

WHY CHANGING THE SUPREME COURT'S MANDATORY JURISDICTION IS CRITICAL TO LAWYERS AND CLIENTS

RANDALL T. SHEPARD*

Business managers consistently stress how competent managers should conduct their oversight responsibilities: limit the number of direct reports. Leaders who seek to give daily direction to too many people are managers who do not have the time to think the larger strategic thoughts that make organizations run well.

The Indiana Supreme Court faces a predicament common to many managers at the head of large organizations. The current requirement of the Indiana Constitution that all criminal appeals of cases involving sentences of more than fifty years come directly to the Supreme Court from the trial court has shifted a substantial number of criminal appeals to the Supreme Court for initial review. These were previously handled very ably by the state's intermediate court. If the Supreme Court is to play well its role as the leader of the state's legal system, we must find a way to limit the number of "direct reports."

This fall, we will ask the voters of the state to amend the constitution to restore this capacity for leadership to the Indiana Supreme Court. I describe here why this is a good idea.

I. HOW WE GOT HERE

Alas, this is the second time in just a few years that we have asked the voters to solve more or less the same problem. A provision placed in the judicial article of the Constitution in 1970 gave persons who received a criminal sentence of more than ten years the right to appeal directly from the trial court to the Supreme Court.¹ More aggressive drug prosecutions, a renewed war on crime generally, and increases in statutory penalties led to mass increases in the number

* Chief Justice of Indiana. Princeton University, A.B., 1969; Yale Law School, J.D., 1972; University of Virginia, LL.M., 1995.

1. "The supreme court shall have jurisdiction, co-extensive with the limits of the state, in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the general assembly may confer." IND. CONST. art. VII, § 5, *amended on* Nov. 3, 1970. The provision now reads in relevant part: "The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment, or imprisonment for a term of greater than ten years shall be taken directly to the Supreme Court." *Id.*

of mandatory criminal appeals during the 1980s.²

This increase meant that nearly all other appellate business was squeezed into a small percentage of the court's time. As I stated in my 1988 address to the General Assembly, "The present ten-year rule has flooded the Supreme Court with criminal cases—93% of our opinions in 1986—and nearly forced off our docket the kinds of civil cases which bring most people to court: custody and child support, landlord/tenant disputes, tort law, and the like."³ The bench and bar proposed a constitutional amendment that raised from the ten years to fifty years the threshold for direct appeals. The legislature approved this proposal and placed it on the ballot for November 1988.

The Indiana State Bar Association provided strong support, particularly in educating the public.⁴ Local bar associations and judges did the same.⁵ There was no opposition to our proposal to amend the Constitution. The public voted "yes" by a wide margin.⁶

2. The following table illustrates the constraints placed upon the court by the direct appeal mandate:

<u>Year</u>	<u>Opinions</u>	<u>Direct Appeal Opinions</u>		<u>Civil Transfer Opinions</u>	
		<u>(%)</u>		<u>(%)</u>	
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	224	285 (85%)		23 (7%)	
1981	204	246 (81%)		38 (13%)	
1980	270	226 (84%)		21 (8%)	
1979	262	210 (80%)		21 (8%)	
1978	275	234 (85%)		21 (8%)	
1977	164	138 (84%)		12 (7%)	
1976	165	137 (83%)		7 (4%)	

Randall T. 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).

3. Randall T. Shepard, *State of the Judiciary*, 31 RES GESTAE 353, 354 (1988).

4. See Randall T. Shepard, *Vote "Yes" on Proposition 2 or "I'm Sorry, But There's No Supreme Court Case on That"*, 32 RES GESTAE 56 (1988).

5. See Doug Haberland, *Chief Justice Makes Case for Proposition 2*, FORT WAYNE JOURNAL-GAZETTE, Sept. 28, 1988, at 1C ("The general populace doesn't have the access to the courts it deserves," said Wells Circuit Court Judge David L. Hanselman Sr.); James O. McDonald, *Prop 2 Is for Law-Abiding Citizens*, TERRE HAUTE TRIBUNE-STAR, Oct. 23, 1988, at C3 ("The Terre Haute Bar Association; Indiana Bar Association; Supreme Court Judges Shepard and Di[cks]on; Vigo County Judges Bolin, Brown, Eldred, Kite and McCrory; county political chairmen Robert Wright and Ruel Burns; Sheriff Jim Jenkins; Prosecutor Phil Adler; and Police Chief Gerald Loudermilk all have endorsed passage of Proposition 2.").

6. In 1998, 1,034,309 citizens voted for the amendment to article VII, section 5; only 153,640 voted against it. Secretary of State, *Indiana General Election 1998: Constitutional Amendments* (visited May 30, 2000) <http://www.state.in.us/serv/sos_elections?office=

The public adoption of the amendment permitted a substantial realignment of the court's docket. Instead of consuming ninety percent of the court's opinions, by 1992 criminal direct appeals accounted for only thirty-one percent.⁷ This change also gave the court the opportunity and energy to undertake all sorts of reform efforts, such as the writing and adoption of the Indiana Rules of Evidence⁸ and large-scale revisions to rules covering a host of other neglected areas. In January 1990, for example, the Indiana Supreme Court amended forty-two different rules of court, including parts of the Rules of Criminal Procedure, Appellate Procedure, Trial Procedure, Post-Conviction Remedies, Small Claims, Admission and Discipline, Professional Conduct, as well as the Administrative Rules and the Code of Judicial Conduct.⁹ Some may have regarded these changes as too aggressive; most practitioners thought we were making up for lost time.

This change in appellate jurisdiction worked rather well until the General Assembly changed the sentence for murder. During the 1994 session, the legislature passed conflicting statutes: one purported to change the presumptive term for murder from forty years to fifty years and the other purported to change it back to forty again.¹⁰ By the 1995 session, the legislature resolved this conflict by setting the standard penalty at fifty-five years.¹¹

Raising the standard sentence for murder to fifty-five years eventually caused an explosion in the number of direct appeals to the Supreme Court. The number of cases docketed in the court because the sentence was more than fifty years grew as follows:

Constitutional+Amendments>.

7. See Kevin W. Betz & Andrew T. Deibert, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1993*, 27 IND. L. REV. 719, 719 (1994) (58 criminal direct appeals and 185 opinions issued in 1992).

8. The Indiana Supreme Court adopted the Rules of Evidence effective January 1, 1994. See *Bryant v. State*, 660 N.E.2d 290, 310 n.23 (Ind. 1995).

9. The rules amended are: Indiana Trial Rules 42, 53.4, 54, 58, 59, 65, 72, 77, 85; Indiana Criminal Rules 11, 15, 16, 18, 19, 23, 24; Indiana Appellate Rules 2, 4, 8.2, 9, 17; Indiana Small Claims Rules 5, 8, 11, 15; Indiana Admission and Discipline Rules 2, 3, 6, 12, 13, 15, 16, 21, 25, 29; Indiana Administrative Rules 1, 2, 7, 8; Indiana Judicial Conduct Canon 7; Indiana Professional Conduct Rule 7.3; Indiana Post-Conviction Rule 1.

10. In 1994, the General Assembly twice amended IND. CODE § 35-50-2-3, which instructs a court on how to sentence a defendant convicted of murder. Compare Pub. L. No. 164-1994 with Pub. L. No. 158-1994. "The first amendment changed the presumptive sentence for murder in section 3(a) from forty to fifty years and reduced the possible enhancement time The second amendment allowed for the exclusion of mentally retarded individuals from the death of life imprisonment without parole sentencing option of section 3(b). . . . However, the second amendment did not incorporate the changes of the first amendment." *Smith v. State*, 675 N.E.2d 693, 695 (Ind. 1996). There were, in effect, two different Indiana Code sections 35-50-2-3, each with different presumptive sentences for murder. See *id.*

11. See Pub. L. No. 148-1995, § 4.

<u>Year</u>	<u>Criminal Direct Appeals</u>
1995	54
1996	82
1997	112
1998	97
1999	118

This expansion in direct appeals reflected the fact that most murder cases became direct appeals and earned a place on the docket of the Supreme Court, whereas formerly only those in which the sentence was fully enhanced or in which there was an habitual offender finding earned mandatory places on the Court's docket. The corollary, of course, was that there was less time available to hear the appeals of civil litigants or of criminals whose sentences were fifty years or less:

<u>Year</u>	<u>Total Civil</u> ¹²	<u>Criminal Transfer</u>	<u>Criminal Direct</u>	<u>Total Criminal</u> ¹³	<u>Total Crim + Civil</u>
1995	41 (38%)	29 (27%)	38 (35%)	67 (62%)	108 (100%)
1996	38 (31%)	25 (20%)	59 (48%)	84 (69%)	122 (100%)
1997	45 (27%)	27 (16%)	94 (57%)	121 (73%)	166 (100%)
1998	31 (23%)	17 (12%)	89 (65%)	106 (77%)	137 (100%)
1999	47 (27%)	24 (14%)	106 (60%)	130 (73%)	177 (100%)

The message of this chart is one of restricted access to justice. As I said to the legislature: "[O]nce again [it is] very difficult for parents or business people or injured Hoosiers (or for that matter appellants in criminal cases who got two-year sentences or 42-year sentences) to get a hearing on the merits in the Supreme Court."¹⁴

II. WHAT TO DO NEXT

It is unacceptable, that over the long term, the Indiana Supreme Court will be open only to those whose sentences are the highest and virtually closed to people with ordinary family and business legal problems. The legal turn of events that created the present predicament has just four solutions: a dramatic decline in the number of murders, a decision by the legislature to reduce the

12. Included in this number are civil direct appeals and civil transfers.

13. Included in this number are criminal direct appeals and criminal transfers.

14. Randall T. Shepard, *Indiana Courts as Servants of Their Communities*, 41 RES GESTAE, Feb. 1998, at 28, 33.

penalty for murder, an outbreak of trial court leniency on murders, or amending the constitution.

While most of these alternatives seem highly unlikely, there are a number of changes one might contemplate as partial solutions. After all, the challenge is one that high appellate courts have regularly faced in one way or another: a growing criminal caseload crowding out the other business. It has certainly been the history of our own state. When the Indiana Appellate Court was created in 1891, it had no criminal jurisdiction at all.¹⁵ By the time reformers were revising the judicial article in the 1960s, it seemed prudent to send the bulk of the criminal business to the Court of Appeals for initial review.

A state high court faced with a growing docket has at its disposal a relatively fixed list of tools. These tools afford some relief, but, as I shall argue, they are not adequate permanent solutions for the problem Indiana now faces.

A. *Work Faster*

To be sure, a court can simply work faster and turn out more opinions. When the crunch came in the mid-1980s, the Indiana Supreme Court issued record numbers of criminal opinions. In 1986, for example, the five members produced a total of 445 signed opinions.¹⁶ Similarly, the current Justices have done their best to increase the number of opinions issued on the merits. It has not been enough. As I said in my 1998 state of the judiciary address: "Last year the Supreme Court had its most productive year since 1991, issuing 30 percent more opinions than the year before, including moving a record number of death-penalty cases. And when we were done, we were farther behind than we were on Jan. 1."¹⁷

Moreover, this rapid-fire approach is necessarily fraught with the chance for error. During the 1980s, for example, the volume was so high that we adopted and reversed a rule within a matter of weeks.¹⁸ The members of the court simply could not keep track of the precedent.¹⁹

15. Regarded initially as a temporary expedient, the court was authorized to exist for only six years. See 1891 Ind. Acts ch. 9, § 26. In 1897, the court's existence was extended for four years. See 1897 Ind. Acts ch. 9, § 3. Finally, in 1901, the General Assembly directed that it be a permanent body. See 1901 Ind. Acts ch. 247, § 19.

16. See Shepard, *supra* note 2, at 682.

17. Shepard, *supra* note 14, at 33.

18. The Indiana Supreme Court's decision in *Phillips v. State*, 492 N.E.2d 10 (Ind. 1986), which held that to establish admissibility of a statement made after an accused has invoked his right to remain silent during custodial interrogation, the state must show that the accused later initiated the dialogue and knowingly waived the previously invoked right to remain silent, was set aside less than six weeks later in *Moore v. State*, 498 N.E.2d 1 (Ind. 1986), which held that a showing that the dialogue was initiated by the accused was not necessary.

19. Compare *Groves v. State*, 456 N.E.2d 720 (Ind. 1983) (reversible error to admitting Regiscope picture without foundation of evidence about the manner in which picture was processed and complete chain of custody), with *Stark v. State*, 489 N.E.2d 43 (Ind. 1986) (proper to admit

B. *Say Less*

Another approach is to say less, that is to use summary dispositions for those appeals that are present on the merits. Some courts have been known to dispose of cases by order or by simply writing "affirmed."²⁰ A slightly better alternative is the summary opinion. When the Indiana Supreme Court was struggling with volume late in the nineteenth century, some opinions on the merits ran as little as a few sentences.²¹ This is spectacularly unpopular with lawyers and clients. A recent resolution adopted by the American Bar Association affirms this unpopularity: "RESOLVED, That the American Bar Association urges the courts of appeal, federal, state and territorial, to provide in case dispositions (except in those appeals the court determines to be wholly without merit), at a minimum, reasoned explanations for their decisions."²²

C. *Say Nothing at All, in Print*

Yet another alternative is the unpublished opinion. All of the federal courts of appeal use this device, by which only some of the court's decisions are submitted for inclusion in the Federal Reporter.²³ In the first two decades after the federal courts began the practice, the trend has been to publish fewer opinions.²⁴ Anecdotal information suggests continuing decline.²⁵

Regiscope photograph without evidence of manner of processing or complete chain of custody).

20. For example, the Fifth Circuit has a rule on "Affirmance Without Opinion." U.S. CT. OF APP. 5TH CIR. R. 47.6. In 1985, the Indiana Court of Appeals disposed of 97% of the cases it heard by opinion. See DIVISION OF STATE COURT ADMINISTRATION, 1985 INDIANA JUDICIAL REPORT, supra note 1, at 16. The supreme court issued opinions in 99% of the cases it decided on the merits. See *id.* at 2, 10. This figure does not include denials of requests for transfer of cases previously heard by the court of appeals. Some other jurisdictions dispose of less than one fourth of the cases heard by opinion. For example, the New Jersey Supreme Court issued opinions in 18% of the cases it heard, while the Kentucky Supreme Court issued opinions in 23%. See NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1985, at 16.

21. See, e.g., *Norris v. State*, 69 Ind. 416 (1879) (46 words) ("This was a prosecution for selling 'one gill of whiskey' without license. The same question is made in this case as that decided in the case of *Arbintrode v. The State*, 67 Ind. 267 (1879). Upon the authority of that case, the judgment in this case must be reversed. Judgment reversed.").

22. American Bar Association, House of Delegates Resolution 8B (Feb. 14, 2000).

23. See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 941-44 (1989).

24. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 761 n.14 (1995). Dragich cites several sources suggesting a decline of 40% in the Fifth Circuit's publication rate between 1969 and 1987, for example. See *id.*

25. See Stephen Reihnhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205, 217 (1992) ("When I came on the court [United State Court of Appeals for the

This same practice is followed in a good many state courts, including Indiana.²⁶ As in the federal courts, the use of unpublished decisions in state court appears to be increasing. Professor Keith H. Beyler calculated that the percentage of unpublished opinions in the Indiana Court of Appeals rose from 47.6% in 1981 to 62.8% in 1987.²⁷ In 1999, that court decided seventy-three percent of its cases by unpublished memoranda.²⁸ Indeed, there is a corollary tool available to state high courts: making an intermediate court opinion “disappear” by ordering it depublished. California is famous for this draconian, if convenient practice.²⁹

This too is relatively unpopular.

Commentators have recognized that the very act of putting pen to paper will itself have a sobering effect. However, the absence of the published opinions severely handicaps the timely critical review of judicial action by legal scholars, the press and the bar. It enhances the possibility that victimized users of the judicial process will develop a deep seated distrust of the institution, such that quixotic proposals for restraints of judicial power of the past, will not be derailed by timely judicial accommodation. In short, the lesson we may learn is that justice rendered in silence is not justice.³⁰

Seventh Circuit Chief Judge Richard Posner has said that unpublished opinions

Ninth Circuit] ten years ago, we wrote reasoned opinions in about seventy-five percent of our cases. We now write them in about twenty-five percent. In the large majority of our cases, we write memorandum dispositions which are unpublished. It is no secret that there is not as much time, attention, or care given to the disposition of cases decided in memoranda.”).

26. See IND. APPELLATE RULE 15.

27. See Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1, 22 (1989).

Unpublished Opinions in the Indiana Court of Appeals

<u>Year</u>	<u>Dist. 1</u>	<u>Dist. 2</u>	<u>Dist. 3</u>	<u>Dist. 4</u>	<u>Ave.</u>
1981	38.3%	63.4%	44.8%	43.9%	47.6%
1982	47.8%	71.4%	55.2%	62.2%	59.2%
1983	52.1%	69.0%	51.7%	64.2%	59.3%
1984	60.0%	66.4%	53.4%	59.8%	59.9%
1985	51.8%	66.4%	45.6%	64.4%	57.1%
1986	53.4%	62.7%	47.5%	58.2%	55.5%
1987	56.1%	70.9%	56.5%	67.5%	62.8%

See *id.*

28. See, COURT OF APPEALS OF INDIANA 1999 ANNUAL REPORT 4 (1999) (unpublished manuscript on file with the Court of Appeals) (593 published opinions, 2200 total opinions).

29. See Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984).

30. Lawrence A. Salibra, II, *Increase in Unpublished Opinions Undermines Public Trust in Courts*, 10 LGL. OPINION LETTER 1 (Apr. 28, 2000).

are a "formula for irresponsibility."³¹ Critics especially dislike the limits on subsequent citation that are a feature common to most such rules that limit subsequent citation.³²

D. Add More Judges

Another common tool is simply to increase the number of judges sitting on the state's highest court, on the presumption that more hands will add to the total volume the court is able to turn out. Of course, the increase in the number of justices does not create a similar increase in the number of cases capable of being handled. This is so because it takes longer for a group of seven or nine to come to resolution than it takes a group of five to do so.³³ While there may be other reasons to expand a court, such as making room for justices from different parts of society, increasing the number of bodies lifts total productivity only marginally. The downside of using more judges, of course, is the same peril always posed by great volume—inconsistent outcomes and rules.

While these approaches and others might well be suitable solutions at the margins of our volume problem, none of them alone or collectively would address the Niagara of direct criminal appeals now washing over the Indiana Supreme Court.

CONCLUSION

When the *Indianapolis Star* endorsed amending the Indiana Constitution twelve years ago, it said: "[T]he state's highest court has become less a marketplace of reasoned, scholarly judgment than an assembly line review process. The consequences cannot be good for the law or for the people governed by it."³⁴ Those consequences are with us again. November's constitutional amendment is the best solution.

31. William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES Mar. 14, 1999, at 1 (quoting Circuit Chief Judge Richard Posner).

32. See *In re Amendment of Section (Rule) 809.23(3)*, Stats, 456 N.W.2d 783, 788 (Wis. 1990) (Abrahamson, J., dissenting) ("I have come to believe, as those judges [Holloway, Barrett, and Baldock of the 10th Circuit] do, that any litigant who can point to a prior ruling of the court and can demonstrate that he or she is entitled to prevail under it should be able to do so as a matter of justice and fundamental fairness.").

33. As Judge Posner explains by comparing a group of nine to a group of eleven: The number of links required to connect all the members of a set grows exponentially with the size of the set, in accordance with the formula $n(n-1)/2$. Thus, 36 links are necessary to connect all the members of a set of 9, and 55 for a set of 11—half again as many. But the reduction in the number of opinion assignments per capita would be less than one-fifth (it would be 2/11).

RICHARD POSNER, *THE FEDERAL COURTS* 14 (1985).

34. *Proposition 2*, INDIANAPOLIS STAR, Oct. 2, 1988, at F-2.