule.¹⁶² Effective January 1, 1983 double celling was prohibited and double bunking will not be permitted after January 1, 1984.¹⁶³

¹⁵⁷The court noted that in *Bell v. Wolfish*, 441 U.S. 520 (1979), the correctional institution was described by the Supreme Court as follows: "The [institution] differs markedly from the familiar image of a jail; there are no barred cells, dark, colorless corridors or clanging steel gates" 538 F. Supp. at 925 (quoting 441 U.S. at 525). Moreover, the complainants were pretrial detainees, confined to their cells only during normal sleeping hours, with an average length of detention of about 60 days. 538 F. Supp. at 925. The court also noted that in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the district court described the correctional institution as "unquestionably a top-flight, first class facility," and that the Supreme Court reversed the district court's conclusion that double celling constituted cruel and unusual punishment because "[v]irtually every one of the [district] court's findings tends to *refute* [the prisoners'] claim" 538 F. Supp. at 925 (quoting 452 U.S. at 347-48). Judge Dillin stated that "the two cases . . . merely serve to point up specific situations in which the facts did not demonstrate a violation of the Eighth Amendment's ban on cruel and unusual punishment." 538 F. Supp. at 925. "In contrast to the new, clean and relatively comfortable facilities described in *Wolfish* and *Rhodes* . . . we find in the Indiana Reformatory . . . a 59 year old structure with inadequate [facilities, services and living space]." *Id.* at 925-26.

¹⁵⁸It was physically impossible for a double celled occupant of the upper bed to sit erect. Because there was no room for a chair or stool in the double cell, the inmate could not sit except upon the floor or the coverless toilet. In the dormitories, conditions were no less crowded; bunks were as close together as 20 to 24 inches or less, close enough to touch one bunk while lying in the other. 538 F. Supp. at 914-15. In 1982, the population level was at least 50 percent over design capacity. *See id.* at 913.

¹⁵⁹*Id.* at 913 (citing CODE OF INDIANAPOLIS AND MARION COUNTY, IND. § 6-7 (1975)).

¹⁶⁰538 F. Supp. at 914.

¹⁶¹*Id.* at 922-23. These cumulative incidences of behavior are not surprising in light of recent prison studies. The number of illness complaints and degree of psychological stress of prisoners can be correlated to the spacial and social density in the prison. *See, e.g.,* McCain, Cox, & Paulus, *The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment*, 8 ENVIRONMENT & BEHAVIOUR 283, 290 (1976).

¹⁶²538 F. Supp. at 927.

¹⁶³*Id.*

The fault of the statute violations and overcrowding, the court noted, was not entirely that of the defendant's; the blame must also fall on the Indiana General Assembly in failing to provide for the critical situation.¹⁶⁴ The court took judicial notice of the fact that while legislating lengthened sentences for violations of criminal law, the legislature failed to allocate funds to provide for the increasing number of commitments for longer terms.¹⁶⁵ Without adequate funding in the future, prisons cannot be reasonably expected to accommodate those persons entrusted to their care and future violations and consequent litigation will be the certain result.

2. *Collateral Estoppel in Previously Litigated Prison Conditions.*—An eighth amendment challenge brought into issue the question of res judicata and collateral estoppel¹⁶⁶ in *Crowder v. Lash*,¹⁶⁷ when the conditions complained of had previously been litigated in a class action, in which the present plaintiff was a class member.¹⁶⁸

In *Aikens v. Lash*, decided in 1974, the plaintiffs sought injunctive relief, alleging violations of the following federal constitutional rights:

1) Plaintiffs were denied due process by their transfer from Indiana Reformatory to the Indiana State Prison without minimum procedural protections.

¹⁶⁴*Id.* at 926.

¹⁶⁵*Id.* The court did acknowledge the Indiana General Assembly's appropriation of funds in 1979 and 1981 for construction or rehabilitation at the reformatory. *Id.*

¹⁶⁶Because the doctrines of res judicata and collateral estoppel are so frequently confused, a short summary of the principles involved may be helpful.

In *Allen v. McCurry*, 449 U.S. 90 (1980), the Supreme Court reviewed the requirements of the two preclusion doctrines in the context of a section 1983 civil rights action. The Court stated:

The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case

In recent years . . . the Court has eliminated the requirement of mutuality in applying collateral estoppel to bar relitigation of issues decided earlier in federal-court suits, and has allowed a litigant who was not a party to a federal case to use collateral estoppel "offensively" in a new federal suit against the party who lost on the decided issue in the first case. But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case.

Id. at 94-95 (citations and footnotes omitted). For a discussion of these doctrines under the specific model presented by *Aikens* and *Crowder*, i.e., class action alleging violations of section 1983 followed by an action for damages brought by an individual member of the class, see Bodensteiner, *Application of Preclusion Principles to § 1983 Damage Actions After a Successful Class Action for Equitable Relief*, 17 VAL. U.L. REV. 347 (1983).

¹⁶⁷687 F.2d 996 (7th Cir. 1982).

¹⁶⁸371 F. Supp. 482 (N.D. Ind. 1974), *aff'd as modified*, 514 F.2d 55 (7th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976).

2) Plaintiffs were denied rights under the first, fourth, eighth, ninth and fourteenth amendments because of their incarceration in two different administrative segregation units (I.D.U. and D.O. units) under deplorable conditions of health, nutrition, medical care, and recreation, as well as inadequate access to literature, legal and otherwise. In the D.O. unit, plaintiffs also complained of the spraying of the chemical MACE into occupied cells as a control tactic.

3) Plaintiffs were denied first, sixth and fourteenth amendment rights by the practice, at the state prison, of interfering with mail sent between prisoners and their attorneys.¹⁶⁹

The United States District Court for the Northern District of Indiana held that minimum due process standards apply to all disciplinary transfers, absent an emergency, and outlined the required procedures.¹⁷⁰ The court also found that the conditions in the D.O. unit of administrative segregation violated the eighth amendment's ban on cruel and unusual punishment, stating: "The conditions therein existing are shockingly inhumane and have no place in today's penal programs. The conditions there threaten the sanity of the inmate and are abhorrent to any efforts at rehabilitation."¹⁷¹ Finally, the court withheld judgment on the question of the censorship of literature and mail sent to and from inmates, pending the resolution of a similar question by the Seventh Circuit en banc.¹⁷²

In *Crowder*, the plaintiff had been a member of the plaintiff class in *Aikens*.¹⁷³ He raised substantially the same due process, eighth amendment and censorship issues as had been raised by the plaintiffs in the preceding class action,¹⁷⁴ but sought damages under section 1983 rather than equitable relief. At trial, the district court directed a verdict for all defendants except the warden on grounds of lack of personal responsibility.¹⁷⁵ Further the district court removed from the jury's consideration all issues except the plaintiff's eighth amendment claim, on which the jury returned a verdict for the plaintiff.¹⁷⁶

With respect to that claim, the evidence showed that the plaintiff spent four out of his seven years in prison confined to the D.O. unit of administrative segregation in the state prison. He alleged that the condition of the cell, coupled with the disproportionate amount of time he was forced to spend in administrative segregation violated the eighth amendment.¹⁷⁷

¹⁶⁹371 F. Supp. at 486.

¹⁷⁰*Id.* at 491-92. The Seventh Circuit approved these procedures with some modification. See 514 F.2d at 58-62.

¹⁷¹371 F. Supp. at 498.

¹⁷²*Id.* at 499 (citing *Morales v. Schmidt*, 489 F.2d 1335 (7th Cir. 1973)).

¹⁷³687 F.2d at 1008.

¹⁷⁴See *id.* at 1000-01.

¹⁷⁵*Id.* at 1001.

¹⁷⁶*Id.* at 1001-02.

¹⁷⁷*Id.* at 1001.

In the court of appeals the defendants argued that because of the plaintiff's participation in *Aikens*, he should have been barred by res judicata principles from bringing his present suit.¹⁷⁸ The appeals court held the defense waived because of the defendant's failure to raise a res judicata defense to the plaintiff's eighth amendment claim in the lower court.¹⁷⁹

Even if the defense had been raised properly, the Seventh Circuit would have rejected it.¹⁸⁰ *Aikens* sought declaratory and injunctive relief only;¹⁸¹ Crowder asked for damages against the prison officials in their individual capacities.¹⁸² Due to the individual damage claims, the possible issue of qualified immunity, and the fact that Crowder's damages had not been fully incurred at the time he joined *Aikens*, the court found Crowder would not be precluded because of res judicata by an earlier class action in which only declaratory and injunctive relief were sought.¹⁸³

In a similar tactic, Crowder raised collateral estoppel arguments in his suit to preclude the defendants from relitigating the constitutionality of the conditions.¹⁸⁴ The district court had refused to apply the doctrine, reasoning that the defendants were entitled to a jury trial in the present suit and the non-jury verdict in *Aikens* could not collaterally estop them from presenting eighth amendment arguments to jury.¹⁸⁵

The court of appeals, however, noted that under *Parklane Hosiery Co. v. Shore*,¹⁸⁶ "a plaintiff in a subsequent legal proceeding may assert collateral estoppel based upon a prior equitable determination, provided that the defendant has had a 'full and fair' opportunity to litigate its claims in the prior action."¹⁸⁷ Because Crowder was a "real" plaintiff in the previous litigation, and because the defendants had every opportunity to litigate their eighth amendment liability and were not forced to litigate in an inconvenient forum, the appeals court held that Crowder could not be prevented from using collateral estoppel to bar relitigation of the constitutionality of the conditions.¹⁸⁸ On remand, the district court was instructed to allow collateral estoppel, but only to the extent allowed under *Parklane*.¹⁸⁹

¹⁷⁸*Id.* at 1007-08.

¹⁷⁹*Id.* at 1008.

¹⁸⁰*Id.*

¹⁸¹See 514 F.2d at 56.

¹⁸²687 F.2d at 1008.

¹⁸³*Id.* at 1009. The Seventh Circuit's dicta is in line with other circuits' decisions. See, e.g., *Cotton v. Hutto*, 577 F.2d 453 (8th Cir. 1978); *Jones-Bey v. Caso*, 535 F.2d 1360 (2d Cir. 1976).

¹⁸⁴687 F.2d at 1009.

¹⁸⁵*Id.* at 1010.

¹⁸⁶439 U.S. 322 (1979).

¹⁸⁷687 F.2d at 1010 (citing 439 U.S. at 328, 332-33).

¹⁸⁸687 F.2d at 1011. The court pointed out that this holding established the defendant's liability in this case; however, the issues of good faith and personal responsibility of the defendants remained to be litigated. *Id.*

¹⁸⁹*Id.* at 1012. Under *Parklane*, collateral estoppel should be permitted provided the

3. *Standard for Personal Injury Claims Under Section 1983.*—In *Burr v. Duckworth*,¹⁹⁰ an inmate at the Indiana State Prison contended that he sustained personal injuries as a result of prison officials' alleged indifference to inmate violence and that such indifference constituted a violation of the eighth amendment.¹⁹¹ The crucial issue in *Burr* was the standard against which the conduct of prison authorities will be measured when personal injury claims arising in prisoner petitions are brought under 42 U.S.C. § 1983.¹⁹²

Plaintiff claimed the proper standard was that of negligence and argued that the defendants were negligent in failing to transfer him to another prison facility after he informed prison officials of his fear of attacks from other inmates and requested transfer from the facility.¹⁹³ No circuit court has adopted the negligence standard in regards to personal injury claims. Moreover, eighth amendment violations require a showing of deliberate indifference, not negligence.¹⁹⁴ Thus, had the prison officials manifested an actual intent to deprive the plaintiff of his rights, or knowingly acquiesced in the violation of the plaintiff's rights, the officials may have been liable. However, in *Burr*, safety precautions were taken to the extent possible by placing the plaintiff in protective segregation.¹⁹⁵ The plaintiff's refusal to inform officials of his prospective assailants could not be mutated into deliberate indifference on the defendant's part.¹⁹⁶

Additionally, although the plaintiff had a right to protection within his facility, the prisoner had no constitutionally protected right or interest to be transferred from one facility to another within a corrections system.¹⁹⁷

issues have been fully and fairly adjudicated in a prior proceeding and nothing remains for trial either with or without a jury. 439 U.S. at 332-33.

The court of appeals also reversed the district court's directed verdict for defendants on the following issues: plaintiff's right to legal literature and correspondence with his attorney, 687 F.2d at 1004; his right to free exercise of religion, *id.*; his due process rights, *id.* at 1005; and the personal responsibility of two of the defendants concerning the first, eighth and fourteenth amendment claims, *id.*

¹⁹⁰547 F. Supp. 192 (N.D. Ind. 1982).

¹⁹¹*Id.* at 194.

¹⁹²To state a claim under section 1983, a plaintiff must show that the conduct complained of was committed by a person acting under color of state law and that it deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Id.* at 195. Because any act by the superintendent of the state prison would be under color of state law, the only issue was whether the defendant-superintendent's failure to transfer the plaintiff to another correctional facility, as requested by the plaintiff because of threats made on his life by other inmates, amounted to a deprivation of the plaintiff's eighth amendment right to be free from cruel and unusual punishment. *Id.* at 196.

¹⁹³*Id.* at 196 n.2.

¹⁹⁴*Id.* See *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

¹⁹⁵547 F. Supp. at 196.

¹⁹⁶*Id.* at 197.

¹⁹⁷*Id.* See *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976); *Montayne v. Haymes*, 427

Section 1983 requires liability to be predicated on the deprivation of a constitutionally protected right. Absent that, no liability can attach.¹⁹⁸

Burr demonstrates the reluctance of the courts to involve the judiciary in issues that are not the business of federal judges, but more properly lie within the discretion of prison authorities. Without a showing that those officials acted recklessly or with actual intent in depriving a prisoner of a *constitutionally protected* right, no claim can rest under section 1983 for personal injuries.

D. Fourteenth Amendment—Equal Protection and Due Process

1. *Prisoner Correspondence and Damage Awards.*—A section 1983 action initiated over eight years ago by a prisoner alleging first and fourteenth amendment violations was brought closer to an end during this survey period after years in a judicial labyrinth. In *Owen v. Lash*,¹⁹⁹ retired Supreme Court Justice Potter Stewart, sitting by designation, wrote for the Seventh Circuit Court of Appeals and held that a denial of an inmate's right to correspond amounts to a substantive rights violation under the fourteenth amendment.²⁰⁰ The significance of the case lies in its lengthy history, the puzzling rationale of the district court, and the dicta offered by the Seventh Circuit on a question of first impression.

From March 1973 to February 1974, while an inmate at the Indiana State Prison, Owen was denied the right to correspond with a newspaper reporter and two other individuals.²⁰¹ In response to Owen's suit for injunctive relief and damages, the district court declared the claims were barred by res judicata in light of *Aikens v. Lash*.²⁰² In the first appeal to the Seventh Circuit, the court ruled the claims were not barred by res judicata and ordered the district court to determine on remand if there existed a "rational basis" for the denial and further, whether the defendant was protected from individual liability by qualified immunity.²⁰³

On remand the district court ruled the state's justification for inhibiting Owen's correspondence did not "pass muster" and amounted to a violation of plaintiff's constitutional rights.²⁰⁴ However, the district court found the rights violated were only "court created procedural due process rights,"²⁰⁵ despite the fact that no paper filed in the suit ever mentioned

U.S. 236, 242 (1976)(holding that a prisoner has no liberty interest protected by due process in remaining in a certain prison within a prison system).

¹⁹⁸See *Parrat v. Taylor*, 451 U.S. 527, 535 (1981).

¹⁹⁹682 F.2d 648 (7th Cir. 1982).

²⁰⁰*Id.*

²⁰¹*Id.* at 650.

²⁰²371 F. Supp. 482 (N.D. Ind. 1974), *aff'd as modified*, 514 F.2d 55 (7th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976). See *supra* notes 169-72 and accompanying text.

²⁰³682 F.2d at 650-51.

²⁰⁴*Id.* at 651.

²⁰⁵*Id.*

procedural due process, nor had any party ever mentioned the right of procedural due process.²⁰⁶ The district court held that when procedural due process rights are violated, only nominal damages in the sum of one dollar may be awarded in the absence of actual damages.²⁰⁷ The judgment ordered was only against Lash in his official capacity, because the plaintiff allegedly failed to introduce evidence against Lash individually.²⁰⁸

The case was appealed again, this time before Justice Stewart. The Seventh Circuit was puzzled by the district court's conclusion that procedural rather than substantive rights had been violated since Owen alleged denial of his substantive correspondence rights—the right to send and receive letters and thereby communicate with the outside world—not the unconstitutionality of the manner in which the restriction had been imposed.²⁰⁹

The district court's ruling on individual and executive liability for damages was found to be equally confounding. Because the eleventh amendment bars any action for the recovery of money from the state in a section 1983 action, unless the state waives its immunity,²¹⁰ a damage award against Lash in his official capacity would, necessarily, be satisfied from state funds and therefore in violation of the eleventh amendment.²¹¹ Absent waiver of immunity by the state it was error to award the nominal one dollar in damages.²¹² Two questions still remained: 1) Given a proven violation of substantive rights, could Owen collect damages from Lash, individually, and, 2) if so, is Owen limited to recovering only the sum of one dollar?

A state prison official's exposure to personal liability in a section 1983 suit is controlled by the doctrine of qualified immunity which invokes a standard of negligence in assessing liability.²¹³ A state prison official is immune from liability unless "the official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [citizen] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury'"²¹⁴

Warden Lash's signature appeared on most of the paperwork relating to the denial of Owen's rights; whether Lash knew or should have known that his conduct violated the constitutional norm, however, was never

²⁰⁶*Id.* at 652.

²⁰⁷*Id.* at 651 (citing *Carey v. Piphus*, 435 U.S. 247 (1977)).

²⁰⁸682 F.2d at 651.

²⁰⁹*Id.*

²¹⁰*Edelman v. Jordan*, 415 U.S. 651 (1974).

²¹¹682 F.2d at 654-55. Both parties in *Owen* agreed that the district court's decision violated the eleventh amendment. *Id.* at 655.

²¹²*Id.* at 654-55.

²¹³*See Procnier v. Navarette*, 434 U.S. 555 (1978).

²¹⁴*Id.* at 562 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

discussed by the district court—even after specific instructions by the Seventh Circuit after the first appeal.²¹⁵ The Seventh Circuit remanded on the issue of qualified immunity.²¹⁶

As to the second issue—the limitation of one dollar recovery if Lash, individually, is found liable for his action and not immune from suit—a question of first impression arises in this circuit. Under section 1983 could Owen recover more than nominal damages against Lash for deprivation of a substantive right if no actual injury can be shown? *Carey v. Phipus*²¹⁷ held expressly that in cases of *procedural* due process violations, plaintiffs who fail to prove actual injury are limited to nominal damages.²¹⁸ In instances where the deprivation is one of a substantive constitutional right, the *Carey* court stated the elements and prerequisites for recovery of damages will vary depending on the facts and the nature of the interest protected by the particular constitutional right in question.²¹⁹

Clearly, the rights in *Owen* were substantive and could be distinguished from the procedural rights involved in *Carey*. However, the Seventh Circuit declined to decide whether a substantive rights violation would warrant a compensatory award in the absence of an actual injury. Instead, the court remanded with instructions for the district court to consider the issue should it find Lash, in his individual capacity, is not immune from liability.²²⁰ Should the district court find qualified immunity applies

²¹⁵682 F.2d at 656. The circuit court stated that because the district court's ruling dismissing Owen's claim against Lash individually "is phrased in purely conclusory terms, without any explanation or citation to the record, it is somewhat difficult to discern the exact meaning of the dismissal." *Id.* at 655. However, the circuit court reasoned that it was "likely" that the district court had the doctrine of qualified immunity in mind when it dismissed the complaint against Lash individually, even though the district court failed to explain its action in those terms. *Id.* at 656. Justice Stewart stated that given the fact that Lash's signature appeared on most of the paperwork denying Owen's first amendment rights, and "[g]iven the complaint, the record, and the other judicial rulings in this case, it is hardly possible to read the District Court's decision as holding that Warden Lash was not even partly responsible for the proven deprivation of Owen's rights." *Id.* at 655. Still, Lash might not be personally liable for such deprivation because of the doctrine of qualified immunity.

²¹⁶*Id.* at 656.

²¹⁷435 U.S. 247 (1978).

²¹⁸*Id.* at 266.

²¹⁹*Id.* at 264-65. Circuit courts have split in their interpretation of *Carey*. The Fifth Circuit has held that only nominal damages are allowable for an infringement of first amendment liberty where no proof of actual injury exists. *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). In contrast, the Eighth Circuit allowed a damage award for physical harm, emotional and mental suffering, and for the violation of substantive constitutional rights of liberty and due process of law, noting that part of the injury was the loss of these rights themselves. *Herrera v. Valentine*, 653 F.2d 1220, 1227-28 (8th Cir. 1981). When compensatory awards are made, the Eighth Circuit has distinguished the substantive rights involved in the case before it from the procedural rights involved in *Carey*. See *id.* at 1230; see generally Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Phipus*, 93 HARV. L. REV. 966 (1980).

²²⁰682 F.2d at 660.

to Lash in his individual capacity, the question of nominal or compensatory damages becomes moot.

2. *Disparate Treatment in Prisoner Security Status.*—In *Kincaid v. Duckworth*,²²¹ an inmate brought a civil rights action alleging deprivation of his equal protection and due process rights. Allegedly, an Indiana Department of Correction's regulation arbitrarily treated inmates convicted of murder and sentenced to life imprisonment differently and more harshly than inmates convicted of murder and sentenced to a term of years under the 1976 revised Indiana statute.²²²

Kincaid, who was convicted in 1975 and given a life sentence, was assigned the maximum security status. Under the department regulation, Kincaid was not entitled to seek a lesser security status until 1981.²²³ However, an individual convicted of the same crime in late 1977 would have been able to seek the lesser status in 1979²²⁴ because the individual could not have been given a life sentence since the revised criminal code repealed the life imprisonment sentence.²²⁵

Neither the district court nor the court of appeals found the disparate treatment of inmates to be a deprivation of equal protection. Both courts noted that classification of inmates is a matter of prison administration and management and that federal courts are reluctant to interfere with such decisions except in extreme circumstances.²²⁶

Still, statutory classifications which result in disparate treatment of similarly situated groups violate the equal protection clause if not rationally related to a legitimate articulated state purpose.²²⁷ The majority in *Kincaid* accepted the "well known and universally recognized prison security

²²¹689 F.2d 702 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2126 (1983).

²²²The plaintiff was sentenced to life in prison on July 11, 1975 under IND. CODE § 35-13-4-1(a)(1976) (repealed effective October 1, 1977) (originally enacted by Act of Mar. 8, 1941, ch. 148, § 1, 1941 Ind. Acts 447). The 1976 revision of the Indiana Criminal Code repealed title 35, article 13 of the Code. Act of Feb. 25, 1976, Pub. L. No. 148, § 24, 1976 Ind. Acts 718, 816. The 1976 revision also amended title 35 by adding a new article 50, *id.* § 8, 1976 Ind. Acts at 788. The effective date of this revision was to have been July 1, 1977, *id.* § 28, 1976 Ind. Acts at 817, but before that date title 35 was re-amended, essentially by amending Public Law Number 148. *See* Act of Apr. 12, 1977, Pub. L. No. 340, 1977 Ind. Acts 1533. The life imprisonment sentence having been repealed in 1976, the 1977 revision of the criminal code then substituted for it the term of years. *Id.* § 116, 1977 Ind. Acts at 1593 (presently codified at IND. CODE § 35-50-2-3 (1982)). The 1977 revision of the criminal code became effective October 1, 1977. *Id.* §§ 151, 152, 1977 Ind. Acts at 1611.

²²³Department of Correction Regulation IV (c)(1) provided that inmates serving a life sentence would not be eligible for minimum security status until after six years from date of admission. 689 F.2d at 703.

²²⁴IND. CODE § 35-4.1-5-3(c) (1982) vests discretion with the department in permitting a change of security status of persons sentenced for murder two years after date of admission.

²²⁵*See supra* note 221.

²²⁶689 F.2d at 704.

²²⁷*McGinnis v. Royster*, 410 U.S. 263, 270 (1973).

risks attending life termers' as rational reasons to justify the four year differential for eligibility of change of security status.²²⁸

Lamenting the lack of clearly articulated reasons for the disparate treatment, the dissent questioned whether the security risks attending life termers who have been convicted of murder are any greater than the security risk attending specific term inmates who have been convicted of the same crime yet who are treated differently by the regulation.²²⁹ If, in fact, a rational basis exists it should be articulated in the record and not disguised under the foil of "inherent differences" between life termers and those sentenced for a term of years. The majority's determination appears especially harsh in respect that the plaintiff was not seeking an automatic right to attain the lesser status, but only the eligibility to seek that status.²³⁰

As to the prisoner's due process claim, the majority found no protected liberty interest of which the plaintiff was deprived.²³¹ No Indiana state law or regulation creates the right to a particular security classification. That classification rests solely within the discretion of the department. Thus, Kincaid's expectation of eligibility for reclassification, gained from what the majority termed a "misplaced" reliance upon the department's reproduction of regulations in the inmate's handbook, was too insubstantial to rise to the level of due process protection.²³²

3. *Appointed Counsel in Civil Proceedings.*—In two cases during the survey period,²³³ the necessity of appointing counsel for indigent civil litigants in order to meet the dictates of due process was evaluated, resulting in the appointment of counsel in both instances.

In *Kennedy v. Wood*,²³⁴ the Indiana Court of Appeals required the appointment of counsel for indigent defendants in paternity actions initiated as a result of Title IV-D of the Federal Social Security Act.²³⁵ The court relied on the recent Supreme Court decision in *Lassiter v. Department of Social Services*,²³⁶ regarding the appointment of counsel in parental

²²⁸689 F.2d at 704.

²²⁹*Id.* at 706 (Pell, J., dissenting).

²³⁰*Id.* at 707.

²³¹*Id.* at 704.

²³²*Id.* at 704-05.

²³³*Kennedy v. Wood*, 439 N.E.2d 1367 (Ind. Ct. App. 1982); *Merritt v. Faulkner*, 697 F.2d 761 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3121 (U.S. July 2, 1983) (No. 83-153).

²³⁴439 N.E.2d 1367 (Ind. Ct. App. 1982).

²³⁵Title IV-D of the Social Security Act requires states to create or designate an agency to obtain and enforce support orders for children receiving AFDC payments, and to establish paternity, where necessary. 42 U.S.C. §§ 651-60 (1976); *see* IND. CODE §§ 12-1-6.1-1 to -21 (1982). Under the Indiana scheme, the state Department of Public Welfare contracts with county prosecuting attorneys to bring paternity actions in the name of recipients of public assistance. IND. CODE § 12-1-6.1-10 (1982). *See* 439 N.E.2d at 1368-69.

²³⁶452 U.S. 18 (1981).

rights termination proceedings, for the proper balancing test to be applied. As stated in *Lassiter*, there is a presumption against the right to appointed counsel in the absence of at least a *potential* deprivation of physical liberty.²³⁷ Against this presumption are to be weighed the three factors, enumerated in *Mathews v. Eldridge*,²³⁸ to be used in evaluating the mandates of procedural due process: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."²³⁹

Because no *direct* deprivation of liberty is involved in a civil paternity action, the court invoked the presumption against appointed counsel and weighed that against the *Mathews* factors. Citing *Little v. Streater*,²⁴⁰ the court acknowledged the compelling private interests of both the putative father and the child involved in the creation of the parent-child relationship. The court of appeals considered not only the emotional, medical, and financial effects, but also the potential criminal liability for non-support which could be imposed on both the father²⁴¹ and the child.²⁴² The state's interest, on the other hand, were seen as primarily financial.²⁴³ The court found that the state's financial interest, while legitimate, was "hardly significant enough to overcome the compelling private interests of the putative father and child."²⁴⁴

Finally, the risk of error in the absence of appointed counsel for indigent defendants was great in light of the state's intervention on behalf of the mother²⁴⁵ and in light of the indigent defendant's constitutional right to a free blood grouping test,²⁴⁶ which might be rendered meaningless without the aid of counsel. Thus, the private interests of the putative father and the child and the likelihood of an erroneous determination of paternity under current procedures were held to outweigh the state's financial interests and to require the appointment of free counsel despite

²³⁷*Id.* at 25.

²³⁸424 U.S. 319 (1976).

²³⁹452 U.S. at 28 (citing *Mathews*, 424 U.S. at 335).

²⁴⁰452 U.S. 1 (1981)(holding that an indigent defendant in a paternity action initiated because of the dictates of Title IV-D has a right to a free blood grouping test).

²⁴¹439 N.E.2d at 1370 (citing IND. CODE § 35-46-1-5 (1982)).

²⁴²439 N.E.2d at 1370-71 (citing IND. CODE § 35-46-1-7 (1982)).

²⁴³439 N.E.2d at 1371.

²⁴⁴*Id.* (footnote omitted).

²⁴⁵*Id.*

²⁴⁶*Id.* at 1372. At this stage of the opinion, i.e., the determination of the putative father's rights to indigent appointed counsel in a paternity proceeding, the court of appeals relied on *Little v. Streater*, 452 U.S. 1 (1981) for the proposition that an indigent putative father has a constitutional right to a free blood grouping test. 439 N.E.2d at 1372. Later in the opinion, deciding the issue because it was likely to recur in the retrial of the case, the court established that the right to such a test exists in Indiana for indigent defendants in paternity proceedings, relying again on *Little*, and on *Anderson v. Jacobs*, 68 Ohio St. 2d 67, 428 N.E.2d 419 (1981). 439 N.E.2d at 1373-74.

the presumption stated in *Lassiter*.²⁴⁷ The court went even further to protect the rights of the putative father by holding that due process requires that the court advise any indigent defendant in this situation of his right to appointed counsel, rather than merely responding to articulated requests for the appointment of counsel.²⁴⁸

In the second case finding the right to appointed counsel, *Merritt v. Faulkner*,²⁴⁹ the Seventh Circuit Court of Appeals reversed the District Court for the Northern District of Indiana and required the appointment of counsel for a blind, indigent prisoner pursuing a section 1983 action against prison officials.²⁵⁰ In so doing, the court considered the five factors set forth in the 1981 case of *Maclin v. Freake*²⁵¹ to determine whether, in the exercise of its discretion, a trial court's refusal to appoint counsel to an indigent civil litigant "would result in fundamental unfairness impinging on due process rights."²⁵² These factors are:

- (1) [W]hether the merits of the indigent's claim are colorable;
- (2) the ability of the indigent plaintiff to investigate crucial facts;
- (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel;

²⁴⁷439 N.E.2d at 1372.

²⁴⁸*Id.* at 1372-73. Two other states have, since *Lassiter*, evaluated their obligation to provide appointed counsel to indigent putative fathers under the same circumstances as those presented in *Kennedy*, reaching opposite results. In *State ex rel. Hamilton v. Snodgrass*, 325 N.W.2d 740 (Iowa 1982), the Iowa Supreme Court applied the *Lassiter* analysis, but found that the *Mathews* factors did *not* outweigh the presumption against appointed counsel, primarily because it believed that the right to a free blood grouping test reduced the risk of error to such a degree that the presence of counsel would not appreciably affect the outcome of paternity actions. *Id.* at 743. Four justices dissented, using essentially the same analysis as the Indiana Court of Appeals. *Id.* at 744 (Uhlenhopp, J., dissenting).

In contrast, the Pennsylvania Superior Court, in *Corra v. Coll*, 451 A.2d 480 (Pa. Super. Ct. 1982), again applying the same *Lassiter/Mathews* test, found that due process did require the right to appointed counsel. Their analysis differed somewhat from that of the Indiana Court of Appeals. First, because of the potentiality of a loss of liberty through future criminal contempt or non-support proceedings, the Pennsylvania court presumed the existence of a right to counsel, *id.* at 484-85, rather than presuming no right to counsel. Also, the Pennsylvania court, in assessing the state's interests under the second prong of the *Mathews* test, found that the state as well as the putative father and child had an interest in an accurate determination of paternity which would be well-served by the appointment of counsel for indigent defendants. *Id.* at 485.

²⁴⁹697 F.2d 761 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3121 (U.S. July 2, 1983) (No. 83-153).

²⁵⁰697 F.2d at 766.

²⁵¹650 F.2d 885 (7th Cir. 1981) (per curiam).

²⁵²*LaClair v. United States*, 374 F.2d 486, 489 (7th Cir. 1967), *cited in* *McKeever v. Israel*, 689 F.2d 1315, 1320 (7th Cir. 1982); *Maclin v. Freake*, 650 F.2d 885, 886 (7th Cir. 1981) (per curiam); *Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978).

- (4) the capability of the indigent litigant to present the case; and
 (5) the complexity of the legal issues raised by the complaint.²⁵³

The *Merritt* case clarified the factual circumstances which should merit appointment of counsel, in that the failure to appoint counsel for the plaintiff was considered a *clear* abuse of discretion.²⁵⁴ In *Maclin*, the plaintiff was a paraprofessional who, like Merritt, sued prison officials for deliberate indifference to his serious medical needs in violation of the eighth amendment.²⁵⁵ In a 1982 case, *McKeever v. Israel*,²⁵⁶ the Seventh Circuit Court of Appeals again required the appointment of counsel for an indigent plaintiff challenging a prison policy limiting the amount of mail a prisoner could take to and from court appearances.²⁵⁷ McKeever also specified medical problems as the basis for his request for counsel.²⁵⁸ Comparing these two cases with the *Merritt* case, a pattern emerges which indicates the type of civil litigant whom the Seventh Circuit deems entitled to court-appointed counsel.

The court clearly placed some weight on the factor of incarceration as reducing the ability of the litigant to investigate facts crucial to his case, but much more important was the presence of a physical handicap. For Judge Cudahy, Merritt's blindness was a decisive consideration.²⁵⁹ In addition, all three cases involved complex medical and/or legal questions.

Judge Posner, in his dissent, re-asserted his belief that the Seventh Circuit is moving toward routine appointment of counsel in prisoner civil rights cases.²⁶⁰ If prisoner civil rights cases are likely to present complex questions of constitutional law pursued by incarcerated persons who have virtually no ability to investigate their cases, Judge Posner's assessment of the current trend in this circuit may be completely accurate.

4. *Administrative Segregation.*—In *Love v. Duckworth*²⁶¹ the United State District Court for the Northern District of Indiana held that the

²⁵³697 F.2d 764 (citing *Maclin*, 650 F.2d at 887-89).

²⁵⁴697 F.2d at 766.

²⁵⁵650 F.2d at 886.

²⁵⁶689 F.2d 1315 (7th Cir. 1982).

²⁵⁷*Id.* at 1316.

²⁵⁸*Id.* at 1321 and n.13.

²⁵⁹697 F.2d at 769 (Cudahy, J., concurring).

²⁶⁰*Id.* at 770-71 (Posner, J., dissenting); see *McKeever*, 689 F.2d at 1325 (Posner, J., dissenting). Much of Judge Posner's dissent was based on an economic analysis of the case. He reasoned that "a prisoner who has a good damages suit should be able to hire a competent lawyer and . . . by making the prisoner go this route we subject the probable merit of his case to the test of the market." 697 F.2d at 769. Judge Cudahy concurred separately specifically to comment on Judge Posner's analysis: "Not entirely facetiously, it occurs to me that the barriers to entry into the prison litigation market might be very high. . . . Hence, I am not prepared to consign to the verdict of the marketplace the issue of prisoner representation; and this is, of course, not the law." *Id.* at 768-69.

²⁶¹554 F. Supp. 1067 (N.D. Ind. 1983).

decision whether to place an Indiana prisoner in administrative segregation does not implicate any liberty interest protected by the due process clause of the fourteenth amendment. The court found no liberty interest because an Indiana prisoner has no legitimate, non-unilateral expectation that he will remain in the general prison population absent the occurrence of certain specified events.²⁶² The court found that the Indiana procedure permitted placement in administrative segregation at the discretion of prison officials rather than upon the happening of certain events or the finding of certain objective criteria.²⁶³ The Indiana procedure was deemed to be discretionary and “for all practical purposes identical to the basis for inter-institutional transfers considered in *Meachum v. Fano*,”²⁶⁴ found by the United States Supreme Court to implicate no liberty interest.²⁶⁵ The court distinguished the Indiana procedure from the Pennsylvania procedure in *Hewitt v. Helms*,²⁶⁶ held by the United States Court of Appeals for the Third Circuit to create a liberty interest because Pennsylvania prisoners could be placed in administrative segregation only upon the finding of specified objective criteria.²⁶⁷

The *Love* court further found that even if a liberty interest in remaining in the general prison population did exist, the prisoner received all the process due him. He appeared personally before the Classification Committee and was given the opportunity to be represented by a lay advocate and call witnesses on his own behalf.²⁶⁸

No mention was made in the opinion of the Indiana statute governing the decision to place a prisoner in administrative segregation.

An offender may be involuntarily segregated from the general population of a facility or program *if* the department *first* finds that segregation is *necessary* for the offender’s own physical safety or the physical safety of others.²⁶⁹

Although the language of the statute is not as clear as the “shall . . . must” language of the statute in *Hewitt*,²⁷⁰ it does require a finding by the Department of Corrections of one of only two possible justifications

²⁶²*Id.* at 1070.

²⁶³*Id.*

²⁶⁴*Id.*

²⁶⁵*Meachum v. Fano*, 427 U.S. 215 (1976). The decision in *Meachum* ultimately rested upon the prison officials’ “discretion to transfer [a prisoner] for whatever reason or for no reason at all.” *Id.* at 228. The reasons for inter-institutional transfers “often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.” *Id.* at 225, *quoted in Love*, 554 F. Supp. at 1070.

²⁶⁶655 F.2d 487 (3rd Cir. 1981), *rev’d on other grounds*, 103 S. Ct. 864 (1983).

²⁶⁷655 F.2d at 497.

²⁶⁸554 F. Supp. at 1070-71 (citing *Owen v. Heyne*, 473 F. Supp. 345 (N.D. Ind. 1978), *aff’d*, 605 F.2d 559 (7th Cir. 1979)).

²⁶⁹IND. CODE § 11-10-1-7 (1982) (emphasis added).

²⁷⁰*See* 103 S. Ct. at 871 n.6; *see infra* text accompanying note 275.

for segregation. As such, the statute would appear to create a non-unilateral expectation on the part of Indiana prisoners that they will remain in the general prison population unless the required findings are made.

Nevertheless, the result of *Love* was borne out one month later by the Supreme Court of the United States in *Hewitt v. Helms*.²⁷¹ The Court held that prior decisions compelled the conclusion that the due process clause does not, of itself, create a liberty interest in remaining in the general prison population.²⁷² "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."²⁷³ Because "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration,"²⁷⁴ it is within the sentence imposed and violates no liberty interest. The Court did, however, agree with the Third Circuit Court of Appeals that the state of Pennsylvania had created a liberty interest in confinement within the general prison population through the use of "shall . . . must" language in its procedural guidelines and through the requirement of findings of specified substantive predicates, such as "the need for control," or "the threat of a serious disturbance."²⁷⁵

Even in light of the existence of such a liberty interest, the Court held that the prisoner had received all the process due him by receiving notice of the charges against him and by having the opportunity to have his version reported as part of the record.²⁷⁶ The Court concluded that, "an informal, nonadversary evidentiary review [is] sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him."²⁷⁷

In light of the *Hewitt* decision, the result in *Love* appears quite sound. Although there is a strong argument that Indiana has statutorily created a liberty interest in remaining in the general prison population,²⁷⁸ the court's conclusion that in any case the prisoner received all the process due him is unquestionably correct as the procedure used afforded him greater procedural safeguards than those endorsed by the Supreme Court in *Hewitt*.

5. *Naming of Illegitimates.*—In *Doe v. Hancock County Board of*

²⁷¹103 S. Ct. 864 (1983).

²⁷²*Id.* at 869-70.

²⁷³*Id.* at 869 (quoting *Montayne v. Haymes*, 427 U.S. 236, 242 (1976)).

²⁷⁴103 S. Ct. at 870.

²⁷⁵*Id.* at 871.

²⁷⁶*Id.* at 874.

²⁷⁷*Id.*

²⁷⁸See *supra* text accompanying notes 269-70.

Health,²⁷⁹ the Supreme Court of Indiana avoided, on procedural grounds,²⁸⁰ a challenge to Indiana Code section 16-1-16-15, which requires that an illegitimate child be registered under his mother's surname.²⁸¹ The parents, though unmarried, lived together and wished to give their child the father's surname. The parents argued that the restriction on naming illegitimate children violated their constitutional rights to privacy and substantive due process, their right to participate freely in the selection of their child's name, and their right to equal protection.²⁸²

In his dissent to the dismissal of *Doe*, Justice Hunter pointed to both federal²⁸³ and state court²⁸⁴ decisions finding that the naming of one's child is a constitutionally protected right with which the state cannot arbitrarily interfere. Also, despite the fact that the statute made classifications based on illegitimacy and gender, which usually require a higher level of scrutiny, Justice Hunter found it necessary to apply only a low-level rational basis scrutiny to reject the state's asserted reasons for limiting the naming of illegitimate children.²⁸⁵ He dismissed as meritless the state's interest in preventing fraud, tracing the child's "changing status," and protecting the confidentiality of the child's records. Nor were the state's interests in promoting marriage and family life, and in keeping vital statistics sufficient, in the opinion of Justice Hunter, to override the parents' right to name their child.²⁸⁶ Justice Hunter would have found Indiana Code section 16-1-16-15 unconstitutional;²⁸⁷ however, because of the procedural dismissal, this statute remains in effect.

²⁷⁹436 N.E.2d 791 (Ind. 1982).

²⁸⁰Appellants timely perfected their appeal; however, appellees (Hancock County Board of Health) filed their brief in the Indiana Court of Appeals one day late. The court refused to accept the belated filing of the brief, resulting in the effective dismissal of the case under IND. R. APP. P. 8.1(A). Appellants filed a petition to transfer to the Supreme Court of Indiana. The petition was granted and the case dismissed. Justice Hunter dissented on the ground that dismissal "effectively deprives the appellants of their constitutional rights of appellate review" under the Indiana Constitution, article III, section 6. *Id.* at 791 (Hunter, J., dissenting to grant of petition to transfer and dismissal). *Cf.* Whittaker v. Burgauer, 144 Ind. App. 106, 111, 244 N.E.2d 445, 447 (1969) ("It is our opinion that dismissal of a cause is proper only when this court does not have jurisdiction of an appeal."). For a further discussion of this case, see Harvey, *Civil Procedure and Jurisdiction, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 55, 75 (1984).

²⁸¹IND. CODE § 16-1-16-15 (1982).

²⁸²436 N.E.2d at 792 (Hunter, J., dissenting to grant of petition to transfer and dismissal).

²⁸³*Id.* at 793 (citing O'Brien v. Tilson, 523 F. Supp. 494 (E.D.N.C. 1981); Jech v. Burch, 466 F. Supp. 714 (D. Hawaii 1979)).

²⁸⁴436 N.E.2d at 793 (Hunter, J., dissenting to grant of petition to transfer and dismissal) (citing Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981); D'Ambrosio v. Rizzo, 425 N.E.2d 369 (Mass. App. 1981); Doe v. Dunning, 87 Wash. 2d 50, 549 P.2d 1 (1976)).

²⁸⁵436 N.E.2d at 794 (Hunter, J., dissenting to grant of petition to transfer and dismissal).

²⁸⁶*Id.* at 794-96.

²⁸⁷*Id.* at 796.

