

A TRIBUTE TO JUSTICE ROGER O. DEBRULER

JUSTICE FRANK SULLIVAN, JR.*

It is reliably reported that several years ago, upon encountering a member of the Indiana Supreme Court, a U.S. Supreme Court Justice asked, “Why is it that, in every case we get from your court, Justice DeBruler has dissented?”

It is true that Justice Roger O. DeBruler, who retired from the Indiana Supreme Court on August 8, 1996, after nearly twenty-eight years of service, wrote many dissents. Among the most memorable were his dissents¹ arguing that the death penalty violated the Indiana Constitution’s requirement that the “penal code . . . be founded on the principles of reformation, and not of vindictive justice[;]”² that the Indiana abortion control statute violated women’s constitutional rights “to privacy and basic liberty, guaranteed by the . . . Fourteenth Amendment[;]”³ that the Indiana “nude dancing” statute was invalid because, by declaring all public nudity a crime, it “swe[pt] constitutionally protected conduct within its proscription[;]”⁴ and that due process required the post-conviction remedy be more widely available to those seeking relief from guilty pleas.⁵ In other dissents, Justice DeBruler set forth for the first time many principles and procedures relating to the imposition of the death penalty that have now become a standard part of Indiana death penalty practice.⁶

Justice DeBruler’s dissents are noteworthy for the legal principles they espouse, but they are noteworthy in another respect as well. They contain no personal attacks on the majority, no sarcasm, no headline-grabbing rhetoric of any kind. These two characteristics of Justice DeBruler’s dissents—their legal power and their civility—have resulted not only in the dissents standing the test of time but also in the dissents later being adopted as the majority view of the court and, in several instances, by the U.S. Supreme Court.

For example, his dissent in *Kerlin v. State*,⁷ arguing that certain evidence of prior offenses was inadmissible, was later adopted by the court in *Lannan v. State*;⁸ his dissent in *Patterson v. State*,⁹ arguing that certain out-of-court

* Associate Justice, Supreme Court of Indiana. B.A., 1972, Dartmouth College; J.D., 1982, Indiana University School of Law—Bloomington.

1. *Judy v. State*, 416 N.E.2d 95, 111 (Ind. 1981) (DeBruler, J., dissenting); *Adams v. State*, 271 N.E.2d 425, 431 (Ind. 1971) (DeBruler, J., dissenting), *modified* 284 N.E.2d 757 (1972).

2. IND. CONST. art. I, § 18.

3. *Cheaney v. State*, 285 N.E.2d 265, 274 (Ind. 1972) (DeBruler, J., dissenting), *cert. denied*, 410 U.S. 991 (1973).

4. *Erhardt v. State*, 468 N.E.2d 224, 226 (Ind. 1984) (DeBruler, J., dissenting); *State v. Baysinger*, 397 N.E.2d 580, 587-88 (Ind. 1979) (DeBruler, J., dissenting).

5. *White v. State*, 497 N.E.2d 893, 906-908 (Ind. 1986) (DeBruler, J., dissenting).

6. *See, e.g., Spranger v. State*, 498 N.E.2d 931, 958 (Ind. 1986) (DeBruler, J., dissenting) (weighing of aggravating and mitigating circumstances “the most critical stage of the death sentence determination”).

7. 265 N.E.2d 22, 25-27 (Ind. 1970) (DeBruler, J., dissenting).

8. 600 N.E.2d 1334, 1339 (Ind. 1992).

9. 324 N.E.2d 482, 488 (Ind. 1975) (DeBruler, J., dissenting).

statements were inadmissible hearsay, was adopted by the court in *Modesitt v. State*;¹⁰ and his dissent in *State ex rel. Rondon v. Lake Superior Court*,¹¹ arguing for limitations on a petitioner's right to a change of judge in post-conviction relief cases, was adopted by the court in *State ex rel. Whitehead v. Madison County Circuit Court*.¹² In three dissents, Justice DeBruler argued that Thomas Schiro's death sentence should be set aside in part due to the jury's unanimous recommendation against death; on his last day in office, a majority of the court agreed.¹³ In addition, following the position advocated by Justice DeBruler in dissent, the U.S. Supreme Court reversed decisions of the Indiana Supreme Court in *Thomas v. Review Board of Indiana Employment Security Division*¹⁴ and *Jackson v. Indiana*.¹⁵

Although these and other dissents are memorable, Justice DeBruler was also the author of many significant majority opinions for the Indiana Supreme Court, a small sampling of which is listed here. In *Grody v. State*,¹⁶ he authored a decision which invalidated, as unconstitutionally overbroad, a statute under which Indiana University students had been prosecuted for failure to leave school premises when requested by university officials. In *Lewis v. State*,¹⁷ he set forth special procedural limitations on the use of statements by juveniles accused of crimes. In *Reilly v. Robertson*,¹⁸ he wrote a landmark decision invalidating gender-specific actuarial tables on equal protection grounds.

Justice DeBruler wrote the well-known opinions of the Indiana Supreme Court affirming the constitutionality of the Indiana Medical Malpractice Act,¹⁹ shielding utility customers from the costs of the abandoned Marble Hill and Bailly nuclear projects,²⁰ and holding that environmental damage was covered by businesses' general comprehensive liability insurance in Indiana.²¹ Additionally, he made

10. 578 N.E.2d 649, 652-53 (Ind. 1991).

11. 569 N.E.2d 635, 636 (Ind. 1991) (DeBruler, J., dissenting).

12. 626 N.E.2d 802, 803 (Ind. 1993).

13. *Schiro v. State*, 669 N.E.2d 1357 (Ind. 1996).

14. 450 U.S. 707 (1981) (holding that the denial of unemployment compensation to an employee who refused reassignment to an armament assembly line in accordance with his religious beliefs violated the employee's rights under the Free Exercise Clause), *rev'g* 391 N.E.2d 1127 (Ind. 1979).

15. 406 U.S. 715 (1972) (holding that the indefinite commitment based on mere existence of pending criminal charges in a mental health institution of a deaf and partially blind defendant of limited intelligence violated the Due Process Clause of the Fourteenth Amendment), *rev'g* 255 N.E.2d 515 (Ind. 1970).

16. 278 N.E.2d 280 (Ind. 1972).

17. 288 N.E.2d 138 (Ind. 1972).

18. 360 N.E.2d 171 (Ind. 1977), *cert. denied* 434 U.S. 825 (1977).

19. *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980).

20. *National Rural Util. Co-op Fin. Corp. v. Public Serv. Comm'n*, 552 N.E.2d 23 (Ind. 1990) (Marble Hill); *Citizens Action Coalition of Ind., Inc. v. Northern Ind. Pub. Serv. Corp.*, 485 N.E.2d 610 (Ind. 1985) (Bailly).

21. *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996).

important contributions with majority opinions, too numerous to list here, in criminal, evidence, and tort law.

As the legacy of his opinions—both dissenting and majority—reflects, Justice DeBruler was a judge's judge, able to set aside all prejudice and outside influence and focus only on the law and the merits of the case before him. The strength of his intellect and courage of his convictions have deeply influenced Indiana law for over a quarter-century. It is hard to envision the Indiana Supreme Court without him.

