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## SURVEY

### FOREWORD

#### Indiana Law, the Supreme Court, and a New Decade

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*Some of Indiana's finest practitioners and professors have contributed to this volume about the progress of Indiana law over the period June 1989 to October 1990. My colleagues have analyzed particular fields of substantive law in which they are expert. The editors have invited me to introduce this survey of the change in Indiana law which this period represents. I do so by highlighting some themes in the Indiana Supreme Court's jurisprudence and by describing the initiatives the court has launched in its role as leader of the state's legal system.*

As the Indiana Supreme Court moves into a new decade, it is fitting to begin by assessing the institution's recent progress. Sometimes progress is well illustrated by tables and graphs. Other times it is better described by anecdote. During the 1987-88 campaign for Proposition Two, a proposal to amend the Indiana Constitution so as to provide the supreme court with greater control over its docket, I gave hundreds of speeches explaining the amendment and urging its adoption.<sup>1</sup> At the conclusion of one of those speeches, a lawyer approached me and said he supported the change because it would permit the supreme court to write more

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1. The origins of this proposal and the case for its adoption were described in Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988).

civil law by shifting initial review of most criminal matters to the Indiana Court of Appeals. "Candidly," he said, "since I don't practice criminal law, I read your part of the advance sheets with my thumb." By contrast, at the October 1990 meeting of the Indiana State Bar Association, a prominent young bar leader said to me: "I used to read the advance sheets by subject matter. Now I look first to see what the supreme court has done." That was as sure a sign as any graph could provide that Indiana's highest court had turned over a new leaf.

Most who supported Proposition Two did so because they thought it was important to bring the Indiana Supreme Court back into civil law. For the ten years before Proposition Two was adopted, the court accepted review on an average of just twenty civil transfer cases a year. One year, it issued only seven opinions on civil transfer.<sup>2</sup> Everyone expected that the number of civil cases heard on the merits in the supreme court would rise when the Indiana Court of Appeals took over the job of reviewing all criminal appeals in which the sentence imposed was fifty years or less.

What was not so obvious in the discussion over Proposition Two was that the old constitutional mandate that the supreme court review the merits of every case involving a sentence of more than ten years also placed pressure on the nonadjudicatory aspects of the court's work. These duties are a substantial part of the supreme court's charge. The court oversees a judicial structure that includes some 300 judges and magistrates and nearly 3000 court employees working in more than 100 locations. It also supervises admission of new lawyers and regulates the practice of law by the Indiana bar, currently numbering some 12,000 lawyers.<sup>3</sup> The court's supervisory functions suffered from inadequate attention during the past decade just as its civil jurisprudence had suffered.<sup>4</sup>

This foreword to the Indiana Law Review's annual survey summarizes the respect in which 1990 was a turning point both in the court's civil

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2. See *infra* note 7.

3. The Clerk of the Indiana Supreme and Appellate Courts informs me that as of November 1, 1990, there were 11,779 lawyers engaged in active practice. Another 2875 inactive lawyers were on our rolls. Thus, there were actually a total of 14,654 lawyers on the roll of attorneys.

4. The supreme court's criminal jurisprudence was also affected by the pressure of this mandatory caseload. The pressure of high volume sometimes led to erratic precedent. Compare *Phillips v. State*, 492 N.E.2d 10 (Ind. 1986) (to establish admissibility of statement made after accused has invoked right to remain silent during custodial interrogation, state must show that accused later initiated dialogue and knowingly waived previously invoked right to remain silent) with *Moore v. State*, 498 N.E.2d 1 (Ind. 1986) (setting aside *Phillips* less than six weeks later, holding that showing that dialogue was initiated by the accused not necessary).

jurisprudence and its nonadjudicatory roles. To describe the new jurisprudence, I have chosen four topics on a rather subjective basis: the march of the common law, use of the state constitution, protection of the environment, and postconviction relief. As for our role as leaders and supervisors of the courts and the profession, I describe what I believe are initiatives that set the Indiana judiciary on a strong course for the new decade. These include an increasing number of oral arguments, major rule reform, reforms affecting legal education, standardization of trial court records, and a better program on judicial ethics.

### I. SOME THOUGHTS ON OUR CASE LAW

The adoption of Proposition Two gave the Indiana Supreme Court the authority to shift initial review of criminal cases with sentences of fifty years or less to the court of appeals. The court exercised this authority within a week of the 1988 election, effective for cases docketed after January 1, 1989.<sup>5</sup> Even though there was a substantial backlog of pre-Proposition Two direct criminal appeals still to be reviewed, the court immediately increased the number of civil transfer cases it heard.<sup>6</sup> The court decided forty of those on the merits in 1989, a new record. That record lasted only one year. In 1990, the court decided fifty-one civil transfer cases.<sup>7</sup>

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5. See Indiana Supreme Court Order of November 14, 1988 (amending IND. APP. R. 4 ), reprinted in 528-29 N.E.2d XLI (Ind. cases ed.).

6. The fact that the Indiana Supreme Court had better docket control was noticed by our federal colleagues. It prompted discussion in the Seventh Circuit about greater use of the technique of certified questions. *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 142 (7th Cir. 1990) (Ripple, J., dissenting). It also prompted the judges of the U.S. District Court for the Northern District of Indiana to suggest the possibility of extending the certified question procedure to the district court.

7. The shift in the court's docket is reflected by the following table:

<u>Year</u>	<u>Total Opinions</u>	<u>Direct Criminal Appeal Opinions (%)</u>	<u>Civil Transfer Opinions (%)</u>
1990	206	141 (68%)	51 (25%)
1989	346	286 (83%)	40 (12%)
1988	306	268 (88%)	23 (8%)
1987	363	312 (86%)	32 (9%)
1986	445	395 (89%)	21 (5%)
1985	330	291 (88%)	22 (7%)
1984	327	280 (86%)	19 (6%)
1983	323	281 (87%)	24 (7%)
1982	334	285 (85%)	23 (7%)
1981	304	246 (81%)	38 (13%)
1980	270	226 (84%)	21 (8%)

With more control over its docket, the court is now able to select the cases that deserve attention — both civil and criminal. I describe below several areas that captured the court's attention in both civil and criminal law.

#### A. "The March of Indiana Common Law"<sup>8</sup>

In an age when Congress and many state legislatures meet nearly year-round every year, it is easy to forget that a great deal of the law important to the lives of individuals is still common law.<sup>9</sup> Even though the Indiana Code has grown to more than 12,000 pages, subjects like torts, contracts, landlord/tenant, and employment are still governed substantially by common law. Indiana's courts, especially the supreme court, act on these subjects just as common law courts have done for four or five hundred years. New problems and new formulations of old problems regularly present themselves in the nearly 1.5 million new lawsuits filed each year in Indiana's courts.<sup>10</sup>

There was a time when Indiana's supreme court commonly eschewed considering new matters of common law. This tilt was not simply the result of being inundated with criminal appeals; it was imbedded in the court's definition of its proper role. The likelihood was that the court, in hearing a matter on the merits, would say of existing common law: "That is the current law. If you wish to change it, go to the legislature."<sup>11</sup>

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1979	262	210 (80%)	21 (8%)
1978	275	234 (85%)	21 (8%)
1977	164	138 (84%)	12 (7%)
1976	165	137 (83%)	7 (4%)

This chart shows only direct criminal appeals and civil transfers as a percentage of all our opinions. The remaining cases each year cover writs of mandate, criminal transfer cases, and others.

8. *Morgan Drive Away, Inc. v. Brant*, 489 N.E.2d 933, 934 (Ind. 1986).

9. For one recent acknowledgment of the continuing role for the common law, see G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

10. A total of 1,490,091 cases were filed in Indiana courts in 1989. 1 *Division of State Court Administration*, 1989 INDIANA JUDICIAL REPORT 55.

11. *E.g.*, *Morgan Drive Away*, 489 N.E.2d at 934 (changes in employment at will doctrine "better left to the legislature"); *Hundt v. La Crosse Grain Co.*, 446 N.E.2d 327, 329 n.1 (Ind. 1983) (change from contributory negligence doctrine to comparative negligence doctrine "a matter for legislative enactment rather than judicial adoption"); *State v. Ingram*, 427 N.E.2d 444, 448 (Ind. 1981) ("Absent a clear mandate from the legislature to require Indiana automobile riders to wear seat belts, we are not prepared to step into the breach and judicially mandate such conduct."); *Budkiewicz v. Elgin, Joliet & Eastern Ry.*, 238 Ind. 535, 555, 150 N.E.2d 897, 907 (1958) (Achor, J., dissenting), *overruled*, 241 Ind. 463, 173 N.E.2d 314 (Ind. 1961) (laws regarding negligence liability of railroads

Of course, rejection of a new proposition of law is hardly an act of neutrality. Whether the court rejects a new proposition of law or rejects the idea of making law, it still decides in favor of the status quo.

During 1990, by contrast, the court flatly declared a willingness to grapple with the merits of new propositions of common law. This declaration occurred as we took up the proposal to recognize a new cause of action in tort, a suit for loss of parental consortium, in the case of *Dearborn Fabricating & Engineering Corp. v. Wickham*.<sup>12</sup> The Indiana Court of Appeals had decided a comparable case on the grounds that a proposed new cause of action should be taken to the legislature.<sup>13</sup> The supreme court expressly rejected this idea, stating: "To the contrary, we find the question of whether the common law should recognize a child's action for loss of parental consortium to be entirely appropriate for judicial determination."<sup>14</sup> Ultimately, the court held that accepting the proposed new cause of action would not improve the state's tort law.<sup>15</sup>

Our court has recently addressed a number of areas of common law. In *Stropes v. Heritage House Childrens Center*, for example, we examined the doctrine of respondeat superior and its common carrier exception.<sup>16</sup> In *Klotz v. Horn*,<sup>17</sup> we addressed riparian rights in determining whether an express grant of an easement to a lake included a right to build a pier at the end of the easement. We examined Indiana's rules of contract construction in *First Federal Savings Bank of Indiana v. Key Markets, Inc.*<sup>18</sup> We also held that a settlement agreement in an employment dispute can condition the terms of a relationship that would otherwise be one of employment at will in *Speckman v. City of Indianapolis*.<sup>19</sup> We focused on the landlord-tenant relationship, specifically

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"should be changed only by legislative enactment").

This approach was also applied to judicial interpretation of statutes. *Compare* *Miller v. Mayberry*, 506 N.E.2d 7, 11 (Ind. 1987) (change in judicial interpretation of statute must come from legislative change) *with id.* at 12 (Shepard, J., concurring in result) ("[J]udges should regard themselves as responsible for rules they have erected.").

12. 551 N.E.2d 1135 (Ind. 1990).

13. *Barton-Malow Co. v. Wilburn*, 547 N.E.2d 1123, 1126 (Ind. Ct. App. 1989) ("In *Dearborn Fabricating & Engineering Corp. v. Wickham* (1988), Ind. App., 532 N.E.2d 16, *trans. pending*, it was suggested that this Court need not defer to the legislature in recognizing a cause of action for loss of parental consortium. However, if the action is to be created, it is wiser to leave it to the legislative branch with its greater ability to study and circumscribe the cause."), *modified*, 559 N.E.2d 600 (Ind. 1990).

14. *Wickham*, 551 N.E.2d at 1136.

15. *Id.* at 1139.

16. 547 N.E.2d 244 (Ind. 1989).

17. 558 N.E.2d 1096 (Ind. 1990).

18. 559 N.E.2d 600 (Ind. 1990).

19. 540 N.E.2d 1189 (Ind. 1989).

whether a binding covenant to repair may be inferred from a landlord's statement to a tenant at the inception of an oral lease, in *Childress v. Bowser*.<sup>20</sup> We also examined the duty of landowners to protect business invitees in two separate cases.<sup>21</sup>

In the midst of all this common law litigation, the Indiana Supreme Court still has been quite clear about its duty to give full force and effect to legislation modifying the common law. In the 1988 case *Picadilly, Inc. v. Colvin*,<sup>22</sup> we held that the legislature's enactment of a remedy for drunk driver dramshop liability claims had not occupied the field.<sup>23</sup> In *Koske v. Townsend Engineering Co.*,<sup>24</sup> we concluded that the legislature intended to codify the entire law of products liability, and we held that a common law defense not mentioned did not survive the codification.

### B. Yes, Indiana Has a State Constitution

A second turning point in the Indiana Supreme Court's jurisprudence during the period was the court's use of the Indiana Constitution to resolve issues that previously would have been resolved only by reference to the United States Constitution. State courts across the country increasingly have relied on their own constitutions for almost two decades, but most commentators did not notice the movement until 1975 when Justice William Brennan, dissenting from a Burger Court decision on the constitutional rights of criminal defendants, urged state courts to use their own constitutions to afford protections not available under the federal charter.<sup>25</sup>

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20. 546 N.E.2d 1221 (Ind. 1989).

21. *Douglass v. Irvin*, 549 N.E.2d 368 (Ind. 1990); *Sowers v. Tri-County Tel. Co.*, 546 N.E.2d 836 (Ind. 1989).

22. 519 N.E.2d 1217 (Ind. 1988).

23. The role of this statute in the scheme of common law dram shop liability is analogous to the relation of motor vehicle driving offense statutes to the common law duty of drivers to exercise reasonable care for the safety of others. Rather than preempting the common law, such statutes designate certain minimal duties but do not thereby relieve persons from otherwise exercising reasonable care.

*Id.* at 1220.

24. 551 N.E.2d 437, 442 (Ind. 1990); *see also* *FMC Corp. v. Brown*, 551 N.E.2d 444 (Ind. 1990); *Miller v. Todd*, 551 N.E.2d 1139 (Ind. 1990).

25. *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting). For a more thorough discussion of the view that Brennan hardly started this movement but only gave it visibility, *see* Shepard, *State Constitutions: State Sovereignty*, INTERGOVERNMENTAL PERSPECTIVE, Summer 1989, at 10. *See also* Falk, *The Supreme Court of California, 1971-1972: Foreword—The State Constitution: A More Than "Adequate" Nonfederal Ground, Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 396 n.70 (1980) (providing extensive bibliography).

Indiana lawyers have been accustomed, of course, to litigation based on the Indiana Constitution when questions affecting the organization of state government are at issue. A recent example of this important but traditional role was *State Election Board v. Bayh*,<sup>26</sup> in which the supreme court held that the leading contender for governor, the eventual choice of the voters, was eligible for election as governor under the residency requirements in the state constitution. Another example was the court's affirmation of the constitutionality of a law designed to rescue the township poor relief system in Lake County.<sup>27</sup> Yet another was the court's invalidation of a legislative act creating a program utilizing interest on attorney trust accounts to finance legal services for the poor.<sup>28</sup>

During 1989-90, the supreme court applied the Indiana Constitution to issues quite different from government organization. The Indiana Constitution played a vital role in resolving a major civil case, *Kellogg v. City of Gary*.<sup>29</sup> In *Kellogg*, the court held that article I, section 32 had been violated when the Gary city administration refused to make available applications for gun permits. This was a cause of action that does not exist under the second amendment to the U.S. Constitution.

*Cooper v. State*<sup>30</sup> focused international attention on Indiana's judicial system after Paula Cooper, who was fifteen years old when she murdered elderly Ruth Pelke, was sentenced to death. The court vacated Cooper's death sentence on two grounds. The principal basis for the decision was the requirement in article I, section 16 of the Indiana Constitution that criminal penalties be proportionate to the nature of the offense. In light of the legislature's 1987 decision that persons under sixteen should not be subject to the death penalty in the future,<sup>31</sup> the court concluded it would be disproportionate to make Paula Cooper the only person ever executed in Indiana for an act committed at age fifteen. The second ground for deciding the case, clearly declared to be separate and independent,<sup>32</sup> was the U.S. Supreme Court's decision that a similar Oklahoma statute violated the eighth amendment.<sup>33</sup>

Paula Cooper's case was not the only one supporting the idea that the Indiana Constitution imposes certain limits on criminal sentencing.

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26. 521 N.E.2d 1313 (Ind. 1988).

27. *Lake County Council v. Allen*, 524 N.E.2d 771 (Ind. 1989).

28. *In re Public Law No. 154-1990* (H.E.A. 1044), 561 N.E.2d 791 (Ind. 1990).

29. 562 N.E.2d 685 (Ind. 1990).

30. 540 N.E.2d 1216 (Ind. 1989).

31. After Cooper was sentenced to death but before her appeal was decided, the Indiana General Assembly passed a bill that prohibited imposition of the death penalty on persons who committed murder at age 15 or younger. The bill was prospective and did not purport to apply to Cooper's case. *Id.* at 1217.

32. *Id.*

33. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

During 1990, that concept became more firmly imbedded in our case law. The court restated its previous position that the U.S. Supreme Court's interpretation of the eighth amendment, as applied to lengthy prison terms in *Solem v. Helm*,<sup>34</sup> did not adequately address the rights possessed by persons under article I, section 16 of the Indiana Constitution.<sup>35</sup> The test under the Indiana Constitution was outlined four years ago in *Taylor v. State*<sup>36</sup> and *Mills v. State*,<sup>37</sup> which held that article I, section 16 of the Indiana Constitution afforded greater protection to individuals than the eighth amendment.

The supreme court applied the rule of *Taylor* and *Mills* again in *Michael Lee Clark v. State*<sup>38</sup> when it set aside a thirty-two-year penalty for driving while intoxicated on the grounds that it was not proportionate to the offense and the offender. The court explained:

The fact that appellant's sentence falls within parameters affixed by the legislature does not relieve this Court of the constitutional duty to review the duration of appellant's sentence as it is possible for the statute under which appellant is convicted to be constitutional, and yet be unconstitutional as applied to appellant in this particular instance.<sup>39</sup>

Although the tradition of reluctance of appellate courts to alter a sentence on appeal will continue, I think there is some willingness to consider cases on the individual merits rather than to rule out all requests for alteration. New recognition of the role of the Indiana Bill of Rights has provided the foundation for this possibility.<sup>40</sup>

Independent adjudication under the Indiana Constitution presents certain challenges to advocates. Although lawyers are accustomed to state constitutional litigation on issues like separation of powers, they

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34. 463 U.S. 277 (1983).

35. *Cash v. State*, 557 N.E.2d 1023 (Ind. 1990).

36. 511 N.E.2d 1036, 1039 (Ind. 1987) ("Our state Constitution mandates that the penalty be proportioned to [the] 'nature' of the offense. . . . [T]he proportionality analysis of a habitual offender penalty has two components. First, a reviewing court should judge the 'nature' and gravity of the present felony. Second, the court should consider the 'nature' of the prior offenses.").

37. 512 N.E.2d 846 (Ind. 1987) (first factor in *Taylor* analysis is gravity of primary offense, second factor is nature of earlier crimes).

38. 561 N.E.2d 759 (Ind. 1990).

39. *Id.*, slip op. at 10. This expression makes explicit that which was implicit in *Taylor* and *Mills*: a sentencing statute may be "constitutional as applied" under art. I, § 16 of the Indiana Constitution.

40. In the wake of *Taylor* and *Mills*, I predicted in this law review that some future litigant would obtain relief. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 583 (1989).

sometimes find it difficult to express state constitutional claims in ways that do not simply parrot traditional federal grounds.<sup>41</sup> The court has declined to consider Indiana Constitutional arguments when the advocate cites a provision of the state constitution but fails to offer any independent analysis.<sup>42</sup>

### C. *It Was the Twentieth Anniversary of Earth Day*

Environmental law is another field where the supreme court has exercised its new-found freedom to choose important cases. During 1989-90, the court heard cases involving the protection of land, the improvement of air quality, and the preservation of aquatic life, all in one twelve-month period.

The leading environmental case of the year was *Department of Natural Resources v. Indiana Coal Council, Inc.*,<sup>43</sup> in which a unanimous court upheld the state's program of preserving archaeological heritage from destruction during coal mining. The Department of Natural Resources had designated for protection from strip-mining 6.57 acres of potentially mineable land, known as the Beehunter Site and located on a 300 acre farm that was rich in coal deposits. It indicated that the landowner could either mine the contiguous land and leave the Beehunter site intact or accept a mitigation plan under which experts would record and preserve any archaeological material found on the site. The site's owners contended that the Department's designation constituted a taking under the fifth and fourteenth amendments to the U.S. Constitution, but the court stated:

The regulations as applied to [the owner's] property through the director's order and mitigation plan bear a substantial relation to the legitimate state interest of preserving our cultural heritage by protecting culturally significant data from strip mining. They are, thus, a legitimate exercise of the State's police power and since the economic impact of the regulations is slight, they do not amount to an unconstitutional taking of [the owner's] property.<sup>44</sup>

Air quality was at the heart of *State v. Costas*,<sup>45</sup> in which former state senator William Costas challenged regulations of the Indiana Air Pollution Control Board requiring motor vehicle emission tests in two northwest Indiana counties and two counties near Louisville.<sup>46</sup> The pro-

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41. Indiana lawyers are not alone. See, e.g., *State v. Jewett*, 146 Vt. 221, 223, 500 A.2d 233, 235 (1985).

42. See, e.g., *Light v. State*, 547 N.E.2d 1073 (Ind. 1989); *St. John v. State*, 523 N.E.2d 1353 (Ind. 1988).

43. 542 N.E.2d 1000 (Ind. 1989), cert. denied, 110 S. Ct. 1130 (1990).

44. *Id.* at 1007.

45. 552 N.E.2d 459 (Ind. 1990).

46. Senator Costas was charged with a class C infraction for failing to have his

gram was designed to reduce the ozone and carbon dioxide levels in the air of those four counties to safe levels. In defending himself, Costas alleged that requiring emission testing in just four counties violated the privileges and immunities clause of the Indiana Constitution.<sup>47</sup> He also alleged a violation of the equal protection clause of the United States Constitution. The trial court granted Costas's motion for summary judgment<sup>48</sup> on grounds that the regulations were unconstitutional, under both the Indiana and federal constitutions, as applied to the two northwest Indiana counties. On appeal, the court rejected these claims, saying that it could find no evidence that the program operated in a discriminatory manner against a protected class of persons.

The preservation of aquatic life was the underlying issue in *State ex rel. Ralston v. Lake Superior Court*,<sup>49</sup> part of a continuing fight between commercial fishermen and sport fishermen. This lengthy saga ran through both state and federal courts at the same time.<sup>50</sup> The Department of Natural Resources had embarked on a multi-year program to stock Lake Michigan and protect the results of this stocking by outlawing use of gill nets by commercial fishermen.<sup>51</sup> The Indiana Supreme Court affirmed the implementation of the Department's program once in *Ridenour v. Furness*,<sup>52</sup> but intervened a second time after the Lake Superior Court held the director of the Department of Natural Resources in contempt and threatened to jail him if he persisted in enforcing regulations designed to limit commercial fishing. The court issued a writ prohibiting the superior court from exercising any further jurisdiction.<sup>53</sup>

In short, the Indiana Supreme Court has used a portion of its new freedom to take up one of the major legal issues of the day, the environment. It was an appropriate decision, made just in advance of the twentieth anniversary of Earth Day, April 22, 1990.

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46. Senator Costas was charged with a class C infraction for failing to have his automobile emissions tested pursuant to state regulations. *Id.* at 460.

47. Article I, § 23 of the Indiana Constitution states: "The General Assembly shall not grant to any citizens, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

48. Costas actually moved to dismiss the charge under IND. TRIAL R. 12(B). However, the trial court held an evidentiary hearing on the motion, thus converting it into a motion for summary judgment. *Costas*, 552 N.E.2d at 462.

49. 546 N.E.2d 1212 (Ind. 1989).

50. See *Burns Harbor Fish Co. v. Ralston*, No. IP 89-433-C (S.D. Ind. Nov. 30, 1989) (WESTLAW, 1989 WL 150471, S.D. Ind.).

51. Gill nets are used by commercial fishermen to catch perch, but the nets also catch protected trout and salmon. *Ralston*, 546 N.E.2d at 1213.

52. 514 N.E.2d 273 (Ind. 1987).

53. *Ralston*, 546 N.E.2d at 1213.

*D. Post-Conviction Relief: Is the Trial Ever Over?*

Questions surrounding Indiana's system for post-conviction relief were prominent on the court's agenda during 1989-90, and there is every prospect that they will stay there. The jurisprudence was hotly debated through the early 1980s as the result of two cases, *German v. State*<sup>54</sup> and *Austin v. State*,<sup>55</sup> holding that a criminal defendant who pled guilty was entitled to plead anew if the trial judge accepting the plea omitted any advisement of rights required by statute. Several years of experience with this case law and a change in the membership of the supreme court ultimately led to a change in jurisprudence.<sup>56</sup> In *White v. State*,<sup>57</sup> the court declared the *German* rule had "visited felony convictions with all the finality of default judgments in small claims court,"<sup>58</sup> and the court overruled both its former authorities. It adopted a standard akin to the one used in federal courts for similar prisoner claims.<sup>59</sup>

During 1989-90, the court sought to refine further the substantive law of post-conviction relief and to alter post-conviction procedure in a way consistent with the posture taken in *White*. First, in *Moredock v. State*,<sup>60</sup> the court refused to extend the rule of *Ross v. State*,<sup>61</sup> which holds that a court cannot accept a plea of guilty from a defendant who professes innocence. *Moredock* claimed the benefit of this rule because he told the probation officer writing his pre-sentence report that he had not committed the crime. We held that *Ross* applied only to protestations of innocence made to the judge.<sup>62</sup>

Second, in *Daniels v. State*,<sup>63</sup> the court modified its previous posture on the retroactivity of new rules of law. It held that the prohibition on victim-impact evidence, announced in 1989 by the U.S. Supreme Court in *South Carolina v. Gathers*,<sup>64</sup> would not apply to *Daniels*'s trial, which had been concluded on direct appeal before *Gathers* was decided.<sup>65</sup>

The court also adopted new rules governing second and subsequent petitions for post-conviction relief. These rules clearly establish that a

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54. 428 N.E.2d 234 (Ind. 1981).

55. 468 N.E.2d 1027 (Ind. 1984).

56. We are not the only court of last resort where this happens. See *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (listing cases in which the U.S. Supreme Court has changed its jurisprudence).

57. 497 N.E.2d 893 (Ind. 1986).

58. *Id.* at 900.

59. *Id.* at 905-06.

60. 540 N.E.2d 1230 (Ind. 1989).

61. 456 N.E.2d 420 (Ind. 1983).

62. *Moredock*, 540 N.E.2d at 1231.

63. 561 N.E.2d 487 (Ind. 1990).

64. 490 U.S. 805 (1989).

65. *Daniels*, 561 N.E.2d at 490.

trial court may dismiss petitions it deems frivolous. They also provide that the state public defender shall be permitted to withdraw his or her representation when he or she deems the petition to be without legal merit.<sup>66</sup>

## II. LEADERSHIP OF THE JUDICIARY

### A. Oral Argument

When I was sworn in as chief justice, I articulated the hope of my colleagues "that lawyers will more often have the chance to argue their cases in person and that the public will more often have the occasion to see us in the courtroom."<sup>67</sup> Oral presentation was one of the traditions of appellate advocacy left behind in the effort to contend with hundreds of criminal cases each year. An early sign of the court's renewed determination to hear more arguments was our decision in April 1987 to order oral argument in the direct appeal of every capital case, whether the parties requested it or not.

During 1990, the court pursued oral argument with a vengeance. Arguments were scheduled in fifteen of the first twenty weeks of the year. And, as the Appendix demonstrates, by the end of the year the number of people invited to present their cases in person was nearly double the number invited in 1989.<sup>68</sup>

On January 8, 1990, the court began issuing weekly schedules of arguments for the benefit of the press and the public. The *Indiana Lawyer*, a new bi-weekly newspaper published by the Indianapolis Business Journal, and *Indiana Legislative Insight*, a weekly political newsletter, published these schedules. This permitted lawyers involved in cases similar to those being heard by the supreme court to attend our arguments.

A court that is more visible is a court in which the people can have greater confidence. I hope we can find new ways to make the Indiana

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66. IND. POST-CONVICTION R. 1(12).

67. We aspire as a court to dedicate more of our time to the legal problems which affect the average citizen: child support and custody, landlord-tenant disputes, commercial law, negligence, product liability, and the like. We hope to work our way out from under the mountain of repetitive matters and have the time to write fewer opinions and write them better. We hope that lawyers will more often have the chance to argue their cases in person and that the public will more often have the occasion to see us in the courtroom.

Remarks by Randall T. Shepard on Assuming the Office of Chief Justice, Old Vanderburgh County Courthouse, Evansville, Indiana (Mar. 4, 1987), *quoted in* Shepard, *supra* note 1, at 685.

68. *See app., infra* at 521.

Supreme Court more accessible to the public and the profession.

### B. *A Niagara of Rule Reform*

The book that sits on the desks of most Indiana lawyers, called *Indiana Rules of Court*, contains 1093 pages in its 1990 version. Almost two-thirds of it consists of rules adopted by or approved by the Indiana Supreme Court.<sup>69</sup> In urging the passage of Proposition Two, I suggested that this was an area that needed more attention and would receive it if Proposition Two were passed.<sup>70</sup>

In the first full year after the constitution was amended, the Indiana Supreme Court issued the most sweeping set of rule changes since the adoption of the trial rules in 1970.<sup>71</sup> The court amended over fifty existing rules in November 1989 and adopted several totally new ones. These amendments covered seventy-eight pages when published in the *Northeastern Reporter, Second*.<sup>72</sup>

These changes covered everything from the death penalty to small claims. One rule change was designed to accelerate the appeal of death penalty cases. Criminal Rule 24(D) mandates that trial transcripts be prepared by use of computer-assisted technology (CAT). The traditional method created long delays in the first step of death penalty appeals. Commonly, preparation of the transcript would consume a year; sometimes more than two years were required.<sup>73</sup> Use of CAT has reduced transcript preparation time dramatically. When the transcript was filed in *Matheney v. State*,<sup>74</sup> it was only the second timely transcript from the originating county in ten years of capital case filings.

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69. The principal vehicle through which the court acts is the Committee on Rules of Practice and Procedure. IND. TRIAL R. 80. That committee receives and considers proposals for rule reform, particularly in the Indiana Rules of Trial Procedure, through its own deliberations and through a process of notice and comment.

Other organs of the court also have need from time to time for alterations in the rules applicable to their operations. Each fall, the various proposals for rule reform are submitted for consideration by the full court.

70. Commencement Address by Randall T. Shepard, Indiana University School of Law-Indianapolis (May 10, 1987), reprinted in THE LAW PRACTITIONER, Summer 1987, at 4.

71. Bruce Kotzan, the State Court Administrator, said, "This is the most the court has done since I've been here, and that's 15 years." *State High Court Issues Sweeping Changes in Rules*, Louisville Courier-Journal, Dec. 1, 1989, at B3, col. 2.

72. 542 N.E.2d XXXI-CIX (Ind. cases ed.).

73. One case that took two years for the transcript to be filed was *Evans v. State*, No. CR85-235C (Marion Super. Ct. 1986), appeal docketed, No. 49S00-8704-CR-453 (Ind. Mar. 15, 1989).

74. No. 45G02-9001-CF-00022 (Lake Super. Ct. 1990), appeal docketed, No. 45S00-9002-DP-116 (Ind. Sept. 20, 1990).

The court adopted a new rule to define for the first time the meaning of the "character and fitness" required of a bar applicant.<sup>75</sup> Yet another new rule advanced truth in attorney advertising by requiring unsolicited communications to a potential client to be identified as advertising and submitted to the Supreme Court Disciplinary Commission.<sup>76</sup>

Although it is clear that the breadth of the 1989 rule amendments was necessitated in part by years of neglect, they represent more than a mere spring cleaning after a long winter. The court now has the time and the determination to do more in the way of rulemaking on a regular basis. We encourage practitioners and judges to help us identify rules that need improvement.

### C. *Legal Education*

As gatekeeper for admission to the bar, the supreme court also plays a role in legal education. In 1989, the court acted on a series of proposals advanced by Indiana's law schools and by the Indiana State Bar Association. Adoption of these proposals brought Indiana closer to the national norms established by the American Bar Association for education and admission to the bar. Their adoption was a logical second step after the court's decision in 1988 to require that applicants for the bar examination graduate from an ABA-accredited law school.<sup>77</sup>

The court trimmed substantially the requirements under Bar Admission and Discipline Rule 13(V)(C) that law students take a particular mix of courses in order to be eligible to take the bar examination. Indiana has been one of only two states with such a requirement.<sup>78</sup> The court agreed to reduce the number of required credit hours by approximately twenty-five percent<sup>79</sup> and removed altogether some required courses, like equity. The court's prior rule specified fifty-three credit-semester hours of courses.<sup>80</sup> This obviously constituted a considerable proportion of the credit hours required for graduation and tended to

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75. IND. BAR ADMISSION AND DISCIPLINE R. 13(IV)(A) (1990).

76. IND. RULES OF PROFESSIONAL CONDUCT Rule 7.3(c) (1990).

77. At the time, Indiana, California, and Georgia were the only three states that permitted graduates of law schools not accredited by the A.B.A. to take their bar examinations. Since Indiana's action, Georgia has chosen to require graduation from an ABA-accredited law school for all persons applying to take the Georgia bar after Jan. 1, 1998. GA. CT. & BAR RULES 12-8 (1990).

78. South Carolina requires classes in 14 subject areas before an applicant may sit for the bar exam. *Comprehensive Guide to Bar Admission Requirements*, 1990 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO BAR & NAT'L CONF. OF BAR EXAMINERS 10-12.

79. The court reduced the number of required credit-semester hours to 41. IND. BAR ADMISSION AND DISCIPLINE R. 13(V)(C) (1990).

80. IND. BAR ADMISSION AND DISCIPLINE R. 13(V)(C) (1989).

drive students' course choices. The rule also had the effect of limiting the ability of Indiana law firms to recruit from other states. A student attending law school in another state would have no particular reason to choose courses that complied with Indiana's Rule 13 unless the student knew early on that he or she would come to Indiana to practice. In an era of increasing mobility, we thought it was wise to reduce this barrier to national recruiting by Indiana's firms.

The law schools and bar also proposed restricting what had frequently been called the "two-year rule." This rule permitted students to take the bar examination after completing two years of law school. A student who passed the examination on this schedule was eligible for induction immediately after graduation.<sup>81</sup> This rule had the advantage of making students eligible for hiring as practicing lawyers immediately after commencement, but it had other effects that were not so attractive. Law schools reported that some who studied for the bar examination during their third year as law students were noticeably less prepared for their regular studies in law school. Schools also reported that students who passed the bar examination, say, in February of their third year, were less concerned about their performance during the final weeks of law school. The court's new rule permits students to take the bar examination before graduation only if they are within 100 days and five credit hours of graduation.<sup>82</sup>

#### *D. Initiative on Judicial Ethics*

We announced the most significant series of actions on judicial ethics in anyone's memory in September 1989.<sup>83</sup> First, the Judicial Center dedicated the annual meeting of the Judicial Conference of Indiana to judicial ethics. Judicial ethics experts from Indiana and the nation presented a complete day's program to the state's 300 judges.

Second, the Judicial Conference created a permanent committee on judicial ethics. I appointed twelve judges to the committee and selected Monroe Superior Court Judge Marc R. Kellams to serve as chairman. For the first time, judges serving on city and town courts were included

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81. *Id.* at 13(VII).

82. IND. BAR ADMISSION AND DISCIPLINE R. 13(V)(C) (1990). IND. BAR ADMISSION AND DISCIPLINE R. 13(VII) (1990) grandfathers all students who were enrolled in an approved law school on Jan. 1, 1990.

83. *Judges Act on Ethics*, Indianapolis News, Sept. 13, 1989, at C1, col. 1 (home ed.); *New Panel May Revise Code of Judicial Conduct*, Indianapolis Star, Sept. 14, 1989, at B3, col. 1. The Star's editorial board applauded these initiatives. "If ethical standards are to rule conduct effectively, they must be expressed clearly and often. Strengthening and emphasizing standards for Indiana judges is a sound move." *Honest Judges*, Indianapolis Star, Sept. 16, 1989, at A16, col. 1.

on the conference committee.<sup>84</sup> The committee was charged to create a regular ethics program for Indiana judges. The committee also will examine the recent changes in the American Bar Association's Model Code of Judicial Conduct, compare these with Indiana's Code of Judicial Conduct, and recommend such changes in Indiana's Code as the committee deems necessary.

Third, the Commission on Judicial Qualifications issued to each Indiana judge a set of advisory opinions covering ethical questions commonly raised by judges. Public advisory opinions were themselves a new tool, first used by the Commission in 1988.<sup>85</sup>

The supreme court's own contribution to this activity came in two sets of rules governing the discipline of judges. In early 1989, the court issued rules governing disciplinary actions involving members of the court itself.<sup>86</sup> More important for the long run, we finished the year by issuing a comprehensive set of rules of procedure for disciplinary matters involving judges.<sup>87</sup> These rules clarify the procedure under which the supreme court exercises its authority to discipline judges by collecting in one place rules that were previously scattered throughout the Indiana Code<sup>88</sup> or that existed only as unwritten custom.

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84. These were Judge Anthony J. Cefali, Hobart City Court; Judge Roger L. Lindsey, Jeffersonville City Court; and Judge Cecelia J. McGregor, Goshen City Court.

85. For the first 19 years of its existence, the Commission routinely gave ethical advice to judges by telephone or private correspondence. In 1988, the Commission began publishing advisory opinions in response to questions of general interest. *See, e.g.*, 33 RES GESTAE 134 (Sept. 1989) (Commission's first public advisory opinion); 34 RES GESTAE 86 (Aug. 1990) (Advisory Opinion #2-90, addressing the propriety of a judge publicly expressing personal views on the morality of abortion). Today, the Commission receives requests from individual judges for written advice concerning questions on judicial ethics. After the Commission members discuss the appropriate answer to the question posed, staff counsel Margaret Babcock drafts an advisory opinion reflecting the Commission's discussion. The Commission finally reviews every opinion before it is issued. Each advisory opinion is provided to all Indiana judges and is submitted for publication to RES GESTAE, the monthly journal of the Indiana State Bar Association. Although the views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, which is the ultimate authority on the Code of Judicial Conduct, the Commission does consider compliance with an advisory opinion to be a good faith effort to comply with the Code.

86. IND. BAR ADMISSION AND DISCIPLINE R. 25(G)(4) (originally adopted Mar. 2, 1989).

87. IND. BAR ADMISSION AND DISCIPLINE R. 25 (1990). The previous version of Rule 25 was one sentence. The new rule covers more than 11 pages and is the product of an ad hoc committee of the Indiana Commission on Judicial Qualifications led by Commission Vice-Chair Sara B. Davies. The principal drafters were Bruce A. Kotzan, counsel to the Commission, and Margaret Babcock, staff attorney for the Commission.

88. *Compare* IND. CODE ANN. § 33-2.1-5 (West 1983) (laws controlling discipline of judges) *with* IND. CODE ANN. § 33-2.1-6 (West 1983) (laws controlling discipline of superior, probate, juvenile, and criminal court judges).

*E. Trial Court Operation*

The supreme court's role in supervising the operation of the trial courts, traditionally a modest one, has been a significant area of activity during the last half decade. During 1989-90, the court moved forward from this base with the assistance of Bruce A. Kotzan and the Division of State Court Administration.

The most significant initiatives have attempted to standardize the paperwork and record-keeping functions of trial courts, which process an estimated ten million documents per year. Historically, each county kept records as it thought best, using methods frequently based on tradition or inertia. Traveling from one county seat to another was more like passing from Albania to Yugoslavia than like visiting two parts of the same state judicial system.

In late 1989, the court adopted a comprehensive set of rules governing the record-keeping practices in the trial courts and the clerks' offices. These practices were tested in several counties and adjusted based on these experiences. They became mandatory in all counties on January 1, 1991.<sup>89</sup> This new system is explained in a manual provided to every county, by a series of seminars, and through on-site technical assistance. These rules follow earlier landmarks such as the uniform case numbering system (designed to simplify analysis of caseloads), the micrographic standards (designed to protect our permanent records), and the record retention schedule (designed to insure that we keep what we need and throw away paper that nobody needs).

The record retention schedule and the work of the Division of State Court Administration in implementing it have been a particularly spectacular success. In 1989 alone, the Division's staff assisted in the destruction of 700 four-drawer file cabinets full of unneeded documents. The county clerks destroyed an additional 300 cabinets of dismissed cases, documents that were routinely retained before our rule was promulgated.

The court also dispensed funds directly to trial courts for the first time. Our office of guardian ad litem/court-appointed special advocates is distributing \$800,000 during the 1989-91 biennium to assist juvenile and family courts in providing better representation for children. The court is also home to the new Public Defender Commission of Indiana,<sup>90</sup> for which the legislature has appropriated \$1.3 million during the 1989-91 biennium to assist counties in paying the costs of litigating capital cases.

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89. IND. TRIAL R. 58, 72, 77 (1990).

90. IND. CODE ANN. § 33-8-13-1 (West Supp. 1990).

*F. Is Anybody Noticing?*

When I was sworn in as chief justice, I said: "We want to be a court so well-regarded that judges in other states, when considering the toughest legal issues of our time, will be led to look at each other and ask: 'I wonder what Indiana has done about this?'"<sup>91</sup> This statement was more a declaration about the need to pursue excellence than the need to pursue recognition. Recognition flows naturally to those who perform quality legal and judicial work. Indiana needs courts befitting the high quality of its bar. A strong Indiana judiciary can contribute to a better life for Indiana's citizens and for all Americans,<sup>92</sup> indeed, for citizens in other lands.<sup>93</sup> The country should view Indiana as a place where high caliber lawyers practice and high caliber judges sit. I suggest that there are some signs that this is so.

There was a time when the Indiana Supreme Court stood near the top of the national list of state courts to which lawyers, academics, and other judges looked for answers to the legal problems of the day. It was no accident that when the West Publishing Company created the Northeastern Reporter in 1885 it included New York, Massachusetts, Illinois, Ohio, and Indiana. These were states with supreme courts that the profession regarded as top-rate. A study by West Publishing Company in 1912 examined how often state courts cited each other as authority. In the years immediately before 1910, the Indiana Supreme Court was the fifth most commonly cited state supreme court, following only New York, Massachusetts, Illinois, and California.<sup>94</sup> A similar exercise in 1920 showed Indiana ranked eighth. A study of the relative prestige of state supreme courts in 1936 concluded that Indiana's court ranked fifteenth.<sup>95</sup>

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91. Remarks by Randall T. Shepard on assuming the office of Chief Justice of the Indiana Supreme Court, Old Vanderburgh County Courthouse, Mar. 4, 1987.

92. Although Indiana Supreme Court opinions are not binding on other state courts, they can offer guidance based on their persuasiveness, especially when other courts are "confronting novel legal problems or contemplating legal change." G.A. TARR & M. ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 31-32 (1988).

93. In more ways than we can know, the decisions coming from this state affect the lives of all persons controlled by the rule of law. Paula Cooper's death penalty appeal attracted international attention, including a plea for leniency from Pope John Paul II. *Cooper v. State*, 540 N.E.2d 1216, 1217 n.1 (Ind. 1989) (citing newspaper articles discussing the international community's reaction to the *Cooper* case). Communist countries in Europe and elsewhere are now abandoning their old systems of government and are looking to the United States collectively and to individual states for guidance in establishing a new legal order. Our federal colleagues have made a contribution on this front. United States District Court Judge John D. Tinder recently travelled to Yugoslavia to lecture on the United States's attempts to combat drug crimes.

94. *THE DOCKET* 642 (West, Jan. 1912), cited in Mott, *Judicial Influence*, 30 *AM. POL. SCI. REV.* 295, 307-08 (1936).

95. Mott, *supra* note 94, at 314.

As time passed, our ranking continued to decline. By 1975, a study of the reputation of state supreme courts placed Indiana twenty-fifth.<sup>96</sup> Only Missouri and Texas had fallen further.<sup>97</sup> The years immediately preceding Proposition Two reflected this same pattern. It was possible to search Shepard's Indiana Citations and find that virtually all of our opinions were being cited only in the Northeastern Reporter by Indiana courts. We were writing to ourselves.

By the late 1980s, Indiana was very much in the business of saying important things about the law, and attracting national attention. The nation's other state courts once again have been citing the Indiana Supreme Court as authority for their own decisions. A search of WESTLAW reveals that during 1990 we were cited at least 165 times by other state courts,<sup>98</sup> 15 times by federal circuit courts,<sup>99</sup> and 2 times by the U.S. Supreme Court.<sup>100</sup> Sixty of the citations by other state courts were to opinions our court issued since the beginning of 1985. Our decision about social host liability, *Gariup Construction Co. v. Foster*,<sup>101</sup> was cited by the Supreme Court of West Virginia,<sup>102</sup> which seemed to like it, and by the Arizona Court of Appeals,<sup>103</sup> which did not. Our case about treating mental patients with psychotropic drugs<sup>104</sup> was cited by the U.S. Supreme Court<sup>105</sup> and noted by the Maryland Court of Appeals.<sup>106</sup> The Illinois Court of Appeals cited our decision in *Covalt v. Carey Canada, Inc.*<sup>107</sup> about the statute of repose in asbestos cases.<sup>108</sup>

Many of our recent criminal law decisions have been noted elsewhere. The Supreme Court of Illinois cited our opinion in *Weekly v. State*<sup>109</sup> in resolving a question about the exclusion of potential jurors who were

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96. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 89 (1983).

97. *Id.* at 92-93.

98. See WESTLAW, Allstates database.

99. See WESTLAW, CTA database.

100. *Horton v. California*, 110 S. Ct. 2301, 2305 n.3 (1990); *Washington v. Harper*, 110 S. Ct. 1028, 1055 n.31 (1990) (Stevens, J., concurring in part and dissenting in part).

101. 519 N.E.2d 1224 (Ind. 1988).

102. *Overbaugh v. McCutcheon*, 396 S.E.2d 153, 156 n.5 (W. Va. 1990).

103. *Bruce v. Chas Roberts Air Conditioning, Inc.*, 801 P.2d 456 (Ariz. Ct. App. 1990).

104. *In re Mental Commitment of M.P.*, 510 N.E.2d 645 (Ind. 1987).

105. *Washington v. Harper*, 110 S. Ct. 1028, 1055 n.31 (1990) (Stevens, J., concurring in part and dissenting in part).

106. *Wilham v. Wilzack*, 319 Md. 485, 510 n.9, 573 A.2d 809, 821 n.9 (1990).

107. 543 N.E.2d 382 (Ind. 1989).

108. *Olsen v. Owens-Corning Fiberglass Corp.*, 198 Ill. App. 3d 1039, 1042, 556 N.E.2d 716, 718 (1990).

109. 496 N.E.2d 29 (Ind. 1986).

black.<sup>110</sup> The Colorado Court of Appeals followed our decision on post-conviction relief, *White v. State*,<sup>111</sup> to decide the appropriate remedy for an error in imposing sentence after a guilty plea.<sup>112</sup> The South Carolina Supreme Court followed our opinion in *Fox v. State*<sup>113</sup> in deciding whether limited expertise in a witness might permit the witness to express an opinion.<sup>114</sup>

The court's rising prominence is also reflected in the fact that several of our cases have been noted by legal commentators. *Department of Natural Resources v. Indiana Coal Council, Inc.*<sup>115</sup> received immediate and wide circulation by national historic preservation organizations, which predicted that other states would use its analysis, and which called the opinion a major takings case of national importance.<sup>116</sup> *Stropes v. Heritage House Childrens Center*<sup>117</sup> was the subject of the lead column in a national trial lawyers magazine. The author called *Stropes* an "enlightened and well-reasoned opinion."<sup>118</sup> One month later, the same magazine analyzed *Koske v. Townsend Engineering Co.*,<sup>119</sup> and applauded the decision as an "exemplary opinion of corrective justice."<sup>120</sup> *Travel Craft, Inc. v. Wilhelm Mende GmbH & Co.*,<sup>121</sup> a case of first impression about disclaimer of warranties, was summarized in the judicial highlights section of the advance sheets of most of the regional and national reporters published by the West Publishing Company.<sup>122</sup> *Farrow v.*

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110. *People v. Hope*, 137 Ill. 2d 430, 457, 560 N.E.2d 849, 861 (1990).

111. 497 N.E.2d 893 (Ind. 1986).

112. *People v. Sandoval*, 1990 WL 162360 (Colo. Ct. App. 1990).

113. 506 N.E.2d 1090 (Ind. 1987).

114. *State v. Myers*, 391 S.E.2d 551, 554 (S.C. 1990) ("authority exists to guide us on this precise question").

115. 542 N.E.2d 1000 (Ind. 1989), *cert. denied*, 110 S. Ct. 1130 (1990).

116. The opinion was featured on the cover page of the National Trust's Preservation Law Reporter advance sheet for September 1989. The Reporter noted that the case would "provide other states and local jurisdictions with a useful framework for upholding other measures designed to protect historic and archaeological sites." The National Center for Preservation Law called it a "major 'taking' case" of "national importance." 37 PRESERVATION LAW UPDATE 1 (Sept. 4, 1989).

117. 547 N.E.2d 244 (Ind. 1989) (focusing on the liability of children's center for damages inflicted on severely retarded boy who was living at the center at the time he was sexually abused by an employee).

118. Lambert, *Tom on Torts*, 33 L. REP. 140, 142 (1990). The opinion was also summarized in a commercial reporter that tracks cases of national significance to the medical community. 12 MED. LIABILITY REP. 108 (May 1990).

119. 551 N.E.2d 437 (Ind. 1990) (defense of open and obvious danger does not survive codification of strict liability).

120. Lambert, *Tom on Torts*, 33 L. REP. 188 (1990).

121. 552 N.E.2d 443 (Ind. 1990).

122. See, e.g., 789 P.2d XVI (West Supp. June 1, 1990); 733 F. Supp. VII (West Supp. June 4, 1990); 552 N.E.2d XXII (West Supp. May 30, 1990).

*Fairrow*,<sup>123</sup> a case that held that the question of paternity might be reopened upon accidental discovery of sickle cell trait, was featured in a recent issue of the *National Law Journal*,<sup>124</sup> and it was included on the front page as a highlighted case in BNA's *Family Law Reporter*.<sup>125</sup> The court's disciplinary opinion in *Matter of Kern*<sup>126</sup> became the subject of a column about ethics on the op-ed page of the *National Law Journal*.<sup>127</sup> Our opinion on judicial discipline, *In re Boles*,<sup>128</sup> was included in a casebook of the American Judicature Society.<sup>129</sup>

As the court's writings have attracted wider notice, its members have been in greater demand. During the last two years, law schools from California to Connecticut have asked members of the Indiana Supreme Court to sit on moot court panels.<sup>130</sup> One member of the court was asked to chair a national panel examining the use of videotape as a record-keeping tool.<sup>131</sup> Another member of the court was asked to sit as a judge in a national individual achievement competition.<sup>132</sup> The Federal Circuit Bar Association asked one justice to speak at a conference on takings, held in Virginia.<sup>133</sup>

A court writing more law and playing a more prominent role in the law finds it easier to recruit good talent. In the early 1980s, the court generally recruited its law clerks from two law schools. In 1990, the court's eleven clerks came from a greater variety of places, including Indiana University-Bloomington (4), Indiana University-Indianapolis (3), Yale (2), Northwestern (1), and Valparaiso (1). Six of our current clerks served on the law journals of those schools, including the editor-in-chief of the *Indiana Law Journal* and the managing editor of the *Yale Law Journal*. That bright, capable young lawyers want to begin their careers

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123. 559 N.E.2d 597 (Ind. 1990).

124. Sept. 24, 1990, at 6, col. 2.

125. 16 Fam. L. Rep. (BNA) 1557, 1563 (Oct. 9, 1990).

126. 555 N.E.2d 479 (Ind. 1990).

127. *Ethics: Indiana Court Backs Up Sanctions*, Nat'l Law J., Oct. 22, 1990, at 13, col. 3.

128. 555 N.E.2d 1284 (Ind. 1990).

129. AMERICAN JUDICATURE SOCIETY, 12TH NATIONAL CONFERENCE FOR JUDICIAL CONDUCT ORGANIZATIONS 158 (1990).

130. These include the University of the Pacific, Yale, University of Cincinnati, John Marshall, and Southern Illinois.

131. The National Center for State Courts asked this author to chair an advisory committee overseeing a study, the results of which were published in book form. NATIONAL CENTER FOR STATE COURTS, VIDEOTAPED TRIAL RECORDS: EVALUATION AND GUIDE (1990).

132. Last June, Justice Brent Dickson served on the 1990 National Awards Jury at the request of the Freedoms Foundation at Valley Forge.

133. The Federal Circuit Bar Association, the United States Claims Court Bar Association, and the National Trust for Historic Preservation asked this author to speak at The Takings Clause Bicentennial, a conference held at Woodberry Forest and Montpelier Station, Virginia, in June 1990.

with the Indiana Supreme Court is very heart-warming. It is also a good sign.

### III. LOOKING AT THE FUTURE

The progress I have described suggests that the 1990s can be a strong chapter in the history of the Indiana Supreme Court. A docket balanced with both civil and criminal cases, and more active leadership of the judiciary and the profession, are just a beginning.

As for our appellate work, I see at least two tasks in the decade ahead — one fairly subtle and one quite public. First, we justices must develop more refined ways of selecting cases to decide on the merits from among the eight or nine hundred requests presented to us each year. We now do this with the assistance of staff counsel and through our own face-to-face discussions of hundreds of cases a year. Still, we decide which appeals to take largely on a case-by-case basis, without reference to the whole of the demand on our time. We must create some new protocol for allocating our docket. Such improvements in our internal operation will go nearly unnoticed, but more systematic selection of cases will benefit one and all.

Second, we must pay greater attention to the caliber of the jurisprudence that our opinions represent. In years when we wrote 3-400 opinions, there was little time for tending to the analytical framework or the turns of phrase that so often set the course for future development of the law. We will now write only 100 or 150 opinions per year. Under these circumstances, pride of craftsmanship and duty to the bar and the public will command better thinking and greater attention to detail. I want a court better respected for its writing, in both the academy and the bar.

We must also give further leadership to the cause of trial court reform. We should begin asking questions that might have seemed too ambitious in even the recent past, such as what we can do to improve the professional working conditions of our trial judges.

We must also improve our record of recruiting women and minorities to the Indiana judiciary. While the number of women and minority judges has doubled in the last decade, all of us should recognize that there are still far too many barriers to equal opportunity. It should be our common project to make the judiciary (and the profession) more inclusive.

Courts are the most visible symbols of the role our profession plays in the lives of the people whom we serve as lawyers and judges. I am determined that the Indiana Supreme Court will be a place befitting our profession's highest aspirations, and I am optimistic that it can be.

### Appendix



