

Indiana Law and the Idea of Progress

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The annual Survey Issue of the Indiana Law Review intends to assess the ways Indiana law has moved during the year. Authors with special talent provide their assessments of our progress in various fields. By way of a foreword to their work, I address here the general idea of movement in Indiana law. It seems clear to me that Indiana's lawmakers and Indiana's legal profession have been and are far more progressive than we give ourselves credit for.

The practice of labeling Indiana as a place slow to accept new ideas may well run back to a time even before the 1923 publication of Irvin S. Cobb's pocket book whose title said a great deal, *Indiana: Intellectually She Rolls Her Own*.¹ Neal Peirce demonstrated that this practice is alive today in the national press when he wrote, "Hoosiers take perverse pride in letting someone else be first."² Closer to home, even some whose careers advanced by benefit of Indiana choose to bash the state. A new United States Trustee recently described the Southern District of Indiana as a "backwater," as though he had just been assigned to a post in Siberia.³ Indeed, even the pages of the *Indiana Law Review*'s annual Survey Issue have sometimes featured hometown criticism of the state's legal system as backwards. One of the state's well-known products liability litigators wrote in the 1984 edition, "Indiana has taken giant strides backwards in time"⁴

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1. Cobb's description of the state's intellectual independence went like this: She is not content to borrow the makings of such intellectual standards and such literary ideals as she has — and they are high ones — from the spaghetti-fed Infant Prodigies of Greenwich Village and Sheridan Square in New York, nor yet from the Russo-Slavonic-Germaniacal School of Chicago, with its air of infallibility and its garlicky breath. She rolls her own!

IRVIN S. COBB, *INDIANA: INTELLECTUALLY SHE ROLLS HER OWN* 43-44 (1923).

2. NEAL PEIRCE & JERRY HAGSTROM, *THE BOOK OF AMERICA: INSIDE FIFTY STATES TODAY* 282 (1983).

3. Richard Cady, *Five Bankruptcy Trustees to be Replaced*, *INDIANAPOLIS STAR*, Dec. 16, 1987, at B6.

4. John Vargo, *Survey of Recent Developments in Indiana Law: Torts*, 17 *IND. L. REV.* 341, 385 (1984) ("Excellent examples of the 'frigid waters' of Indiana legal policy can be found in the major areas of litigation in tort law.").

Other examples of such sentiment abound.⁵

Running contrary to this chorus of criticism is the considerable evidence of Indiana's willingness to grasp new ideas. In writing the opinion for our court in *In re Lawrance*,⁶ I was struck by the fact that the Indiana General Assembly was the first legislature in the nation to adopt the Uniform Health Care Consent Act devised by the Commissioners on Uniform State Laws.⁷ Using that statute and other Indiana legislative and constitutional authority, our court answered questions about the right to refuse life-sustaining medical treatment which had not yet been addressed by any supreme court in the country.⁸ Progressive legislation and ground-breaking judicial action have actually been part of Indiana's history for a long time. Throughout the nineteenth century and during the progressive era of this century, Indiana built a decent record of addressing new social problems through legislation and litigation. The year 1991 demonstrated that this is a

5. Walter W. Krieger, Jr. & Michael A. Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 643 (1977) ("Indiana is truly at the crossroads of landlord-tenant reform — and is wavering."); Harold Greenberg, *Vertical Privity and Damages for Breach of Implied Warranty Under the U.C.C.: It's Time for Indiana to Abandon the Citadel*, 21 IND. L. REV. 23, 31 (1988) ("Despite the continuing assault on and collapse of the citadel elsewhere, the assault in Indiana has proceeded extremely slowly. . . ."); Nancy L. Marshall, Note, *The Constitutional infirmities of Indiana's Habitual Offender Statute*, 13 IND. L. REV. 597, 626 (1980) ("Old attitudes die hard. Consequently, Indiana courts have rather consistently upheld the habitual offender statute . . . with little or no enlightened reasoning."). This last image of Indiana as a place where citadels are protected puts us in company with Alabama. "Few parapets of the citadel of privity have been more stoutly defended than that portion of the fort assigned to the protection of the Alabama judiciary." Julian B. McDonnell, *The New Privity Puzzle: Products Liability Under Alabama's Uniform Commercial Code*, 22 ALA. L. REV. 455, 455 (1970). On the other hand, steadfastness sometimes leads to praise. *United States v. Stump Home Specialties*, 905 F.2d 1117, 1120 (7th Cir. 1990) ("Freedom of contract is alive and well, and it is living in Indiana.").

6. 579 N.E.2d 32 (1991).

7. IND. CODE §§ 16-8-12-1 to -13 (1988 & Supp. 1991).

8. The New York Times told its readers that the case "could provide legal guidance on some of the thorniest issues of medicine and law, issues left open by the United States Supreme Court's decision last year in the case of Nancy Cruzan." Tamar Levin, *Despite Daughter's Death, Parents Pursue Right-to-Die Case*, N.Y. TIMES, July 28, 1991, at 10, col. 2 (also observing that questions of first impression facing our court included what to do when a person in a persistent vegetative state has not left instructions or was never competent to indicate her preference about prolonged life support). Commenting on our resolution of the case, the editors of *USA Today* wrote, "Indiana's Supreme Court ruled Monday that life-or-death decisions are too important to be left to strangers. . . . [T]he Indiana decision moved us in the right direction." *Life-and-Death Decisions*, USA TODAY, Sept. 17, 1991, at 10A.

state still committed to searching for the best solutions to the legal problems of modern society. I begin by discussing the history of Indiana's more progressive moments and close by outlining the many ways in which Indiana today builds on that history.

I. PROGRESS AND THE FIRST INDIANA CENTURY

I have chosen four landmarks representing Indiana's legal progress from the time of statehood to World War I. First, the Indiana Supreme Court spent forty years fighting slavery. Second, we were among the first states to hold that an indigent defendant is entitled to counsel at public expense. Third, Indiana courts admitted women to the bar through court rule when other states would not. Fourth, Indiana was among the first states to adopt a rule excluding illegally seized evidence.

A. *The Fight Against Slavery*

The central social issue of the era in which Indiana became a state was undoubtedly slavery. Those who wrote the Indiana Constitution of 1816 chose to include a strong prohibition: "There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes. . . . Nor shall any indenture of any negro . . . hereafter made, and executed out of the bounds of this state be of any validity within the state."⁹ The Indiana Supreme Court also staked out a strong position in the fight against slavery.

While the state government was still situated in Corydon, the supreme court of the new state was put to the test. It would have been easy enough for the Indiana Supreme Court to grant relief to the slaveowner who appeared before it asking the return of his slave, a woman known only as Polly. Polly was the daughter of a slave whom Lasselle had purchased from the Indians in the territory northwest of the Ohio River before Virginia ceded it to the United States government and before Indiana entered the Union. The Circuit Court of Knox County remanded Polly to the custody of Lasselle saying, "[F]or as far as it regards the situation of the mother of the present applicant, this is now a slave state."¹⁰ Polly appealed. In *State v. Lasselle*,¹¹ the Indiana Supreme Court set her free, 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

9. IND. CONST. art. XI, § 7 (1816).

10. The actual handwritten record of proceedings in this case is still maintained in the state archives at the Indiana State Library, Indianapolis.

11. 1 Blackf. 60 (Ind. 1820).

been more clearly expressed."¹² The court also awarded Polly \$26.12 in costs for her trouble.¹³

This declaration against slavery was not temporary. Some thirty years later, as the nation began the slide toward civil war, the Indiana Supreme Court demonstrated anew its opposition to slavery and the laws that supported it. The court invalidated an act of the general assembly making it a crime to induce the escape of a slave or to hide one.¹⁴ Ironically, the court used as part of its authority a decision of the United States Supreme Court *affirming* fugitive slave laws, *Prigg v. Pennsylvania*.¹⁵ In *Prigg*, the Taney Court struck down a Pennsylvania law which prohibited the recapture and return of fugitive slaves.¹⁶ The Court held that states could not invade the exclusive jurisdiction of the federal government when it came to dealing with runaway slaves.¹⁷ Because the Indiana statute dealt with the subject of runaway slaves, our court reasoned in *Donnell v. State*,¹⁸ it was beyond the scope of a state's authority as limited by *Prigg*. Using *Prigg* to invalidate Indiana's inducement and harboring statute would today be akin to using *Brown v. Board of Education*¹⁹ to abolish busing. Such was the depth of our court's opposition to slavery that it used whatever precedent it could find, even Taney precedent, to further freedom for all. While the Court in Washington looked for ways to protect slaveowners, the Indiana court looked for ways to protect slaves.

Eventually, the Indiana Supreme Court was confronted with a case involving the very federal fugitive slave laws which the United States Supreme Court had upheld in *Prigg*. There was little our court could do when United States marshals began appearing in the state to take possession of slaves and return them to their owners. Still, the Indiana Supreme Court in *Freeman v. Robinson*²⁰ held that a slave had the right

12. *Id.* at 62.

13. *Id.*

14. *Donnell v. State*, 3 Ind. 480 (1952). *See also* *Degant v. Michael*, 2 Ind. 396 (1850) (slave owner not entitled to warrant for runaway slave); *Graves v. State*, 1 Ind. 368 (1849) (Indiana statute providing slaveholders with warrants for arrest of runaway slaves unconstitutional). Thereafter, the U.S. Supreme Court specifically held that states had the authority to pass laws against assisting fugitive slaves. *Moore v. Illinois*, 55 U.S. (4 How.) 13 (1852). Faced with the decision in *Moore v. Illinois*, the Indiana Supreme Court overruled *Donnell v. State* and *Degant v. Michael*. *State v. Moore*, 6 Ind. 436, 437 (1855).

15. 41 U.S. (16 Pet.) 539 (1842).

16. *Id.* at 613.

17. *Id.* at 562.

18. 3 Ind. 480 (1852).

19. 347 U.S. 483 (1954).

20. 7 Ind. 321 (1855).

to sue the marshal in state court for assault and battery occurring during the arrest and for extortion, that is, charging the slave three dollars a day for his own upkeep.²¹ The court held, "the assault and battery, and the extorting of money were no part of his official duty, under that or any other act, and were unlawful," implicitly agreeing that charging Freeman three dollars a day for his keep might fairly be called extortion.²² Because Congress had 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."²³

These cases provide a dramatic contrast to the approach taken in other states, including our neighbor Illinois, which did not outlaw slavery for another twenty-five years.²⁴ As for the United States Supreme Court, the decision in *Prigg v. Pennsylvania* was just the beginning. The conclusion of Chief Justice Taney in *The Dred Scott Case*²⁵ that slaves were property was a significant contribution to the schism ultimately leading to the Civil War.

B. Counsel for the Poor

The mid-nineteenth century saw other progressive actions by both the Indiana legislature and the supreme court, including a major milestone in the criminal law. In 1854, the Indiana Supreme Court held in *Webb v. Baird*²⁶ that a circuit court had the power to appoint counsel for a pauper defendant in criminal cases saying:

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.²⁷

21. *Id.* at 322.

22. *Id.* at 323.

23. *Id.* Nevertheless, the marshal won because Freeman sued him in the wrong jurisdiction. *Id.* at 324.

24. See *Jarrot v. Jarrot*, 7 Ill. (2 Gilm.) 1 (1845).

25. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (upholding the right of property in slaves guaranteed by the Constitution and voiding provisions of the Missouri Compromise of 1820 which had prohibited slavery in new American territory acquired in the Louisiana Purchase). Wrote Chief Justice Taney, a Southern partisan, "[N]o word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles *property of that kind* to less protection than property of any other description." *Id.* at 452 (emphasis added).

26. 6 Ind. 14 (1854).

27. *Id.* at 18.

The court's holding was based on both statute and the Indiana Constitution.²⁸ A good many states recognized the right of a pauper to have counsel in criminal cases.²⁹ What made Indiana a leader was its adoption of the notion that the duty to pay for such services lay with the public.³⁰ The rule in most states was that absent a specific statute or court rule, counsel appointed for an indigent defendant had no right to compensation at public expense.³¹

Indiana's leadership in this field is all the more remarkable in light of the approach taken by the federal courts. In the federal court system, indigent defendants were not constitutionally guaranteed the right to counsel in all criminal prosecutions until 1938.³² Moreover, Indiana acted more than a century before the United States Supreme Court held in *Gideon v. Wainwright*³³ that the Fourteenth Amendment requires the appointment of counsel for indigents.³⁴

28. In holding that an appointed attorney had a right to be paid, the court quoted article 1, section 21 of the Indiana Constitution, "that no man's services shall be demanded without just compensation" *Id.* at 15. The grounds for compelling the county to pay counsel were somewhat vague, though the court did cite a statute which allowed the court to pay "reasonable sums for fuel and necessary articles furnished, and extra services performed, during the term of the Court." *Id.* of 17.

29. By 1868, most states provided indigent defendants with appointed counsel. See THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 334 (1868) ("With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel. The humanity of the law has generally provided that, when the prisoner is unable to employ counsel, the court may designate some one to defend him. . .").

30. Few states imposed a duty on the public to pay for such services. We have found only two. *Hall v. Washington County*, 2 Green 473 (Iowa 1850); *Carpenter v. Dane County*, 9 Wis. 249 (1859).

31. See, e.g., *Posey & Tompkins v. Moble County*, 50 Ala. 6 (1873); *Arkansas County v. Freeman & Johnson*, 31 Ark. 266 (1876); *Rowe v. Yuba County*, 17 Cal. 61 (1860); *Elam v. Johnson*, 48 Ga. 348 (1873); *Vise v. Hamilton County*, 19 Ill. 78 (1857); *Case v. Board of County Comm'rs*, 4 Kan. 511 (1868); *State v. Simmons*, 10 So. 382 (La. 1891); *Dismukes v. Board of Supervisors*, 58 Miss. 612 (1881); *Kelley v. Andrew County*, 43 Mo. 338 (1869); *Johnston v. Lewis & Clarke County*, 2 Mont. 159 (1874); *People ex rel. Ransom v. Board of Supervisors*, 78 N.Y. 622 (1879); *Wayne County v. Waller*, 90 Pa. 99 (1879); *Wright v. State*, 50 Tenn. 256 (1871); *Pardee v. Salt Lake County*, 118 P. 122 (Utah 1911); *Presby v. Klickitat County*, 31 P. 876 (Wash. 1892); *Yates v. Taylor County Ct.*, 35 S.E. 24 (W. Va. 1900). Various rationales were advanced to support the denial of attorney compensation including that it was an attorney's duty as an officer of the court to render services without compensation, that the attorney consented to rendering uncompensated service when he accepted his license to practice law, and that the court did not have the power to award compensation absent a specific statute.

32. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

33. 372 U.S. 335 (1963).

34. *Id.* at 339.

C. *Women in the Profession*

The Indiana Supreme Court also took a forward-looking approach to the admission of women to the bar. During the nineteenth century, admission to the bar of this state was open to people who had never attended law school, in accordance with a provision in the Indiana Constitution which declared: “[E]very person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice.”³⁵ People seeking admission typically presented their credentials to a local court. Antoinette Dakin Leach presented her credentials to the Greene Circuit Court and that court declined to admit her to the bar because she was not a voter (being a woman, she could not vote).³⁶ The Indiana Supreme Court ordered the admission of Ms. Leach, saying:

If nature has endowed woman with wisdom, if our colleges have given her an education, if her energy and diligence have lead her to a knowledge of the law, and if her ambition directs her to adopt the profession, shall it be said that forgotten fiction must bar the door against her?³⁷

This approach was in stark contrast to the position the Illinois Supreme Court took when Myra Bradwell petitioned for admission to the bar in Illinois. That court denied her admission solely on the grounds that she was a woman.³⁸ The applicable Illinois statute did not specifically exclude women from admission to the practice of law, but the Illinois Supreme Court stated that at the time of the statute’s enactment, “God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost

35. IND. CONST. art. 7, § 21 (repealed 1932). This section was abrogated by virtue of its submission to the voters at the general election of November 8, 1932. The vote was 439,949 in favor of repeal and 236,613 against repeal. See *In re Todd*, 193 N.E. 865 (Ind. 1935).

36. *In re Leach*, 34 N.E. 641 (Ind. 1893). Hon. Sue Shields, *Remarks Before the Indianapolis Bar Association Upon Receiving the Woman Lawyers Division Antoinette Dakin Leach Award*, reprinted in RES GESTAE, June 1990, at 588-92 (Antionette Dakin Leach was the first woman lawyer in Indiana). Compare *In re Leach* with *Gougar v. Timberlake*, 148 Ind. 38 (1897) (state constitutional provision giving male citizens the right to vote held not violative of federal constitution; right to vote is political privilege held only by those to whom it is granted, and state constitution did not grant the privilege to females). It is interesting to note the court’s willingness to go beyond the constitutional language when admission to the bar was at stake and the court’s unwillingness to go beyond the language of the Indiana Constitution to resolve the issue of women’s suffrage. Perhaps this is explained by the court’s traditional role of overseeing and maintaining the bar.

37. *In re Leach*, 34 N.E. at 641.

38. *In re Bradwell*, 55 Ill. 535 (1869).

axiomatic truth.”³⁹ The Illinois court thus refused to allow a woman to be admitted to the practice of law because the legislature had not specifically provided for doing so and because at the time of the statute the sentiment was that women did not make, apply, or execute laws.⁴⁰ The court said “the sex of the applicant” was “a sufficient reason for not granting this license.”⁴¹ Mrs. Bradwell sought review in the Supreme Court of the United States. That Court affirmed the Illinois decision, one concurring Justice stating “The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.”⁴² The Illinois legislature subsequently enacted a statute providing for the admission of women to the bar.

The federal courts also declined to admit women to the bar absent specific statutory authority. In 1873, the Court of Claims denied Mrs. Belva Lockwood’s petition for admission and held that women were without legal capacity to be attorneys.⁴³ In 1876, the United States Supreme Court also denied her petition because under the uniform practice of the court “none but men are admitted to practice before it as attorneys and counsellors.”⁴⁴ It took an act of Congress specifically providing for the admission of women to the bar to accomplish what Indiana courts did through benevolent analysis of legislative intent.⁴⁵

D. Illegal Search and Seizure

Finally, Indiana was an early adherent to the exclusionary rule. In 1922, the Indiana Supreme Court, using the Indiana Constitution, adopted the exclusionary rule to protect Hoosiers against unreasonable searches and seizures.⁴⁶ Our court unanimously stated, “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

39. *Id.* at 539. It is interesting to note that the court also stated it would “cheerfully obey” a legislative enactment authorizing the admission of women to the bar, “trusting to the good sense and sound judgment of women themselves, to seek those departments of the practice in which they can labor without reasonable objection.” *Id.* at 542.

40. *Id.*

41. *Id.* at 537.

42. *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

43. *In re Lockwood*, 9 Ct. Cl. 346 (1873).

44. *See Lelia Robinson’s Case*, 131 Mass. 376, 383 (1881) (quoting an authentic copy of an unreported United States Supreme Court decision).

45. Act of February 15, 1879, ch. 81, 20 Stat. 292 (women who have been a member of the bar of the highest court of any state or the District of Columbia for five years, have maintained good standing, and are of good moral character, shall be admitted to practice before the Supreme Court of the United States).

46. *Callender v. State*, 138 N.E. 817 (Ind. 1922).

be used as evidence, against the appellant and its admission over his objection was prejudicial error."⁴⁷ Indiana took a progressive view of this issue at a time when the exclusionary rule was unpopular in the legal community.⁴⁸ Decades after Indiana acted, courts in other states continued to admit illegally obtained evidence. It was the practice of admitting such evidence in neighboring Ohio which, forty years after our decision, led the United States Supreme Court to prohibit the practice in *Mapp v. Ohio*.⁴⁹

II. PROGRESS AND THE POST-WAR PERIOD

Just as the nineteenth century was a period when law was largely given through the common law, the twentieth century has been a century dominated by law given through legislation.⁵⁰ One need only examine the annual statutes of Indiana to recognize the dramatic rise in subjects which have become the subject of legislation, especially after the general assembly began meeting every year instead of every other year.⁵¹

I take as one sign of Indiana lawmakers' interest in progressive legislation their willingness to make use of uniform acts. The National Conference of Commissioners on Uniform State Laws recognizes that with the development of rapid transportation and communication, the states have become increasingly interdependent socially and economically.⁵² They labor over uniform statutes as a way to assist states in dealing with the challenges of modern America. The general objects of the Commissioners are to alleviate the potential deterrent to the free flow of goods, credits, services, and persons between the states; minimize the restraint of economic and social development; and reduce the pressure for federal intervention to compel uniformity.⁵³ The Commissioners un-

47. *Id.* at 818.

48. In the 1920s, Professor Wigmore called the exclusionary rule revolutionary and characterized it as against all rules of evidence pertaining to the subject. JOHN H. WIGMORE, EVIDENCE, §§ 2183, 2184 (1961) (2d ed. 1923).

49. 367 U.S. 643 (1961).

50. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

51. As one might expect, our general assembly has become more prolific over the decades. In 1911, the legislature enacted about 1,200 sections of law spanning more than 700 pages. In 1951, about 1,900 sections of law were enacted by about 1,100 pages of legislative work product. In 1991, the general assembly produced more than 6,200 sections of law in 3,390 pages. See Indiana Code Session Law Tables (1988 & Supp. 1991).

52. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW AND PROCEEDINGS 459-60 (1986) [hereinafter HANDBOOK].

53. *Id.* at 460. Of course, the various uniform laws have more specific and distinct purposes. For example, the Uniform Anatomical Gift Act intends to enlarge the class of possible donors by as much as possible and to eliminate time-consuming questions about organ donation in light of the limited time available after death to remove critical tissues successfully. UNIF. ANATOMICAL GIFT ACT § 2 (1968 Act), 8A U.L.A. 35 cmt. (1983).

dertake to do so by promoting "uniformity in state law on all subjects where uniformity is desirable and practicable."⁵⁴

The Indiana General Assembly has built a substantial record of adopting these acts: prior to the 1991 legislative session our legislature had adopted thirty uniform state laws.⁵⁵ As I mentioned earlier, Indiana was the first state to adopt the Uniform Health Care Consent Act, the adoption of which in 1987 provided a base for our 1991 *Lawrance* decision.⁵⁶ We were also the first to adopt the Uniform Testamentary Additions to Trust Act,⁵⁷ and one of the first handful of states to adopt the Uniform Anatomical Gift Act of 1968,⁵⁸ the Uniform Simultaneous Death Act,⁵⁹ the Uniform Act to Secure Attendance of Witnesses,⁶⁰ and the Uniform Criminal Extradition Act.⁶¹ The trend continued in 1991, when our general assembly adopted the Uniform Statutory Rule Against Perpetuities Act.⁶² The legislature has also been willing to act on a host of challenges which are not covered by uniform acts.⁶³

The year 1991 was also a year when Indiana courts moved forward progressively on a host of fronts. Indiana became one of the first states to adopt minimum standards for lawyers who represent defendants in capital cases.⁶⁴ Promoting such standards has been a struggle for those committed to improving representation of such defendants. In 1990, the director of the National Legal Aid and Defender Association stated that although they have been urging states to adopt minimum standards, there has been "almost no progress."⁶⁵ Before our court acted, only Ohio had a court rule regarding minimum standards.⁶⁶

Besides the *Lawrance* case, Indiana has taken up a host of other questions in recent years which advance the law. In doing so, I have

54. HANDBOOK, *supra* note 52, at 459.

55. UNIFORM LAWS ANNOTATED, MASTER EDITION, DIRECTORY OF UNIFORM ACTS AND CODES 24 (1991). The Durable Power of Attorney Act was repealed during the 1991 session. See IND. CODE §§ 30-2-11-1 to -7, *repealed by* Pub. L. No. 149-1991, § 6 (1991).

56. IND. CODE ANN. §§ 16-8-12-1 to -13 (West 1992).

57. IND. CODE § 29-1-5-9 (Supp. 1991).

58. IND. CODE §§ 29-2-16-1 to -11 (1988 & Supp. 1991).

59. IND. CODE §§ 29-2-14-1 to -8 (1988).

60. IND. CODE §§ 35-33-10-3 to -7 (1988).

61. IND. CODE §§ 35-37-5-1 to -9 (1988).

62. IND. CODE §§ 32-1-4.5-1 to -6 (Supp. 1991).

63. Our general assembly broke new ground in 1985 when it authorized the admissibility of videotaped wills in probate proceedings. IND. CODE § 29-1-5-3(c) (Supp. 1991). This led one commentator to laud Indiana for being "the pioneering exception." William R. Buckley, *Indiana's New Videotaped Wills Statute: Launching Probate Into the 21st Century*, 20 VAL. U. L. REV. 83, 83 (1985).

64. See IND. CRIM. R. 24 (amended Oct. 25, 1991).

65. Marcia Coyle et al., *Fatal Defense, Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30, 44.

66. See RULES OF SUPERINTENDENCE FOR COURTS OF COMMON PLEAS 65 (1991).

been mindful of the advice my friend Professor E. Donald Elliott of Yale gave me about the pitfalls involved in our court's new venture into civil law after the voters adopted Proposition Two in 1988.⁶⁷ If you have not touched a subject since 1940, he said, and all you do now is do what others did in 1960, you may miss the opportunity to correct the mistakes of 1960. You have to find new solutions.

Our decision concerning the traditional rule of *lex loci*, for instance, reflects advancements in our law crafted to take account of the choices made elsewhere. *Hubbard Manufacturing Co., Inc. v. Greeson*⁶⁸ follows an earlier Indiana case adopting the substantial contacts test for choice of law in contract disputes.⁶⁹ We could have adopted the 1971 Restatement (Second) of Conflicts of Law, which includes a full significant contracts test, but the Restatement has been subject to a great deal of criticism on grounds that it provides insufficient certainty.⁷⁰ Though some have thought of us as adopting a straightforward significant contact test, we chose purposefully to find another course. We observed that in a large number of cases the place of the tort will be significant and will be the place with the most contacts. In such cases, the traditional rule of *lex loci delicti commissi* serves well and should be applied.⁷¹ "In those instances where the place of the tort bears little connection to the legal action," the factors constituting the heart of the Restatement's significant contacts test may be considered in determining what state's law to apply.⁷² This formulation makes *lex loci* a kind of "first option" and may prove to provide greater predictability than the Second Restatement.

There were several cases decided in 1991 which moved the law. In *Picadilly, Inc. v. Raikos*,⁷³ the court analyzed public policy and history in deciding that an assignment of a legal malpractice claim was invalid.⁷⁴

67. See generally 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).

68. 515 N.E.2d 1071 (Ind. 1987).

69. *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417 (Ind. 1945).

70. See, e.g., ROBERT LEFLAR, *AMERICAN CONFLICTS LAW* 184-85 (3d ed. 1977) (the Restatement Second affords no real basis for decision in hard cases because it does not identify the considerations which move courts to go one way or the other within the formula); EUGENE F. SCHOLES & PETER HAY, *CONFLICT OF LAWS* § 2.14 (1982) (Restatement Second drew severe criticism while in preparation and upon its adoption); Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1965); Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 388 (1966); Herma H. Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 561-62 (1983).

71. *Hubbard*, 515 N.E.2d at 1073.

72. *Id.* at 1073-74.

73. 582 N.E.2d 338 (Ind. 1991).

74. *Id.* at 345.

*Tittle v. Mahan*⁷⁵ and *City of Wakarusa v. Holdeman*⁷⁶ provided a reasonably bright line defining what conduct qualifies as "enforcement of the law" so as to confer law enforcement immunity under the Indiana Tort Claims Act. In *Cowe v. Forum Group, Inc.*,⁷⁷ the court examined an emerging national issue and chose not to recognize a cause of action for damages for wrongful life.⁷⁸

The Indiana Supreme Court also decided a number of cases dealing with use of advanced technology during trials. In *Hopkins v. State*,⁷⁹ the court was asked to decide whether DNA testing would be admissible to prove an accused perpetrator's identity. In answering this question in the affirmative, we went on to say that once the trial court has ruled that the testifying witness is a qualified expert in DNA testing, subsequent evaluation of the evidence goes towards its weight, not its admissibility.⁸⁰ More interesting than this conclusion, Justice Brent Dickson reminded us about Indiana's ambivalence concerning the ubiquitous *Frye* test.⁸¹

Our trend of using the Indiana Constitution continued. In *Brady v. State*,⁸² the court faced the question of whether the use of videotaped testimony of a child abuse victim violated a criminal defendant's constitutional right to confront witnesses against him.⁸³ The court held that although use of such testimony was permissible under the federal Constitution, the Indiana Constitution ensures defendants a greater right, to meet witnesses against them "face to face."⁸⁴ Therefore, the use of one-way videotaped testimony, where the defendant can see the witness but the witness cannot see the defendant, is not permitted under the Indiana Constitution. Use of two-way closed circuit television, however, would be permissible.⁸⁵

Indiana has also played a leading role in the national debate over medical malpractice. Indiana was the first state to adopt a comprehensive set of medical malpractice reforms, the Indiana Medical Malpractice Act.⁸⁶ It is one of the most sweeping set of reforms in the country and

75. 582 N.E.2d 796 (Ind. 1991).

76. 582 N.E.2d 802 (Ind. 1991).

77. 575 N.E.2d 630 (Ind. 1991).

78. *Id.* at 634.

79. 579 N.E.2d 1297 (Ind. 1991).

80. *Id.* at 1303.

81. *Id.* at 1305-07 (Dickson, J., concurring).

82. 575 N.E.2d 981 (Ind. 1991).

83. *Id.* at 988.

84. *Id.* (citing IND. CONST. art. I, § 13).

85. *Id.* at 909.

86. IND. CODE §§ 16-9.5-1-1 to -10-5 (1988 & Supp. 1991).

is considered a national model.⁸⁷ Although it has been the subject of recurring criticism,⁸⁸ the Act has been credited with allowing Indiana physicians to have some of the lowest medical malpractice insurance premiums in the country and is said to encourage malpractice insurers and health care professionals to settle claims, particularly large ones.⁸⁹

The Indiana courts decided a number of important medical malpractice cases in 1991. In *Centman v. Cobb*,⁹⁰ the court of appeals held that the medical malpractice standard of care for a post-graduate intern or first-year resident with a valid temporary medical permit is the same standard of care applicable to physicians with unlimited licenses to practice medicine.⁹¹ They must "exercise the reasonable and ordinary degree of skill, care, and diligence generally possessed, exercised, and accepted by members of their profession," including fully licensed doctors, who practice in the same or similar localities.⁹² In *McCarty v. Hospital Corp. of America*,⁹³ the Indiana Supreme Court clarified the circumstances in which an amendment to a pleading can relate back to the original date the suit was filed. The court noted that the emphasis on "cause of action" language was unduly rigid and held that the factual circumstances that gave rise to the original claim must be examined.⁹⁴ If the amendment is based on the same factual circumstances as those in the original complaint, relation back is permissible.⁹⁵

I take citation by other courts as an indication that Indiana is resolving in a thoughtful way important questions which others need to address. During 1991, the Indiana Supreme Court was cited by other state courts at least 169 times.⁹⁶ Sixty-three of these citations were to cases we decided in 1985 and after. In one of these cases, the Tennessee

87. See Joseph Hallinan & Susan Headden, *A Case of Neglect: Medical Malpractice in Indiana*, INDIANAPOLIS STAR, June 26, 1980, at 1; Isabel Wilkerson, *Indiana Law at Center of Malpractice Debate*, N.Y. TIMES, Aug. 20, 1990, at 13 ("24 other states have followed Indiana's lead and set limits on the amount awarded in malpractice cases").

88. See Hallinan & Headden, *supra* note 87, at 9 (arguing that the act benefits doctors and insurance companies far more than patients and their families); Wilkerson, *supra* note 87 (noting that although most injured patients receive adequate compensation, patients with the most serious injuries, especially those who will require life long care, cannot be adequately compensated because the cap on damages).

89. Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three-Year Study*, 24 IND. L. REV. 1274, 1298, 1302 (1991).

90. 581 N.E.2d 1286 (Ind. App. 1991).

91. *Id.* at 1288.

92. *Id.* at 1290.

93. 580 N.E.2d 228 (Ind. 1991).

94. *Id.* at 230-31.

95. *Id.* at 231.

96. The Indiana Court of Appeals was cited by other state courts at least 200 times in 1991.

Supreme Court overruled seventy years of authority on the subject of governmental immunity when it decided *Bowers v. City of Chattanooga*.⁹⁷ The Tennessee court relied principally on our decision in *Peavler v. Monroe County Board of Commissioners*⁹⁸ in fashioning a new standard for distinguishing which acts are entitled to governmental immunity. The Tennessee Supreme Court adopted the "planning-operational" test from *Peavler*.⁹⁹ New York's highest court relied on an Indiana decision, *In re Terry*,¹⁰⁰ in deciding that prosecutor Elizabeth Holtzman, who released to the media unsubstantiated allegations of wrongdoing by a judge, was subject to disciplinary action.¹⁰¹ New Jersey's intermediate appellate court cited *Stewart v. State*¹⁰² for the proposition that an expert cannot testify that another witness is telling the truth,¹⁰³ and the Court of Appeals of Maryland cited *Cox v. State*¹⁰⁴ in concluding that words alone are not adequate provocation to reduce murder to manslaughter.¹⁰⁵ The Supreme Court of Appeals of West Virginia relied largely on Indiana law in *Waugh v. Traxler*.¹⁰⁶ That court cited *Witham v. Norfolk & Western Railway Co.*¹⁰⁷ in deciding what evidence a party must produce to rebut the presumption of negligence in the context of a traffic violation, an issue of first impression in that jurisdiction. West Virginia adopted the same standard used by Indiana.¹⁰⁸

III. CONCLUSION

To be sure, the progress of American society and of Indiana law is not always straight forward. There are plenty of occasions for discouragement, disillusionment, missteps, or downright embarrassment. Still, in our better moments, Indiana exemplifies an ennobling determination to build a better future. The essence of the American experiment has always been such a determination. The nation and the state cannot look toward the future in any other way.

97. No. 03S01-9104CV0023, 1992 WL 33945 (Tenn. Feb. 18, 1992).

98. 528 N.E.2d 40, 45 (Ind. 1988).

99. *Bowers*, No. 03S01-9104CV0023, 1992 WL 33945, at *3 (Tenn. Feb. 18, 1992).

100. 394 N.E.2d 94 (Ind. 1979).

101. *In re Holtzman*, 577 N.E.2d 30, 33-34 (N.Y. 1991).

102. 555 N.E.2d 121 (Ind. 1990).

103. *State v. J.Q.*, 599 A.2d 172, 188 (N.J. Super. Ct. App. Div. 1991).

104. 512 N.E.2d 1099 (Ind. 1987).

105. *Girouard v. State*, 583 A.2d 718, 722 (Md. 1991).

106. 412 S.E.2d 756 (W. Va. Dec. 13, 1991).

107. 561 N.E.2d 484 (Ind. 1990).

108. *Witham*, 412 S.E.2d at 760.