

INDIANA'S PLACE IN AMERICAN COURT REFORM: RARELY FIRST, OCCASIONALLY LAST, FREQUENTLY EARLY*

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Where do Indiana courts stand in the larger story of reinventing America's courts? Where does Indiana fit in this broad effort at reform, and what do we contribute to it?

I. PRESENT OBJECTS OF NATIONAL REFORM

To assess Indiana's place, one must first enumerate the areas in which the nation's state courts face the greatest challenges.

A. Globalization

Justice John Paul Stevens gave a speech recently in Indianapolis about the effects of a globalizing world economy on the American court system and on the American legal profession. When an American employer strikes a commercial deal with a business partner in Asia or Europe, both parties need to understand how their own domestic law and customary international law will affect the transaction. Likewise, lawyers for the American company and lawyers for the company overseas need to help facilitate that transaction by plying their trade far away from the place where they are licensed. America's state courts, as regulators of the bar, are actively examining how to support those arrangements, which are so important to our domestic economy.

The legal profession is likewise engaged in a massive effort to help new democracies—like those in Kosovo, Ukraine, Iraq, and Afghanistan—establish the rule of law, believing as most Americans do that a world with more democratic states possessing stable legal systems will be a safer place.¹ This effort proceeds through training judges and lawyers in such places and through a high level of exchange visits.

And, of course, globalization shows up in every state's back yard in the form of immigrants for whom English is not the first language. State courts are active in devising ways to assure such people access to justice. Many people with language issues are too poor to even hire lawyers, let alone interpreters, and finding new ways to provide legal help to them and to other low-income Americans is a national priority.

* This is a revised version of the 2006 State of the Judiciary Address given by the Chief Justice of Indiana to a joint session of the Indiana General Assembly in the House of Representatives Chamber at the Indiana State House on January 12, 2006.

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1. Condoleezza Rice, Secretary of State, Remarks at the American Bar Association's Rule of Law Symposium (Nov. 9, 2005), *available at* <http://usinfo.state.gov/dhr/Archive/2005/Nov/10-814789.html>.

B. Families

Thousands of American judges spend every day asking themselves, “What can we do to strengthen American families and improve the lives of children?” A national commission released a landmark report in 2004 that examined how all levels of government can do better for abused and neglected children.² This led to a remarkable national summit in October 2005 of leaders in state courts and child protection; agencies gathered to develop action plans to make that happen.³

C. Ethics in Government

Judges and lawyers are in the middle of a major national effort to revise the rules of ethics that apply to judges so that we can assure our fellow citizens that fidelity to high standards is part of their judiciary. The scandal in Congressional lobbying makes this need ever more apparent.⁴

D. Correction, Guilt, and Innocence

The growing number of people in American jails and prisons compels a search for an effective, less expensive means of dealing with offenders and deterring repeaters. The latest inventive projects with this aim focus on courts as institutions that help solve problems rather than as places that simply try cases. Judges and others have devised what are called “problem-solving courts”: drug courts, neighborhood courts, mental health courts, and re-entry courts, to name a few.⁵

E. New Age and New Law

At least since deTocqueville’s tour of nineteenth century America, the country’s courtrooms have been places where the changes in American society show up quickly. These changes present brand new legal questions, such as: “What is privacy in the electronic age?” or “What do civil rights mean in the war on terror?”

F. Jury Reform

At the heart of American justice stands the right to a trial by jury. There is a national movement, based in the state courts, to improve the selection of jurors,

2. THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, WELL-BEING AND PERFORMANCE FOR CHILDREN IN FOSTER CARE* (2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

3. See Barbara L. Jones, *National Foster-Care Summit is Held in Minnesota*, MINN. LAW., Oct. 3, 2005.

4. See Mike Dorning, *GOP Proposes Lobbying Restrictions; Tighter Rules Include Travel, Gifts but Are Vague on Other Issues*, CHI. TRIB., Jan. 18, 2006, at C8.

5. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL’Y REV. 125 (2004).

to give jurors better tools to do their work, and to help them understand the laws they should apply.⁶

In thinking about how Indiana connects to these major national initiatives, I have come to a description that fits Indiana's position on the question of law reform, not just today, but through much of its history: Rarely first, occasionally last, and frequently early.

There are examples that demonstrate this description from our history and from modern times. In 2003, for example, we celebrated the 100th anniversary of Indiana's first juvenile court, the third juvenile court in America, way ahead of everybody.⁷ In the 1970s, Indiana was the third state whose legislature adopted determinant sentencing, the regime under which most of the country has now operated for about a quarter century.⁸ In the 1980s, Indiana was the second state to adopt standards for the qualifications and compensation of lawyers who represent defendants in capital cases.⁹ In the 1990s, we were the sixth or seventh state to launch a project on jury reform. Rarely first, occasionally last, frequently early.

II. INDIANA IS CONNECTED TO EVERY EFFORT AT COURT REFORM

So, what has Indiana been doing on the leading national priorities I described?

A. Globalization

Indiana courts have been front-line participants in devising lawyer rules to facilitate national and international commerce and were first to adopt the uniform rule admitting foreign lawyers to reside here and advise on the law of their home country.¹⁰ Indiana has sent judges and prosecutors overseas, to places such as Kosovo, Iraq, and Afghanistan, to assist in devising new constitutions, laws, and court rules. (And, since charity begins at home, we also sent people to the Gulf Coast to help rebuild courts and communities after Hurricane Katrina.) Indiana has likewise become a place foreign judges want to visit. During 2005 we hosted a delegation from Russia and one from Ukraine.

B. Families

Last year, the Indiana General Assembly passed legislation requiring the appointment of a guardian or child advocate in every case in which a child has

6. THE ARIZONA SUPREME COURT COMMITTEE ON THE MORE EFFECTIVE USE OF JURIES, THE POWER OF TWELVE (1994).

7. Frank Sullivan, Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 IND. L. REV. 279 (1997).

8. 1976 IND. ACTS 788-94.

9. IND. CRIM. R. 24(B)-(C) (1990).

10. IND. ADMIS. DISC. R. 5 (1994).

been abused or neglected.¹¹ In this respect, Indiana has been both last and first. We were the last state to enact this comprehensive requirement—but as far as building a corps of people to speak for the abused child in court, last year there were more than 2000 adult volunteers who worked with more than 16,000 Indiana children. Indiana has more local programs to recruit and train volunteers to represent the best interests of children than any other state.¹²

C. Ethics

The national re-examination of the ethics rules for judges I mentioned is being led by the American Bar Association (“ABA”). I have been invited to serve as a standing adviser to the ABA’s commission, but more importantly, the ABA has recruited two Hoosiers to do the heaviest intellectual lifting as reporters for the commission. They are Professor Charles Geyh of the law school at Bloomington and Professor Emeritus William Hodes of the law school at Indianapolis.¹³

A close corollary of ethics reform is working to make government more accessible, more “transparent,” as the current saying goes. Indiana has developed an award-winning project for public information and education about its courts.¹⁴ We work to expand public knowledge about the courts using a variety of different media, from printed materials to live lectures to public displays. And, of course, the Internet. On one day last September, more than 19,000 people visited our website.

D. Corrections and Problem-Solving

The best-known tool in judicial administration of drug offenses is the drug court. A drug court is not really a separate court but a court process under which the prosecutor and defense counsel can consent to permit a defendant to avoid prison on the condition that the defendant comply with a tight set of treatment requirements and extremely close monitoring directly by the judge. Approximately thirty-five percent of the people sent to drug courts would otherwise be holding down beds at the department of correction. The number of drug courts in Indiana is rising steadily, and new legislation in 2004 will strengthen and accelerate this movement.¹⁵ It is a movement whose national leadership has an Indiana cast. The executive director of the national organization for drug court professionals is former judge and Attorney General Karen Freeman-Wilson of Gary.

11. 2005 IND. ACTS 2150-56.

12. INDIANA STATE OFFICE OF GAL/CASA, 2003 STATISTICS REPORT 2 (2003).

13. Eileen C. Gallagher, *The ABA Revisits the Model Code of Judicial Conduct: A Report on Progress*, 44 A.B.A. JUDGES J. 7 (2005).

14. *Outstanding Achievements Recognized at Luncheon*, 49 RES GESTAE 10 (2006); CTR. FOR DIGITAL GOV'T, BEST OF BREED REPORT 15-16 (2002), available at <http://www.in.gov/judiciary/citc/bob.pdf>.

15. 2004 IND. ACTS 2116-20.

Similar problem-solving techniques are applied in “re-entry courts.” As Corrections Commissioner J. David Donahue says, “We can’t expect much when we push an offender out the prison door with \$75 and a set of clothes.” Re-entry courts mean we can expect more. The nation’s leading re-entry court is in Fort Wayne, Indiana, under the leadership of Judge John Surbeck.¹⁶

E. New Age Law

On issues like privacy and consumer protection in the electronic age, any list of America’s top ten legal scholars would include Professor Fred Cate of Bloomington.¹⁷ Professor Cate is one of the jewels of Indiana’s legal community, and he helps the profession and the courts in a host of ways. These include advising our effort, under the leadership of Justice Brent Dickson, to devise new practices for improving public access to court records without making life easy for identity thieves or domestic abusers.¹⁸

F. Legal Help for the Poor

Many states have long used a system to gather otherwise uncollected interest from lawyer trust accounts as a way of helping people who need legal assistance. Indiana was the last state to implement such a system. But we were the first state to commit that resource to building a network of volunteer lawyers to assist low-income people. Last year Indiana attorneys contributed over 20,000 hours of time to indigent Hoosiers through this unique network.¹⁹

G. Jury Reform

You know that we have made many improvements in how Indiana juries do their work, but the newest one became effective just this January. At the end of 2005, we distributed to county clerks the best list of potential jurors ever devised. Justice Ted Boehm led an effort with assistance from the Bureau of Motor Vehicles, the Department of Revenue, Purdue University, and local court personnel that, in the end, produced a disc for each county containing non-duplicated, up-to-date names and addresses for use in mailing jury summons. We estimate that it includes ninety-nine percent of the people living in Indiana who are eligible for jury service.²⁰

16. See Editorial, *Reforming Juvenile Offenders*, FORT WAYNE J. GAZETTE, July 20, 2005, at 12A.

17. See, e.g., Fred H. Cate, *Past and Future Drivers of Privacy Law*, 828 P.L.I./PAT.11 (May-June 2005); Michael E. Staten & Fred H. Cate, *The Impact of Opt-In Privacy Rules on Retail Credit Markets: A Case Study of MBNA*, 52 DUKE L. J. 745 (2003).

18. See IND. ADMIN. R. 9.

19. Telephone Interview with Monica Fennell, Executive Director, Indiana Pro Bono Commission, in Indianapolis, Ind. (Feb. 9, 2006).

20. Editorial, *Jury Selection Now More Efficient, Fair*, BEDFORD TIMES-MAIL, Jan. 9, 2006, at A7; Theodore R. Boehm, *Teamwork Leads to Jury Pool Improvements*, INDIANAPOLIS STAR,

Why does that matter? For one thing, it will save a lot of money. In some counties, forty percent of the jury notices come back as undeliverable because the addresses are out of date.

There is a more important reason it matters. Americans treasure the idea that we are entitled to a “jury of our peers,” but the fact is that many jury lists leave out a lot of people, especially low-income people and minorities. This new initiative, a product of our Judicial Technology and Automation Committee, has produced the most inclusive list of possible jurors ever. The people summoned for jury duty now will be the most representative array of citizens in all the time since King John signed the Magna Carta in 1214. The country’s leading experts in jury reform made this Indiana development the lead story in their national electronic newsletter under the headline: “List Heaven.”²¹

III. INDIANA SUPPLIES LEADERS

Having listed some of the ways Indiana connects to the leading court issues of the day, I suggest that Indiana contributes to national reform in two ways: we provide leaders, and we export new ideas.

First, in a host of settings, Indiana provides leaders for the national judiciary and the legal profession.

I recently made a business call to a judge in Seattle named Eileen Kato; she was national chair of the American Bar Association Conference of Specialized Court Judges. Judge Kato said, “I know two of your colleagues.” She knew her successor as leader of this legion of judges: Judge Michael Witte of Lawrenceburg, Indiana. And she knew Frank Sullivan. “Justice Sullivan’s been our leader,” she said, “on a project to help more minority law school graduates get appellate court clerkships.”

Judge Lorenzo Arredondo of Lake County has been a director of the American Judicature Society, the country’s leading group on judicial selection and ethics. Judge John Baker of the Indiana Court of Appeals has served on the committee that devises education for appellate judges. Justice Sullivan now guides the ABA Appellate Judges Conference. Former Justice Myra Selby, now helping us on race and gender issues, earlier served on the body that accredits and therefore shapes America’s 180 law schools. It is an effort led for thirty years by Dean James P. White of the Indiana University School of Law.²²

Nov. 20, 2005, at 4E.

21. National Ctr. for State Court’s Jury Cmty. of Practice and Ctr. for Jury Studies, *List Heaven: Indiana’s Jury Pool Project*, JUR-E BULL., Oct. 28, 2005, available at http://www.ncsconline.org/WC/Publications/KIS_JurInnJurE10-28-05.pdf.

22. Dean White’s preeminence in this field is only partially illustrated by the volume of scholarly work he has published over the years concerning legal education. A brief sample of his work includes the following: James P. White, *Rededication to Our Court Values: Legal Education in the Public Interest*, 31 SW. U. L. REV. 159 (2002); James P. White, *Rethinking the Program of Legal Education: A New Program for the New Millennium*, 36 TULSA L.J. 397 (2000); James P. White, *Supreme Courts and Legal Education Reform*, 72 NOTRE DAME L. REV. 1155 (1997); James

Judges Margret Robb and Pat Riley of the Indiana Court of Appeals are recognized leaders in the National Association of Women Judges (and last year brought their annual meeting to Indianapolis). Judge Jim Payne, if he were not now part of the Daniels Administration, would instead be today president of the National Council of Juvenile and Family Court Judges. Don Lundberg, who runs the Indiana Supreme Court's Disciplinary Commission, is presently treasurer of the National Association of Bar Counsel, the country's organization of lawyer disciplinary agencies. And not far from the judicial circle, it is an honor for our state that the fifty state attorneys general have chosen Attorney General Steve Carter as their president.

Indiana's contribution of national leaders goes well beyond judges and lawyers. Cathy Springer, the director of education at the Indiana Judicial Center, has lately become a member of the faculty and a member of the oversight committee for the number one place in America where people work on how to improve the continuing legal education of judges, the University of Memphis.²³ Anne Davidson, assistant director of the Indiana Continuing Legal Education Commission, was recently president of the national association of organizations that oversee Continuing Legal Education ("CLE") for lawyers, a group called ORACLE. And, Cheri Harris of Indiana has recently become the executive director of ORACLE. (And indeed, we brought the offices of ORACLE here to Indiana.)

And the Judicial Family Institute, which helps spouses and children of judges navigate through judicial waters, was conceived and created by Justice Dickson's spouse, Jan Dickson, now widely regarded as having done more to help judicial families than any other single person in the country.²⁴

IV. INDIANA EXPORTS IDEAS

Second, and at least as important, Indiana is an exporter of ideas about better courts.

P. White, *Legal Education in the Era of Change: Law School Autonomy*, 1987 DUKE L.J. 292.

23. The University of Memphis's Center for the Study of Higher Education runs two complementary programs that serve directly the educational needs of judges. The Leadership Institute in Judicial Education ("LIJE") has, during its sixteen year existence, provided intensive and highly respected professional education to nearly 3500 judges, and other court staff from nearly every state in the Union. The Institute for Faculty Excellence in Judicial Education ("IFEJE") has, over the last nine years, provided training to judges and court staff that enhances their ability, in turn, to provide education to other judicial officers. Univ. of Memphis, Ctr. for the Study of Higher Educ., <http://coe.memphis.edu/CSHE> (last visited June 26, 2006).

24. The Judicial Family Institute is affiliated with the National Center of State Courts and is "dedicated to informing and offering support to judicial families confronting the unique challenges of public life." Judicial Family Institute, About JFI, <http://jfi.ncsconline.org/who.html> (last visited June 26, 2006). The institute provides judges, and their families, with support and access to numerous resources on topics ranging from questions regarding judicial ethics to concerns over quality of life. *Id.*

I will start with an example that even many judges in our state do not know about. There are two places in Indiana where we try most “mass tort” cases, litigation such as asbestos claims. They are presided over by Judge Jeff Dywan in Lake County and Judge Ken Johnson in Marion County. When I spoke to a recent conference at the University of Chicago, the first judge I ran into said, “How’s Ken Johnson? I wish we could use his system here in New Jersey.” Judge Johnson has developed a case management system for mass torts that is the envy of other judges elsewhere. Why does one need a special system for such cases? There was one four-week period when Judge Johnson received 300 cases with 15,000 claims.

Indiana’s pro bono plan, by which thousands of Hoosier lawyers volunteer their time to assist low-income people in need of legal assistance has been emulated by multiple states around the country. And several other states have taken our model on the Conference for Legal Education Opportunity (Indiana “CLEO”) to help more minority and other disadvantaged college students become lawyers.²⁵

On the problem of language, last year we certified the first interpreters qualified to translate formal courtroom testimony.²⁶ We also need people in the county courthouses who can on a day-to-day basis communicate with persons who walk into the courthouse speaking mostly Spanish. So, last fall we completed a pilot program in Terre Haute in partnership with Ivy Tech to train local court personnel in Spanish. We will soon launch it state-wide.²⁷

Most recent immigrants are people who speak Spanish, but individuals do appear in local courts speaking everything from Mandarin to Urdu. We are experimenting with a system designed for those situations called “Language Line,” and so far we have deployed it to assist with people who spoke French, Somalian, Russian, Mongolian, Yeman, and Mixteco (a Mexican regional dialect). Recently, for example, Judge James Jarrette in Kosciusko County had a litigant who spoke only Korean. He called our Division of State Court Administration and was quickly connected by telephone with a skilled interpreter who spoke Korean, so that people in the courtroom could understand her and she could understand them, and the court could resolve the case based on full

25. Indiana’s CLEO program is built upon the success of the national CLEO program. The program is authorized by IND. CODE §§ 33-24-13-1 to -7 (2005). Several other states, including Kentucky, Georgia, and Ohio, have either implemented similar programs, or begun the process of doing so. See National Ctr. for State Courts, Public Trust and Confidence Forum, http://www.ncsconline.org/projects_Initiatives/PTC/UnequalTreatment.htm (last visited June 26, 2006).

26. Press Release, Chief Justice Shepard to Swear in New Court Interpreters (Mar. 16, 2005), available at <http://www.in.gov/judiciary/press/2005/0316.html>. The court interpreter program involves a testing procedure in which individuals hoping to be certified as interpreters must pass rigorous oral and written exams. For more information on the program, see Indiana Supreme Court Division of State Court Administration, Court Interpreter Certification Program, <http://www.in.gov/judiciary/interpreter> (last visited June 26, 2006).

27. Press Release, Supreme Court and Ivy Tech Partner to Teach Spanish to Trial Court Employees (June 26, 2006), available at <http://www.in.gov/judiciary/press/2006/0626.html>.

communication by all.

Quite aside from structural reform, Indiana has been a giver of useful caselaw. When I became Chief Justice, I said, “We want to be a judiciary so well-regarded that judges and lawyers in other states, when considering the toughest legal issues of our time, will be led to look at each other and ask, ‘I wonder what Indiana has done about this.’”²⁸

Every few weeks, thousands of American lawyers receive the Supreme Court Reporter, the latest cases of the U.S. Supreme Court. The editors of this publication search the country for decisions from *other* courts that they think lawyers in America would want to know about, and they feature these as “Judicial Highlights.” In one six-month period last year, ten of those were Indiana cases—representing issues from the death penalty to criminal sentencing to family law and consumer protection.²⁹ It is a number far out of proportion to our state’s size and judicial output. This level of national recognition reflects the good job our appellate courts do, but it also reflects splendid work by Indiana lawyers and trial judges who skillfully litigate these cases long before the appeals reach this building.

V. THE PROSPECTS FOR MORE IMPROVEMENT

It has always seemed to me that our state’s bench ought to have its feet firmly planted on Indiana soil, but its eyes fixed on the horizon. It should be one that cares about individual cases, big and small. And always has in its heart what we can do together, tomorrow, to be better servants than we were yesterday.

That is more true in the Indiana judiciary now than it was eighteen months

28. This is an aspiration to which I return frequently for inspiration. As I noted in 2000, “It is the sort of heady statement one makes when taking office, a reminder of the lofty objectives that come with such a day.” Randall T. Shepard, Chief Justice of Indiana, State of the Judiciary Address: What Has Indiana Done About This? (Jan. 13, 2000) (on file with author). It is also an aspiration shared by a great many members of our judicial system, as the previous discussion, I hope, illustrates.

29. Among those cases recognized during this period were: *Smylie v. State*, 823 N.E.2d 679 (Ind.) (Shepard, C.J.) (holding *Blakely v. Washington* applicable to Indiana sentencing and appearing in Judicial Highlights on April 1, 2005), *cert. denied*, 126 S. Ct. 545 (2005); *Hyundai Motor America, Inc. v. Goodin*, 822 N.E.2d 947 (Ind. 2005) (Boehm, J.) (finding that an implied warranty of merchantability exists between manufacturer and buyer of automobile and appearing in Judicial Highlights on March 15, 2005); *Beckley v. Beckley*, 822 N.E.2d 158 (Ind. 2005) (Rucker, J.) (involving the division of marital property and appearing in Judicial Highlights on March 1, 2005); *Corcoran v. State*, 820 N.E.2d 655 (Ind.) (Sullivan, J.) (involving mental competence to waive post-conviction relief review in death penalty case and appearing in Judicial Highlights on February 1, 2005), *aff’d on reh’g*, 827 N.E.2d 542 (Ind. 2005). Recently, an opinion by Justice Dickson was also cited in Judicial Highlights. *Myers v. State*, 839 N.E.2d 1154 (Ind. 2005) (finding a warrantless dog sniff of student’s unoccupied car in high school parking lot conducted by school officials permissible and appearing in Judicial Highlights on January 15, 2005), *cert. denied*, 74 U.S.L.W. 3544 (Ind. May 22, 2006) (No. 05-1202).

ago, and Judge Diane Schneider of Lake County best articulated a central reason why. Speaking to a roomful of judges during the summer of 2005, she said: “A perpetual cloud hung over us year after year, a cloud labeled ‘compensation.’ That cloud finally has been lifted. This is a time when we should move ahead to better things.”³⁰ She was confirming the response of the state’s judges and prosecutors to the legislature’s action in adjusting salaries during the 2005 session.³¹ This could not have happened without broad support in both houses and support from Governor Daniels. It will be in Indiana’s best interest to make similar adjustments in the other two branches of government.

As for the judicial branch, I stand with Judge Schneider in believing that this is a moment when the judiciary must strive to do better than ever at helping Indiana be a safer, more prosperous, and more decent place to live.

30. Diane Schneider, Judge, Lake County, Remarks to the Indiana Graduate Program for Judges (June 9, 2005).

31. 2005 IND. ACTS 2351-53.