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## The Constitutionality of Indiana's Civil Change of Venue Law: Change for the Sake of Change

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## THE CONSTITUTIONALITY OF INDIANA'S CIVIL CHANGE OF VENUE LAW: CHANGE FOR THE SAKE OF CHANGE

In 1964, Indiana effectively eliminated the traditional causal requirement for change of venue<sup>1</sup> by the adoption of Trial Rule 76. Historically, venue change was permitted to insure the moving party a fair trial.<sup>2</sup> At the same time, the opposing party was protected from frivolous motions by the requirement that change be justified.<sup>3</sup> Under

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1. IND. TRIAL R. 76 (promulgated in its present form in 1964 as Supreme Court Rule 1-12B, 244 Ind. xxxix (1964)).

2. State *ex rel.* Fox v. LaPorte Circuit Court, 236 Ind. 69, 74, 138 N.E.2d 875, 878 (1956); The Michigan Mutual Life Ins. Co. v. Naugle, 130 Ind. 79, 80-81, 29 N.E. 393, 394 (1891); *cf.* State *ex rel.* Kielpikowski v. Murray, 240 Ind. 222, 163 N.E.2d 597 (1960); State *ex rel.* Janelle v. Lake Superior Court, 237 Ind. 3, 143 N.E.2d 288 (1957).

3. All Indiana statutory provisions dealing with change of venue have enumerated specific instances in which a change of venue must be granted. These have been held to be exclusive on the ground that the legislature had determined that a change of venue would result in a fairer trial only in these enumerated instances. If none of these circumstances existed, the interests of the party opposing the change would outweigh the negligible possibility of a fairer trial. State *ex rel.* Young v. Niblack, 229 Ind. 509, 99 N.E.2d 252 (1951).

The most recent statute required that an affidavit be filed alleging one of seven specific grounds:

First. That the judge has been engaged as counsel in the cause, prior to his election or appointment as judge, or is otherwise interested in the cause, or,

Second. That the judge is of kin to either party, or,

Third. That the opposite party has an undue influence over the citizens of the county, or that an odium attaches to the applicant, or to his cause of action or defense, on account of local prejudice, or,

Fourth. When the county is a party to the suit, or,

Fifth. Showing to the satisfaction of the court that the convenience of witnesses and the ends of justice would be promoted by the change, or,

Sixth. That the judge of the court wherein such action is pending, is a material witness for the party for such change, or,

Seventh. When either party shall make and file an affidavit of the bias, prejudice or interest of the judge before whom the said cause is pending.

Ch. 38. § 255, [1881] Ind. Acts Spec. Sess. 240, 285, IND. ANN. STAT. § 2-1401 (1967) (codified at IND. CODE § 34-1-13-1 (1971)).

The requirement of an affidavit was considered to be a safeguard against the filing of spurious motions for change of venue because the filing of a false affidavit could result in a prejury conviction or disbarment. State *ex rel.* Ray v. Veneman, 209 Ind. 575, 200 N.E. 216 (1936); *cf.* Berger v. United States, 255 U.S. 22 (1921); Witter v. Taylor, 7 Ind. 110 (1855). The requirement was in force until 1955, when the Indiana Supreme Court promulgated rule 1-12B, which stated that the motion must be granted upon an unverified application specifically stating the grounds for change. 234 Ind. xxxviii (1955).

The reasons for allowing change only in certain specific cases have been stated by the Indiana Supreme Court as follows:

It is apparent that the legislature, in the enactment of the statute governing

present Trial Rule 76, venue change must be granted in virtually all civil cases,<sup>4</sup> regardless of cause, provided that the moving party meet the requisite time limitations.<sup>5</sup> As a result, change of venue today is

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changes of venue, sought to accomplish a double purpose. It was designed, primarily, to enable litigants to remove their causes from an atmosphere of prejudice and unfairness to a locality where they might find fair and unbiased triers, with surroundings not tainted by an undeserved odium affecting them or their cause. *At the same time they wished, so far as possible to limit the mischief that might be done by those whose only wish was delay, and the hindrance of justice.*

Michigan Mutual Life Ins. Co. v. Naugle, 130 Ind. 79, 80-81, 29 N.E. 393, 394 (1891) (emphasis added). *Accord*, State *ex rel.* Fox v. LaPorte Circuit Court, 236 Ind. 69, 74, 138 N.E.2d 875, 878 (1956); *see also* State *ex rel.* Welty v. Allen Superior Court, 243 Ind. 378, 185 N.E.2d 617 (1962); State *ex rel.* Young v. Niblack, 229 Ind. 509, 99 N.E.2d 252 (1952); *cf.* State *ex rel.* Neal v. Superior Court of Marion County, 202 Ind. 456, 174 N.E. 732 (1931); Houser v. Laughlin, 55 Ind. App. 563, 104 N.E. 309 (1914).

4. In all cases where the venue of a civil action may now be changed from the judge or the county, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor. . . .

IND. TRIAL R. 76(1).

The rule does not explicitly state that a motion for change must be granted regardless of the grounds for the motion. It has generally been assumed that the words, "[i]n all cases where the venue of a civil action may now be changed," refer, among other things, to the seven causes set forth in the statute requiring an affidavit. State *ex rel.* Red Cab v. Shelby Circuit Court, 243 Ind. 127, 132, 183 N.E.2d 336, 338 (1962); State *ex rel.* Blood v. Gibson Circuit Court, 239 Ind. 394, 402, 157 N.E.2d 475, 479 (1959); 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE, RULES OF PROCEDURE ANNOTATED 551-61 (1971) [hereinafter cited as HARVEY].

Since the present rule states that no reasons for the change need be stated, however, a change must be granted as a matter of right. The court can no longer consider the issue of cause. *See* State *ex rel.* Dunn v. Lake Juvenile Court, 248 Ind. 324, 288 N.E.2d 16 (1967), where the respondent judge stated that he denied the relator's motion for a change of venue because she did not specifically state a ground for change as required by the statute, and because no cause existed. Relator stated that cause did exist, although she did not specify the cause in her motion. The Supreme Court completely disregarded the issue of cause, stating that Court Rule 1-12B (now Trial Rule 76) superceded the statute and that therefore a change of venue must be granted upon compliance with the rule. This holding was in line with previous decisions in which it was held that a motion for change of venue must be granted upon compliance with the applicable rule. State *ex rel.* Ray v. Veneman, 209 Ind. 575, 578, 200 N.E. 216, 218 (1936), and cases cited therein; Moore v. Fletcher, 136 Ind. App. 478, 508, 196 N.E.2d 422, 439 (1964), and cases cited therein. *See* cases cited in Note, *Change of Venue and Change of Judge in a Civil Action in Indiana: Proposed Reforms*, 38 IND. L.J. 289, 295 n.31 & 32 (1963) [hereinafter cited as *Proposed Reforms*]. *But see* Riggerberg v. Hartman, 102 Ind. 537, 26 N.E. 91 (1885); Houser v. Laughlin, 55 Ind. App. 563, 104 N.E. 309 (1914) (*held*, the lower court was justified in not granting a motion for a change of venue, even though the motion was made by affidavit in due form, when the moving party virtually admitted that he had made the motion only for purposes of delay).

5. IND. TRIAL R. 76(2)-(7). In addition to time limitations, there are other requirements, such as the presence of adverse parties. State *ex rel.* Stockton v. Leopold, 227 Ind. 426, 86 N.E.2d 530 (1949). Moreover, change of venue cannot be granted upon the final report of the executor of an estate. State *ex rel.* Draper v. Roszkowski, 248 Ind. 590, 230 N.E.2d 296 (1967).

regularly abused,<sup>6</sup> often being utilized to delay,<sup>7</sup> harass, and inconvenience opponents.<sup>8</sup> While Trial Rule 76 has been a useful tool in the artful attorney's bag of tricks, recent developments suggest that the Rule may be unconstitutional. Such a holding might rest on the finding that, in certain circumstances, automatic changes of venue (1) violate due process by denying access to the courts, (2) violate due process and equal protection by effectively depriving a person of his property without a hearing, or (3) violate the right to a speedy trial which is guaranteed by Article 1, § 12 of the Indiana Constitution.

#### DENIAL OF ACCESS TO THE JUDICIAL PROCESS—PLAINTIFFS

A motion granted under Trial Rule 76 may effectively deny plaintiffs access to the court system. Whenever a change of venue from the county

Several other general requirements and their application are discussed in HARVEY, *supra* note 4, at 551-61; *Proposed Reforms, supra* note 4; Note, *Change of Judge in Indiana: A Continuing Dilemma*, 2 IND. L.F. 164 (1968).

6. Even prior to the 1964 Rule, the right to a change of venue was often abused. Lowe, *President's Annual Address*, 23 IND. L.J. 1, 6-7 (1947); see *City of Evansville v. Baumeier*, 245 Ind. 643, 648, 199 N.E.2d 472, 475 (1964), wherein the court stated that it was "judicially aware" that the right to a change of venue is abused frequently for purposes of delay.

7. See, e.g., *State ex rel. Hohlt v. Superior Court of Marion County*, — Ind. —, 270 N.E.2d 761 (1971), wherein a motion for change of venue, utilized to avoid a default judgment, was granted. As a result, a dilatory party was rewarded for his delaying tactics with further delay. See also note 6 *supra*.

8. This practice is illustrated in *Slocum v. Jacobson*, Civ. No. 71-H-344 (N.D. Ind., filed Dec. 17, 1971), where one of the defendant insurance companies virtually admitted in its answer that it and other insurance companies seek change of venue only to inconvenience plaintiffs.

The same case is pending in the Indiana Supreme Court under the name of *State ex rel. Bicanic v. Lake Circuit Court*, Civil No. 472-S-44 (Ind. S. Ct., filed Apr. 18, 1972) (petition for writ of mandate to compel court to deny motion for change of venue). In *Bicanic* plaintiffs pointed out the severe financial burden which would be imposed on them if a change of venue were granted:

Plaintiffs are forced to bear the burden of increased attorney expenses for travel and additional expense to produce witnesses a further distance to the surrounding counties. Specifically, substantial additional expense results for all witnesses and especially for expert witnesses, such as doctors, who must be paid as much as \$500 to \$1,000 to appear in remote counties when they would charge \$150 to \$250 to appear locally. Such costs are not taxable and must always be borne by plaintiff. It is about sixty-five (65) miles to Kentland and over two (2) hours driving round trip. It is about sixty-five (65) miles to Rensselaer and over two (2) hours round trip. It is about thirty (30) to forty (40) miles to Valparaiso and over one (1) hour round trip. These are the county seats of the three (3) surrounding counties to which a case may be venued pursuant to Trial Rule 76. . . . Minimum per diem is \$35.00 per hour in Hammond. Twelve (12) cents a mile is reasonable auto expense.

Relator's Motion to Strike Defendant's Motion for Change of Venue at 40, *State ex rel. Bicanic v. Lake Circuit Court*, Civil No. 472-S-44 (Ind. S. Ct., filed Apr. 18, 1972).

is granted to a defendant, it will almost invariably make it more inconvenient for the plaintiff to prosecute his case. Not only are individual travelling expenses incurred, but substantial resources in excess of those originally contemplated must be utilized for necessary attorney and witness fees.<sup>9</sup> Because such additional, unanticipated expenses may total thousands of dollars, many plaintiffs may agree to an undesired settlement of their claim, or decide that the practical economics of their case force them to drop their cause of action.<sup>10</sup>

Recently courts have begun to question whether denial of access to the courts because of one's inability to pay litigation costs is unconstitutional. Virtually all such cases have centered upon the constitutionality of imposing filing fees upon indigent plaintiffs when such imposition operates to foreclose their suits.<sup>11</sup>

The most recent United States Supreme Court case in this area is *Boddie v. Connecticut*.<sup>12</sup> In *Boddie*, the Court held that Connecticut denied indigent plaintiffs due process of law when the state required them to pay filing fees approximating \$60 per party in order to bring an action for divorce. In essence, the Court, through Justice Harlan, held that: (1) where the state has monopolized the means of resolving a dispute (i.e., divorce), and (2) where the underlying right or relationship affected by denial of access to the courts is "fundamental" (i.e., marriage), the prerequisite of fee payment denies due process of law to those who cannot afford to pay.<sup>13</sup>

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9. See note 8 *supra*.

10. The possibility of a party having to discontinue his suit because of additional travel expenses resulting from a change of venue has been noted by at least one federal court considering a motion for change of venue under 28 U.S.C. § 1404(a). *Beach v. National Football League*, 331 F. Supp. 249 (S.D. N.Y. 1971).

11. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971); *O'Brien v. Trevehan*, 336 F. Supp. 1029 (D. Conn. 1972); *Matter of Kras*, 331 F. Supp. 1207 (E.D.N.Y. 1971), *prob. juris. noted*, 405 U.S. 915 (1972); *Hart v. Superior Court*, 16 Ariz. App. 184, 492 P.2d 433 (1972); *McCandless v. McCandless*, 38 App. Div. 2d 171, 327 N.Y.S.2d 896 (1972). For a general discussion of the problems faced by indigent parties in obtaining access to the courts, see Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970) [hereinafter cited as Goodpaster].

12. 401 U.S. 371 (1971).

13. *Id.* at 382-83. In a concurring opinion, Justice Douglas stated that the case should have been decided on equal protection grounds. *Id.* at 386. Justice Brennan also concurred, but stated that the result was correct in both its equal protection and its due process analyses. *Id.* at 388.

Several notes have been written on the reasons for the majority's use of a due process analysis rather than equal protection analysis in invalidating the Connecticut fee requirements. See, e.g., Note, 20 KAN. L. REV. 554 (1972); Note, 17 N.Y. L. F. 634 (1971); Note, 46 TUL. L. REV. 799 (1972). The conclusions have not been uniform. The majority did not explain its failure to use the equal protection clause. Apparently the Court desired to put some limitation on the case's applicability as precedent, intend-

The precise phraseology of Justice Harlan's holding seems to restrict the application of the due process clause to disputes which must necessarily invoke the legal process to achieve resolution (e.g., divorce and bankruptcy proceedings). However, Harlan's opinion, taken in its entirety, suggests that *Boddie's* application may be much wider.<sup>14</sup> Indeed, it appears that *Boddie* must be extended to apply to *all* civil cases in which a state imposes fees, or grants unjustified motions, which have the practical effect of denying a plaintiff access to the judicial system. That the logical extension of *Boddie's* reasoning compels this conclusion has been suggested by Justices Brennan and Black. In response to *Boddie's* first restriction, that the action be such that resort to the judicial process is the only way to resolve the dispute, Justice Brennan, concurring, stated: "As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually 'the only forum effectively empowered to settle their disputes. . . .'"<sup>15</sup> Equally pertinent is Justice Black's comment, in another case, that "the judicial process is the exclusive means through which almost any dispute can ultimately be resolved short of brute force."<sup>16</sup>

The second restriction, that there must be a fundamental right or relationship affected by the denial of access, involves the difficult problem of defining "fundamental rights under due process." Harlan's majority opinion specifically refused to go further than necessary to dispose of *Boddie's* facts by stating that the Court was not deciding that denial of access to the courts violates due process in all circumstances.<sup>17</sup> However, the District of Columbia Circuit Court of Appeals has already stated that access to the courts is itself a fundamental right,<sup>18</sup> implying that

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ing thereby to prevent its extension to all aspects of civil litigation which have an unequal impact upon persons because of their financial status. Even if the due process analysis of *Boddie* is extended in the manner discussed in this note, there may be certain limitations which would not be present if an equal protection analysis were available. For example, fee requirements imposed upon criminal defendants for filing an appeal have been held in violation of the equal protection clause. However, even though the right to initial access to the courts may be held to be a fundamental right under the due process clause, the right of a plaintiff to appeal a civil case may not be considered such. Cf. *Griffin v. Illinois*, 351 U.S. 12 (1956) (wherein the Court stated that the states are not required to provide appellate review at all; the opinion implies that the right to appeal is not in itself a fundamental right under the due process clause).

14. 401 U.S. at 374-377.

15. *Id.* at 387.

16. *Meltzer v. LeCraw & Co.*, 402 U.S. 954, 957, *denying cert. to* 225 Ga. 91, 166 S.E.2d 88 (1971).

17. 401 U.S. at 382.

18. *Lee v. Habib*, 424 F.2d 891, 901 (D.C. Cir. 1970). In addition, Justice Brennan, concurring in *Boddie*, opined that initial access to the courts should be considered a fundamental right under the due process clause. 401 U.S. at 387. More-

effective denial of access violates due process in any civil case. Moreover, the Indiana constitutional requirement that "[a]ll Courts shall be open; and every man, for injury done him . . . shall have remedy"<sup>19</sup> suggests that the right is both guaranteed and fundamental in Indiana, and therefore protected under a due process analysis in state courts. Short of saying that access to the courts is a fundamental right, it should be noted that many plaintiffs seek the aid of the courts in search of a remedy against unlawful deprivation of their property.<sup>20</sup> Thus, it could also be argued that fundamental property interests will be adversely affected by denying access to the courts.<sup>21</sup>

The logic of *Boddie* and its progeny<sup>22</sup> appears to apply where a plaintiff is effectively precluded from pursuing his case because an unjustified change of venue has created additional expenses which he cannot afford. This conclusion seems particularly true if a defendant refuses to settle a claim after his motion for change is granted. Since plaintiff now has no recourse but the court in settling the dispute, *Boddie's* first requirement is satisfied. Furthermore, the expenses resulting from a change of venue can easily exceed the \$60 filing fee struck down in *Boddie*.<sup>23</sup> Even if other additional costs are minimal, personal traveling

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over, Justice Black stated in *Meltzer v. LeCraw & Co.* that if *Boddie* is to remain law, it should apply to all civil cases. 402 U.S. at 954 n.1.

A wealth of Supreme Court precedent supports the proposition that an opportunity for a meaningful hearing is a constitutional right. Although these precedents have usually referred to defendants' rights, they can plausibly be extended to hold that "initial access" is a fundamental right. See, e.g., *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Hovey v. Elliott*, 167 U.S. 409 (1897); *Barbier v. Connolly*, 113 U.S. 27 (1885). Furthermore, it has been argued that the right of initial access to the courts is ingrained in certain provisions of the Constitution, viz. art. 3, §§ 1-3, art. 4, § 1, amend. VI, and amend. VII. Goodpaster, *supra* note 11, at 250.

19. IND. CONST. art. 1, § 12.

20. To limit the concept of due process to defensive action is . . . to ignore the manifold ways in which property can be taken without reliance on court process, and for which the courts provide a remedy to financially able individuals.

Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 288 (1968).

21. See U.S. CONST. amends. V, XIV.

22. *O'Brien v. Trevethan*, 336 F. Supp. 1029 (D. Conn. 1972); *Matter of Kras*, 331 F. Supp. 1207 (E.D.N.Y. 1971), *prob. juris. noted*, 405 U.S. 915 (1972); *Hart v. Superior Court*, 16 Ariz. App. 184, 492 P.2d 433 (1972); *McCandless v. McCandless*, 38 App. Div. 2d 171, 327 N.Y.S.2d 896 (1972). See also *Thompson v. Thompson*, — Ind. —, 286 N.E.2d 657 (1972).

23. In Lake County, the average additional cost to plaintiffs whose case is venued to another county exceeds 200 dollars. Relator's Motion to Strike Defendant's Motion for Change of Venue at 40, State *ex rel.* *Bicanic v. Lake Circuit Court*, Civil No. 472-S-44 (Ind. S. Ct., filed Apr. 18, 1972). Expenses may greatly exceed 200 dollars. See note 8 *supra*. The fact that public or private funds are available to defray these additional costs is apparently not significant under the *Boddie* due process analysis. *Boddie v. Connecticut*, 401 U.S. 371, 374 n.2 (1971).

expenses alone could justify a holding that granting the change without cause violates the due process rights of plaintiffs unable to bear such expenses.<sup>24</sup>

Perhaps the most glaring deficiency in Indiana's change of venue provisions is the complete lack of a legitimate state interest to balance against the rights of persons adversely affected by a change without cause. Under any due process formulation, if the state's interests are "legitimate," and there are no reasonable alternatives which will effectuate these interests more fairly, the challenged provision may be upheld.<sup>25</sup> Indiana's legitimate interest in granting a change of venue extends only to insuring a fair trial to the litigants.<sup>26</sup> In cases where an adequate cause is present, a change of venue serves this purpose. Conversely, where a legitimate cause does not exist, no change is warranted. Indeed, granting change in those circumstances harms the interests of the state by taking up unnecessary time and money in transferring the case. Therefore, legitimate state interests can only be furthered by a requirement that the moving party show cause.

There are alternatives to the present rule which could be utilized to further the legitimate interests of the state while minimizing interference with the plaintiff's rights. Safeguards against abuse of the venue change process are available, as evidenced by the wide variety of provisions for change of venue in other states.<sup>27</sup> Indiana is unique in granting venue changes from the county regardless of cause. Thus, Trial Rule 76 as it is presently formulated should be held unconstitutional where its application effectively denies a plaintiff's access to the courts.

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24. Indeed, the United States Supreme Court has recognized that a required expenditure of \$1.50 may unconstitutionally preclude a person from exercising his fundamental right to vote. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

25. Prior cases establish, first, that due process requires, at a minimum, that *absent a countervailing state interest of overriding significance*, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. 401 U.S. at 377 (emphasis added).

Requiring a balancing of interests may negate the argument that if change of venue provisions are held unconstitutional, states could logically be required to build additional court houses near poorer communities so that poor people are not deprived of their right to free access to the courts. The interest of the state in utilizing resources for something other than court houses would probably be deemed to outweigh the slight benefit to poor people.

26. *State ex rel. Fox v. LaPorte Circuit Court*, 236 Ind. 69, 74, 138 N.E.2d 875, 878 (1956); *Michigan Mutual Life Ins. Co. v. Naugle*, 130 Ind. 79, 80-81, 29 N.E. 393, 394 (1891); *cf. State ex rel. Kielpikowski v. Murray*, 240 Ind. 222, 163 N.E.2d 597 (1960); *State ex rel. Janelle v. Lake Superior Court*, 237 Ind. 3, 143 N.E.2d 288 (1957).

27. For a discussion of provisions of various states, see *Proposed Reforms, supra* note 4, at 298-299.

DEPRIVATION OF PROPERTY WITHOUT A REASONABLE  
OPPORTUNITY TO BE HEARD — DEFENDANTS

If a defendant cannot bear the additional costs of following his case to another county, an overreaching plaintiff may utilize change of venue as a lever to compel the defendant to forfeit or make an unfair settlement.<sup>28</sup> Thus, Trial Rule 76 may have the practical effect of depriving a defendant of a reasonable opportunity to be heard in court.

It has been 96 years since the Supreme Court stated that merely giving notice to a defendant of a claim against him was not sufficient to validate a judgment against his property.<sup>29</sup> The defendant must also be given a reasonable opportunity to be heard: "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable."<sup>30</sup> Since 1876, most cases in this area have focused on the adequacy of notice<sup>31</sup> and on temporary pre-hearing deprivations of property.<sup>32</sup> However, several recent cases suggest that the right to be heard may be extended to situations in which a defendant is effectively denied such opportunity by the imposition of unjustified expenses. The United States Supreme Court has held that requiring expenses incidental to appeals by criminal defendants who could not pay such expenses denied them equal protection of the law.<sup>33</sup> The fundamental interest of preserving one's liberty weighed quite heavily in these cases.

Similarly, several lower courts have weighed the fundamental interests of property and found that economic discrimination which precludes an adequate defense of one's property also violates equal protection. In *Lee v. Habib*,<sup>34</sup> the District of Columbia Circuit Court of Appeals held that requiring payment for a transcript on appeal from a

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28. Indiana requires a plaintiff to initiate his action in a forum of "preferred venue," which usually proves to be convenient to the defendant. IND. TRIAL R. 75. However, a plaintiff can easily evade this requirement by subsequently moving for a change of venue under Trial Rule 76.

29. *Windsor v. McVeigh*, 93 U.S. 274 (1876).

30. *Id.* at 277.

31. *See, e.g., Armstrong v. Manzo*, 380 U.S. 545 (1965); *Schroeder v. New York*, 371 U.S. 208 (1962); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

32. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (suspension of welfare benefits pending hearing); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (pre-hearing wage garnishment); *Randone v. Appellate Dept.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (pre-hearing attachment of checking account).

33. *Mayer v. City of Chicago*, 404 U.S. 189 (1972); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); *Griffin v. Illinois*, 351 U.S. 12 (1956).

34. 424 F.2d 891 (D.C. Cir. 1970).

civil judgment may deny equal protection.<sup>35</sup> The court stated:

The equal protection clause applies to both civil and criminal cases; the Constitution protects life, liberty and property. *It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance* to a court in deciding what procedures are constitutionally required in each case.<sup>36</sup>

The court also cited Supreme Court decisions extending the rationale of equal protection to certain proceedings traditionally considered civil, to wit, coram nobis<sup>37</sup> and habeas corpus<sup>38</sup> proceedings. The appellate court then concluded: "Although these types of cases might fairly be characterized as criminal, they do show that the civil-criminal distinction is not the touchstone of equal protection."<sup>39</sup> In *Spring v. Little*,<sup>40</sup> the Supreme Court of Illinois held that a statute requiring a bond as a prerequisite to an appeal from an eviction proceeding violated equal protection when the requirement was applied to defendants who could not afford to pay the fees.<sup>41</sup>

Apparently, no decisions have considered the equal protection clause in relation to costs required in initially defending a claim.<sup>42</sup> Undoubtedly, this is because defendants are not required to pay filing fees which might limit their access to the courts. Nonetheless, the argument that the equal protection clause should be applied in this area is stronger than in *Lee* and *Spring*, for in those decisions the defendant had already been afforded an initial hearing on the merits. Venue change may preclude even this initial hearing.

In addition to equal protection, a defendant who is kept out of court

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35. *Id.* at 904.

36. *Id.* at 901 (emphasis added).

37. *Lane v. Brown*, 372 U.S. 477 (1963).

38. *Gardner v. California*, 393 U.S. 367 (1969).

39. 424 F.2d at 901.

40. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

41. *Id.* at 355, 280 N.E.2d at 211.

42. This question was touched on in *Williams v. Shaffer*, 385 U.S. 1037, *denying cert.* to 222 Ga. 334, 149 S.E.2d 668 (1967). Similar to *Boddie* on the facts, *Williams* dealt with a summary eviction statute which provided that upon the landlord's filing of an affidavit stating that the tenant had held over or failed to pay rent, a dispossession warrant was to be issued. The only way for the tenant to arrest the proceedings was to tender a bond, with security, for the payment of such sum as might be recovered against him at trial. Justice Douglas, joined by Chief Justice Warren, dissented from the majority's denial of certiorari, which was based on the ground of mootness. To support his view that the statute deprived defendant of equal protection of the law, Justice Douglas stated, "[t]he effect of the security statute is to grant an affluent tenant a hearing and to deny an indigent tenant a hearing." 385 U.S. at 1039.

because of a change of venue may seek recourse under a *Boddie* due process analysis. A defendant obviously satisfies the first requirement of *Boddie* in that legal action is the only way to resolve the dispute. As Justice Harlan has stated:

[W]e think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes.<sup>43</sup>

*Boddie's* second criterion, that there be a fundamental right affected by the denial of due process, is also met, since defense of a civil action usually involves one's constitutional right against deprivation of property. Thus, it appears that when a change of venue without cause deprives a party of a reasonable opportunity to defend, the change clearly violates constitutional protection, for under both due process and equal protection analyses there is no legitimate state interest which can outweigh the defendant's right to be heard.<sup>44</sup>

#### THE RIGHT TO A SPEEDY TRIAL

Probably the most common abuse of Rule 76 is its widespread use as a dilatory tactic.<sup>45</sup> A person may get a change of venue from the county and then move for a similar change from the judge. If court calendars are crowded, delay for several months is a distinct possibility.<sup>46</sup>

The right to a speedy trial is guaranteed by Article I, § 12 of the Indiana Constitution. Most litigation regarding this provision has been in the criminal area.<sup>47</sup> However, the Indiana Supreme Court has discussed the guarantee in reference to civil actions involving the pre-1964 Indiana change of venue rule, which required a specific allegation of cause. In *City of Evansville v. Baumeyer*,<sup>48</sup> the court stated, in dictum, that a desire for delay is not a proper cause for seeking a change of venue from the county. The court refused to sanction further abuse of the right to change of venue, adding that such a delay would be in deroga-

43. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

44. See text accompanying notes 25 & 26 *supra*.

45. See notes 6, 7 & 8 *supra* & text accompanying.

46. In New York, where judges can exercise discretion in passing upon a motion for change of venue, the courts, in considering motions, take into account the length of the relevant court calendars and the procedural delays involved in changing venue. See, e.g., *Scaccia v. County of Onondaga*, 11 Misc. 2d 907, 175 N.Y.S.2d 120 (Sup. Ct. 1957).

47. See, e.g., *Chelf v. State*, 223 Ind. 70, 58 N.E.2d 353 (1944); *State v. Beckwith*, 222 Ind. 618, 57 N.E.2d 193 (1944).

48. 245 Ind. 643, 199 N.E.2d 472 (1964).

tion of the constitutional guarantee of a speedy trial.<sup>49</sup>

When *Baumeyer* was decided, the requirement of cause represented at least one safeguard against abuse of the change of venue rule. By removing that safeguard and promulgating Trial Rule 76, the court has sanctioned further abuse. If *Baumeyer* indicates the maximum abuse that will be tolerated, the 1964 change surely permits that limit to be surpassed and therefore Trial Rule 76 may be unconstitutional as being in derogation of the right to a speedy trial.<sup>50</sup>

#### CONCLUSION

Originally, an affidavit showing cause was a prerequisite to a change of venue in Indiana. This requirement was designed to minimize the risk of mischief and delay.<sup>51</sup> The possibility of perjury and disbarment were thought to be sufficient safeguards against abuse.<sup>52</sup> Although such safeguards were not always effective,<sup>53</sup> this does not justify their elimination. Today, change of venue in Indiana is terribly vulnerable to abuse. Even if venue change does not entirely preclude a person from having his day in court, it is an extremely useful tool for pressuring one's adversary. Also, unjustified changes impose unwarranted time and expense on parties, attorneys, and the state.

The Indiana change of venue provisions should be altered to approach the model presently utilized in the federal system and the majority of states.<sup>54</sup> There should be no absolute right to venue change, and the trial judge should have discretion in weighing the facts alleged by both sides. The judge's ruling on a motion should not be overturned unless there is a clear abuse of discretion and, in order to minimize delay, an appeal of the ruling should be allowed only after final judgment in the lower court. If bias of the judge is alleged, a different judge should pass on the motion. Although there may be problems involved in such an approach, none could match those potentially resulting from the present

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49. *Id.* at 649, 199 N.E.2d at 475.

50. It may seem illogical for the Indiana Supreme Court to invalidate one of its own rules. However, the court has stated that its power is limited to promulgating rules which do not affect substantive rights. *Square D. Co. v. O'Neal*, 225 Ind. 49, 72 N.E.2d 654 (1947). It has been noted that it is difficult to decide the constitutionality of a court rule until its full impact has become evident. Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 629 (1957). In view of the abuses of Trial Rule 76, therefore, it would not be illogical for the court to hold that the rule, as applied in certain circumstances, unconstitutionally infringes upon the right to a speedy trial.

51. See note 3 *supra* & text accompanying.

52. See note 3 *supra*.

53. *Supra* note 6.

54. See materials cited in *Proposed Reforms, supra* note 4, at 298-99 n.45-52.

system.

It is arguable whether the court or the legislature is the proper body to correct Indiana's change of venue rule. It has been held that venue change is purely statutory,<sup>55</sup> since the right involved is substantive.<sup>56</sup> Therefore, it would appear that only the legislature can formulate new provisions. However, from 1955 to 1969, change of venue was regulated by court rules and these rules conflicted with the corresponding statute.<sup>57</sup> Presumably, what the court has changed by its own rule, it can change back by a similar rule. Therefore, it can be argued that the court has the power to alter the present venue change provisions, at least to coincide with those of the original statute.

In any event, until some change is effected, either by the court or the legislature, Indiana's change of venue procedures will continue to endanger the principles of due process of law and the right to a fair trial for all.

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55. State *ex rel.* Young v. Niblack, 229 Ind. 509, 99 N.E.2d 252 (1951); State *ex rel.* Neal v. Superior Court, 202 Ind. 456, 174 N.E. 732 (1931).

56. State *ex rel.* Blood v. Gibson Circuit Court, 239 Ind. 394, 157 N.E.2d 475 (1959).

57. See notes 1, 3, 4 & 5 *supra*. Whether the change from requiring an affidavit specifically stating cause to requiring only an unverified application or motion without stating cause was a change of procedure, within the court's power, or of substantive law, outside the power of the court, apparently became a moot question when the legislature passed its own version of the rules of procedure in 1969. The legislature's change of venue rule (Rule 82.1) is the same as Trial Rule 76. IND. CODE § 34-5-1-1 (1971).