

IN MEMORY OF JUSTICE ROGER O. DEBRULER

FRANK SULLIVAN, JR.*

Roger Owen DeBruler died on February 13, 2017, at the age of eighty-two.¹ He was the longest serving justice on the Indiana Supreme Court during the twentieth century and the third longest serving justice ever.² His influence on Indiana jurisprudence is pervasive. And those who knew him will ever be inspired by the life lessons he taught.

After primary and secondary education in Evansville public schools, Roger DeBruler majored in German at Indiana University, served in the military, and then returned to Bloomington for law school. Following graduation, he practiced law in Indianapolis for only a few years before being appointed by Governor Matthew E. Welsh to fill a vacancy on the Steuben Circuit Court in the home county of his wife, Karen Steenerson DeBruler.³ Judge (even when he became a “Justice,” he preferred to be called “Judge”) DeBruler won election the next year to a full term in that position and settled in for a career in Indiana’s northeastern-most courthouse.⁴ But another judicial vacancy was soon to arise – this time on the Indiana Supreme Court – and again the Governor, now Roger D. Branigin, appointed DeBruler to fill it.⁵ History was to continue repeating itself; two years later, in 1970, the voters of Indiana elected him to a full term in that position.⁶

The 1970 election was a pivotal one for the Indiana Supreme Court: the voters of Indiana amended the State’s Constitution to provide that Supreme Court justices would no longer be elected.⁷ In the future, they would be appointed by the Governor from a short-list submitted by a non-partisan judicial nominating commission.⁸ DeBruler, always quick with the quip, would thereafter call those elected under the old system (like him!) “hard way judges” – because they got

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1. Frank Sullivan, Jr., *In memory of Indiana Justice Roger Owen DeBruler*, IND. LAWYER (Mar. 8, 2017), <https://www.theindianalawyer.com/articles/43007-in-memory-of-indiana-justice-roger-owen-debruler> [https://perma.cc/6B8P-Y5XY].

2. DeBruler served from 1968 to 1996. Serving longer have been Isaac N. Blackford (1817-1853) and Brent E. Dickson (1986-2016). *Supreme Court Justices*, COURTS.IN.GOV, <https://mycourts.in.gov/JR/Default.aspx> [https://perma.cc/7ZCN-YEUG] (last visited Oct. 1, 2017).

3. Maurer Sch. of Law, *Roger Owen DeBruler*, NOTABLE ALUMNI, <http://www.repository.law.indiana.edu/notablealumni/37/> [https://perma.cc/6GTH-8ACL] (last visited Oct. 24, 2017).

4. *Id.*

5. Justice Donald R. Mote died on September 17, 1968. *See id.*

6. *Id.*

7. Edward W. Najam, Jr., *Merit Selection in Indiana: The Foundation for a Fair and Impartial Appellate Judiciary*, 46 IND. L. REV. 15, 28 (2013).

8. *Id.* at 30.

their jobs the hard way; and those appointed under the new system “easy way judges.” But he didn’t complain too much because he was grandfathered into the new system and never had to run in a partisan election again.⁹

Twenty years ago, writing in this journal, former Indiana Chief Justice Randall T. Shepard described a photograph of DeBruler taken at the time of the latter’s arrival at the Court in 1968:

In this picture, the newest thirty-something Democrat [sic] justice sits up proudly in a full beard (fluffed up, no doubt, during the bicycle ride over from Lockerbie Square) and faces the camera with a restrained grin that says: “I’m not like them.” By “them,” Roger frequently meant the Republicans on the court.¹⁰

There are several things noteworthy about Shepard’s description of DeBruler. First, it comments on DeBruler’s youth at the time of his appointment; he had just turned thirty-four.¹¹

Second, it comments on his appearance. A full beard in 1968 was pretty much an anti-establishment marker.

Third, it comments on his early environmental consciousness. (*Cf.* The EPA was not established until two years later.)¹²

Fourth, it comments on Lockerbie Square. This requires a word of explanation. Lockerbie Square is the oldest neighborhood in Indianapolis, a few blocks east of Monument Circle. In the late 1960s, it had fallen on the hardest of times and was devoid of owner-occupied housing. DeBruler, Kenneth R. Stroud (DeBruler’s closest friend and a long-time revered member of this law school’s faculty), and a few others became pioneer homeowners in what is now one of the city’s premier neighborhoods.

Fifth, the quotation from Shepard comments on Republicans. And indeed, Justice DeBruler was not like the Republicans on the Court at that time or for the seventeen years thereafter. It turned out, however, that not all Republicans were like those Republicans and in 1985 and 1986, two new Republicans came to the Court by appointment of Governor Robert D. Orr: Shepard himself and Brent E. Dickson.¹³ All of a sudden, DeBruler was in the majority in more and more cases

9. Under the new “merit selection” system, judges were and are required to stand for periodic yes-no retention votes. IND. CONST. art. VII, § 11. “DeBruler himself was retained in 1976 with 65 percent of the vote and in 1986 with 57 percent of the vote.” See Frank Sullivan, Jr., *Roger O. DeBruler*, in JUSTICES OF THE INDIANA SUPREME COURT 370, 380 (Linda C. Gugin & James E. St. Clair eds., 2010).

10. Chief Justice Randall T. Shepard, *On the Retirement of Justice Roger O. DeBruler*, 30 IND. L. REV. 7, 9 (1997).

11. Maurer Sch. of Law, *supra* note 3.

12. *EPA History*, EPA (Oct. 20, 2017), <https://www.epa.gov/history> [<https://perma.cc/4TP5-6W4C>].

13. *Supreme Court Justices*, *supra* note 2; see also *Justice Randall Terry Shepard*, COURTS.IN.GOV, <http://www.in.gov/judiciary/citc/2828.htm> [<https://perma.cc/8TSC-PDBV>] (last visited Oct. 24, 2017); *Justice Brent E. Dickson*, COURTS.IN.GOV, <http://www.in.gov/>

and the Indiana Supreme Court began receiving national attention for the quality of its jurisprudence.

In the years that followed, DeBruler made a monumental contribution to Indiana law.¹⁴ “He wrote some 1750 opinions . . . [A]bout 890 were majority opinions, 590 were dissents, and 270 were concurrences.”¹⁵ Of particular note are his dissents, his opinions in capital cases, and his championing of liberties for Hoosiers even greater than those protected by the Bill of Rights. This Memorial will touch on each of those below.

DeBruler left the Court in 1996, a few days after reaching the age of sixty-two, passing the baton to Justice Theodore R. Boehm, one Olympian to another.¹⁶ He could have served until age seventy-five, and if he had, he would have shattered by more than five and half years the all-time record for years of service on the Court.¹⁷ But being a record-holder was not very important – perhaps not at all important – to this modest man as was being able to pursue a wide range of interests that he had been forced to neglect in the face of the relentless press of Court business.

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As suggested above in talking about Republicans, the first seventeen years of Roger DeBruler’s Supreme Court tenure were characterized by disagreements with his fellow justices on the reasoning and results of many cases. He wrote and published those disagreements in dissenting opinions—lots of dissenting opinions.

A Justice of the U.S. Supreme Court once wrote that certain dissents “seek to sow seeds for future harvest” and when a judge writes such a dissent, the judge speaks with a “prophetic” voice.¹⁸ The aforementioned Kenneth Stroud recited this in a discussion of Roger DeBruler’s dissents.¹⁹ Stroud never explicitly said that DeBruler was a prophet – but that’s what he meant. And he was right.

For example, DeBruler in dissent wrote that a man who had quit his job rather than perform a task that violated his religious beliefs was entitled to unemployment benefits.²⁰ The U.S. Supreme Court granted certiorari and adopted the dissent.²¹ And later, Congress nearly unanimously enshrined this principle in the 1993 Religious Freedom Restoration Act²² (not to be confused with the

judiciary/citc/2829.htm [https://perma.cc/3JK9-5TTC] (last visited Oct. 24, 2017).

14. Shepard, *supra* note 10, at 7.

15. *Id.*

16. *Supreme Court Justices*, *supra* note 2.

17. *Id.*

18. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431 (1986).

19. Kenneth M. Stroud, *Justice DeBruler and the Dissenting Opinion*, 30 IND. L. REV. 15, 18-19 (1997).

20. Thomas v. Review Bd. of Ind. Emp’t Sec. Div., 391 N.E.2d 1127, 1136-37 (Ind. 1979) (DeBruler, J., dissenting).

21. See generally Thomas v. Review Bd. of Ind. Emp’t Sec. Div., 450 U.S. 707 (1981).

22. Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993) (codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4).

pernicious bill here in Indiana a couple of years ago that masqueraded under the same name).²³

DeBruler wrote in dissent that two particular Indiana criminal statutes violated the U.S. Constitution.²⁴ These dissents prophesized the later very famous cases of *Roe v. Wade*²⁵ and *Lawrence v. Texas*.²⁶

Positions taken by DeBruler in dissent. Today, the law of the land.

Although DeBruler's dissents were often prophetic, they were always models of decorum; tightly reasoned; not overstated. They were written in a straightforward, declarative style; not punctuated with hyperbolic rhetoric. Dissents written in this way meant that when a new generation of justices joined the Court towards the end of his tenure and following – Shepard, Dickson, Krahulik, Selby, Boehm, Rucker and more – the DeBruler dissents of years gone by became the majority opinions of the Indiana Supreme Court.²⁷

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No judge or lawyer has made a greater contribution to Indiana's death penalty jurisprudence than Roger DeBruler. Although his views, expressed in his dissenting, concurring, and majority opinions in capital cases, did not always carry the day, the principles he explicated came to comprise much of the canon of Indiana death penalty jurisprudence.²⁸

DeBruler came to the Court in 1968, believing the death penalty violated the Indiana Bill of Rights specification that the Indiana “[P]enal Code shall be founded on the principles of reformation, and not vindictive justice.”²⁹ His position failed on a 3-2 vote.³⁰ Soon thereafter, the U.S. Supreme Court declared unconstitutional death penalty statutes similar to Indiana's.³¹ When the Indiana

23. The pernicious effect of Ind. Pub. L. No. 3-2015 was alleviated by Ind. Pub. L. No. 4-2015. See Monica Davey & Mitch Smith, *Indiana Governor, Feeling Backlash From Law's Opponents, Promises a 'Fix'*, N.Y. TIMES (Mar. 31, 2015), <https://www.nytimes.com/2015/04/01/us/politics/indiana-governor-mike-pence-feeling-backlash-from-religious-laws-opponents-promises-a-fix.html> [https://perma.cc/9M83-796H].

24. Cheaney v. State, 285 N.E.2d 265, 272-74 (Ind. 1972) (DeBruler, J., dissenting) (abortion); Dixon v. State, 268 N.E.2d 84, 87-88 (Ind. 1971) (DeBruler, J., dissenting) (consensual sodomy).

25. See generally 410 U.S. 113 (1973).

26. See generally 539 U.S. 558 (2003).

27. See, e.g., Patterson v. State, 324 N.E.2d 482, 488 (Ind. 1975) (DeBruler, J., dissenting), *overruled by* Modesitt v. State, 578 N.E.2d 649 (Ind. 1991); Kerlin v. State, 265 N.E.2d 22, 25-27 (Ind. 1970) (DeBruler, J., dissenting), *overruled by* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992).

28. The following discussion is truncated from a more extensive review of DeBruler's influence on Indiana death penalty jurisprudence contained in Frank Sullivan, Jr., *Selected Developments in Indiana Criminal Sentencing and Death Penalty Law (1993-2012)*, 49 IND. L. REV. 1349, 1371-73 (2016).

29. *Id.* at 1371; IND. CONST. art I, § 18.

30. Adams v. State, 271 N.E.2d 425 (Ind. 1971), *rev'd on reh'g*, 284 N.E.2d 757 (Ind. 1972) (vacating death penalty in light of Furman).

31. Furman v. Georgia, 408 U.S. 238 (1972).

General Assembly adopted the new Indiana Death Penalty Act to conform to the high court's dictates, DeBruler mounted an even stronger attack on its constitutionality.³² This time, his position drew no other votes.³³

DeBruler adhered thereafter to *stare decisis* as to the constitutionality of the death penalty statute³⁴ and joined the majority in voting to affirm capital sentences in many cases. He authored the majority opinion in eight of them.³⁵ But in doing so, DeBruler subjected each death sentence to exacting scrutiny. It was his position that the "most critical stage" in making a death sentencing determination was the weighing of the aggravating circumstances proffered by the State in support of its death penalty request against the mitigating circumstances advanced by the defendant in justification of life.³⁶ In case after case, he relentlessly insisted on a strict application of this weighing process. Indeed, in some of his later opinions, he undertook to engage in an explicit weighing process himself, valuing each aggravating and mitigating circumstance and then weighing them.

My own time on the Court overlapped with DeBruler's but briefly. Yet during that time, I was privileged to participate in oral arguments on capital cases in which DeBruler engaged Deputy Attorney General Arthur Thaddeus Perry, the two of them together identifying the issues and analyzing them with remarkable acumen and insight. These were intellectual inquiries of the highest order, seminars really, and from them Indiana developed a capital jurisprudence that made prosecutors far more selective over time in seeking the death penalty.

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Roger DeBruler always wanted Indiana standards to be higher than the nation's. The dissents and his approach to the death penalty and much more embodied his aspiration that Hoosiers enjoy liberties greater even than those protected by the Bill of Rights.

And in this regard he was not always in dissent.

To this day, thanks to a DeBruler opinion, Hoosiers have greater protection from searches by the government than even that provided by the Bill of Rights.³⁷

To this day, thanks to a DeBruler opinion, Hoosier juveniles have greater protection from interrogation by the government than even that provided by the Bill of Rights.³⁸

And a Memorial to Roger DeBruler cannot help but remind that Hoosiers have greater protection from search and seizure by the government of their automobiles! "It is . . . particularly important, in the state which hosts the Indy 500 automobile race, to recognize that cars are sources of pride, status, and

32. *Judy v. State*, 416 N.E.2d 95, 111-14 (Ind. 1981) (DeBruler, J., dissenting).

33. *Id.*

34. *See, e.g., Fleenor v. State*, 514 N.E.2d 80, 90 (Ind. 1987).

35. A detailed spreadsheet containing citations for each of these and Justice DeBruler's votes in other death penalty cases is on file with the author.

36. *Spranger v. State*, 498 N.E.2d 931, 958-59 (Ind. 1986) (DeBruler, J., dissenting).

37. *Pirtle v. State*, 323 N.E.2d 634 (Ind. 1975).

38. *Lewis v. State*, 288 N.E.2d 138 (Ind. 1972).

identity that transcend their objective attributes. We are extremely hesitant to countenance their casual violation”³⁹

Was his tongue in his cheek when he wrote this? Perhaps. But the broader point remains: more protection than even that provided by the Bill of Rights.

There is much more to be said about Roger DeBruler and law. But these reflections will have to suffice except to say how proud he was of his daughter Lily’s admission to the bar.

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Roger DeBruler read widely and prodigiously. “Judge DeBruler, what have you read in the last year?” “All of the works of William Faulkner,” he’d answer. “Judge DeBruler, what are you reading now?” “Ken Stroud and I are working on James Joyce’s *Finnegans Wake*,” was his reply. To the end, he was patron of the Indianapolis Public Library; in my last visit with him, he told me that his library card was his most valued possession.

He traveled far and wide. He spent the entire year after he left the Court in France. (He took courses at a local university there – and sent his report card back to the Court to prove it. *Très bien* in all courses.) He made an epic trip to the Yukon with sons Roger Jr. and Joseph.

His law clerks became judges, federal district attorneys, mayors, and lawyers of great note.

He studied the prices of high-yield bonds in the Wall Street Journal each day, looking for bargains.

I fear my Memorial has slipped into the kind of Faulknerian-Joycean stream of consciousness in which he revealed.

* * *

What, Professor, do you want us to take away from this Memorial?

That Roger DeBruler showed us by his life and example how to take a stand for what will make things better. That even in dissent, taking a reasoned stand, with decorum, will “sow seeds for future harvest.”⁴⁰ That, although he taught us these lessons through his monumental written contribution to law, in whatever our walk or station of life, progress demands from time to time courageous yet dignified disagreement.

That Roger DeBruler showed us by his life and example how to love and hold dear our families; and how to take care of our minds and our bodies. He showed us self-effacing modesty, almost to a fault.

Roger DeBruler left us with some words that are uncannily apt for this time in our history. Hoosiers, he wrote, are people who “always value[] neighborliness, hospitality, and concern for others, even those who may be strangers.”⁴¹ May we honor this fine judge and man with our own neighborliness, hospitality, and concern for others, even those who may be strangers.

We mourn with Karen and the DeBruler family the death of Roger Owen DeBruler. May he rest in peace.

39. Brown v. State, 653 N.E.2d 77, 80 n.3 (Ind. 1995).

40. Brennan, Jr., *supra* note 18, at 431.

41. Moran v. State, 644 N.E.2d 536, 541 (Ind. 1994).