

# INDIANA CONSTITUTIONAL DEVELOPMENTS: INCREMENTALISM AND SCHOOL TUITION

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Case law applying the Indiana Constitution evolved incrementally in several areas during the survey period. Even as the Indiana Supreme Court addressed a longstanding question regarding the availability of freestanding damages for state constitutional violations, it did so tentatively.<sup>1</sup> Indiana's appellate courts also moved incrementally in the areas of special laws, search and seizure, taxation and finance, and double jeopardy.<sup>2</sup> The courts applied the equal privileges and immunities clause only a few times, breaking no new ground.<sup>3</sup> The Indiana Supreme Court explored new territory as to only one constitutional provision, the requirement that "tuition shall be without charge" in public schools.<sup>4</sup>

## I. DAMAGES FOR STATE CONSTITUTIONAL VIOLATIONS

The Indiana Supreme Court addressed an issue of perennial interest—whether the Indiana Constitution creates an action for damages for its violation—in *Cantrell v. Morris*.<sup>5</sup> The court addressed the issue in the context of a question certified by the United States District Court for the Northern District of Indiana, and the answer was careful, limited, and equivocal.<sup>6</sup> The court previously has expressed its reticence at responding to certified questions because of their inherent nebulousness and lack of full record, and those limitations circumscribed the court's response in *Cantrell*.<sup>7</sup>

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1. See *infra* Part I.

2. See *infra* Parts III, IV, VI, VIII.

3. See *infra* Part V.

4. See IND. CONST. art. I, § 1; *infra* Part II.

5. 849 N.E.2d 488 (Ind. 2006).

6. The federal court certified the following question: "Does a private right of action for damages exist under Article I, Section 9 of the Indiana Constitution, and if so, what are the elements of the action the plaintiff must prove?" *Id.* at 491. The Indiana Supreme Court accepted the federal court's invitation to rephrase the question because it did "not believe the question as phrased is susceptible of a generally applicable response." It rephrased the question as follows:

Does an employee of a state or local governmental agency whose discharge is alleged to have violated rights of free speech guaranteed by Article I, Section 9 of the Indiana Constitution assert a claim for money damages against the unit of government or any individual responsible for the firing, and, if so, what is the source of that claim and what are its elements?

*Id.*

7. See *Citizens Nat'l Bank of Evansville v. Foster*, 668 N.E.2d 1236, 1241-42 (Ind. 1996). Chief Justice Shepard has also written on the topic of pros and cons of certified questions regarding

Justice Boehm wrote the court's unanimous opinion in the case, which arose in the context of the firing of a public defender by a Lake County judge.<sup>8</sup> The public defender, Cantrell, alleged that the termination was politically motivated and violated his rights under article I, section 9.<sup>9</sup> Cantrell had worked in the previous election for the opponent of the judge who ultimately became his employer.<sup>10</sup> In Cantrell's federal lawsuit, he sought damages for the violation of his state constitutional rights.<sup>11</sup>

The court looked first at whether section 9 protects public employees from termination for political activities or speech, a question it had not previously addressed.<sup>12</sup> The court did not decide the question, concluding that "whether or not Article I, Section 9 of the Indiana Constitution affords any protection to public employees under some circumstances, a terminated employee has no private right of action for damages that arises under that Section."<sup>13</sup> The court did, however, reject the defendant's argument (put forth by the attorney general, the defendant's counsel) that only statutes, not executive actions, could violate section 9.<sup>14</sup> The court noted that it already had held that executive actions were governed by section 9.<sup>15</sup>

The court then reviewed existing remedies for wrongful discharge. It noted that, unlike a few other states, Indiana has enacted no statute creating a claim for damages for violation of the state constitution.<sup>16</sup> It also noted that Indiana's statutes protect citizens' free speech rights and that a specific statute protects the free speech rights of "court employees."<sup>17</sup> The court further stated that, in some cases, common law and statutory immunities do not apply, so that public officers can be held individually liable for their wrongful acts.<sup>18</sup>

The court next reviewed case law on wrongful discharge. While Indiana generally follows the doctrine of employment at will, that doctrine is limited.<sup>19</sup> It is unlawful for employers to fire an employee for certain reasons, such as when the employee has exercised a lawful right (like claiming workers' compensation

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state law. Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?*, 38 VAL. U. L. REV. 327 (2004).

8. *Cantrell*, 849 N.E.2d at 490.

9. *Id.*

10. *Id.*

11. *Id.* at 490-91.

12. *Id.* at 491-92.

13. *Id.* at 492.

14. *Id.* at 493.

15. *Id.* (citing *Whittington v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996); *Price v. State*, 622 N.E.2d 954, 960 (Ind. 1993)).

16. *Id.* at 493 n.3 (citing statutes from Massachusetts, Arkansas, Maine, and California creating rights to actions for damages for state constitutional violations).

17. *Id.* at 493 (citing IND. CODE §§ 33-23-12-1 to -3 (2004)).

18. *Id.* at 493-94.

19. *Id.* at 494.

or reporting an unlawful working condition).<sup>20</sup> When an employee is fired for one of these unlawful reasons, the employee has a cause of action for damages for wrongful discharge.<sup>21</sup>

Without deciding the scope of section 9's protection of public employee speech, the court held that "to the extent Article I, Section 9 is relevant to any claim for discharge, the claim is simply a common law claim for wrongful discharge."<sup>22</sup> The court stated that any such claim against a governmental entity would be governed by the Indiana Tort Claims Act.<sup>23</sup> The court indicated that the immunities conveyed by the Tort Claims Act would also apply to claims for wrongful discharge on the basis of section 9.<sup>24</sup>

The court indicated that many claims for wrongful termination would fall within the "discretionary function" immunity in Indiana Code section 34-13-3-3(7), covering the "exercise of political power which is held accountable only to the Constitution or the political process."<sup>25</sup> But the court stated that discretionary function immunity is not limitless when it comes to politically motivated firings.<sup>26</sup> Quoting its previous opinion applying federal immunity law, the court stated that "public official may . . . be held liable if he violated constitutional or statutory rights that were clearly established at the time he acted such that a reasonably competent official should have then known the rules of law governing his conduct," unless the official shows extraordinary circumstances exempting the official from this standard.<sup>27</sup> Under this standard, the plaintiff first must show that the law was clearly established in relation to the specific facts of the plaintiff's case; then the court must "evaluate the objective reasonableness of the [public] official's conduct" to determine "whether reasonably competent officials would agree on the application of the clearly established right to a given set of facts."<sup>28</sup>

The court then returned to a tort-based analysis, noting the provision of the Restatement (Second) of Torts indicates that some constitutional provisions give rise to damage remedies when courts determine that such a remedy is consistent with the framers' intent.<sup>29</sup> Also, federal law has implied a damage remedy for violations of the Fourth Amendment in the absence of a statute providing a remedy.<sup>30</sup> Indiana courts have implied remedies for statutory violations in some

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20. *Id.*

21. *Id.* at 494-95.

22. *Id.* at 494.

23. *Id.*

24. *Id.* at 495.

25. *Id.* (quoting *Peavler v. Bd. of Comm'rs of Monroe County*, 528 N.E.2d 40, 45 (Ind. 1988)).

26. *Id.* at 495-96.

27. *Id.* at 496 (quoting *Kellogg v. City of Gary*, 562 N.E.2d 685, 703 (Ind. 1990)).

28. *Id.* (quoting *Earles v. Perkins*, 788 N.E.2d 1260, 1267 (Ind. Ct. App. 2003)).

29. *Id.* at 497 (citing RESTATEMENT (SECOND) OF TORTS § 874A (1979)).

30. *Id.* at 501 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

cases when, under the Restatement's approach, such remedies appeared consistent with legislative intent.<sup>31</sup>

But the court declined to imply a remedy for the violation of section 9 in the context of the certified question before it.<sup>32</sup> "We think resolution of this issue in the abstract is particularly inappropriate because of the wide range of situations in which it may arise. We therefore explicitly leave open the extent to whether public employees enjoy Indiana constitutional protection against employment action."<sup>33</sup>

The court reiterated that to the extent section 9 protects against politically motivated firing, "termination of an employee for exercise of a constitutional right is entitled to no lower status in tort law than termination for exercise of a statutory right."<sup>34</sup> The court reiterated that any such cause of action would fall under the Tort Claims Act unless and until the General Assembly provided some different remedy.<sup>35</sup>

The final portion of the court's opinion addressed whether the Indiana Constitution itself created a private right of action for damages. As usual, the court placed great emphasis on the Constitution's language, noting that "no explicit language in the Indiana Constitution provid[es] any specific remedy for violations of constitutional rights."<sup>36</sup> It rejected the plaintiff's argument that the language of the due course of law clause<sup>37</sup> indicated the framers' desire to supply a damage remedy because that section also had no specific language relating to a remedy for constitutional violations.<sup>38</sup> The court stated that only the takings clause of article I, section 20 indicated any specific damages remedy for a constitutional violation. "In short, whether a civil damage remedy exists under Section 9, and if so, against whom, and for what types of violation are not resolved by the text of the Constitution or by any Indiana precedent."<sup>39</sup>

The court also rejected the argument of the Indiana Civil Liberties Union, as *amicus curiae*, that some provisions of the Indiana Constitution are "self-executing," providing within themselves a sufficient rule to enforce the rights they convey and that those self-executing provisions imply a damage remedy.<sup>40</sup> The court stated that it would not address that argument in the context of a certified question because the "self-executing" concept injected additional

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31. *Id.* at 497-98.

32. *Id.* at 498.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 499.

37. IND. CONST. art. I, § 12.

38. *Cantrell*, 849 N.E.2d at 499. Article I, section 12 states, in relevant part that "every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." IND. CONST. art. I, § 12.

39. *Cantrell*, 849 N.E.2d at 499.

40. *Id.*

uncertainty into the already uncertain circumstances of the certified question.<sup>41</sup>

The court also concluded that no previous Indiana state court had directly addressed, in a reported opinion, the availability of damages for a constitutional violation, although some federal courts in Indiana had done so.<sup>42</sup> The United States District Court for the Northern District of Indiana had found that a damages remedy would be available for a claim under article I, section 23 alleging discriminatory zoning.<sup>43</sup> But several other federal district court cases in the United States District Court for the Southern District of Indiana, each involving a claim of illegal search and seizure under article I, section 11, found no damage remedy available under the Indiana Constitution.<sup>44</sup>

The court indicated that federal courts have implied damage remedies for certain violations of the United States Constitution, but not others.<sup>45</sup> Reviewing cases, it concluded that “several states have found violations of various state constitutional rights to support private civil actions for damages, and a roughly equal number have rejected such an action.”<sup>46</sup>

The court concluded, however, that whether a right of action is implied under the constitution itself or is available through some other means is not as important an issue in state court as it is in federal court.<sup>47</sup> “In the case of a federal ‘constitutional tort’ the question whether the Constitution itself is the source of a civil damage remedy is of paramount significance because federal court jurisdiction typically turns on whether the claim arises under federal law.”<sup>48</sup> State courts, in contrast, are courts of general jurisdiction so the claim may be brought in state court whether it arises under the constitution itself or under common law tort doctrine.<sup>49</sup>

Also, the court found the constitutional tort concept is more important in federal courts because it is sometimes the only avenue available to provide protection against constitutional violations.<sup>50</sup> In state courts, in contrast, common law tort remedies are generally available even if, when the defendants are government actors, those remedies may be limited by statutes like the Tort

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41. *Id.* at 499-500.

42. *Id.* at 500-01.

43. *See* *Discovery House, Inc. v. City of Indianapolis*, 43 F. Supp. 2d 997, 1004 (N.D. Ind. 1999).

44. *See Cantrell*, 849 N.E.2d at 501 n.18 (citing *Raines v. Chenowith*, No. 1:03-CV-01289-JDTTAB, 2004 WL 2137634 (S.D. Ind. June 29, 2004); *Malone v. Becher*, No. NA 01-101-CH/H, 2003 WL 22080737 (S.D. Ind. Aug. 29, 2003); *Estate of O’Bryan v. Town of Sellersburg*, No. NA 02-238-CH/H, 2003 WL 21852320 (S.D. Ind. July 2, 2003)).

45. *Id.* at 501-04.

46. *Id.* at 504 (citing JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* 7-7 (3d ed. 2000)).

47. *Id.* at 505.

48. *Id.*

49. *Id.* at 506.

50. *Id.*

Claims Act.<sup>51</sup> Thus, at least a limited remedy for constitutional violations is available in state courts, whereas in federal courts the constitutional tort is the only remedy in the absence of a statutory cause of action.<sup>52</sup>

The court then examined whether the limits on claims imposed by the Tort Claims Act unconstitutionally limited the remedies for constitutional violations, holding that the limitations were valid.<sup>53</sup> The court concluded that the limitations in the Tort Claims Act, such as precluding punitive damages and immunizing behavior within the scope of employment, exist to preclude requiring the “innocent taxpayers” to pay damages.<sup>54</sup> The court recognized that some argue that a full damage remedy is required to vindicate constitutional rights, but concluded that the General Assembly has instead tipped the balance in favor of limits on liability for firing public employees to encourage innovation and leadership.<sup>55</sup> “The Constitution does not mandate any specific remedy for violations, so balancing of these competing interests is a matter well within the power of the General Assembly.”<sup>56</sup>

The legal community has long awaited an answer to whether damage remedies are available for violations of the Indiana Constitution, but *Cantrell* is only the beginning of a response. The court’s decision to provide a circumscribed response may be well advised because the lack of a full record makes its opinion advisory; only a complete record would give the court a real context in which to apply the law.

But the court’s initial review of the question indicates that it will take a conservative approach, depending on the General Assembly to define (and perhaps even eliminate) the damage remedy, if any, available for constitutional violations. The court’s reliance on the existing tort-claim framework cedes the subject of damage remedies for constitutional violations to the legislative branch and tightly cabins what might otherwise be an incentive for more creative litigation under the Indiana Constitution.

## II. PUBLIC SCHOOL “TUITION” UNDER ARTICLE VIII, SECTION 1

In *Nagy v. Evansville-Vanderburgh School Corp.*, the Indiana Supreme Court construed the language of article VIII, section 1, stating that the General Assembly is to provide a “system of Common Schools, wherein tuition shall be without charge, and equally open to all.”<sup>57</sup>

The case arose from a dispute over the school’s \$20 per student “student services fee.”<sup>58</sup> The fee proceeds were deposited in the school’s general fund, where they were used to pay for “among other things, a coordinator of student

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51. *Id.*

52. *Id.*

53. *Id.* at 506-07.

54. *Id.* at 507.

55. *Id.*

56. *Id.*

57. 844 N.E.2d 481, 484 (Ind. 2006) (quoting IND. CONST. art. I, § 1).

58. *Id.* at 482.

services, nurses, media specialists, alternative education, elementary school counselors, a police liaison program, and activities such as athletics, drama, and music.”<sup>59</sup> The fee was charged to all students, including those of low income.<sup>60</sup>

A parent challenged the constitutionality of the fee, and the trial court granted the parent summary judgment on a federal constitutional ground.<sup>61</sup> The Indiana Court of Appeals addressed the state constitutional claim, ruling that the fee violated article VIII, section 1.<sup>62</sup> The Indiana Supreme Court also invalidated the fee under that constitutional section, but on different grounds, in a 4-1 opinion by Justice Rucker.<sup>63</sup>

The court reviewed the history of article VIII, focusing on the meaning of “tuition,” which section 1 says is to be “without charge.”<sup>64</sup> The justices concluded that “the framers of Indiana’s constitution were careful not to provide for a free school system.”<sup>65</sup> Indeed, “[a] free public school system implies a level of educational subsidization that the framers at least did not endorse and at most rejected outright.”<sup>66</sup> In the 1840s, there was strong support for free education, and free public education was endorsed by a legislatively-called state convention in 1847.<sup>67</sup> A statewide referendum for free schools passed by fifty-six percent in 1849.<sup>68</sup>

But some opposed totally free schools.<sup>69</sup> They argued that free public schools would decrease the value of private education.<sup>70</sup> They also argued that the poor should not be required to pay for the education of children of the rich.<sup>71</sup> Still others feared that free common schools would undermine religious training, local government authority, or family liberties.<sup>72</sup>

The court concluded that the language ultimately agreed upon by the framers fell short of establishing free schools.<sup>73</sup> “Rather than completely subsidizing education, which would fall within the meaning of a ‘free school’ system, the framers pursued a more modest, and perhaps less controversial, route: a uniform

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59. *Id.* at 483.

60. *Id.*

61. *Id.*

62. The court of appeals ruled that “tuition” includes not only instructional and teaching services, but also “those functions and services which are by their very nature essential to teaching or ‘tuition.’” *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 808 N.E.2d 1221, 1230 (Ind. Ct. App. 2004), *vacated*, 844 N.E.2d 481 (Ind. 2006).

63. *Nagy*, 844 N.E.2d at 483.

64. *Id.* at 484-85 (quoting IND. CONST. art. VIII, § 1).

65. *Id.*

66. *Id.* at 485.

67. *Id.* at 486.

68. *Id.* at 487.

69. *Id.* at 486.

70. *Id.*

71. *Id.* at 487.

72. *Id.*

73. *Id.* at 489.

statewide system of public schools that would be supported by taxation.”<sup>74</sup> The court found the phrase “common schools” in section 1 to be equivalent to “public schools,” not “free schools.”<sup>75</sup> The court also looked to the 1854 Webster’s Dictionary definition of “tuition,” which means “instruction” or “teaching.”<sup>76</sup>

The court then applied these definitions to Evansville’s fee. The court indicated its understanding that modern education involves many costs beyond those that could have been contemplated by the framers.<sup>77</sup> But that fact, the court stated, did not permit public schools to charge parents for all of the costs of their children’s educations beyond the very basics because the key result of the debate over funding in the 1840s and 1850s “was that public schools would be operated largely at public expense.”<sup>78</sup>

The court then reached its central conclusion that “determining the components of a public education is left within the authority of the legislative branch of government.”<sup>79</sup> This conclusion is based on the language of article VIII, section 1, conveying to the legislature the responsibility of providing for common schools.<sup>80</sup> The court stated that the General Assembly has “considerable discretion in determining what will and what will not come within the meaning of a public education system.”<sup>81</sup>

The court noted that the legislature had enacted a “detailed, comprehensive” set of statutes governing public education comprising titles 20 and 21 of the Indiana Code.<sup>82</sup> The court concluded that those functions and activities mandated or permitted by the legislature would have to be paid for by tax dollars—unless the legislature specified other financing.<sup>83</sup>

Where the legislature—or through delegation of its authority the State Board [of Education]—has identified programs, activities, projects, services or curricula that it either mandates or permits school corporations to undertake, the legislature has made a policy decision regarding exactly what qualifies as a part of a uniform system of public education commanded by Article 8, Section 1 and thus what qualifies for funding at public expense.<sup>84</sup>

Thus, “absent specific statutory authority, fees or charges for what are otherwise public education cost items cannot be levied directly or indirectly against

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74. *Id.*

75. *Id.*

76. *Id.* at 490 (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1181 (1854)).

77. *Id.* at 491.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 492.

84. *Id.*

students or their parents.”<sup>85</sup> Only costs for programs and activities “outside of or expand[ed beyond] those identified by the legislature” may be subject to charges to students.<sup>86</sup> The court noted that the legislature or the State Board of Education had specified in some cases that school corporations could charge for certain items—specifically including the cost of textbook rental—and such legislative or administrative permissions were allowed by the Indiana Constitution.<sup>87</sup>

As to Evansville’s fee, the court noted that “either the legislature or the State Board has already determined that all such items [covered by Evansville’s fee] are part and parcel of a public school education and by extension qualify for public funding.”<sup>88</sup> These include the “coordinator of student services, nurses, media specialists, alternative education, elementary school counselors, a drama program, a music program, speech and debate programs,” and a police liaison program.<sup>89</sup> The court concluded that Evansville’s fee, at least as it was administered, violated article VIII because it amounted to a charge for attending a public school and obtaining a public education.<sup>90</sup> The court also stated that Evansville could offer programs beyond those described in state law or State Board of Education rules, and it could fund those through fees charged to the students who participate.<sup>91</sup>

Justice Sullivan dissented, stating that the trial court’s findings of fact did not support the decision. The trial court specifically found that Evansville’s fee was not used to offset the cost of state mandated education, instruction, or curriculum.<sup>92</sup> He concluded that the fee-supported programs were outside of or expanded upon those programs commanded by the legislature, so the fee was permissible.<sup>93</sup>

*Nagy* begins to illuminate an area of state constitutional law not previously the subject of litigation in the modern era of state constitutional interpretation.<sup>94</sup> The court’s decision is consistent with past jurisprudence, in which the court was more expansive in its interpretation of the “structural” provisions of the Indiana Constitution than of the provisions explicitly protecting individual rights.<sup>95</sup> But

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85. *Id.*

86. *Id.*

87. *Id.* at 492 n.12.

88. *Id.* at 492.

89. *Id.* at 492-93.

90. *Id.* at 493.

91. *Id.*

92. *Id.* at 493-94 (Sullivan, J., dissenting).

93. *Id.* at 494.

94. During the survey period, a group of plaintiffs filed suit to challenge Indiana’s school funding mechanism as inadequate under article VIII and other provisions of the Indiana Constitution. Class Action Complaint, *Bonner v. Daniels*, No. 49D01-0604-PL-16414 (Ind. Super. Ct., Marion County, Apr. 20, 2006).

95. See, e.g., Jon Laramore, *Indiana Constitutional Developments: The Wind Shifts*, 36 IND. L. REV. 961, 986-89 (2003) (arguing that modern Indiana constitutional jurisprudence has seen

as to the Tuition Clause, the court has not clearly outlined the boundaries of the constitutional provision, but rather has permitted the General Assembly to set those boundaries by defining what is encompassed within public education and, therefore, what can and cannot be the subject of fees.

### III. SPECIAL LAWS

In *Bonney v. Indiana Finance Authority*<sup>96</sup> and *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe County*,<sup>97</sup> the Indiana Supreme Court furthered the course struck several years earlier in article III, section 23 special legislation cases. *Bonney* also charts new ground in public debt and property tax analysis under article X, discussed in Part VI of this Article.

In *Bonney*, the Indiana Supreme Court considered constitutional challenges to House Enrolled Act 1008 (“HEA 1008”), the “Major Moves” legislation that authorized a seventy-five-year lease of the Indiana Toll Road.<sup>98</sup> *Bonney* reached the high court through expedited procedural circumstances under the Public Lawsuit Statute.<sup>99</sup> The lawsuit challenging the Toll Road lease was expedited because the high bidder had the right to decline to close on the lease if litigation over the constitutionality of the authorizing statute was pending on the closing date.<sup>100</sup> The lawsuit was filed on the same day the bid was accepted, which was only a few weeks before the closing date.<sup>101</sup> In requesting certification of *Bonney* as a public lawsuit, the State cited concern that the plaintiffs’ action might trigger the provision of the lease agreement allowing the lessor to back out of the deal if litigation remained pending on the closing date.<sup>102</sup>

Indiana’s Public Lawsuit Statute imposes procedural limitations on litigation that fall within its definitional ambit.<sup>103</sup> Relevant to this case, the statute provides that if a lawsuit constitutes a “public lawsuit” and plaintiffs cannot “establish facts that would entitle [them] to a temporary injunction,” then a bond must be

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greater development under structural portions of the constitution and less under those provisions expressly conveying individual rights).

96. 849 N.E.2d 473 (Ind. 2006).

97. 849 N.E.2d 1131 (Ind. 2006).

98. *Bonney*, 849 N.E.2d at 476.

99. *Id.* at 477-78.

100. *Id.* at 477.

101. *Id.*

102. *Id.*

103. The Public Lawsuit Statutes defines a “public lawsuit” as

(1) any action in which the validity, location, wisdom, feasibility, extent, or character of construction, financing, or leasing of a public improvement by a municipal corporation is questioned directly or indirectly, including but not limited to suits for declaratory judgments or injunctions to declare invalid or to enjoin the construction, financing, or leasing; and (2) any action to declare invalid or enjoin the creation, organization, or formation of any municipal corporation.

IND. CODE § 34-6-2-124(a) (2004).

posted.<sup>104</sup> After a two-day hearing in *Bonney*, the trial court certified various counts of the plaintiffs' action as a public lawsuit and directed plaintiffs to post a \$1.9 billion bond.<sup>105</sup> Plaintiffs appealed, and the Indiana Supreme Court took jurisdiction under Indiana Appellate Rule 56(A), which provides for the state supreme court to accept original appellate jurisdiction in rare cases.<sup>106</sup> The Indiana Supreme Court affirmed fifteen days later, ten days before the closing date for the lease agreement.<sup>107</sup>

The defendants' request that the action be certified as a public lawsuit required the courts to consider the merits of the constitutional challenges to the statute because plaintiffs had to demonstrate the existence of a "substantial issue" to be tried to avoid the bond requirement.<sup>108</sup> In a unanimous opinion written by

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104. The statute specifically provides,

At any time before the final hearing in a public lawsuit, the defendant may petition for an order of the court that the cause be dismissed unless the plaintiff posts a bond with surety to be approved by the court. The bond must be payable to the defendant for the payment of all damages and costs that may accrue by reason of the filing of the lawsuit if the defendant prevails.

IND. CODE § 34-13-5-7(a) (2004). This standard "requires the plaintiff in a public lawsuit to demonstrate that there is a 'substantial issue to be tried.'" *Bonney*, 849 N.E.2d at 481 (quoting *Marshall County Tax Awareness Comm. v. Quivey*, 780 N.E.2d 380, 382 n.4 (Ind. 2002) (citing *Hughes v. City of Gary*, 741 N.E.2d 1168, 1171 (Ind. 2001); *Johnson v. Tipton Cmty. Sch. Corp.*, 255 N.E.2d 92, 94 (Ind. 1970); *Boaz v. Bartholomew Consol. Sch. Corp.*, 654 N.E.2d 320, 322-23 (Ind. Tax Ct. 1995))).

105. *Bonney*, 849 N.E.2d at 478.

106. *Id.* Indiana Appellate Rule 56(A) provides:

In rare cases, the Supreme Court may, upon verified motion of a party, accept jurisdiction over an appeal that would otherwise be within the jurisdiction of the Court of Appeals upon a showing that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination. If the Supreme Court grants the motion, it will transfer the case to the Supreme Court, where the case shall proceed as if it had been originally filed there. If a filing fee has already been paid in the Court of Appeals, no additional filing fee is required.

IND. APP. R. 56(A). Although the bond statute provides for immediate appeal to the supreme court, IND. CODE § 34-13-5-7(d), the court has previously indicated that the appeal lies in the first instance in the jurisdiction of the court of appeals. See *Quivey*, 780 N.E.2d at 383-84 (noting that although Indiana Code section 34-13-5-7(d) (2004) provides for appeal to the supreme court, the plaintiffs properly filed their appeal with the court of appeals). Under *Sekerez v. Board of Sanitary Commissioners*, 304 N.E.2d 533, 533-34 (Ind. 1973), the court's Rules of Procedure (and not the Indiana Code) direct which cases the supreme court hears on direct appeal. In *Quivey*, however, the court also granted emergency transfer under Appellate Rule 56(A). 780 N.E.2d at 384.

107. *Bonney*, 849 N.E.2d at 473, 477.

108. *Id.* at 480-81; see *supra* note 104. The Indiana Supreme Court first considered and rejected plaintiffs' statutory arguments that the Public Lawsuit Statute did not apply because IFA was not a municipal corporation or because the statute applied only to challenges to acquisition of public improvements. *Bonney*, 849 N.E.2d at 478-80. The court held that the IFA as a "public

Justice Boehm, the court found no constitutional defect with respect to the three issues raised by the plaintiffs on appeal, including whether the legislative decision to allocate some of the funds received from the lease to the seven northern counties through which the Toll Road runs constitutes special legislation in violation of article IV, section 23.<sup>109</sup>

The court held that HEA 1008 did not constitute special legislation in violation of article IV, section 23. Noting its decision three years prior in *Municipal City of South Bend v. Kimsey*,<sup>110</sup> the court recited that the purpose of the section 23 prohibition “is to prevent state legislatures from granting preferences to some local units or areas within the state, and thus creating an irregular system of laws, lacking state-wide uniformity.”<sup>111</sup> The court then followed the framework set out in *Kimsey* and the earlier special legislation cases.<sup>112</sup> Accordingly, the court first asked the threshold question whether the law is special or general and then noted the follow-up question: if the law is special, whether a general law can be made applicable.<sup>113</sup> The court further noted, “[a] general law cannot ‘be made applicable’ where the law’s objective is to support a given project.”<sup>114</sup> The court’s analysis at this point is somewhat puzzling as the opinion declares that laws providing particularized funding, such as funding of state university construction, cannot be made general, which implies that such laws or at least portions of such laws are special.<sup>115</sup> But the opinion specifically denies that such laws become special legislation merely because they support particular projects.<sup>116</sup> Indeed, the opinion goes further and indicates that, to the extent the constitution constrains individual projects made part of a larger statutory regime, the single-subject requirement of article IV, section 19, and not section 23, provides the relevant limitation.<sup>117</sup> Accordingly,

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corporate body” and “public instrumentality” constituted a “municipal corporation” as defined in Indiana Code section 34-6-2-86(1). *Id.* at 479. The court further held that it was not necessary to resolve whether the term “leasing” in the definition of a public lawsuit was restricted to occasions in which the municipal corporation is the lessee because HEA 1008 contemplated “financing” for various “public improvements” in addition to the provisions for the lease of the Toll Road, and so the legislation met the definition of Indiana Code section 34-6-2-124(a) regardless. *Id.* at 480.

109. Justice Dickson did not participate. *Id.* at 488. See *infra* Part VI for further discussion of the other two issues in *Bonney*.

110. 781 N.E.2d 683 (Ind. 2003).

111. *Bonney*, 849 N.E.2d at 481 (quoting *Kimsey*, 781 N.E.2d at 685 (quoting OSBORNE M. REYNOLDS, LOCAL GOVERNMENT LAW 86 (1982))) (internal quotation marks omitted).

112. See *Williams v. State*, 724 N.E.2d 1070, 1085 (Ind. 2000); *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996); *Ind. Gaming Comm’n v. Moseley*, 643 N.E.2d 296, 299-301 (Ind. 1994).

113. *Bonney*, 849 N.E.2d at 481. No claim was raised under article IV, section 22, which prohibits special laws in sixteen enumerated categories. IND. CONST. art. IV, § 22.

114. *Bonney*, 849 N.E.2d at 481.

115. *Id.*

116. *Id.*

117. *Id.* at 482. No article IV, section 19 claim was raised by the plaintiffs, which the court indicated was appropriate because “[p]rovisions for raising public funds and directing their use are

the court held that the Major Moves legislation did not violate section 23 on the ground that allocations were made to certain counties, but not others.

The court continued its analysis to explain that the appropriations at issue did not violate section 23 “for a more fundamental reason.”<sup>118</sup> The constitution authorized the General Assembly to make appropriations under article X, section 3, and therefore such appropriations were distinctly legislative and “unusually unsuitable to judicial review as a matter of separation of powers.”<sup>119</sup> The court went on to note, however, that appropriations have a statewide impact because they affect the public purse, and, particularly with respect to HEA 1008, the “inclusion of some local effects in a bill of general statewide significance does not render the bill a special law.”<sup>120</sup>

In a final disposition of the plaintiffs’ arguments with respect to the appropriations, the court noted that no rational basis for the selection of the seven counties receiving the appropriations need be shown given the conclusion that the legislation was not special.<sup>121</sup> But to the extent that plaintiffs were raising in substance an equal privileges claim, the court recognized the possibilities of increased traffic and potential financial burden on the citizens of these counties in traveling the Toll Road and suggested that at least the latter would provide a sufficient rational basis to justify special treatment.<sup>122</sup> And finally, the court found no constitutional defect in the fact that the appropriations to the seven counties were subject to different spending use limitations than those imposed on other counties for roadway allocations.<sup>123</sup>

The significance of the court’s analysis reaches beyond the Major Moves legislation to the more generalized question of whether particularized appropriations require special justification consistent with the section 23 “can be made applicable” analysis. The court’s emphasis that appropriations lie within the legislative function and are distinctly unsuitable for judicial review appears to practically foreclose section 23 challenges brought merely on the ground of particularized appropriations.<sup>124</sup>

The other special legislation case decided during the survey period by the

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properly contained in the same bill.” *Id.* (citing *Hoovler v. State*, 689 N.E.2d 738, 742 (Ind. Ct. App. 1997); *Bayh v. Ind. State Bldg. & Constr. Trades Council*, 674 N.E.2d 176, 179 (Ind. 1996)).

118. *Id.*

119. *Id.* In addition to Indiana law supporting this proposition, the court cited a stream of authority from other states reaching same or similar results under their respective state constitutions. *Id.* at 482-83.

120. *Id.* at 483.

121. *Id.*

122. *Id.* The trial court had relied on the burden on local traffic. *Id.*

123. *Id.* at 483-84. The Indiana Supreme Court found that the plaintiffs had raised no substantial challenge to the Toll Road lease statute and required them to post the \$1.9 billion bond to continue, which effectively ended the litigation. *See infra* Part VI.

124. *Id.* at 483. “The laws we have found to be ‘special’ operated in only one area, typically a county, and the constituents of most legislators who supported those had no interest in the passage or failure of those bills. An appropriation does not suffer from that defect . . . .” *Id.*

Indiana Supreme Court, *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe County*, concerned three Indiana University fraternities' failures to file property tax exemption applications.<sup>125</sup> Accordingly, the fraternities were assessed property taxes for 2000 and 2001, due and payable 2001 and 2002.<sup>126</sup> During the 2003 session, the General Assembly passed a statute that "retroactively provided what amounted to a filing extension that permitted the taxpayers to apply for their 2000 and 2001 property tax exemptions in 2004 and required the county auditor to grant those exemptions."<sup>127</sup> When one of the fraternities requested that the Monroe County Auditor provide a refund, the auditor moved for a declaratory judgment that the statute was unconstitutional as a special law.<sup>128</sup> The trial court agreed and found the law unconstitutional under article IV, sections 22 and 23.<sup>129</sup>

In an opinion written by Chief Justice Shepard, the court invalidated the statute as a special law. Chief Justice Shepard began the opinion with a historical discussion of the rationale behind section 22 as illuminated by the debates of the Constitutional Convention.<sup>130</sup> The historical evidence suggested that the majority of Indiana legislation passed before the Constitutional Convention—from two-thirds to ninety percent—was special in nature.<sup>131</sup> The limitation on special or local laws was thus a priority of the delegates in 1850,

125. 849 N.E.2d 1131, 1133 (Ind. 2006).

126. *Id.*

127. *Id.* at 1133. Section 44 of Public Law 256-2003 specifically provides:

(a) This SECTION applies to property that:

(1) is used for a fraternity for students attending Indiana University;

(2) is owned by a nonprofit corporation that was previously determined by the auditor of the county in which the property is located to be eligible to receive a property tax exemption . . .

(3) is not eligible for the property tax exemption . . . for property taxes due and payable in 2001 or 2002 because the nonprofit corporation failed to timely file an application . . . .

(b) . . . [T]he auditor of the county in which the property described in subsection (a) is located shall:

(1) waive noncompliance with the timely filing requirement for the exemption application in question; and

(2) grant the appropriate exemption.

(c) A property tax exemption granted under this SECTION applies to:

(1) property taxes first due and payable in 2001; and

(2) property taxes first due and payable in 2002.

2003 Ind. Legis. Serv. Pub. L. No. 256-2003, § 44 (West).

128. *Alpha Psi*, 849 N.E.2d at 1134.

129. *Id.*

130. *Id.* at 1135.

131. *Id.* (citing Frank E. Horack & Matthew E. Welsh, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 109, 115 (1936); 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 2043 (1850)).

in part because of the time lawmakers devoted to consideration of local legislation as opposed to legislation of statewide importance and effect.<sup>132</sup>

With this background, the court undertook to clarify its characterization in *Kimsey* that a “statute is ‘general’ if it applies ‘to all persons or places of a specified class throughout the state.’”<sup>133</sup> The court indicated that the term “class” in this analysis is not merely the group the statute identifies “but rather the broader classification to which the particular group belongs.”<sup>134</sup> As to the statute at issue in this case, the specified classification “includes at least all property-owning fraternities and sororities, because that is the smallest relevant class the legislature has defined by statute as eligible for a property tax exemption.”<sup>135</sup> If a later law “singles out a group smaller than the previously specified class to receive unique privileges, [then] the law necessarily becomes special.”<sup>136</sup> Because the statute targeted only Indiana University (“IU”) fraternities that missed two specific filing deadlines (but had previously been exempt), the law was special “[u]nder even the gentlest scrutiny.”<sup>137</sup>

Having found the law special, the court went on to analyze whether “inherent characteristics” of the legislatively targeted class justified the special law.<sup>138</sup> The court further suggested that “[i]n our more recent cases, we have typically looked first to whether some uniqueness exists in the class specified in the special law.”<sup>139</sup> Citing as comparators the county-specific riverboat gambling legislation analyzed in *Indiana Gaming Commission v. Moseley*,<sup>140</sup> the Tippecanoe County-specific statute authorizing increased economic development income taxation in *State v. Hoovler*,<sup>141</sup> and the Lake County special property taxation provisions considered in *State ex rel. Attorney General v. Lake Superior Court*,<sup>142</sup> the court found missing any unique circumstances of IU fraternities that would similarly justify the retroactive tax exemption.<sup>143</sup> The proffered rationale by the

132. *Id.*

133. *Id.* at 1136 (quoting *South Bend v. Kimsey*, 781 N.E.2d 683, 689 (Ind. 2003) (quoting BLACK’S LAW DICTIONARY 890 (7th ed. 1999))).

134. *Id.*

135. *Id.* (citing IND. CODE §§ 6-1.1-10-16, -24 (2006)).

136. *Id.* at 1137.

137. *Id.* In a footnote, the court reflected that population categories, previously employed as a “camouflage” to make special legislation general, did not control the analysis and that the legislature would do better to “accompany special laws with ‘legislative findings as to the facts justifying the legislation’s limited territorial application.’” *Id.* at 1137 n.7 (quoting *Kimsey*, 781 N.E.2d at 691).

138. *Id.* at 1138.

139. *Id.*

140. 643 N.E.2d 296 (Ind. 1994) (finding uniqueness with respect to their suitability for riverboats based on the presence of a large body of water).

141. 688 N.E.2d 1229 (Ind. 1996) (finding uniqueness due to Superfund cleanup liability).

142. 820 N.E.2d 1240 (Ind. 2005) (finding uniqueness for historical reasons and complex characteristics of tax base).

143. *Alpha Psi*, 849 N.E.2d at 1138.

taxpayers—the financial burden of education eased by the taxes—was insufficient because that burden was not unique to the IU fraternities targeted by the legislation.<sup>144</sup> Indeed, the taxpayers' unique need for assistance—based on their own inattentiveness to a general law—doomed the statute as an invalid special law.<sup>145</sup>

Consistent with his past position in special legislation cases, Justice Sullivan dissented, primarily on the rationale that the court's review usurped the legislative function.<sup>146</sup> Justice Sullivan limited his dissent to several points. First, he observed that, with the decision in *Alpha Psi*, the court had expanded the classifications subject to scrutiny beyond geographical classifications.<sup>147</sup> Second, he predicted that the court would face a challenge that a statute should be opened to entities outside the legislature's classification as opposed to being struck as constitutionally invalid.<sup>148</sup> Third, he criticized the court's search for inherent characteristics to justify a special law as contrary to the text of the constitutional test of situations "where a general law can be made applicable"<sup>149</sup> and as essentially legislative in nature.<sup>150</sup> Fourth, he observed that the legislation suffered constitutional defect only because of its reference to Indiana University and that requiring legislative findings to justify such a restriction trespasses too far into the separation of functions.<sup>151</sup>

The court's decision (and Justice Sullivan's dissent) seem generally consistent with the framework and rationale established several years ago in the earlier special legislation cases. It should be noted, however, that "curative" laws that address the problems of a single taxpayer, single property owner, or other individual or small group are not uncommon, and there is likely to be additional litigation in the future addressing such situations. Also, in moving beyond geographic classifications to include other types of laws as special, however, the court presents an interesting problem. Where does one draw the line at "the broader classification to which the particular group belongs"<sup>152</sup>—the baseline for determining whether a given law is special or general? In *Alpha Psi*, the court headed off this problem by looking toward the related law's broad identification of all property-owning fraternities and sororities as eligible for the exemption, but other "classes" may not prove as susceptible to easy definition.

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144. *Id.* at 1138-39.

145. *Id.* at 1139.

146. *Id.* (citing *City of South Bend v. Kimsey*, 781 N.E.2d 683, 697-700 (Ind. 2003) (Sullivan, J., dissenting); *State v. Hoovler*, 668 N.E.2d 1229, 1236 (Ind. 1996) (Sullivan, J., concurring in result)).

147. *Id.*

148. *Id.* at 1140.

149. IND. CONST. art. IV, § 23.

150. *Alpha Psi*, 849 N.E.2d at 1140.

151. *Id.* at 1140-41.

152. *Id.* at 1136.

## IV. SEARCH AND SEIZURE

Article I, section 11 of the Indiana Constitution governing the right to be free against unreasonable search and seizure employs the language of the Fourth Amendment, but the Indiana Supreme Court has clarified that the analysis proceeds in a somewhat different manner under the state constitution.<sup>153</sup> In March 2005, the supreme court described the analysis as a three-part balancing test in the trash search case of *Litchfield v. State*.<sup>154</sup> The past year brought several opportunities for the supreme court and the court of appeals to apply that analysis.

In *Trimble v. State*, the Indiana Supreme Court unanimously upheld the search and seizure without a warrant of an emaciated and injured dog pulled from an outside doghouse, which led to several animal cruelty convictions.<sup>155</sup> In *Trimble*, an officer, following up on a credible tip that the animal was injured and in need of care, drove to the back of the house where guests typically arrive and knocked on the door but received no answer.<sup>156</sup> The officer began to return to his car, but stopped first at the doghouse, which was along the path of the driveway.<sup>157</sup> After coaxing the dog out of the doghouse and finding it to be emaciated and injured, the officer called an animal control officer who then removed the dog.<sup>158</sup> On these facts, the court found no Fourth Amendment violation but also separately addressed the three factors set out in *Litchfield*: “(1) the degree of concern, suspicion, or knowledge that a violation has occurred, (2) the degree of intrusion the method of the search or seizure imposes on the citizen’s ordinary activities, and (3) the extent of law enforcement needs.”<sup>159</sup>

As to the first factor, the court noted that “[i]f a search is based on a concerned citizen’s report of an alleged crime, the degree of concern, suspicion, or knowledge that a violation has occurred is essentially the same as the reasonable suspicion required for an investigatory stop.”<sup>160</sup> That reasonable suspicion is itself adjudged on the totality of circumstances.<sup>161</sup> Here, the abused condition of the dog was reported based on a firsthand observation, the officer investigating was able to corroborate the details reported, the reporting citizens had identified themselves to police, and there was no indication that these

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153. *Trimble v. State*, 842 N.E.2d 798, 803 (Ind.), *adhered to on reh’g*, 848 N.E.2d 278 (Ind. 2006) (citing *Moran v. State*, 644 N.E.2d 536, 539 (Ind. 1994)).

154. 824 N.E.2d 356, 361 (Ind. 2005).

155. *Trimble*, 842 N.E.2d at 801, 803. Justice Rucker concurred in result only with respect to the section 11 analysis but without separate opinion. *Id.* at 804.

156. *Id.* at 801.

157. *Id.*

158. *Id.*

159. *Id.* at 803 (quoting *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005)).

160. *Id.*

161. *Id.* (citing *Kellems v. State*, 842 N.E.2d 352, 356 (Ind. 2006); *Pawloski v. State*, 380 N.E.2d 1230, 1232-33 (Ind. 1978)).

individuals lacked reliability.<sup>162</sup>

As to the second factor, the court found the degree of intrusion “minimal.”<sup>163</sup> Noting that the officer entered the property through generally accessible routes, the court found that the only item examined was the dog itself, which was within public view, although the dog happened to be inside of the doghouse at that particular moment.<sup>164</sup> The mere presence of police on the property “through normal means of approach to residences or other structures” was not unreasonable, contrary to the defendant’s argument.<sup>165</sup>

Regarding the third factor, “concern for the health and safety of others, including animals” enhanced the severity of the law enforcement need.<sup>166</sup> In conclusion, the court clarified that the information police had would not have justified entry into the home.<sup>167</sup> But approaching the house was reasonable, and “[o]nce in the yard, the object of his search—an ambulatory animal in open space—is fair game; particularly when there are immediate health concerns regarding the dog.”<sup>168</sup>

Similarly, in *Holder v. State*, the degree of concern that a violation of law had occurred and the need for law enforcement protection of the public weighed heavily in comparison to the nature and extent of an intrusion into the home of a defendant, justifying a warrantless search under section 11.<sup>169</sup> In *Holder*, police smelled a strong odor of ether in the neighborhood and ultimately detected the source of the ether as coming from inside the defendant’s home; they located the odor by sniffing a partially opened basement window at the defendant’s home.<sup>170</sup> After police knocked on a back door (following no answer from a knock at the front door), the defendant exited the home and conversed with the officers outside, but refused to consent to a search.<sup>171</sup> During his conversation with the officers, the defendant indicated that his three-year-old granddaughter as well as other individuals were inside the home.<sup>172</sup> The officers then entered the home without the warrant and discovered methamphetamine, precursors, and related paraphernalia.<sup>173</sup>

In a unanimous opinion by Justice Dickson, the court found that three factors—the release of additional ether fumes into the air when the defendant opened the door in response to the police officer’s knock; the defendant’s admission that methamphetamine charges were pending against him in another

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162. *Id.* at 804.

163. *Id.* at 803.

164. *Id.*

165. *Id.*

166. *Id.* at 804.

167. *Id.*

168. *Id.*

169. 847 N.E.2d 930, 940-41 (Ind. 2006).

170. *Id.* at 934.

171. *Id.*

172. *Id.*

173. *Id.* at 934-35.

county; and his acknowledgment that others, including a three-year-old child, were in the home—“together clearly demonstrate[d] two of the three *Litchfield* balancing factors—police concern that a violation of law has occurred, and the extent of law enforcement needs for protection of the public.”<sup>174</sup> These factors “strongly outweigh[ed]” the intrusion imposed on the defendant, including both the sniff at the window and the eventual warrantless entry of the home.<sup>175</sup> The court rejected the defendant’s argument that the knock at the back door was highly intrusive, noting that if the smell detected was natural gas, “it would clearly have been reasonable, proper, and expected for the officers to knock at the rear door of a home after the failure of their attempt to rouse occupants at the front door.”<sup>176</sup> Under *Holder*, it appears that the privacy interests of occupants of homes operating as ongoing methamphetamine laboratories will generally be outweighed by the exigency of the danger created by such laboratories when the probable cause is based on firsthand observation of current operation.<sup>177</sup>

In *Hardister v. State*, the supreme court unanimously approved another warrantless entry of a home, this time under even more unusual circumstances.<sup>178</sup> Officers received an anonymous tip that individuals with guns had drugs inside the residence.<sup>179</sup> When police knocked on the door and revealed their identity, individuals inside the home fled to the back of the residence.<sup>180</sup> The police followed around the house to the rear and while doing so, noticed through a window an individual disposing of white powder down a drain.<sup>181</sup> Following this observation, a general “melee” occurred with certain occupants retreating to the roof (where some were apprehended), bags with white powder being thrown on the ground from the roof, and officers ultimately entering the home through a second-story window.<sup>182</sup> Significantly, the court found that no “search” occurred when the officers (outside the house) followed the fleeing residents (in the house) around to the back door.<sup>183</sup> Rather, the police reasonably pursued fleeing suspects to a backyard area that was “at most a semi-private place.”<sup>184</sup> Once the police observed the disposal of white powder during this pursuit, exigent

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174. *Id.* at 941.

175. *Id.*

176. *Id.*

177. *See id.* at 939 (citing cases and noting under the Fourth Amendment analysis that “[s]everal courts have concluded that a belief that an occupied residence contains a methamphetamine laboratory, which belief is found on probable cause based largely on observation of odors emanating from the home, presents exigent circumstances permitting a warrantless search for the occupants’ safety,” and agreeing without qualification).

178. 849 N.E.2d 563, 573 (Ind. 2006).

179. *Id.* at 568.

180. *Id.*

181. *Id.*

182. *Id.* at 568-69.

183. *Id.* at 572.

184. *Id.* (“Law enforcement is not baseball and the residence of a fleeing suspect does not constitute a base that is a safe haven from being tagged out.”).

circumstances justified entry into the home.<sup>185</sup> The court approved the police action as reasonable under section 11 for the same reasons justifying that action under the Fourth Amendment.<sup>186</sup>

The high court also considered the reasonableness of searches in several traffic stop cases decided during the survey period. In *State v. Quirk*, in a unanimous opinion by Justice Rucker, the court rested its decision exclusively on a section 11 violation and did not address the Fourth Amendment claim in affirming the trial court's suppression of evidence from a canine search.<sup>187</sup> In *Quirk*, a truck driver was stopped due to a non-working headlight, answered a series of questions and consented to a search of the cargo area, but did not consent to a search of the truck's cabin area.<sup>188</sup> During this time, officers had determined that the driver had used aliases in the past and apparently had a criminal history involving narcotics trafficking decades before.<sup>189</sup> The officers released the driver, but when he pulled into a rest stop shortly thereafter, they radioed for a canine unit and detained the truck.<sup>190</sup> The canine search found cocaine.<sup>191</sup>

The court found the officer's detention and search of the truck at the rest stop unreasonable based on the totality of circumstances.<sup>192</sup> The court noted that "Section 11 permits an officer, during an investigatory stop, to detain a motorist briefly only as necessary to complete the officer's work related to the illegality for which the motorist was stopped," and that the traffic stop was unchallenged as an appropriate detention.<sup>193</sup> But the court concluded that the totality of information gained by the officers and the driver's conduct during the traffic stop did not justify the additional, separate detention and the canine search.<sup>194</sup>

The court of appeals also had the opportunity to address a number of section 11 challenges to searches during the survey period. Notably, the court of appeals decided *State v. Litchfield*<sup>195</sup> following remand. In *Litchfield*, officers had searched the trash of an address that had received three shipments from an

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185. *Id.* at 572-73 (citing *Brigham City v. Stuart*, 126 S. Ct. 1943, 1947 (2006); *Holder v. State*, 847 N.E.2d 930, 930 (Ind. 2006) and noting that *Holder* antedated *Brigham City* by four days).

186. *Id.*

187. 842 N.E.2d 334, 343 (Ind. 2006).

188. *Id.* at 338-39.

189. *Id.* at 338.

190. *Id.* at 339.

191. *Id.*

192. *Id.* at 343.

193. *Id.* at 340.

194. *Id.* at 341-43; *see also* *Taylor v. State*, 842 N.E.2d 327, 333-34 (Ind. 2006) (invalidating an impoundment and inventory search of a car on Fourth Amendment and section 11 grounds because the police had not shown a need to impound the car following a traffic stop in which the driver was cited for driving while suspended and was thus forbidden from further driving the vehicle; although illegally parked, the car was not shown to be creating a safety hazard).

195. 849 N.E.2d 170 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 589 (Ind. 2006).

organic garden supply store that the Drug Enforcement Agency (DEA) had identified on a target list as a garden supply store that marijuana cultivators used.<sup>196</sup> After finding evidence of marijuana refuse in the trash, police obtained a warrant, and, upon searching the home, discovered fifty-one marijuana plants on the back deck.<sup>197</sup> Following remand by the supreme court to determine whether the police had articulable individualized suspicion when the officers searched the Litchfields' trash, the trial court concluded that the police did not have the requisite level of suspicion and suppressed the evidence discovered.<sup>198</sup> The court of appeals affirmed.<sup>199</sup> Likening the DEA's list of target garden supply stores to an anonymous tip, the court found no corroboration to justify the trash search.<sup>200</sup> The Litchfields' receipt of shipments from a general garden supply company did not alone create articulable individualized suspicion.<sup>201</sup>

The court of appeals addressed several other trash search cases in addition to *Litchfield* that raised some conflict among and between the panels. In *Turner v. State*,<sup>202</sup> two members of the panel, Judges Najam and Bailey, required withdrawal of a plea agreement so that a hearing might be held on a motion to suppress evidence arising from a trash search.<sup>203</sup> The majority noted that, on the record before the court, hearsay reports of drug-dealing activity would not provide the requisite reasonable, articulable suspicion necessary to justify the trash search that had provided evidence for a probable cause affidavit for a warrant to search the home.<sup>204</sup> Judge Baker dissented on the ground that it was not necessary to allow withdrawal of the plea to prevent manifest injustice.<sup>205</sup> Rather, the police acted in accord with pre-*Litchfield* law, and the defendant's decision to plead guilty was based in part on that assumption.<sup>206</sup> Judge Baker opined that the supreme court's ruling in *Litchfield* should not apply retroactively to *Turner*'s circumstances.<sup>207</sup>

The tables turned in *Richardson v. State*,<sup>208</sup> heard by the same panel that decided *Turner*. In *Richardson*, an anonymous tip that the residents were involved with the manufacture of methamphetamine lacked indicia of intimate familiarity necessary to justify the trash search (which later yielded evidence that supported a warrant for search of the residence).<sup>209</sup> Nonetheless, Judge Bailey

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196. *Id.* at 172.

197. *Id.*

198. *Id.* at 172-73.

199. *Id.* at 175.

200. *Id.* at 174-75.

201. *Id.* at 174.

202. 843 N.E.2d 937, 945 (Ind. Ct. App. 2006).

203. *Id.* at 939, 944-45.

204. *Id.* at 943-44.

205. *Id.* at 946.

206. *Id.*

207. *Id.*

208. 848 N.E.2d 1097 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 590 (Ind. 2006).

209. *Id.* at 1103.

joined Judge Baker's decision to decline to apply the exclusionary rule to the evidence discovered in the trash search because the officers acted in good faith following then-controlling precedent in conducting the trash search.<sup>210</sup> Accordingly, the good faith exception applied, and exclusion was not required.<sup>211</sup> Judge Najam dissented on the ground that the statutory good faith exception could not defeat the retroactive constitutional rule announced by the supreme court in *Litchfield*.<sup>212</sup>

However, in *Membres v. State*,<sup>213</sup> the majority, consisting of then Chief Judge Kirsch and Judge Crone, declined to apply the good faith exception to save a trash search not based on reasonable, articulable suspicion when an informant's information about a drug deal was not supported by specific indicia of reliability.<sup>214</sup> In this case, Judge Bailey dissented consistent with the majority opinion in *Richardson*—on grounds that the statutory good faith exception applied because the search was reasonable under prevailing law at the time.<sup>215</sup> The supreme court has granted transfer in *Membres*.<sup>216</sup> As of the time of publication, the court has not rendered its decision.

In *Richardson*, *Turner*, and *Membres*, the split among the panels concerned the remedy required, not the application of the *Litchfield* analysis to the searches at issue, as to which the judges appeared to be in general agreement. Significant to the *Richardson*, *Turner*, and *Membres* cases is the matter of timing—all concern searches that occurred before the supreme court decided *Litchfield*. Thus, the remedial questions which split the panel in these cases are limited in application to a finite number of cases.<sup>217</sup> The supreme court's upcoming decision in *Membres* may resolve the conflict.

The court of appeals also had occasion to apply the *Litchfield* analysis in cases outside the trash search context. In *State v. Lefevers*,<sup>218</sup> the court reversed a trial court's suppression of evidence because the officer's investigation and ultimate seizure of an individual arrested for driving while intoxicated met Fourth Amendment and section 11 standards.<sup>219</sup> In *Lefevers*, an officer received an anonymous tip of a potentially intoxicated driver.<sup>220</sup> When a car matching the

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210. *Id.* at 1103-05; *see also* *State v. Harmon*, 846 N.E.2d 1056, 1059-60 (Ind. Ct. App. 2006) (applying good faith exceptions to validate trash pull search notwithstanding a lack of reasonable, articulable suspicion for the search as required by *Litchfield*); *Edwards v. State*, 832 N.E.2d 1072, 1073, 1076 (Ind. Ct. App. 2005) (same).

211. *Richardson*, 848 N.E.2d at 1105.

212. *Id.* at 1105-07.

213. 851 N.E.2d 990 (Ind. Ct. App. 2006), *trans. granted*, 2007 Ind. LEXIS 55 (Ind. Jan. 18, 2007).

214. *Id.* at 991, 993-94.

215. *Id.* at 994-95.

216. 2007 Ind. LEXIS 55 (Ind. Jan. 18, 2007).

217. *See Membres*, 851 N.E.2d at 1107 n.18.

218. 844 N.E.2d 508 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1008 (Ind. 2006).

219. *Id.* at 516.

220. *Id.* at 511.

description of the vehicle reported pulled into a convenience store, the officer pulled into a nearby parking spot and began speaking with the driver.<sup>221</sup> Noticing signs of intoxication, the officer then requested that the driver submit to a breath test, and she agreed, ultimately testing over the legal limit.<sup>222</sup> Under the *Litchfield* analysis, the court found that the officer's initial conversation with Lefevers was a reasonably limited intrusion given that she had, of her own accord, parked in a public place.<sup>223</sup> The officer's later observation of signs of intoxication, along with the anonymous tip, permitted further investigation, including his request that she submit to a breath test.<sup>224</sup> The court reached a similar result in *Cannon v. State*,<sup>225</sup> finding that an officer's approach and investigation of an erratic driver who had been directed to stop during that officer's direction of traffic was a reasonable intrusion.<sup>226</sup> In *Frensemeier v. State*,<sup>227</sup> an officer's reasonable suspicion that a driver was intoxicated based on personal observations and the fact that the driver had been involved in an accident justified a blood draw based on law enforcement's need to keep intoxicated drivers off the road and the criminal and civil issues raised by the traffic accident.<sup>228</sup>

In *Masterson v. State*, the court affirmed the trial court's denial of suppression of evidence obtained from a warrantless search of a vehicle.<sup>229</sup> Officers in hot pursuit of an armed robbery suspect identified the car used in the alleged robbery.<sup>230</sup> After discovering that the vehicle was registered to an older, handicapped man rather than the suspect, police conducted an inventory search.<sup>231</sup> That search led them to the apartment of the suspect, where the suspect and evidence of the crime were discovered.<sup>232</sup> Notwithstanding precedent holding a similar search unreasonable,<sup>233</sup> the court found this search reasonable under the *Litchfield* analysis: the significant degree of concern that a serious crime had occurred and the need of law enforcement to pursue the armed and dangerous suspect outweighed the intrusiveness of the warrantless search, which itself was minimized by the nighttime nature of the search and the lack of

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221. *Id.*

222. *Id.*

223. *Id.* at 515-16.

224. *Id.*

225. 839 N.E.2d 185, 188 (Ind. Ct. App. 2005).

226. *Id.* at 192.

227. 849 N.E.2d 157 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 598 (Ind. 2006).

228. *Id.* at 164. Judge Sullivan dissented on the ground that the totality of circumstances would not lead a reasonable person to believe that a crime had been committed and thus would have suppressed the toxicology evidence of the blood draw. *Id.* at 164-65.

229. 843 N.E.2d 1001, 1002 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1007 (Ind. 2006).

230. *Id.* at 1003.

231. *Id.*

232. *Id.* at 1003-04.

233. *Id.* at 1006-07 (citing *Brown v. State*, 653 N.E.2d 77, 82 (Ind. 1995)).

certainty as to the suspect's rightful possession of the car.<sup>234</sup>

Consistent with the supreme court's approach in *Trimble* and *Holder*, the court of appeals found no section 11 violation in *Baird v. State*, concerning officers' visits to private property following a report of an explosion on the property.<sup>235</sup> In *Baird*, a neighbor called police to report an explosion in a rural area.<sup>236</sup> When officers arrived at the scene, they found the driveway gated but climbed a hill on the property after observing signs of fire.<sup>237</sup> Upon climbing the hill, officers viewed a building with the glow of fire behind it, and upon further investigation, discovered an active methamphetamine lab and two individuals at work.<sup>238</sup> Consents to searches executed by two individuals revealed further evidence of crimes.<sup>239</sup> The trial court denied the defendant's motion to suppress and later admitted evidence recovered in the searches at trial.<sup>240</sup> The court of appeals affirmed.<sup>241</sup> Noting that the report was not of suspicious activity *per se*, but rather of an explosion, the court ruled that the privacy interest in the yard and hillside was minimal and the need of law enforcement to investigate the circumstances of the fire outweighed it.<sup>242</sup>

The circumstances of *State v. Atkins*,<sup>243</sup> also involving a search on private property, contrast those in *Baird*. In *Atkins*, police received a domestic disturbance call, and an officer was dispatched to the residence.<sup>244</sup> Upon encountering the defendant, who was walking on his own property but carrying a jacket that obstructed the officer's view of his hands, the officer performed a patdown search.<sup>245</sup> The defendant informed the officer that he had a gun, which the officer then recovered, and the defendant was charged with unlawful possession of a firearm by a felon.<sup>246</sup> The court invalidated the search based upon the Fourth Amendment of the United States Constitution and section 11 of the Indiana Constitution grounds.<sup>247</sup> Under section 11, the officer had no

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234. *Id.* at 1007-08.

235. 854 N.E.2d 398, 401, 405 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 597 (Ind. 2006).

236. *Id.* at 401.

237. *Id.*

238. *Id.* at 402.

239. *Id.*

240. *Id.* at 402-03.

241. *Id.* at 400.

242. *Id.* at 404-05. Similarly, the court of appeals approved the selection of a particular motel room for investigation in *Tate v. State*, 835 N.E.2d 499, 507-08 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 192 (Ind. 2005), under the *Litchfield* analysis because the police acted reasonably in conducting walk-throughs of the motel due to its propensity for crime, and police had identified the room in question based on the scent of marijuana emitting from the room's air conditioning unit. *Id.* at 507-08.

243. 834 N.E.2d 1028 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 192 (Ind. 2005).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1032-35; *see* U.S. CONST. amend. IV; IND. CONST. art. I, § 11.

reasonable grounds to suspect the plaintiff of criminal activity and no basis to initiate an investigatory stop when the defendant merely walked toward the officer on his own property and complied with his directions.<sup>248</sup>

The court also considered several search cases relating to the necessity of the *Pirtle* advisement that an individual in custody is entitled to consult with counsel before consenting to a general search.<sup>249</sup> In *Miller v. State*,<sup>250</sup> a driver and his passenger appeared to lunge forward “as if they were stuffing something under the seat” when detained in a traffic stop.<sup>251</sup> Upon approaching the car, the officer detected the smell of marijuana and asked the driver to step out of the vehicle.<sup>252</sup> When both the driver and the passenger exited the vehicle, the officer handcuffed them.<sup>253</sup> After the officer observed what appeared to be pills in the ashtray, he requested consent to search the car and found marijuana.<sup>254</sup> The trial court admitted the recovered evidence at trial, and the court of appeals affirmed that ruling.<sup>255</sup> Miller challenged the search as invalid because no *Pirtle* advisement was given prior to requesting consent to search the vehicle.<sup>256</sup> The court agreed that Miller’s consent was invalid because he was in custody (after being handcuffed), but found that probable cause based on the marijuana odor justified the warrantless search.<sup>257</sup>

Similarly, in *Datzek v. State*,<sup>258</sup> the court held that a *Pirtle* advisement was unnecessary before administering a chemical blood test because, pursuant to Indiana Implied Consent Statute,<sup>259</sup> “an officer cannot offer a chemical blood test to a suspect, and the suspect cannot consent to or refuse the test, until after the officer has probable cause to believe” that a crime has occurred.<sup>260</sup> Additionally, the chemical blood test was not a general search but was limited to the search for alcohol or other drugs in the body.<sup>261</sup> Accordingly, the court held that “the purpose of the *Pirtle* doctrine would not be served by extending that doctrine to

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248. *Atkins*, 834 N.E.2d at 1034-35.

249. *See Pirtle v. State*, 323 N.E.2d 634, 640 (Ind. 1975).

250. 846 N.E.2d 1077 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 584 (Ind. 2006).

251. *Id.* at 1079 (quoting Transcript of Record at 24, *Miller v. State*, 846 N.E.2d 1077 (Ind. Ct. App. 2006) (No. 18A02-0506-CR-501)).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 1079-80.

256. *Id.* at 1080.

257. *Id.* at 1081; *see also* *Marcum v. State*, 843 N.E.2d 546, 548 (Ind. Ct. App. 2006) (citing *State v. Hawkins*, 766 N.E.2d 749, 752 (Ind. Ct. App.), *trans. denied*, 783 N.E.2d 690 (Ind. 2002) and holding that officer’s smell of burnt marijuana provided probable cause and justified warrantless search and confirmation by a drug-sniffing canine was not required to verify the officer’s suspicion).

258. 838 N.E.2d 1149 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1006 (Ind. 2006).

259. IND. CODE § 9-30-6-2(a) (2004).

260. *Datzek*, 838 N.E.2d at 1160.

261. *Id.*

apply to chemical blood testing.”<sup>262</sup>

## V. RIGHT TO PRESENT A DEFENSE

*Washington v. State* addressed a criminal defendant’s right under article I, section 13 of the Indiana Constitution to present a defense and found that a defendant could sometimes introduce third-party alibi evidence even if the defendant had failed to comply with statutory alibi notice requirements.<sup>263</sup> The defendant was convicted of conspiracy, burglary, kidnapping, and auto theft.<sup>264</sup> During trial, he filed a late notice of alibi defense, but the trial court disallowed third-party alibi testimony because he failed to show good cause for his late notice (he testified to his alibi).<sup>265</sup>

The Indiana Court of Appeals ruled that exclusion of two alibi witnesses, despite the late notice, violated the defendant’s right to present a defense under article I, section 13,<sup>266</sup> as well as his Sixth Amendment right to compulsory process.<sup>267</sup> The Indiana Supreme Court already had ruled that, in most circumstances, section 13 gives a defendant the right to testify about his own alibi even if he gave late notice.<sup>268</sup> The court ruled that the defendant’s failure to give timely alibi notice was “at most, negligence and not done willfully or in bad faith” and that any prejudice to the State was not severe.<sup>269</sup> The court said that belatedly disclosed alibi testimony should be allowed when there is no evidence of bad faith or substantial prejudice to the State.<sup>270</sup> In this case, however, the court of appeals affirmed the conviction because exclusion of the alibi testimony was deemed to be harmless error.<sup>271</sup>

## VI. TAXATION AND FINANCE

In *Bonney v. Indiana Finance Authority*, addressing a challenge to the proposed lease of the Indiana Toll road, the Indiana Supreme Court discussed two issues relating to the taxation and finance provisions of article X of the

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262. *Id.*; see also *Schmidt v. State*, 816 N.E.2d 925, 944 (Ind. Ct. App. 2004) (finding that no *Pirtle* advisement is required for chemical breath tests); *Ackerman v. State*, 774 N.E.2d 970, 982 (Ind. Ct. App. 2002) (finding that no *Pirtle* advisement is required for field sobriety tests).

263. 840 N.E.2d 873 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1006 (Ind. 2006).

264. *Id.* at 877-79.

265. *Id.* at 878.

266. *Id.* at 883-84.

267. *Id.* at 884-86.

268. *Campbell v. State*, 622 N.E.2d 495, 499 (Ind. 1993), *abrogated in part by Richardson v. State*, 717 N.E.2d 32 (Ind. 1998). A defendant waives his right to present this evidence, however, if the trial court finds that the defendant delayed his notice of alibi to prejudice the prosecution. *Washington*, 840 N.E.2d at 885.

269. *Washington*, 840 N.E.2d at 885.

270. *Id.*

271. *Id.*

Indiana Constitution.<sup>272</sup> The factual and procedural background of *Bonney* is discussed in Part III of this Article.<sup>273</sup> The *Bonney* plaintiffs claimed that the statute authorizing the lease violated article X, section 2, relating to payment of “Public Debt” by not requiring proceeds from the lease to be applied to certain existing obligations.<sup>274</sup> They also argued that the property tax exemption conveyed to the lessor violated article X, section 1, which limits the exemptions the legislation may provide.<sup>275</sup>

The plaintiffs’ challenge to the planned disposition of the lease implicated article X, section 2, which provides that “revenues derived from the sale of any of the public works belonging to the State, and from the net annual income thereof, . . . shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the Public Debt.”<sup>276</sup> Plaintiffs argued that certain existing governmental obligations constituted “Public Debt” within the meaning of this provision and that House Enrolled Act 1008 (“HEA 1008”)<sup>277</sup> violated this section by not requiring the lease proceeds to be applied to these debts.<sup>278</sup>

The court approached the argument from both historical and structural perspectives. Noting the setting of the 1850 Constitutional Convention amidst the “fallout of the financial collapse” of major public works financed with state-issued debt,<sup>279</sup> the court also considered article X, section 5, which provides that “[n]o law shall authorize any debt to be contracted, on behalf of the State.”<sup>280</sup> The court found two facts significant in interpreting the breadth of “Public Debt” in section 2.<sup>281</sup> First, only the State was prohibited from issuing new debt by virtue of section 5.<sup>282</sup> Second, during the Debates of the Constitutional Convention of 1850, the terms “public debt” and “state debt” were used interchangeably.<sup>283</sup>

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272. 849 N.E.2d 473, 484-88 (Ind. 2006); IND. CONST. art. I, § 2, 5.

273. See *supra* notes 96-124 and accompanying text.

274. *Bonney*, 849 N.E.2d at 476.

275. *Id.*

276. IND. CONST. art. X, § 2.

277. H.E.A. 1008, 114th Gen. Assem., 2nd Reg. Sess. (Ind. 2006).

278. *Bonney*, 849 N.E.2d at 484.

279. Under the Mammoth Internal Improvements Act of 1836, the Indiana Board of Internal Improvements was authorized to borrow up to \$10 million for the construction of canals, roads, and railroads. See An Act to Provide for a General System of Internal Improvements, Indiana Laws, Chapter II, Indiana General Assembly, 20th session, p. 5. By 1841, the State had incurred nearly \$13 million of debt and ultimately defaulted. John Joseph Wallis, *Constitutions, Corporations and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST., 211, 217 (2005).

280. *Bonney*, 849 N.E.2d at 484 (disregarding irrelevant exceptions in article X, section 5, such as repelling invasion).

281. *Id.* at 484-85.

282. *Id.* at 484.

283. *Id.* at 485.

The defendants argued that the Public Debt referred to in section 2 was retired in 1915, and no new debt had been incurred by virtue of the prohibition in section 5,<sup>284</sup> and accordingly, no Public Debt existed that required retirement per section 2.<sup>285</sup> The court agreed with the defendants,<sup>286</sup> but it went further to clarify that because the obligations the plaintiffs identified were obligations of local government units and debts of independent authorities and were not proscribed by section 5, it followed that those debts were not affected by the section 2 requirement.<sup>287</sup> The court found particularly significant the fact that those entities could reissue debt, and so any requirement to retire debt would be without practical effect.<sup>288</sup> In sum, the court's reading of article X, section 2 as applying only to state debt retired in 1915 relieves that constitutional provision of any modern consequence unless additional State debt is issued for the exceptional reasons specified in article X, section 5.

The plaintiffs' other constitutional challenge addressed whether the General Assembly had authority to exempt the Indiana Toll Road from property tax once the Toll Road was leased to a private entity.<sup>289</sup> HEA 1008 provided such an exemption.<sup>290</sup> Article X, section 1 permits the General Assembly to "exempt from property taxation any property in any of the following classes: (1) Property being used for municipal, educational, literary, scientific, religious or charitable purposes . . . ."<sup>291</sup> The plaintiffs argued that upon the lease of the Toll Road to a private party, the validity of a "municipal purpose" exemption ceased to exist.<sup>292</sup> The plaintiffs argued that prior cases upholding the constitutionality of such a tax exemption relied on the public ownership of the property.<sup>293</sup>

The court "agree[d] that public ownership is ordinarily sufficient for exemption,"<sup>294</sup> but the court did "not agree that it is necessary."<sup>295</sup> Municipal "use" of the property triggers the constitutional exemption, and, under the lease agreement, the Toll Road continues to exist as a public road.<sup>296</sup> The court

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284. *Id.* at 484.

285. *Id.*

286. *Id.*

287. *Id.* at 485-86 (citing cases creating independent authorities—called body corporate and politic—allowed to issue debt, including *Steup v. Ind. Hous. Fin. Auth.*, 402 N.E.2d 1215 (1980)).

288. *Id.* at 486 ("Lawyers and investment bankers would profit from such a rule, but it is hard to see who else would."). The court also noted the perverse incentives that might result if state proceeds were required to be applied to municipal debt under the plaintiffs' reading of section 2. *Id.* at 485.

289. *Id.*

290. *Id.* at 487 (citing HEA 1008, § 39, 114th Gen. Assem., 2nd Reg. Sess. (Ind. 2006), *codified at* IND. CODE § 8-15.5-7-1 (2004)).

291. IND. CONST. art. X, § 1.

292. *Bonney*, 849 N.E.2d at 487.

293. *Id.*

294. *Id.* at 488.

295. *Id.*

296. *Id.*

concluded by noting that, as a practical matter, requiring taxes in these circumstances would “lower the rent the lessee would be willing to pay, or to subject the State to local property taxes.”<sup>297</sup> Neither result would further the purpose of increasing public revenue.<sup>298</sup> However, the court did not rest its analysis on this rationale, stating that the issue raised by defendants of whether the Constitution contemplates exemption when the property is publicly owned need not be decided because the “use” of the Toll Road remained municipal.<sup>299</sup> Finding no constitutional infirmity in the law, the court affirmed the trial court’s decision setting a \$1.9 billion bond to avoid the lawsuit’s dismissal.<sup>300</sup>

The Indiana Tax Court also analyzed constitutional provisions governing property tax exemptions in *College Corner, L.P. v. Department of Local Government Finance*.<sup>301</sup> The case presented the question whether a for-profit real estate developer could obtain a tax exemption for certain property under the charitable purposes statutory exemption,<sup>302</sup> which codifies the provision of article X, section 1 and “provides that ‘[a]ll or part of a building is exempt from property taxation, and used [] for educational, literary, scientific, religious, or charitable purposes.’”<sup>303</sup> The developer was working to revitalize a particular Indianapolis neighborhood and claimed the exemption only for the period during which the properties were being rehabilitated (they were later sold at market prices).<sup>304</sup>

The court explained that the charitable exemption is aimed at activities that relieve human want and inure to the benefit of the general public.<sup>305</sup> The developer claimed that by rebuilding the neighborhood’s infrastructure, its work preserved historic character, prevented community deterioration, reduced abandoned housing and crime, and thereby relieved a burden that would have fallen on government.<sup>306</sup> The court admitted that the developer was not providing “relief of human want in the sense that it is helping the less fortunate,” but “it is clear that [the developer] provides a general benefit to the community that is charitable in nature.”<sup>307</sup> As the court stated, “when a private organization takes on a task that would otherwise fall to the government, this provides a benefit to the community as a whole because it allows the government to direct its funds and attention to other community needs.”<sup>308</sup> The court therefore found that the

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297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 470, 488.

301. 840 N.E.2d 905 (Ind. Tax Ct. 2006).

302. IND. CODE § 6-1.1-10-16(a) (2006).

303. *College Corner, L.P.*, 840 N.E.2d at 908 (citing IND. CODE § 6-1.1-10-16(a) (2006)) (alteration in original).

304. *Id.* at 907.

305. *Id.* at 908.

306. *Id.* at 909.

307. *Id.*

308. *Id.* at 910.

developer met the criteria for charitable exemption despite its for-profit nature.<sup>309</sup>

## VII. EQUAL PRIVILEGES AND DUE COURSE OF LAW

The Indiana Supreme Court clarified recent developments involving the interaction of medical malpractice law with the due course of law clause<sup>310</sup> and equal privileges and immunities clause (article I, section 23) in *Booth v. Wiley*.<sup>311</sup> In earlier cases, the court had determined that it was sometimes unconstitutional, under sections 12 and 23, to apply the medical malpractice statute of limitations to bar a claim when certain facts were present.<sup>312</sup> As the court stated,

the two-year occurrence-based statute of limitations may not constitutionally be applied to preclude the filing of a claim before a plaintiff either knows of the malpractice and resulting injury or discovers facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury.<sup>313</sup>

The Indiana Supreme Court appeared to use *Booth*, a 3-2 decision, to clarify more precisely the rules that apply to determine whether it is constitutional to apply the strict two-year, occurrence-based statute of limitations to medical malpractice claims. The court set for the following procedures required by the medical malpractice statute of limitations:

Initially, a court must determine the date the alleged malpractice occurred and determine the discovery date—the date when the claimant discovered the alleged malpractice and resulting injury, or possessed enough information that would have led a reasonably diligent person to make such discovery. If the discovery date is more than two years beyond the date the malpractice occurred, the claimant has two years after discovery within which to initiate a malpractice action. But if the discovery date is within two years following the occurrence of the alleged malpractice, the statutory limitation period applies and the action must be initiated before the period expires, unless it is not reasonably possible for the claimant to present the claim in the time remaining after discovery and before the end of the statutory period. In such cases where discovery occurs before the statutory deadline but there is insufficient time to file, we have not previously addressed how much time should be permitted. But because *Boggs* permits such an action to be commenced after the statutory two-year occurrence-based period when timely filing is not reasonably possible, we hold that such

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309. *Id.* at 910-11.

310. IND. CONST. art. I, § 12.

311. 839 N.E.2d 1168 (Ind. 2005).

312. See *Halbe v. Weinberg*, 717 N.E.2d 876 (Ind. 1999); *Harris v. Raymond*, 715 N.E.2d 388 (Ind. 1999); *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999); *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999).

313. *Booth*, 839 N.E.2d at 1171.

claimants must thereafter initiate their actions within a reasonable time.<sup>314</sup>

In *Booth*, the plaintiff had pre-existing eye problems for which he sought treatment.<sup>315</sup> The defendant performed surgery after which the plaintiff's eye problems worsened.<sup>316</sup> But (taking the facts most favorable to the plaintiff on summary judgment) subsequent physicians treating his complications never indicated during the two-year limitations period that the surgery might have caused the deterioration.<sup>317</sup> Only after the expiration of the two-year period did a subsequent treating physician tell the plaintiff that the surgery might have caused the problem, and the plaintiff sued within a few months of learning that information.<sup>318</sup>

The court majority concluded that, given the allegations, there was at least a genuine issue as to whether the plaintiff acted promptly in filing his claim.<sup>319</sup> Because he may have discovered the facts necessary to learn of the alleged malpractice after the two-year limitations period had expired, the court permitted the suit to go forward.<sup>320</sup> However, the majority explicitly stated that "we are not holding that an expert's advice is always required to put a patient on notice that problems may be due to malpractice. In fact, in most cases, such advice is not required."<sup>321</sup> The majority also noted that the statute of limitations could be presented again as a defense at trial.<sup>322</sup>

Chief Justice Shepard and Justice Sullivan each dissented and concluded that the plaintiff should have known from his deteriorating eyesight after surgery that malpractice might have occurred, triggering his responsibility to investigate.<sup>323</sup> Chief Justice Shepard also stated that the majority's opinion "puts us on the path that the statute of limitation cannot run unless a medical expert informs the patient that the 'pain or debilitating symptoms,' . . . are the product of negligence by a particular actor."<sup>324</sup>

In another case involving the Equal Privileges and Immunities Clause during the survey period, *Ellenwine v. Fairley*, the Indiana Supreme Court vacated a court of appeals decision that had found a constitutional flaw in a statute of limitations.<sup>325</sup> When the plaintiffs' child was born with brain damage, the plaintiffs did not file a malpractice lawsuit at that time because the statute

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314. *Id.* at 1173.

315. *Id.*

316. *Id.*

317. *Id.* at 1173-74.

318. *Id.* at 1173.

319. *Id.* at 1175-76.

320. *Id.* at 1176.

321. *Id.*

322. *Id.* at 1177.

323. *Id.* at 1177-78 (Shepard, C.J., dissenting); *id.* at 1178-79 (Sullivan, J., dissenting).

324. *Id.* at 1178 (Shepard, C.J., dissenting) (quoting *id.* at 1172, 1175).

325. *Ellenwine v. Fairley*, 846 N.E.2d 657 (Ind. 2006) (vacating 818 N.E.2d 961 (Ind. Ct. App. 2004)).

permitted filing up until the child's eight birthday if the child remained alive.<sup>326</sup> Ultimately, the child died at age two after the two-year occurrence based medical malpractice statute of limitations had expired.<sup>327</sup> The plaintiffs filed their claim two years after the death of their child but four years before what would have been their son's eighth birthday.<sup>328</sup>

The Indiana Supreme Court rejected the court of appeals' constitutional analysis in favor of an interpretation using the Indiana Survival Statute.<sup>329</sup> In an unanimous opinion by Justice Sullivan, the court concluded that the Survival Statute extinguished the medical malpractice claim at the time of the child's death.<sup>330</sup> But the court concluded that the parents could maintain an action under the Child Wrongful Death Act<sup>331</sup> and that claim was timely because it was filed within two years of the child's death.<sup>332</sup>

The Indiana Supreme Court also overruled a court of appeals decision invalidating a statute on equal privileges grounds in *Ledbetter v. Hunter*, another case about the medical malpractice statute.<sup>333</sup> The supreme court previously had found that the medical malpractice statute satisfied constitutional requirements,<sup>334</sup> but it did so before promulgating the standard now used to evaluate equal privileges claims.<sup>335</sup> The court of appeals applied the current equal privileges test to conclude that the special statute of limitations for minors' medical malpractice claims was unconstitutional.<sup>336</sup>

Applying the current test, the Indiana Supreme Court first concluded that the legislature could have found inherent differences between medical malpractice claims by minors and other tort claims by minors.<sup>337</sup> The legislature could have concluded, the court determined, that a shorter medical malpractice statute of limitations claims could increase the availability of health care by decreasing malpractice costs.<sup>338</sup> The court of appeals rejected this rationale based on discovery responses in the litigation, which purported to show that the different statute of limitations for minors' medical malpractice claims had an insignificant

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326. *Id.* at 660; IND. CODE § 34-18-7-1(b) (2004).

327. *Ellenwine*, 846 N.E.2d at 659.

328. *Id.* at 660.

329. *Id.* at 661-63 (citing IND. CODE §§ 34-9-3-1 to -5 (2004)).

330. *Id.* at 661.

331. *Id.* at 665-67 (citing IND. CODE § 34-23-1-1 (2004)).

332. *Id.* at 666.

333. *Ledbetter v. Hunter*, 842 N.E.2d 810 (Ind. 2006) (vacating 810 N.E.2d 1095 (Ind. Ct. App. 2004)).

334. *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980).

335. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

336. *Ledbetter v. Hunter*, 810 N.E.2d 1095 (Ind. Ct. App. 2004). Under Indiana Code section 34-18-7-1, a medical malpractice claim on behalf of a minor is two years or until age eight if the child is under age six when injured. In contrast, the general statute of limitations for injury to a child is two years after the child achieves majority. IND. CODE § 34-11-6-1 (2004).

337. *Ledbetter v. Hunter*, 842 N.E.2d 810, 814 (Ind. 2006).

338. *Id.*

effect on health care costs.<sup>339</sup> The Indiana Supreme Court rejected the notion that the defendants had to provide factual proof that the legislative rationale was valid—“[d]emonstrating a lack of substantial evidence supporting a legislative rationale does not affirmatively establish that the rationale is unreasonable.”<sup>340</sup> The evidence might persuade the legislature to rethink its determination, but it does not permit the courts to overturn the legislative judgment.<sup>341</sup> The court therefore determined that the statute did not violate the Equal Privileges and Immunities Clause of the Indiana Constitution.<sup>342</sup>

In *Scottish Rite of Indianapolis Foundation, Inc. v. Adams*,<sup>343</sup> the Indiana Court of Appeals rejected an equal privileges challenge to provisions of the statutes governing partition of real estate.<sup>344</sup> The challenged statutes permit owners with fee interests to petition for partition, but do not permit owners of interests less than fee to do so.<sup>345</sup> Adams contended that this classification violated article I, section 23, but the Indiana Court of Appeals disagreed. The court found it was “reasonable to treat life tenants differently from fee simple owners based on inherent characteristics that distinguish them.”<sup>346</sup> The court ruled that if a life tenant could force partition, the life tenant would be able to convey an interest greater than the life tenant’s own interest.<sup>347</sup> A fee owner’s interest in property is sufficiently greater to permit different treatment under the partition laws.<sup>348</sup>

In *Horseman v. Keller*, an election recount case, the unsuccessful candidate raised an equal privileges challenge to the statute providing different treatment for ballots cast in person at the polls as compared to absentee ballots.<sup>349</sup> The recount commission had not counted two absentee votes because the ballots were not initialed by two members of the election board, as the statute required.<sup>350</sup> It appeared that the failure to apply initials to the ballot resulted from mere clerical error.<sup>351</sup> The trial court invalidated the statute requiring the two-member initialing because it treated absentee ballots differently than ballots cast in person.<sup>352</sup>

The supreme court found that the different treatment of two classes of ballots

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339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 815.

343. 834 N.E.2d 1024 (Ind. Ct. App. 2005).

344. *Id.* at 1027 (challenging IND. CODE §§ 32-17-4-1 and 32-17-4-23 (2004)).

345. *Id.* at 1026.

346. *Id.* at 1027.

347. *Id.*

348. *Id.*

349. *Horseman v. Keller*, 841 N.E.2d 164 (Ind. 2006) (addressing IND. CODE 3-12-1-13 (2005)).

350. *Id.* at 166-67.

351. *Id.* at 167.

352. *Id.*

was justified.<sup>353</sup> The court first found inherent differences between absentee voters and those who vote in person on election day.<sup>354</sup> “The fact that absentee ballots reach the hands of election officials outside of the confines of the Election Day polling place necessitate statutory procedures for receiving, verifying, storing, transporting, and counting these ballots.”<sup>355</sup> The court then found that the different statutory treatment of absentee ballots reasonably related to the differences between absentee and in-person ballots.<sup>356</sup> The court found it permissible to disqualify absentee ballots for clerical errors while allowing in-person ballots to be counted even when they contained clerical errors because “Election Day polling sites operate as closed environments” while absentee balloting takes place over a long period in many locations and absentee ballots are received in a variety of ways.<sup>357</sup> It is therefore permissible under article I, section 23 of the Indiana Constitution for more stringent counting rules to apply to absentee ballots.<sup>358</sup>

### VIII. DOUBLE JEOPARDY

Indiana’s appellate courts continued to apply Indiana’s separate test for multiple-punishments double jeopardy during the survey period. This test goes beyond the federal *Blockburger* multiple-punishments test, which focuses only on whether each offense of which an individual is convicted has at least one element that no other offense has.<sup>359</sup> The Indiana test, derived from *Richardson v. State*,<sup>360</sup> also looks at whether at least one unique fact proves each offense of which the individual is convicted.<sup>361</sup> The courts also applied statutory and common law principles “often described as double jeopardy, but not governed by the constitutional test.”<sup>362</sup> It is not always easy to differentiate the situations in which the courts are applying constitutional principles from those where other principles govern.

In *Grinstead v. State*,<sup>363</sup> the Indiana Supreme Court applied double jeopardy principles in the context of a post-conviction appeal.<sup>364</sup> Grinstead was convicted of murder, theft, and related conspiracy charges, and his conviction was affirmed on appeal.<sup>365</sup> On appeal from denial of post-conviction relief, Grinstead raised several issues. Double jeopardy was the only issue the supreme court found

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353. *Id.* at 173.

354. *Id.* at 172.

355. *Id.*

356. *Id.* at 172-73.

357. *Id.* at 173.

358. *Id.*

359. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

360. 717 N.E.2d 32 (Ind. 1999).

361. *Id.* at 52-55.

362. *Pierce v. State*, 761 N.E.2d 826, 830 (Ind. 2002).

363. 845 N.E.2d 1027 (Ind. 2006).

364. *Id.* at 1037-38.

365. *Id.* at 1030.

availing.

The court ruled that, at the time of Grinstead's appeal (before Indiana clarified its unique double jeopardy test), it was clear that an individual could not be convicted "for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished."<sup>366</sup> Grinstead was convicted of theft and conspiracy to commit theft, where the theft itself was the only overt act alleged in connection with the conspiracy.<sup>367</sup> His appellate lawyer raised a federal double jeopardy claim, which was rejected on appeal, but no state double jeopardy claim.<sup>368</sup> The court found counsel's failure to raise the separate state claim to be ineffective assistance of appellate counsel justifying vacating the theft conviction.<sup>369</sup>

Similarly, in *McCann v. State*,<sup>370</sup> the Court of Appeals found on post-conviction that appellate counsel was ineffective for failing to raise a double jeopardy claim when two different convictions were enhanced for the same conduct.<sup>371</sup> McCann was convicted of rape and murder, and he contended on post-conviction that his rape sentence could not be enhanced based on the same offense that was the basis for another conviction (murder).<sup>372</sup> The court of appeals ruled that the law was established at the time of McCann's appeal that one conviction could not be enhanced based on the same act for which a defendant was separately convicted and punished, so his appellate counsel was ineffective for failing to raise the issue on appeal and the enhancement of his rape sentence had to be vacated.<sup>373</sup>

The Indiana Supreme Court looked at double jeopardy principles in *Mathews v. State*<sup>374</sup> as well, this time in the context of an arson that resulted in multiple injuries and a death.<sup>375</sup> The defendant challenged his conviction of multiple counts of arson under the *Richardson* analysis, claiming that he could be convicted only once because he committed only one act of arson.<sup>376</sup> In affirming the defendant's convictions for multiple counts, the Indiana Court of Appeals expanded *Richardson* by ruling that multiple convictions for multiple victims did not violate article I, section 14 even if only one act created the multiple victims.<sup>377</sup>

But in a unanimous opinion by Justice Boehm, the Indiana Supreme Court

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366. *Id.* at 1037 (quoting *Richardson*, 717 N.E.2d at 56-57).

367. *Id.*

368. *Id.*

369. *Id.* at 1038.

370. 854 N.E.2d 905 (Ind. Ct. App. 2006).

371. *Id.* at 914-15.

372. *Id.* at 913.

373. *Id.* at 913-16.

374. 849 N.E.2d 578 (Ind. 2006).

375. *Id.* at 580-81.

376. *Id.* at 581.

377. *Mathews v. State*, 824 N.E.2d 713 (Ind. Ct. App. 2005).

resolved the issue without reaching double jeopardy principles. The court found that some crimes are defined so that a consequence is not an element of the crime, but can enhance the penalty.<sup>378</sup> If the consequence serves mainly to enhance the penalty, multiple consequences do not establish multiple crimes.<sup>379</sup> As an example, the court cited operating while intoxicated, the penalty for which is enhanced if bodily injury results.<sup>380</sup> But, because the consequence is only a penalty enhancement, there is still just one crime even if several people are injured by the intoxicated operator.<sup>381</sup>

Other crimes, in contrast, contain the consequence as an element, murder being an example. If a single act results in multiple murders, there can be multiple convictions.<sup>382</sup> The court then closely analyzed the arson statute, concluding that B-felony arson is a crime for which the consequence (endangering human life) is a sentence enhancement.<sup>383</sup> Thus, it was improper as a matter of statutory construction for the defendant to be convicted of arson six times based upon the six injured victims.<sup>384</sup> Rather, the statute permitted only a single B-felony conviction, and double jeopardy principles did not come into play.<sup>385</sup>

The Indiana Court of Appeals' applications of double jeopardy principles often were more straightforward. Arra Ransom was convicted of confinement and battery for her part in an attack on her father's girlfriend.<sup>386</sup> She claimed a double jeopardy violation, arguing that she committed only one act.<sup>387</sup> The court reviewed the trial court's jury instructions, concluding that the instructions did not overlap and portrayed separate incidents of confinement and battery.<sup>388</sup> But "the prosecutor's closing argument did not clearly separate the evidentiary facts that the State was alleging to constitute separate offenses."<sup>389</sup> The court concluded that based on the prosecutor's closing and other factors, there was no reasonable possibility that the jury could have used separate facts to convict Ransom of the separate offenses, and it therefore vacated the lesser conviction of battery.<sup>390</sup>

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378. *Mathews*, 849 N.E.2d at 582.

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.* at 583-84.

384. *Id.* at 584.

385. *Id.* at 585-87.

386. *Ransom v. State*, 850 N.E.2d 491, 494 (Ind. Ct. App. 2006).

387. *Id.* at 500.

388. *Id.*

389. *Id.*

390. *Id.* at 501. Chief Judge Kirsch dissented on the double jeopardy issue, explaining his view that the evidence clearly showed two separate crimes. *Id.* at 501-02. Judge Sullivan separately concurred, setting forth a separate analysis also supporting a double jeopardy violation. *Id.* at 502-04.

The prosecution had more success in *Barrett v. State*,<sup>391</sup> where the defendant was convicted of conspiracy to commit dealing in methamphetamine and operating an illegal drug lab.<sup>392</sup> She was arrested in possession of methamphetamine and many methamphetamine precursors, and she admitted manufacturing methamphetamine with intent to sell it.<sup>393</sup> She claimed a double jeopardy violation and argued that the overt act proving the conspiracy was the same act that constituted another crime of which she was convicted.<sup>394</sup> But the court found the conspiracy charge to be supported by a shopping list for methamphetamine ingredients and the defendant's admission that she intended to manufacture methamphetamine, while the illegal drug lab conviction was supported by the precursors.<sup>395</sup> Because each conviction was supported by separate evidence, there was no *Richardson* problem.<sup>396</sup>

The Indiana Court of Appeals raised the double jeopardy issue *sua sponte* in *Scott v. State*,<sup>397</sup> involving convictions for possession of cocaine as a C felony and possession of cocaine as a B felony.<sup>398</sup> The court concluded that each cocaine possession conviction was based on the same cocaine.<sup>399</sup> One was elevated because it occurred within 1000 feet of a school; the other was elevated because the defendant possessed a handgun.<sup>400</sup> The court ruled that these are not separate crimes because only one act of cocaine possession occurred and required vacation of the lesser conviction.<sup>401</sup>

The court also addressed double jeopardy in the context of juvenile adjudications of rape and child molesting in *D.B. v. State*.<sup>402</sup> The court determined that the true findings for these two offenses were based on the same act.<sup>403</sup> In the adult context, under *Richardson*, the lesser conviction would have to be vacated.<sup>404</sup> The State argued that in the juvenile context, however, there is just a single disposition based on all true findings and therefore no "multiple punishments."<sup>405</sup> The court of appeals still required vacation of the lesser adjudication, applying the principles of article I, section 14 of the Indiana Constitution, because a single act cannot be the basis for multiple adjudications

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391. 837 N.E.2d 1022 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 995 (Ind. 2006).

392. *Id.* at 1024. Judge Mathias dissented on a separate issue. *Id.* at 1030-31.

393. *Id.* at 1025.

394. *Id.* at 1029-30.

395. *Id.* at 1030.

396. *Id.*

397. 855 N.E.2d 1068 (Ind. Ct. App. 2006).

398. *Id.* at 1069.

399. *Id.* at 1074.

400. *Id.*

401. *Id.*

402. 842 N.E.2d 399, 400 (Ind. Ct. App. 2006).

403. *Id.* at 404.

404. *Id.* at 403.

405. *Id.*

of delinquency.<sup>406</sup>

### IX. FREE EXPRESSION

The language of Indiana's Free Expression Clause, article I, section 9, is more detailed and expansive than its federal counterpart, but the state clause has been the source of little litigation since the Indiana Supreme Court's seminal *Price v. State*<sup>407</sup> in 1993. *Price*'s theoretical framework set the stage for expansion of individual rights under the Indiana Constitution. Specifically in the free expression realm, *Price* created a favored status for political speech, setting a high bar that must be met before political speech can be punished by civil or criminal means.<sup>408</sup> *Price*'s specific holding is that an individual cannot be prosecuted for disorderly conduct for political speech unless that speech can be shown to harm an identifiable individual.<sup>409</sup>

The Indiana Court of Appeals rejected a challenge to a disorderly conduct conviction similar to the one in *Price* in *Wells v. State*,<sup>410</sup> a 2-1 decision written by Judge Barnes. The defendant was involved in local politics in Monroe County, serving as a member of the Bloomington city council.<sup>411</sup> Another politically active individual called a police officer at home to report that the defendant was publicly intoxicated and urinated in public.<sup>412</sup> The officer, who also was politically active, called the state police and asked a trooper to meet him.<sup>413</sup> The officer and trooper found the defendant's car illegally parked, but the defendant drove it away before it could be towed.<sup>414</sup> The trooper then followed the defendant and stopped him when he made a sharp turn.<sup>415</sup>

The defendant was hostile and profane toward the officer and had difficulty finding his driver's license.<sup>416</sup> The trooper concluded that the defendant was intoxicated, and when the defendant learned that the trooper was acquainted with his political enemies, he told the trooper he had been "set up."<sup>417</sup> The defendant was belligerent, loud, and profane throughout his interaction with the trooper.<sup>418</sup> He was arrested and convicted of operating while intoxicated and disorderly conduct and was acquitted of resisting law enforcement and battery on a police

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406. *Id.* at 404.

407. 622 N.E.2d 954 (Ind. 1993).

408. *Id.* at 960.

409. *Id.* at 963-64.

410. 848 N.E.2d 1133 (Ind. Ct. App. 2006).

411. *Id.* at 1138.

412. *Id.* at 1139.

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.* at 1140.

417. *Id.*

418. *Id.*

officer.<sup>419</sup>

On appeal, the defendant's claims included that his conviction for disorderly conduct violated article I, section 9 because his loud comments had been political in nature.<sup>420</sup> The court said that determining whether this speech was political was a "difficult question."<sup>421</sup> The court reviewed the applicable case law and determined that the speech was not political within the meaning of *Price*, but instead was more about the conduct of private parties and therefore not political under the rules enunciated in *Whittington v. State*.<sup>422</sup> The court emphasized that complaining about police conduct toward oneself, as opposed to police conduct toward a third party, is less likely to be classified as political speech.<sup>423</sup> The defendant's accusations that he had been "set up" by political adversaries did not move his speech into the political category, although the court acknowledged the call to be a close one.<sup>424</sup>

Judge Riley dissented on the political speech issue and would have vacated the disorderly conduct conviction.<sup>425</sup> She wrote that the defendant's protest against police conduct generally, although he was its immediate object, was sufficient to classify his words as political speech and thereby subject them to additional protection.<sup>426</sup>

Also in relation to section 9, the Indiana Court of Appeals rejected a claim of a right to possess child pornography in *Logan v. State*.<sup>427</sup> The defendant was convicted of possessing child pornography, and on appeal claimed that the statute under which he was convicted, Indiana Code section 35-42-2-2, unconstitutionally infringed his right to free expression under section 9.<sup>428</sup> Taking guidance from *Price*, the court stated that because the speech at issue was not political, the statute would receive rational basis review and found that "[t]he State's interest in protecting child welfare easily passes this standard."<sup>429</sup>

## X. DEATH PENALTY

The Indiana Supreme Court rejected an application of the Cruel and Unusual Punishments Clause to a death penalty case in *Matheney v. State*.<sup>430</sup> Matheney claimed that the Cruel and Unusual Punishments Clause of article I, section 16

419. *Id.*

420. *Id.* at 1147.

421. *Id.* at 1148.

422. *Id.* at 1148-49 (comparing *Price v. State*, 622 N.E.2d 954, 961 (Ind. 1993) with *Whittington v. State*, 669 N.E.2d 1363 (Ind. 1996)).

423. *Id.* at 1149 (citing *Shoultz v. State*, 735 N.E.2d 818, 827 (Ind. Ct. App. 2000)).

424. *Id.* at 1149-50.

425. *Id.* at 1150-51.

426. *Id.*

427. 836 N.E.2d 467 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 994 (Ind. 2006).

428. The court's opinion also contains an extensive review of First Amendment law relative to child pornography. *Id.* at 470-73.

429. *Id.* at 474.

430. 833 N.E.2d 454 (Ind. 2005).

precluded his execution because of his serious mental illness which, the court stated, “caused him to view life through a distorted and deluded version of reality” (on furlough from prison, he killed his wife because he fantasized that she was having an affair).<sup>431</sup> The court stated that the defendant’s mental illness was taken into account as a potential factor in his guilt and sentencing.<sup>432</sup> The court rejected the argument that mental illness is a per se reason not to execute someone.<sup>433</sup>

## XI. SENTENCING

Indiana’s appellate courts continued during the survey period to address a large number of claims under article VII, section 4, which gives the appellate courts authority to review and revise criminal sentences. As in the past, the Indiana Supreme Court appeared more willing to provide guidance by revising sentences than the Indiana Court of Appeals, which was more deferential to trial court determinations.<sup>434</sup> Because review of sentences under article VII, section 4 is related to other aspects of appellate review of sentencing, these matters are fully discussed in the portion of this Developments issue pertaining to criminal law.

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431. *Id.* at 454, 457.

432. *Id.* at 457.

433. *Id.*

434. Compare *Prickett v. State*, 856 N.E.2d 1203, 1210 (Ind. 2006) (revising sentence for child molesting) and *Hunter v. State*, 854 N.E.2d 342, 344-45 (Ind. 2006) (revising sentence for escape), with *McMahon v. State*, 856 N.E.2d 743, 748-52 (Ind. Ct. App. 2006) (declining to revise sentence for intimidation and criminal recklessness; holding that under most recently revised sentencing statute, trial courts still must list and explain mitigators and aggravators and explain how it has evaluated and balanced them and appellate courts may review those factors and their application as well as other appropriate factors).