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Second Wind for the Indiana Bill of Rights*

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We assemble this evening on the two hundredth anniversary of the national debate over what to include in the federal Bill of Rights. Inextricably tied to that debate was the key role which our nation's founders believed the states should play in the protection of individual liberties against the excesses of government. The role of states, state courts and state constitutions requires care and tending. As Justice Clark wrote in *Mapp v. Ohio*:¹ "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."²

You will recall that it was only the promise of the federalists that they would support a federal bill of rights which brought the last two key states, Virginia and New York, into the new union. The anti-federalists had attacked the new constitution on the grounds that it would permit the new government too much control over the lives of individual citizens. Americans felt comfortable that they could live free lives with few threats from the state capital, but they feared the unchecked power of a new and distant sovereign. Even the promise of a series of amendments spelling out individual freedoms managed to carry the day in New York by only three votes.

As people like Jefferson, Sherman, and Madison began to think about the shape such a federal bill of rights should take, they had ample opportunity for borrowing. Many provisions in such charters as the

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1. 367 U.S. 643 (1961).

2. *Id.* at 659.

Virginia Declaration of Rights became part and parcel of the new proposed amendments.

Notwithstanding the prompt adoption of ten amendments to the Constitution of the United States, the bills of rights in the state constitutions remained the principal force in American civil liberties for a century and a half. The federal Bill of Rights, after all, was designed to protect people against the national government. If there had ever been any doubt that it was not a limitation on state action, that doubt vanished when John Barron argued in the Supreme Court of the United States that the City of Baltimore had violated the Fifth Amendment. Chief Justice Marshall was not impressed: "The question thus presented is, we think, of great importance, but not of much difficulty."³

Indeed, even after the adoption of the Civil War amendments,⁴ federal due process and equal protection were deemed to require only fundamental fairness in state procedures rather than to embody specific guarantees in the same manner in which they were written in the Bill of Rights. In the familiar *Slaughter-House Cases*,⁵ the Supreme Court held that the fourteenth amendment did not add to the rights, privileges, or immunities of the citizens of the several states. Eleven years later in *Hurtado v. California*,⁶ the Court declared that "[d]ue process of law" referred to "that law of the land in each State, which derives its authority from the inherent and reserved powers of the State."⁷

Even in the twentieth century, the Court held that the fourteenth amendment did not impose on states the obligation to recognize the right against self-incrimination contained in the fifth amendment.⁸ And it was not until 1925 that the Court held that the first amendment limited a state's regulation of free speech and free press.⁹

This is not to say that Americans were without protection from the excesses of government. States and state courts pursued the obligations which the drafters at Philadelphia assumed they would continue to pursue: protection of the civil liberties of Americans through the use of state bills of rights.

Indiana was an early and noteworthy participant in using its bill of rights to defend personal liberty. The Indiana Supreme Court, for ex-

3. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

4. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

5. 83 U.S. (16 Wall.) 36 (1872).

6. 110 U.S. 516 (1884).

7. *Id.* at 535.

8. *Twining v. New Jersey*, 211 U.S. 78 (1908), *implicitly overruled*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

9. *Gitlow v. New York*, 268 U.S. 652 (1925).

ample, spent forty years asserting its authority in the fight against slavery. The very first volume of Blackford's Reports records the court's decision in *State v. Lasselle*,¹⁰ an appeal by a slave known only as Polly, whose Virginia owner had been granted a writ of habeas corpus. Our supreme court reversed, observing that "the framers of our constitution intended a total and entire prohibition of slavery in this State; and we can conceive of no form of words in which that intention could have been more clearly expressed."¹¹

When the legislature passed a statute making it a crime to induce the escape of a slave or to hide one, the Indiana Supreme Court invalidated the law¹² on the basis of the United States Constitution as interpreted in *Prigg v. Pennsylvania*,¹³ a decision of the Taney Court affirming federal fugitive slave laws. Eventually confronted with the very federal fugitive slave laws affirmed in *Prigg*, which allowed United States marshals to take possession of slaves and return them to their owners, the Indiana Supreme Court in *Freeman v. Robinson*¹⁴ found a slave has the right to sue the marshal in state court for assault, battery and extortion. These are not part of the marshal's duty, the court held, implicitly concluding that charging Freeman three dollars a day for his keep might be fairly called extortion.¹⁵ Because Congress has not legislated on these matters, Judge Gookins wrote for the court, "[W]e do not see that it is possible there should be any conflict between federal and state authorities."¹⁶

These were but a few in a fine line of cases in which the Indiana Supreme Court held that the Indiana Bill of Rights afforded Hoosiers rights which the federal Constitution did not. In 1825, for example, the court declared unconstitutional a law permitting the assessment of damages in condemnation cases by three appraisers, holding that article I, section 5, of the 1816 Constitution guaranteed a right to trial by jury.¹⁷ As Judge Fisher of the Indiana Tax Court noted in July 1988, this is still not a right recognized under the seventh amendment.¹⁸

10. 1 Blackf. 60 (Ind. 1820).

11. *Id.* at 62.

12. *Donnell v. State*, 3 Ind. 480 (1852), *overruled*, *State v. Moore*, 6 Ind. 436, 437 (1855).

13. 41 U.S. (16 Pet.) 539 (1842).

14. 7 Ind. 321 (1855).

15. *Id.* at 323.

16. *Id.* at 323. Nevertheless, the marshal won because Freeman sued him in the wrong jurisdiction. *Id.*

17. *Armstrong v. Jackson*, 1 Blackf. 374, 375-76 (Ind. 1825).

18. *State Line Elevator v. State Bd. of Tax Comm'rs*, 526 N.E.2d 753, 754 (Ind. T.C. 1988).

More than a century before *Gideon v. Wainwright*¹⁹ was decided in 1963, the Indiana Supreme Court held that a criminal defendant had the right to an attorney at public expense if he could not afford to hire one on his own. Relying on section 21 of our Bill of Rights, Judge Stuart wrote:

It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defence [sic] of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.²⁰

In 1856, the court used Indiana's double jeopardy clause to hold that a defendant was entitled to discharge after a hung jury.²¹ In an early precursor of the exclusionary rule, the Indiana Supreme Court declared that article I, section 14 of the Indiana Constitution required that any incriminating statements a party might be required to give to defend himself in a civil action could not be used against him as the basis for criminal prosecution.²² The court adopted procedures for post-conviction proceedings by prisoners nearly seventy years before the United States Supreme Court held that such were required under due process.²³

Indiana's use of its own constitution early in this century is equally intriguing. In 1922, the Indiana Supreme Court adopted the exclusionary rule as a way of protecting Hoosiers against unreasonable searches and seizures. Relying on sections 11 and 14 of the Indiana Bill of Rights, Judge Willoughby wrote for a unanimous court, "If the property was secured by search and seizure under the pretext of a search warrant, which was invalid for any reason, then the property so seized could not be used as evidence, against the appellant and its admission over his objection was prejudicial error."²⁴ Without the illegally seized evidence the conviction was based on insufficient evidence, and the court discharged the defendant.²⁵ These words were written nearly forty years before *Mapp v. Ohio*,²⁶ at a time when the exclusionary rule was so

19. 372 U.S. 335 (1963).

20. *Webb v. Baird*, 6 Ind. 13, 18 (1854).

21. *Miller v. State*, 8 Ind. 325 (1856), *implicitly overruled*, *State v. Walker*, 26 Ind. 346, 352 (1866).

22. *Wilkins v. Malone*, 14 Ind. 153 (1860).

23. *Young v. Ragen*, 337 U.S. 235 (1949); *Sanders v. State*, 85 Ind. 318 (1882).

24. *Callender v. State*, 193 Ind. 91, 96, 138 N.E. 817, 818 (1922).

25. *Id.* at 99, 138 N.E. at 819.

26. 367 U.S. 643 (1961).

unpopular that Professor Wigmore was moved to call it revolutionary and against all rules of evidence theretofore pertaining to the subject.²⁷

Indiana declared in 1920 that a defendant had the right to counsel at pre-trial proceedings. In *Batchelor v. State*,²⁸ a defendant was arrested in the middle of the night and kept in jail six days before he saw a judge. He asked several times to see a lawyer and each time the police put him off. He eventually pled guilty to murder without ever having talked to an attorney. Relying on section 13 of our Bill of Rights, the Indiana Supreme Court held that "the spirit of the provision contemplates the right of accused to consult with counsel at every stage of the proceedings"²⁹ and set aside Batchelor's plea of guilty to murder. The Attorney General of Indiana had argued that before setting aside the conviction the prisoner should demonstrate that he was innocent or that he should not be severely punished for his acts. The court was not impressed with this assertion that a defendant must demonstrate his innocence before being granted relief from the violation of his right to counsel: "The rights of just and upright citizens are not more sacred in the eyes of the law than the rights of the poorest and meanest citizens of the state."³⁰

The Indiana Supreme Court affirmed Indiana's Bill of Rights, section 13, to hold that citizens have the right to jury trials in misdemeanors, something not provided by the sixth amendment.³¹ It also held that the right to counsel extended to misdemeanors.³²

Even in the face of extensive federal activity during the Warren Court years, the Indiana Supreme Court sometimes charted its own course when reviewing search and seizure claims under the fourth amendment and the Indiana Bill of Rights. Confronted with a case in which a trial court had authorized surgery to remove bullets as evidence from a defendant's body, the court held that doing so constituted an unrea-

27. WIGMORE, EVIDENCE; §§ 2183, 2184 (2d ed. 1923), cited in *Flum v. State*, 193 Ind. 585, 591, 141 N.E. 353, 355 (1923). In 1923 Wigmore wrote of the development of the exclusionary rule: "the heretical influence of *Weeks v. United States* spread, and evoked a contagion of sentimentality in some of the State Courts, inducing them to break loose from long-settled fundamentals." 4 WIGMORE, EVIDENCE, § 2184 (2d ed. 1923).

28. 189 Ind. 69, 125 N.E. 773 (1920).

29. *Id.* at 76-77, 125 N.E. at 776. Justice Lairy further wrote: "The privilege of the presence of counsel upon the trial would be a poor concession to the accused if the right of consultation with such counsel prior to the trial was denied." *Id.* at 77, 125 N.E. at 776 (quoting *People ex rel. Burgess v. Risley*, 66 How. Pr. 67 (N.Y. 1883)).

30. *Id.* at 84, 125 N.E. at 778.

31. *State ex rel. Rose v. Hoffman*, 227 Ind. 256, 85 N.E.2d 486 (1949).

32. *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951) (affirming right to jury trial and right to counsel in misdemeanor cases to the same extent and under the same rules that it exists in felony trials).

sonable search.³³ The court did not consider the recent United States Supreme Court cases *Rochin v. California*³⁴ and *Schmerber v. California*³⁵ to be determinative of the issue, but rather used them for guidance in interpreting the guarantee of reasonableness in searches and seizures.

The story of the Indiana Supreme Court for most of the 1970's and 1980's, however, has been a different one. Criminal defense lawyers became accustomed to arguing virtually every criminal appellate issue in terms of the federal Constitution and the Indiana Supreme Court became swamped with direct criminal appeals mandated by article 7, section 4, of the Indiana Constitution.³⁶ Until recently, our attention has been diverted from the jurisprudence of the Indiana Constitution. I come to suggest that this attention may be refocused for a variety of reasons.

First, the Indiana Constitution provides a great variety of protections for citizens which are not contained in the Federal Bill of Rights. Aside from the ability to submit a claim that Indiana's provisions provide greater protection, there are a great many parts of Indiana's Bill of Rights which simply have no federal counterpart.³⁷

Section 3, for example, provides flatly that no law may "interfere with the rights of conscience."³⁸ Section 9 affirms the rights of expression

33. *Adams v. State*, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974).

34. 342 U.S. 165 (1952).

35. 384 U.S. 757 (1966).

36. IND. CONST. art. VII, § 4. This increase in direct appeals is discussed and documented 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, 682 n.75 (1988).

37. There are also rights enumerated in articles other than the bill of rights. The Indiana Constitution has an entire article devoted to education. IND. CONST. art. VIII. In addition, article IX sets up benevolent institutions and county farms to offer refuge to those who need assistance in caring for themselves.

38. IND. CONST. art. I, § 3. The federal Constitution addresses freedom of religion together with political freedom in the First Amendment providing simply: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The Indiana Constitution on the other hand has six distinct clauses designed to protect freedom of religion and the separation of church and state. IND. CONST. art. I, §§ 2-7.

The plain language of some provisions clearly extends beyond the federal provision. Article I, section 3, for example, reads: "No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."

The Indiana Court of Appeals has held that IND. CONST. art. I, §§ 2 & 3 does not prohibit the Indiana State University Board of Trustees from discharging a professor who insists upon reading from The Bible at the start of each of his mathematics classes. *Lynch v. Indiana State Univ. Bd. of Trustees*, 177 Ind. App. 172, 378 N.E.2d 900 (1978), *cert. denied*, 441 U.S. 946 (1979). The court noted: "To allow Lynch to exercise his freedom to act, here, in reading the Bible aloud to his students would infringe upon his students'

in language much more comprehensive than the first amendment.³⁹ Section 12, usually thought of as a simple "due process" provision, in fact, guarantees that all courts shall be open and that every person shall have a remedy.⁴⁰ Section 17 affirms that "[o]ffenses, other than murder or

freedom to believe as they wish." *Id.* at 180, 378 N.E.2d at 905.

In 1978, the Indiana Supreme Court affirmed a trial court finding that a statute requiring photographs on drivers licenses was unconstitutional as applied to properly certified members of the Amish and Pentecostal sects. *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 269 Ind. 361, 380 N.E.2d 1225 (1978). The Court decided that the notion of free exercise of religion and article I, section 2 outweighed the state's interest in regulating licensing of drivers. *Id.* at 364, 368-69, 378 N.E.2d at 1227, 1229.

39. IND. CONST. art. I, § 9. In 1929, Professor Hugh E. Willis claimed that "since the United States Constitution protects [freedom of speech and of the press] against both the action of Congress and the action of state legislatures, the guaranties of state constitutions are superfluous." Willis, *Freedom of Speech and of the Press*, 4 IND. L.J. 445, 446 (1929). That this is not true is easily demonstrated by comparing differences in the text of the federal provision and some state provisions.

The first amendment's guarantee of political freedom provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I. The Indiana Constitution provides "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." IND. CONST. art. I, § 9. The Washington State Declaration of Rights, which was largely modeled after the Indiana Bill of Rights, used an even broader provision which eliminated the need for state action by providing: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. I, § 5. See generally Utter & Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 637 (1987).

Willis' comment was not entirely without foundation, however. Indiana Supreme Court cases from the 1920's displayed a reluctance to protect the right of free speech. In *Watters v. City of Indianapolis*, 191 Ind. 671, 134 N.E. 482 (1922), the Indiana Supreme Court held that an ordinance prohibiting carrying any banner, placard, advertisement or handbill for the purpose of displaying it on a public street did not violate IND. CONST. art. I, § 9. The court determined that this ordinance did not deny the right of "free interchange of thought and opinion" or "the right to speak, write, or print freely" because one could still "hire a hall or print a paper." "But," the Court continued, "this does not mean that he may do as he pleases on a public street." *Id.* at 674, 134 N.E. at 483 (quoting IND. CONST. art. I, § 9). See also *Thomas v. City of Indianapolis*, 195 Ind. 440, 145 N.E. 550 (1924) (ordinance prohibiting labor picketing upheld against a challenge under IND. CONST. art. I, § 9).

41. IND. CONST. art. I, § 12. This section reads: "All courts shall be open; and every person, for injury done to him in his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

In *State ex rel. Board of County Comm'rs v. Laramore*, 175 Ind. 478, 94 N.E. 761 (1911), the Indiana Supreme Court traced the history of this section back to the Magna

treason, shall be bailable," a guarantee easily recognized as more complete than that provided by the eighth amendment.⁴¹ Section 19 provides that the citizens on a criminal jury shall determine for themselves both the facts and the law of the case.⁴² Section 30 holds that no conviction shall work forfeiture of estate.⁴³ Section 31 guarantees broad rights of as-

Charta. In upholding the constitutionality of legislation allowing sheriffs to charge a commission on sales and executions, the Court noted that this provision was not designed to abolish fixed fees to raise revenue, but rather to eliminate arbitrary, sometimes oppressive gratuities extracted to influence legal proceedings. *Id.* at 483-84, 94 N.E. 762-63. Finally, the Court indicated that the provision, though derived from the Magna Charta, "may be a broader guaranty of free, unpurchased and impartial justice . . ." and acknowledged the possibility that the constitution would be violated if "costs and fees imposed on those who resort to the courts for justice [were] so burdensome as to result in a practical denial of justice to a large number of our people." *Id.* at 485, 94 N.E. at 763.

41. IND. CONST. art. I, § 17.

42. IND. CONST. art. I, § 19. Only two other states, Georgia and Maryland, continue to have comparable provisions granting the jury the right to judge the law in criminal cases. GA. CONST. art. I, § 2-111(a); MD. DECLARATION OF RTS. art. 23. According to Mortimer and Sanford Kadish, such provisions are the only remaining "relics" of a debate on the role of the jury in English and American law which lasted from the end of the seventeenth century to the 1830s. Disagreement over the jury's role in seditious libel cases was at the center of this debate. Kadish & Kadish, *On Justified Rule Departures by Officials*, 59 CALIF. L. REV. 905, 913, 915 (1971).

The provision was discussed at the Indiana Constitutional Convention. The committee on the practice of law and law reform rejected a resolution providing that "in criminal cases the jury shall find facts alone, and the courts assess the penalty." 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1850 394 (1850). According to the record of the debates, the original purpose of this section was to allow defendant's in both civil and criminal libel cases to "give the truth in evidence" as a defense. 2 *id.* at 1389.

Conflicting interpretations of this provision appeared in *Williams v. State*, 10 Ind. 503 (1959), just seven years after the new constitution was written.

43. IND. CONST. art. I, § 30. Historically, forfeitures were used to raise money for the king. *See Ballard v. Board of Trustees of Police Pension Fund*, 263 Ind. 79, 85-86, 324 N.E.2d 813, 817 (1975).

The constitutional provision prohibiting such forfeitures has been discussed in a number of unusual cases. In a 1957 opinion, *National City Bank of Evansville v. Bledsoe*, 237 Ind. 130, 144 N.E.2d 710 (1957), the court examined what happens to a tenancy by the entirety owned by a husband and wife when the husband murders the wife and then commits suicide. The court proposed a rule that tenancy by the entirety be dissolved by murder, as it is by divorce. The court found that rule did not violate IND. CONST. art. I, § 30 because "the murderer is not deprived of any property which he obtained in any other way than through the murder; he is merely prevented from enriching himself by acquiring property from the murder." *Id.* at 142, 144 N.E.2d at 716. Furthermore, the court pointed out that statutes that prevent a murderer from inheriting from his victim would be unconstitutional if they imposed a forfeiture of property as a penalty for the murder, but they have been upheld since they merely prevent the murderer from profiting by his act. *Id.*

The constitutional prohibition on forfeiture of estate has been interpreted restrictively

sembly, a right which the United States Supreme Court had to draw out of the right of free speech and free press.⁴⁴

These and other sections clearly provide occasions when a litigant who would lose in federal court may win in state court. A clear example of such an occasion is demonstrated in a pair of cases decided in 1987 in which the Indiana Supreme Court spelled out a methodology for testing the constitutionality of a prison sentence under section 16 of our Bill of Rights, which provides: "All penalties shall be proportioned to the nature of the offense."⁴⁵ In *Taylor v. State*⁴⁶ and *Mills v. State*⁴⁷ it was quite clear that the prisoner's claims under the eighth amendment were utterly unavailing.⁴⁸ Just as clearly, both had distinctly different and stronger claims under our Bill of Rights.⁴⁹ Eventually, the court concluded that habitual offender terms for each were proportionate to their offenses, but I do not doubt that the analytical framework would compel a different conclusion under different facts.

Another such occasion occurred last winter, a full six months before the United States Supreme court's decision in *Coy v. Iowa*,⁵⁰ when our court used section 13 of Indiana's Bill of Rights to begin exploring the balance between a defendant's right to confront his accuser and the importance of protecting the child victim of molestation. The result was a new trial for Annabel Miller.⁵¹

to mean a prohibition of "automatic" forfeiture to the state upon conviction. *Ballard*, 263 Ind. at 79, 324 N.E.2d at 813. The court determined that termination of benefits under the Police Pension Act as a result of the plaintiff's felony conviction was merely a fine or penalty, and did not violate the constitutional provision against forfeiture of estate. *Id.*

44. *De Jonge v. Oregon*, 299 U.S. 353 (1937).

45. IND. CONST. art. I, § 16.

46. 511 N.E.2d 1036 (Ind. 1987).

47. 512 N.E.2d 846 (Ind. 1987).

48. *See Solem v. Helm*, 463 U.S. 277 (1983); *Rummel v. Estelle*, 445 U.S. 263 (1980) Although these cases undertook a proportionality test, the Indiana Supreme Court concluded that these cases did not require the extensive proportionality test required by the Indiana Constitution.

49. "Although the United States Constitution does not require an extensive proportionality review in this case, the Indiana Constitution does require such analysis." *Mills*, 512 N.E.2d at 848.

50. 108 S. Ct. 2798 (1988) (The Supreme Court held in this case that the Confrontation Clause of the federal Constitution provides a criminal defendant in a child molestation case the right to "confront" face-to-face the witnesses giving evidence against him at trial.)

51. *Miller v. State*, 517 N.E.2d 64 (Ind. 1987). "The confrontation rights granted by the Indiana Constitution and the federal Constitution may differ to some degree. The Indiana clause requires 'face to face' confrontation, while the federal clause mandates only a general right 'to be confronted with the witnesses.'" *Id.* at 71.

In 1988, the Indiana Supreme Court tested the rights of victims of crime, particularly of drunk driving, to seek punitive damages against those who have caused them injury. We reviewed the 130-year-old rule of *Taber v. Hutson*,⁵² concluding that the statute allowing such damages was not a violation of Indiana's double jeopardy clause.⁵³

These cases on our Bill of Rights must be viewed in context with other landmark cases in 1987 and 1988 in which the court used the Indiana Constitution as the basis for resolving questions ranging from the ownership of a \$1.7 million lottery ticket,⁵⁴ to the rescue of the Lake County poor relief system,⁵⁵ to the eligibility of Evan Bayh for the office of Governor.⁵⁶ Other questions the court left open for the next round of litigation, such as whether drunk driving roadblocks violate Indiana's right in section 11 against unreasonable search and seizure.⁵⁷

The ability of our court and other Indiana courts to write good law about the Indiana Bill of Rights depends in important part upon good lawyering by those who appear before us. The Indiana Supreme Court has signaled twice this year that we will not take Indiana constitutional claims to be serious ones when litigants themselves treat them lightly.⁵⁸ In *Stroud v. State*,⁵⁹ a prisoner asked us to declare unconstitutional the use of a pen register, a device which records the number dialed on a telephone. Stroud's lawyer exhorted us to follow five other state supreme

52. 5 Ind. 322 (1854).

53. *Eddy v. McGinnis*, 523 N.E.2d 737 (Ind. 1988).

54. *Kaszuba v. Zientara*, 506 N.E.2d 1 (Ind. 1987).

55. *Lake County Council v. Dozier Allen*, 524 N.E.2d 771 (Ind. 1988).

56. *State Election Bd. v. Bayh*, 521 N.E.2d 1313 (Ind. 1988).

57. *State v. Garcia*, 500 N.E.2d 158 (Ind. 1986), *cert. denied*, 107 S. Ct. 1889 (1987). "[W]hile the Court has rejected Garcia's Fourth Amendment claim, it has not so much as mentioned, much less purported to decide, the rights assured under Art. I, § 11 of the Indiana Constitution. I take it that question is to be decided another day." *Id.* at 172-73 (Shepard, J., dissenting).

58. This position is not unique to Indiana. The Utah Supreme Court requires that state constitutional issues be fully briefed with arguments for treating state provisions differently from analogous federal constitutional provisions. Justice Utter of the Washington Supreme Court describes this requirement as a "common approach." Utter, *Ensuring Principled Development of State Constitutional Law: Responsibilities for Attorneys and Courts*, 1 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 217 (1988). Utter's discussion contains two useful guidelines for practitioners making state constitutional claims: (1) analyze the state's law including its constitutional law, before reaching a federal claim; and (2) discuss what the state's guarantee means and how it applies to the case at hand, not just whether the state's guarantee is the same or broader than its federal counterpart as interpreted by the United States Supreme Court. *Id.* at 220. A basic approach to developing a state constitutional argument can be found in Collins, *Litigating State Constitutional Issues: The Government's Case*, 1 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 201 (1988).

59. 517 N.E.2d 780 (Ind. 1988).

courts in so holding, without so much as citing the section of the Indiana Bill of Rights on which he relied, much less supplying any authority. That this could be regarded as a basis for a constitutional declaration is impossible.

More recently, Barry Wayne St. John asked the Indiana Supreme Court to reverse his 20-year conviction because of a prosecutor's threats to a witness. He explained at some length why this violated the fourteenth amendment, a claim we addressed on the merits. He also said that it violated section 12 of our Bill of Rights. Period. We declared that he had waived the issue for failing to argue it.⁶⁰

In short, our ability to make good law frequently depends on counsel, and I solicit your help.

Those who wrote the federal Constitution and the national Bill of Rights regarded state constitutions and state courts as vital in protecting the liberties of the people. They understood that putting down rights on paper hardly assured that they would be recognized by those who govern,⁶¹ and their vision turned out to be prophetic. One could examine the Samozan constitution in Nicaragua, after all, and find a lengthy Bill of Rights,⁶² but one which bore almost no relationship to the reality of what was going on in the country.⁶³

60. *St. John v. State*, 523 N.E.2d 1353 (Ind. 1988). Indiana courts have long refused to use the state constitution unless the issue is clearly joined. In *Miller v. State*, 77 Ind. App. 611, 134 N.E. 209 (1922), a father convicted of violating a compulsory school attendance law claimed he was protected by IND. CONST. art. I, § 3. Because Miller did not argue the attendance law was unconstitutional, the court concluded that the section was not germane to whether Miller was guilty of violating the statute. Similarly, in *Vonnegut v. Baun*, 206 Ind. 172, 188 N.E. 677 (1934), a resolution preventing children who had not been vaccinated from attending school was challenged as a violation of IND. CONST. art I, §§ 2-4 "in that it abridges religious and civil liberties and matters relating to conscience of many of the citizens" *Id.* at 179, 188 N.E. at 680 (quoting plaintiff's complaint). Remarking that "[n]either in brief nor in argument is it pointed out how the constitutional rights mentioned are infringed," the court found that the right of the state to require vaccination was not involved. *Id.*

61. James Madison discussed this problem in *The Federalist Papers*. He referred to the State of Pennsylvania as an example. A Council of Censors assembled there in 1783 and 1784 "to inquire whether the Constitution had been preserved inviolate in every part." They reported that "the Constitution had been flagrantly violated by the Legislature in a variety of important instances. . . . The constitutional trial by jury had been violated. . . ." *THE FEDERALIST* No. 48, at 276 (J. Madison) (E.H. Scott ed. 1894).

62. CONST. arts. 36-127 (Nicaragua) (1950, repealed 1974).

63. According to JOHNSON RESEARCH ASSOCIATES, *AREA HANDBOOK FOR NICARAGUA* 156 (1970), "Personal rights such as freedom of conscience, religion, speech, peaceful assembly, and individual liberty are guaranteed." However, the president also has the authority under articles 196 and 197 of the Nicaraguan Constitution to suspend all constitutional guarantees when the "public tranquility" is threatened. *Id.* (citations omitted).

A similar override provision can be found in the Canadian Charter of Rights and

Our constitution's founders believed that the rights of Americans could only be secured by creating a federal system full of checks and balances. They borrowed this idea from the French philosopher Montesquieu, who proposed that governmental authority be dispersed among competing institutions in order that no part of the government could achieve so much power as to have the capacity for tyranny.⁶⁴ The federal system created in 1787 supposes two kinds of dispersion of power. One is vertical, what we call separation of powers: legislative, judicial, and executive. The other is horizontal, between state governments and the national government.

The rights of Americans cannot be secure if they are protected only by courts or only by one court. Civil liberties protected only by a U.S. Supreme Court are only as secure as the Warren Court or the Rehnquist Court wishes to make them. The protection of Americans against tyranny requires that state supreme courts and state constitutions be strong centers of authority on the rights of the people. I am determined that the Indiana Constitution and the Indiana Supreme Court be strong protectors of those rights.

Freedoms. CAN. CONST. I, § 33 reads: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision included thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

64. "For the politics of his own time, Montesquieu's single most important doctrine in *The Spirit of Laws* was the theory that intermediary bodies, such as the nobility, the parliaments, the local courts of seigneurial justice, and the church, were all indispensable to political liberty." M. RICHTER, *THE POLITICAL THEORY OF MONTESQUIEU* 103 (1977).