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### "What I've Learned About Judging"

Frank Sullivan Jr.

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## "WHAT I'VE LEARNED ABOUT JUDGING"

Frank Sullivan, Jr.\*

It is a great honor to have been asked to deliver this lecture, particularly in light of the distinguished individuals who have preceded me in this series. I am also every bit as honored that all of you have taken your time to be here.

My association with this law school began almost twenty years ago. I have been extended friendship and multiple courtesies from deans, professors, administrators, and students. I have been honored to serve on Dean Jay Conison's National Council. Jay, as you prepare to leave us for a new venture, we salute you and thank you for everything you have done for this great school. I have learned a great deal by attending many lectures here including perhaps the greatest lecture I have ever heard anywhere, Professor Ronald Dworkin's "Must Judges Be Philosophers?" on November 29, 1999.<sup>1</sup>

Ed Gaffney and Richard and Rosemarie Stith have provided Cheryl and me with memorable experiences during sessions of the Cambridge summer program. Faculty members generously critiqued my LLM thesis at a colloquium here. This school provided two of my law clerks, Susan Oliver Martello and Melina Villalobos—and JoEllen Lind steered me to a third, her wonderful daughter, Erin Shencopp. I have been inspired beyond measure by the brilliance, the courage, the grace, and the goodness of Rosalie Levinson. For all of this and much more, my profound thanks.

I want to acknowledge some special friends of mine in the audience—judges with whom I have worked closely and from whom I have learned much and the aforementioned Erin Shencopp. And I could not be more pleased and flattered at the presence of a very special friend of mine from here in Porter County, Patricia Bengert, whose late husband, Daniel Bengert, was my high school debate coach, English teacher (read: Shakespeare), wise mentor, and cherished friend. Thanks to each of you for coming.

As you have heard, Governor Evan Bayh did me the high honor of appointing me to the Indiana Supreme Court effective November 1,

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<sup>1</sup> *Valparaiso University Notes*, NORTHWEST IND. TIMES (Nov. 24, 1999, 12:00 AM), [http://www.nwitimes.com/uncategorized/valparaiso-university-notes/article\\_7f2e674e-d13d-5da4-be6d-3da181785ce6.html](http://www.nwitimes.com/uncategorized/valparaiso-university-notes/article_7f2e674e-d13d-5da4-be6d-3da181785ce6.html).

1993. I had had no prior judicial experience. I take from the fact that you have invited me here tonight, that after nineteen years you are—at last—willing to overlook that deficiency in my qualifications. Still, since I had no experience with judging when I started on the court, it is fair to ask today what I’ve learned about judging.

LESSON #1: JUDGING IS MORE THAN ADJUDICATION; IT IS ALSO  
ADMINISTRATION

For twenty-five years until his retirement approximately one year ago, one man stood at the helm of the Indiana judicial system—Chief Justice Randall T. Shepard.<sup>2</sup> Chief Justice Shepard was a great adjudicator, to be sure, but he knew that the quality of the judicial decision meant little if justice was not actually delivered. He taught us all that the proper and effective administration of the courts goes hand-in-hand with the fair and impartial resolution of cases. In doing so, he initiated and supported countless initiatives in support of a vision of Indiana where: (1) the judges are highly qualified and well-trained, come from diverse backgrounds, and enjoy superior reputations for fairness, integrity, and efficiency;<sup>3</sup> (2) the courts are properly funded, equipped, secured, and staffed, have relatively balanced workloads, and operate under rules of procedure that reflect best practices;<sup>4</sup> (3) courts with specialized jurisdiction—juvenile courts and “problem-solving” courts—achieve great success in addressing the needs of troubled children and children in trouble, and of individuals dealing with issues such as drug abuse, mental illness, and re-entry from incarceration;<sup>5</sup> (4)

<sup>2</sup> *Justice Randall Terry Shepard*, COURTS.IN.GOV, <http://www.in.gov/judiciary/citc/2828.htm> (last visited Oct. 14, 2013).

<sup>3</sup> See Kevin Brown, *Tribute to Randall Shepard*, 48 VAL. U. L. REV. (forthcoming Winter 2013) (unpublished manuscript at 4) (on file with the Valparaiso University Law Review) (stating that Chief Justice Shepard was the driving force behind the Indiana Conference for Legal Education Opportunity (“ICLEO”) Program); Andrew R. Klein, *Justice Shepard and Diversity in the Legal Profession: The Legacy of ICLEO*, 48 VAL. U. L. REV. (forthcoming Winter 2013) (unpublished manuscript at 5) (on file with the Valparaiso University Law Review) (explaining Justice Shepard’s efforts to start ICLEO despite the national program losing most of its funding); María Pabón López, *The ICLEO Mentoring Legacy of Chief Justice Randall Shepard: An Essay*, 48 VAL. U. L. REV. (forthcoming Winter 2013) (unpublished manuscript at 4) (on file with the Valparaiso University Law Review) (stating that Chief Justice Shepard played an instrumental role in the creation of ICLEO). ICLEO’s goals are to assist minority, low-income, or educationally disadvantaged college graduates in attending law school and entering the legal profession. López, *supra*.

<sup>4</sup> See, e.g., Randall T. Shepard, Chief Justice, Indiana Supreme Court, *Burdened but Unbowed* (Feb. 21, 2011), <http://www.in.gov/judiciary/supreme/2453.htm> (addressing Indiana’s efforts to establish a respectable court system).

<sup>5</sup> See Randall T. Shepard, *The New Role of State Supreme Courts as Engines of Court Reform*, 81 N.Y.U. L. REV. 1535, 1549–51 (2006) (calling for a reform movement that looks to what

the courts are equipped with twenty-first century technology that maximizes court efficiency and provides court information to those who need it;<sup>6</sup> and (5) litigants have effective access to the courts without regard to financial circumstances.<sup>7</sup>

Partnered with the Indiana Supreme Court in these endeavors are the hundreds of men and women who serve as judicial officers throughout our state. They recognize the importance of both adjudicative work and administrative work, and they are totally committed to seeing a vision similar to the one I have just articulated become a reality—and not just for their courts or for their counties but for our entire state. They make our justice system work, and they deserve our admiration and appreciation.

#### LESSON #2: JUDICIAL SELECTION METHODS MATTER

During my time on the Indiana Supreme Court, I saw two candidates for the Illinois Supreme Court spend more than \$9.3 million seeking to be elected in 2004.<sup>8</sup> One was strongly supported by plaintiff personal injury lawyers, the other by business and insurance interests.<sup>9</sup> All the while, the appeal from a multi-million-dollar jury verdict against State Farm Insurance was pending before the court.<sup>10</sup>

During my time on the court, the *New York Times* wrote a major story about how candidates for the Ohio Supreme Court had raised more than \$21.2 million over the prior decade seeking to be elected, while routinely sitting on cases involving parties or groups filing amicus briefs from

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other state supreme courts have done to create special problem-solving courts); Kathryn Dolan, *Indiana Juvenile Court to Be Featured in Nationally Broadcast Documentary*, COURTS.IN.GOV (July 31, 2008), <http://www.in.gov/judiciary/press/2008/0731.html> (reporting Chief Justice Shepard's desire to continually evaluate the juvenile court system to see how it can help children and families in trouble).

<sup>6</sup> See *About: Mission Statement*, COURTS.IN.GOV, <http://www.in.gov/judiciary/jtac/2373.htm> (last visited Oct. 14, 2013) (explaining that in 1999 the Indiana Supreme Court created its Judicial Technology and Automation Committee).

<sup>7</sup> See Shepard, *supra* note 5, at 1543–46 (describing the need to assure equal access to justice).

<sup>8</sup> Whitney Woodward, *2010 Justice Kilbride Retention in Illinois*, 60 DRAKE L. REV. 843, 855 (2012).

<sup>9</sup> See Edward J. Kionka, *Things to Do (or Not) to Address the Medical Malpractice Insurance Problem*, 26 N. ILL. U. L. REV. 469, 475 (2006) (“[I]n the 2004 election, tort reform, business, insurance, medical, and legal groups on the right side of the political spectrum contributed about four-and-one-half million dollars to Judge Karmeier’s campaign. Interests on the other side of the spectrum contributed a like amount to Justice Maag’s campaign.” (footnote omitted)).

<sup>10</sup> Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 810 (Ill. 2005).

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which they had received campaign contributions.<sup>11</sup> During my time on the court, contribution-fueled television advertising in a campaign for a seat on the Michigan Supreme Court described one candidate as soft on terrorists and sexual predators and the other as a pawn for big business who literally slept on the job.<sup>12</sup>

Unlike our neighbors to the west, east, and north, the justices of the Indiana Supreme Court do not rely on campaign contributions and television advertising to obtain their seats. We have instead a merit selection system, in place since 1970, in which the governor appoints the members of the court from a list of nominees compiled by a judicial nominating commission consisting of lawyers and non-lawyers alike.<sup>13</sup> Once appointed, justices stand for periodic yes/no retention votes.<sup>14</sup>

This method of judicial selection and accountability helps assure that people of integrity, impartiality, and intelligence are appointed. The involvement of the governor and non-lawyer commission members, along with periodic retention votes, helps assure accountability. The absence of contested elections means that there is no perception either that justice in Indiana is for sale or that lawsuits are decided in response to party or interest-group contributions. We are fortunate to have such a system for the reasons I have indicated, and I hope that you will all join me in committing ourselves to preserving it.

## LESSON #3: JUDGING BENEFITS FROM EXPERIENCE

Many judges and legal theorists, as well as law school orientation and commencement speakers, have expropriated Holmes's aphorism— "[t]he life of the law has not been logic: it has been experience"<sup>15</sup>— so I feel no compunction in doing so either.

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<sup>11</sup> Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1, available at <http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all&r=0>; see James Nash, *Ohio's High-Court Races Are Flush with Cash*, COLUMBUS DISPATCH (Aug. 16, 2010, 6:03 AM), <http://www.dispatch.com/content/stories/local/2010/08/16/ohios-high-court-races-are-flush-with-cash.html> (recognizing that Ohio Supreme Court candidates spent \$21.2 million from 2000 to 2009); see also JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE 78-85 (2010), available at [http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE\\_8E7FD3FEB83E3.pdf](http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf) (detailing the amount spent on state judicial elections in each state between 2000 and 2009).

<sup>12</sup> SAMPLE ET AL., *supra* note 11, at 30, 35.

<sup>13</sup> IND. CONST. art. VII, §§ 9-10; see *Judicial Selection in the States: Indiana*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=IN](http://www.judicialselection.us/judicial_selection/index.cfm?state=IN) (last visited Sept. 30, 2013) (identifying that appellate courts undergo a similar selection process).

<sup>14</sup> IND. CONST. art. VII, § 11.

<sup>15</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown & Co. 1881).

Now I unselfconsciously said at the outset that I had no prior judicial experience at the time of my appointment to the court, but that is not to say that I had no experience with the real-life issues that were to come before the court. When asked in settings like this for an example of a case in which my real-life experience informed my judging, I often tell the story of *Hooks SuperX, Inc. v. McLaughlin*.<sup>16</sup>

In 1992, while I was recovering from a serious automobile accident, my doctor wrote me a refillable prescription for Vicodin. When I tried to refill the prescription, the pharmacist told me that she could not do so until she contacted my physician since I had consumed the pain-killer at a rate faster than that prescribed. Later, my doctor would tell me that he was furious that the pharmacist had not simply refilled the prescription as his written instructions had directed and that she had no business questioning his written order.

In the *Hooks SuperX, Inc.* case, McLaughlin also consumed pain-killing drugs at a rate much faster than prescribed.<sup>17</sup> However, McLaughlin's pharmacist followed the physician's written instructions without question.<sup>18</sup> A subsequent lawsuit contended the pharmacy had breached its legal duty of care by allowing McLaughlin to consume drugs at a rate that posed a threat to his health.<sup>19</sup>

Now, our court did not need my auto accident experience to conclude—as it did—that pharmacists are professionals who have a legal responsibility to exercise judgment in their work; that they are not—as my own physician seemed to think—robots or automatons whose job it is to follow the orders of MDs without question. However, I do think my experience helped us identify some nuances of the physician-pharmacist-patient relationship that made for a better opinion and for better law.

No judge will have relevant experience on every case that comes before his or her court. However, as I hope my *Hooks SuperX, Inc.* example demonstrates, the more relevant real-life experience that can be brought to bear in judging, the better the judging.

One way to bring more relevant real-life experience to bear in judging is by enhancing diversity among those involved in the decision-making process. Men and women from different backgrounds and experiences than our own often produce new perspectives on issues—and entirely new ways of looking at, examining, and solving problems.

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<sup>16</sup> 642 N.E.2d 514 (Ind. 1994).

<sup>17</sup> *Id.* at 516.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

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This is why diversity among judges on multi-member appellate courts is so desirable.

Hardly anything about the last nineteen years of my life approaches the satisfaction of the keen friendships that I have developed with the twenty-eight lawyers who served as my law clerks. A major part of the reason I say that is because of how much they taught me—to be sure, some of it merely generational: as each year went by, the clerks were that much younger than me!—as women, African-Americans, Hispanics, and Asian-Americans, they brought background and experience to the issues confronting our court that I simply did not have.

There is one last point about the relationship of experience to judging that I want to make. Just because a judge on a multi-member court has prior personal experience related to a matter before the court—like my experience with consuming medicine faster than prescribed—does not privilege that judge's view on the merits as to the outcome of the case. Chief Justice Shepard had a lot of experience in local government administration and that experience was helpful to all of us in understanding zoning disputes.<sup>20</sup> But, that did not mean that we deferred to his view as to the outcome. Chief Justice Dickson worked as an insurance adjuster while in law school and that experience was helpful to us in understanding insurance disputes.<sup>21</sup> Yet, that did not mean that we deferred to his view as to the outcome. Nor did the background and experience of my clerks dictate how I would vote.

But the life of the law has been experience, and the more experience that can be brought to bear on legal questions, the better the answers will be.

LESSON #4: JUDGING IS OFTEN A DANCE WITH THE LEGISLATURE

If I channeled Holmes in discussing judging as experience, here I draw from a contemporary jurist in discussing judging as a dance with the legislature: Wisconsin's Chief Justice Shirley S. Abrahamson. In 1991, Chief Justice Abrahamson authored an article entitled *Shall We*

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<sup>20</sup> See Photo Release – Old National Appoints Former Chief Justice Randall Shepard to Corporate Board of Directors, OLD NAT'L BANCORP (July 9, 2012, 2:10 PM), <http://globenewswire.com/news-release/2012/07/09/272979/261538/en/Photo-Release-Old-National-Appoints-Former-Chief-Justice-Randall-Shepard-to-Corporate-Board-of-Directors.html> (stating that Chief Justice Shepard served in local government before serving on the Indiana Supreme Court).

<sup>21</sup> Dan Carden, *Gary Native Takes Helm as Indiana's Acting Chief Justice*, NWI POLITICS (Mar. 25, 2012, 8:05 PM), [http://www.nwitimes.com/news/local/govt-and-politics/gary-native-takes-helm-as-indiana-s-acting-chief-justice/article\\_a5f33d63-3647-5dad-98e4-21453f2fd8e5.html](http://www.nwitimes.com/news/local/govt-and-politics/gary-native-takes-helm-as-indiana-s-acting-chief-justice/article_a5f33d63-3647-5dad-98e4-21453f2fd8e5.html).

*Dance? Steps for Legislators and Judges in Statutory Interpretation.*<sup>22</sup> It described how court decisions can provoke a legislative response followed by additional court decisions—a sort of “dance” or “dialogue.”<sup>23</sup>

During my tenure on the court, the statehouse was a veritable discothèque. One of the most famous dances actually started in this building. In the fall of 2010, the Indiana Supreme Court held oral argument at this law school in *Barnes v. State*, a criminal case in which the defendant had been convicted of battery on a police officer.<sup>24</sup> He appealed, contending that his conviction conflicted with his common law right forcibly to defend his home against invasion.<sup>25</sup> When our court rejected his defense, the legislature passed a statute expressly authorizing an individual forcibly to resist police officers in the individual’s home in specified circumstances.<sup>26</sup>

Another example of Chief Justice Abrahamson’s dance is *Estate of Heck ex rel. Heck v. Stoffer*, where the estate of an Allen County Sheriff’s Deputy—who had been killed by a fugitive felon—sued the parents of the killer.<sup>27</sup> The parents had assisted their son in avoiding arrest by hiding him in their lake cottage;<sup>28</sup> the murder weapon was a gun belonging to the parents that the son took from the cottage.<sup>29</sup> The estate sought damages from the parents on the theory that they had failed to exercise reasonable and ordinary care in the storage and safekeeping of their firearm.<sup>30</sup> We allowed the estate’s claim to proceed, and the legislature thereupon passed a law providing immunity from civil liability for any act or omission related to the use of a firearm by another person if the other person obtained the firearm illegally.<sup>31</sup> Had this law been in effect at the time the deputy was killed, the parents would have been immune from suit because their son had stolen the firearm from their cottage.

Those of you who had occasion to watch or read Chief Justice Dickson’s excellent 2013 *State of the Judiciary* speech to the legislature last

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<sup>22</sup> Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1991) (expanding on the William B. Lockhart Lecture that Justice Abrahamson delivered at the University of Minnesota in March 1990).

<sup>23</sup> *Id.* at 1045, 1055.

<sup>24</sup> 946 N.E.2d 572, 574 (Ind. 2011), *aff’d on reh’g*, 953 N.E.2d 473 (Ind. 2011).

<sup>25</sup> *Id.* at 575.

<sup>26</sup> IND. CODE ANN. § 35-41-3-2(i) (West Supp. 2013) (as amended by P.L. 189-2006, § 1).

<sup>27</sup> 786 N.E.2d 265, 266 (Ind. 2003).

<sup>28</sup> *Id.* at 267.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> IND. CODE ANN. § 34-30-20-1 (West 2011) (as added by P.L. 80-2004, § 5).



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month saw that he spent some time on this very subject of the dance or dialogue between the courts and the legislature.<sup>32</sup> “[O]ur two branches each respect the other’s essential function,” he said. “You determine public policy and make the laws, and we follow and apply them—whether we agree or not. And if you disagree with the way we interpret a statute, you amend it as you wish.”<sup>33</sup> Now I want to associate myself with Chief Justice Dickson’s central point—that it is the legislature and not the courts that, in his words, “determine public policy and make the laws.”<sup>34</sup> I will speak more to this in a few minutes. To emphasize my agreement, I need to tell you about two more types of cases.

In *Ross v. State*, a defendant was convicted of and sentenced for a misdemeanor violation of Indiana’s handgun statute.<sup>35</sup> Then the trial court increased the sentence using a statute specifically designed to increase sentences for repeat handgun violators.<sup>36</sup> The trial court increased the sentence yet again using the “habitual offender” statute generally designed to increase sentences for repeat offenders no matter what their crime.<sup>37</sup> We held that once the sentence had been increased using the specific handgun statute, it could not be increased again using the general statute unless the legislature specifically said so.<sup>38</sup> After our decision, the legislature moved in the direction of our opinion by removing certain offenses and categories of offenses from eligibility for increased sentences using the general habitual offender statute.<sup>39</sup>

Now let me tell you about *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, where our court catapulted a junior lien into a senior position after foreclosure and transfer of the property.<sup>40</sup> I took the position in dissent that the junior lien was not entitled to the priority the court gave it.<sup>41</sup> The legislature then passed a law overruling the court’s majority opinion, effectively writing my dissent into the Indiana Code.<sup>42</sup>

I hope you can see that sometimes the legislature overrules the court’s opinions; sometimes it acts in furtherance of the court’s opinions;

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<sup>32</sup> Brent E. Dickson, Chief Justice, Indiana Supreme Court, State of the Judiciary (Jan. 23, 2013), <http://www.in.gov/judiciary/supreme/2480.htm>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 729 N.E.2d 113, 114 (Ind. 2000).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 115–17.

<sup>39</sup> IND. CODE ANN. § 35-50-2-8 (West 2012) (as amended by P.L. 291-2001, § 226).

<sup>40</sup> 949 N.E.2d 1195, 1201–02 (Ind. 2011).

<sup>41</sup> *Id.* at 1202–03 (Sullivan, J., dissenting).

<sup>42</sup> IND. CODE ANN. § 32-29-8-4 (West Supp. 2013) (as added by P.L. 130-2012, § 7).

and sometimes it effectively adopts a dissenting opinion. It's quite a dance, isn't it?

LESSON #5: JUDGING'S PLACE IN A SEPARATION OF POWERS DEMOCRACY IS  
TENUOUS

In our constitutional order, the legislative branch is given the power to make law; the executive branch is given the power to administer the laws. Their decisions are effectuated through majoritarian politics. Our constitutional order entrusts resolving disputes to the judicial branch and insulates its decisions from majoritarian politics. We call this dimension of the constitutional order "separation of powers" or, in Indiana, "separation of functions."<sup>43</sup>

One of the most important lessons I have learned about judging is its tenuous place in a separation of powers democracy. On the one hand, separation of powers gives the law-making power to the legislative branch, not the judicial branch; on the other hand, where the law in a case is not clearly established, a judge makes law in the course of exercising the judicial branch power to resolve disputes.

I raise here the problem familiar to many of you—the "[c]ounter-[m]ajoritarian [d]ifficulty," to use Professor Bickel's apt description coined fifty years ago.<sup>44</sup> Doing what separation of powers entrusts the judiciary to do—resolve disputes—inevitably requires exercising powers entrusted to the majoritarian branches. This is why we have the policy of judicial restraint which, as the Supreme Court has said, is not "merely procedural" but rather is "one of substance."<sup>45</sup> The policy's ultimate foundations "are found in . . . the necessity . . . for each [branch of government] to keep within its power."<sup>46</sup>

This is easier said than done, of course. How on earth do judges not act upon their personal political and policy preferences—that is what I have concluded "judicial restraint" means—when presented with a case where the law is not clear? And not only when confronted with constitutional cases, but also cases like *Heck* as originally presented or *Barnes* or *Ross*?

Among the ways I tried to keep my personal and policy preferences from impinging upon my votes on cases before our court was being alert to whether cases were "ripe" or plaintiffs had "standing." "Ripeness relates to the degree to which the defined issues in a case are based on

<sup>43</sup> See IND. CONST. art. III, § 1 (laying out Indiana's separation of functions).

<sup>44</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986).

<sup>45</sup> *Rescue Army v. Mun. Court. of L.A.*, 331 U.S. 549, 570 (1947).

<sup>46</sup> *Id.* at 571.

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actual facts rather than on abstract possibilities, and are capable of being adjudicated on an adequately developed record.”<sup>47</sup> Here is an example: an applicant for a permit to operate a landfill challenged the constitutionality of a statute that required applicants for such permits to disclose their criminal histories.<sup>48</sup> Because the Indiana Department of Environmental Management had not begun considering the application, we concluded that the case was not ready or “ripe” for our review.<sup>49</sup>

The standing requirement is grounded in this same philosophy: “[C]ourts act in real cases, and eschew action when called upon to engage only in abstract speculation.”<sup>50</sup> We deployed the requirement of standing in the case of *Pence v. State*, in which future-Governor Mike Pence, then a private citizen, challenged the constitutionality of a statute increasing legislative pensions on grounds that it violated the Indiana Constitution’s requirement that statutes be limited to a single subject.<sup>51</sup> We held that Pence did not have standing because “[f]or a private individual to invoke the exercise of judicial power, such person must ordinarily show that some direct injury has or will immediately be sustained.”<sup>52</sup>

It is tempting to think that judges can act on personal preferences in common law cases—contract, property, and personal liability claims—where no statute or constitutional principle is at stake. Indeed, common law is sometimes called “judge-made law.” However, because separation of powers demands judicial restraint, judges cannot decide common-law cases based on personal preferences any more than they can in statutory interpretation or constitutional ones.<sup>53</sup>

One way to avoid utilizing personal political and policy preferences in deciding common law cases is *stare decisis*—adherence to precedent. Justice Thurgood Marshall makes my point in a 1986 opinion—*stare decisis* “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”<sup>54</sup>

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<sup>47</sup> Ind. Dep’t of Env’tl. Mgmt. v. Chem. Waste Mgmt., Inc., 643 N.E.2d 331, 336 (Ind. 1994).

<sup>48</sup> *Id.* at 335–36.

<sup>49</sup> *Id.* at 337.

<sup>50</sup> *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995).

<sup>51</sup> *Id.* at 487.

<sup>52</sup> *Id.* at 488.

<sup>53</sup> See discussion *supra* notes 45–46 (explaining judicial restraint and the importance of separation of powers).

<sup>54</sup> *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986).

There is a particular value to precedent in common law cases, specifically that reliance interests are often at stake. Individuals and businesses will have ordered their affairs—and will often purchase insurance—based on their understanding of the existing consensus as to legal principles governing contract, property, and personal liability. “Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved,” Chief Justice Rehnquist wrote in 1991.<sup>55</sup> This is also the point of one of Justice Brandeis’s most famous aphorisms: “[s]*tare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”<sup>56</sup>

One of the most dramatic examples of adherence to *stare decisis* in common law cases during my tenure on the court manifested itself in a decision just a few days before my departure. At issue was the so-called “pollution exclusion” in the standard business comprehensive general liability insurance policy, providing that the policy will not cover an insured’s liability for personal injury or property damage caused by “pollutants.”<sup>57</sup> Early on in my tenure on the court, in *American States Insurance Co. v. Kiger*, we held that the exclusion was too ambiguous for the insurance company to enforce.<sup>58</sup> Two days before I left the court, in *State Automobile Mutual Insurance Co. v. Flexdar, Inc.*, the court once again held the policy exclusion unenforceable.<sup>59</sup> In doing so, Justice Rucker wrote, “Indiana decisions have been consistent in recognizing the requirement that language of a pollution exclusion be explicit. ‘To unsettle the law . . . would show scant respect for the principle of *stare decisis*.’”<sup>60</sup> He concluded by writing, “[w]e see no reason to abandon settled precedent.”<sup>61</sup>

Precedent will not resolve every dispute. Precedent may be distinguishable; precedent may be obsolete; indeed, precedent may not exist. A particularly good source for legal principles to apply in such circumstances is the work produced by the American Law Institute (“ALI”). Consisting of lawyers, judges, and law professors of distinction, including members of this faculty, the ALI addresses uncertainty in the law by developing “restatements” of legal subjects for use by courts and

<sup>55</sup> *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

<sup>56</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (emphasis added), *overruled in part by Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

<sup>57</sup> *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 847 (Ind. 2012).

<sup>58</sup> 662 N.E.2d 945, 949 (Ind. 1996).

<sup>59</sup> 964 N.E.2d at 852.

<sup>60</sup> *Id.* (quoting *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2639–40 n.4 (2011)).

<sup>61</sup> *Id.*

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lawyers applying existing law. These “restatements of the law” contain clear formulations of common law, meant to reflect the law as it presently stands or might plausibly be stated by a court.<sup>62</sup>

I could give you a lot of examples of our court turning to restatements to help us decide previously unanswered questions of common law. In fact, I was always willing to consider an argument to overrule precedent that was grounded in a restatement. There are, of course, sound reasons for not adhering to *stare decisis*. For example, Justice Brandeis stated that not adhering to *stare decisis* is appropriate where a decision was “rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. Moreover, the judgment of the court in the earlier decision may have been influenced by prevailing views as to economic or social policy[,] which have since been abandoned.”<sup>63</sup> Justice Kennedy has written for the Court that *stare decisis* need not be adhered to where a precedent is not workable, antiquated, or not well-reasoned.<sup>64</sup>

However, mindful of our separation of powers constraints, the fact that precedent may be legitimately overruled does not give a judge license to adopt a personal political or policy preference instead. This is why restatements are so helpful—they allow a judge to present to the court a legal rule of the law as it presently stands based on careful study by lawyers, judges, and professors.

Here is but one example of many. *Creasy v. Rusk* is an opinion of mine in a tort case that I understand is widely taught in law schools.<sup>65</sup> A nurse sued her patient for injuries suffered when she was kicked by the patient, a person with Alzheimer’s disease, while she was trying to put him to bed in a nursing home.<sup>66</sup> One of the issues in the case was whether the general duty of care imposed upon adults with mental disabilities is the same as that for adults without mental disabilities.<sup>67</sup> At the time of the *Creasy* case, Indiana precedent held that a person’s mental

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<sup>62</sup> See STEVEN M. BARKAN ET AL., FUNDAMENTALS OF LEGAL RESEARCH 379 (9th ed. 2009) (explaining that the ALI first adopted restatements “for the law of agency, conflict of laws, contracts, judgments, property, restitution, security, torts, and trusts” between 1923 and 1944).

<sup>63</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting) (citation omitted), *overruled in part by Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

<sup>64</sup> *Citizens United v. FEC*, 558 U.S. 310, 362–63 (2010) (citing *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009)).

<sup>65</sup> 730 N.E.2d 659 (Ind. 2000); see DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 92 (6th ed. 2009).

<sup>66</sup> *Creasy*, 730 N.E.2d at 661.

<sup>67</sup> *Id.*

capacity was a factor in determining whether a legal duty existed.<sup>68</sup> However, we found that “contemporary public policy in Indiana[,] as embodied in enactments of our state legislature,” then “reflected policies to deinstitutionalize people with disabilities and integrate them into the least restrictive environment.”<sup>69</sup> We found this to be more in accord with the rule of *Restatement (Second) of Torts* section 283B and adopted it, articulating that “mental disability does not excuse a person from liability for ‘conduct which does not conform to the standard of a reasonable man under like circumstances.’”<sup>70</sup> When the ALI produced the *Restatement (Third) of Torts: Physical and Emotional Harm*, the Reporters’ Note to section 11, comment e, singled out *Creasy* for particular mention.<sup>71</sup>

The policy of judicial restraint applies with particular force in constitutional cases. When a court declares a statute unconstitutional, the court tells the legislature that notwithstanding its lawmaking authority, this particular law goes beyond that authority. Some would say that that is a good thing because there are many laws that Congress and the Indiana General Assembly never should have enacted and it is good for a court to tell them so. But, apart from the counter-majoritarian difficulty that we have been discussing, declaring a statute unconstitutional oftentimes places highly controversial subject matter beyond legislative compromise. When a court declares a statute unconstitutional, it is not just engaged in lawmaking, it is affirmatively restricting the ability of the legislative branch from engaging in its constitutional function of making law. And when highly controversial subject matter cannot be compromised, dire consequences can flow from the inability of the contending legislative factions to compromise.

I offer our court’s performance in the property tax case, *State Board of Tax Commissioners v. Town of St. John*, as an example.<sup>72</sup> At the time litigation began, real property was assessed based on its “true tax value.”<sup>73</sup> “True tax value” was not market value but rather was based on “cost schedules” that took into account replacement cost, physical depreciation, and obsolescence, causing the value to vary depending upon whether the property was industrial, commercial, agricultural, or

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<sup>68</sup> *Id.* at 662.

<sup>69</sup> *Id.* at 664–65.

<sup>70</sup> *Id.* at 663, 666 (adopting as law the Restatement’s position that “a person with mental disabilities is generally held to the same standard of care as that of a reasonable person under the same circumstances”); RESTATEMENT (SECOND) OF TORTS § 283B (1965).

<sup>71</sup> RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 11 reporters’ notes cmt. e (2010).

<sup>72</sup> 702 N.E.2d 1034 (Ind. 1998).

<sup>73</sup> *Id.* at 1037.

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residential.<sup>74</sup> This was alleged to violate a provision of our Indiana Constitution that mandates the General Assembly to provide “for a uniform and equal rate of property assessment and taxation.”<sup>75</sup> The Indiana Supreme Court held the “true tax value” system to be unconstitutional.<sup>76</sup> To be precise, the court declared the “cost schedules” used to calculate the “true tax value” unconstitutional because they did not meet the requisite uniformity and equality requirements.<sup>77</sup>

As you can see, the court’s decision placed the ability to compromise the competing interests of industrial, commercial, agricultural, and residential taxpayers beyond the power of the legislature in ways that had occurred for many decades. The consequences were dire, especially for owners of more expensive homes in older urban neighborhoods like Miller in Gary, Twyckenham Hills in South Bend, and Meridian Kessler in Indianapolis.<sup>78</sup>

When I was on the court, my views on the reach of judicial review in constitutional cases comprised the position of only one justice, and you are very nice to give him an audience this afternoon to present his views. My principal attempts at articulating them came in *Town of St. John*,<sup>79</sup> the property tax case just mentioned, and another case called *Municipal City of South Bend v. Kimsey*.<sup>80</sup> In both cases, our court declared that the challenged enactments violated the Indiana Constitution.<sup>81</sup> In both cases, I dissented.<sup>82</sup>

I stated my objection to the majority’s ruling in the property tax case as follows:

I can think of no area where we can be more confident of the ability of the normal democratic processes working as they should than in taxation. Residential, commercial, industrial[,] and agricultural interests can

<sup>74</sup> *Id.* at 1037 n.4, 1038–39, 1042.

<sup>75</sup> IND. CONST. art. X, § 1; *Town of St. John*, 702 N.E.2d at 1038 (describing Indiana’s constitution as requiring “uniform and equal rates of assessment and taxation and for just valuation”).

<sup>76</sup> *Town of St. John*, 702 N.E.2d at 1043.

<sup>77</sup> *Id.*

<sup>78</sup> See, e.g., Cordell Eddings, *Neighbors Are Bracing for Tax Bills: Meridian-Kessler Residents Fear Another Hike in Property Taxes Will Force Some to Leave Area*, INDIANAPOLIS STAR (June 15, 2007), <http://archive.indystar.com/article/20070625/LOCAL18/706250397/Neighbors-bracing-tax-bills> (reporting on increases in property taxes after the *Town of St. John* decision).

<sup>79</sup> *Town of St. John*, 702 N.E.2d at 1044 (Sullivan, J., concurring and dissenting).

<sup>80</sup> 781 N.E.2d 683, 697 (Ind. 2003) (Sullivan, J., dissenting).

<sup>81</sup> *Id.* at 697; *Town of St. John*, 702 N.E.2d at 1043.

<sup>82</sup> *Kimsey*, 781 N.E.2d at 697 (Sullivan, J., dissenting); *Town of St. John*, 702 N.E.2d at 1044 (Sullivan, J., concurring and dissenting).

well pursue and protect their respective interests in state tax policy before the executive and legislative branches without judicial intervention.<sup>83</sup>

In *Kimsey*, the court struck down a statute that restricted the ability of cities in St. Joseph County to annex suburban territory because it violated a prohibition on "special legislation" contained in Article IV of the Indiana Constitution.<sup>84</sup> My answer was that "[t]he legislation at issue here represents a political struggle between suburban and urban interests. While the geographic focus of this particular law was St. Joseph County, the legislative history shows a hard-fought battle in which the suburban interests narrowly prevailed."<sup>85</sup> The court had "intervene[d] to turn those who lost a close fight in the [l]egislature into winners."<sup>86</sup>

Now I did not much like assessing property based on "true tax value" and had advocated a market value system when I was Indiana State Budget Director. I certainly would have voted "no" on the law at issue in *Kimsey* had I been a legislator. However, I hope you understand the thrust of my dissents. My view in these two cases was that separation of powers demanded that the court not intervene to invalidate statutes where it was clear that the majoritarian political process had worked in exactly the way the constitution intended. Competing interest groups brought their views to the legislature and the legislature acted on those views, making compromises it deemed appropriate along the way.

Now what is the counterargument to my position? It is pretty straightforward, is it not? When presented with a constitutional question, courts have the duty to answer it. Justice Boehm forcefully made this point while writing for the majority in the *Kimsey* case:

Justice Sullivan in substance argues for a doctrine of nonjusticiability of Article IV issues. But for over seventy years precedent has uniformly rejected [his] view. . . . As we held in *Dawson v. Shaver* [in 1822], citing *Marbury v. Madison*: "The task is delicate and unpleasant, but the duty of the Court is imperative, and its authority is unquestionable, to declare any part of a statute null and void that expressly contravenes the

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<sup>83</sup> *Town of St. John*, 702 N.E.2d at 1044 (Sullivan, J., concurring and dissenting).

<sup>84</sup> *Kimsey*, 781 N.E.2d at 684.

<sup>85</sup> *Id.* at 698 (Sullivan, J., dissenting).

<sup>86</sup> *Id.*



provisions of the constitution, to which the legislature itself owes its existence.”<sup>87</sup>

Justice Boehm was right that I argue for a doctrine of nonjusticiability when it comes to judicial review of legislative enactments where there is no suggestion that the majoritarian process did not work properly. Justice Boehm maintained that the majoritarian process did not work properly in the *Kimsey* situation,<sup>88</sup> and I contended that there was no way a court could reach that conclusion.<sup>89</sup> However, all of this is a level of detail that I simply do not have time to get into today.

What if the majoritarian process has not worked properly in a particular case? Would I still treat the claim as non-justiciable? In arguing against my position, Justice Boehm deployed the reapportionment decisions of the 1960s to attempt to demonstrate the necessity for judicial review of the constitutionality of statutes.<sup>90</sup> “What, Sullivan, do you say about this?” Justice Boehm’s position asks. “Shouldn’t the court have intervened to rectify malapportionment? And if your answer to that is ‘yes,’ how do you justify not intervening in cases like *Town of St. John* and *Kimsey*?”

I find my answer in the famous footnote four of Justice Stone’s opinion for the United States Supreme Court in *United States v. Carolene Products Co.*<sup>91</sup> *Carolene Products Co.* is an otherwise little-known case in which a federal statute protecting the milk industry was challenged on grounds that it violated the Commerce Clause and the Fifth Amendment.<sup>92</sup> The Court rather summarily dismissed the constitutional challenges, citing the Court’s obligation to presume that Congress had acted rationally.<sup>93</sup> But the Court added a footnote—footnote four—at this point, saying that scrutiny of a statute for constitutionality may be warranted in one of three circumstances: (1) where the statute appears on its face to be within a specific prohibition of the Bill of Rights; (2) where the statute “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation;” and (3)

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<sup>87</sup> *Id.* at 695–96 (majority opinion) (citations omitted) (quoting *Dawson v. Shaver*, 1 Blackf. 204, 206–07 (1822)).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 698 (Sullivan, J., dissenting).

<sup>90</sup> *Id.* at 695 (majority opinion).

<sup>91</sup> 304 U.S. 144, 152 n.4 (1938).

<sup>92</sup> *Id.* at 145–46.

<sup>93</sup> *Id.* at 152–54.

where the statute reflects prejudice against particular religious, national, racial, or other discrete and insular minorities.<sup>94</sup>

Notice what happens in these three circumstances. In the first, the court is in a position where it cannot avoid ruling on constitutionality. If the legislature takes action that facially violates a constitutional provision, the court can hardly defer to the legislature as the legislature has no authority to make a statute in violation of the plain language of the constitution.

As to the second, separation of powers demands the proper functioning of the majoritarian process, and so it is entirely appropriate for a court to assure that the legislature's exercise of its lawmaking authority does not extend to undermining the majoritarian process. As footnote four reads, the legislature's lawmaking authority does not extend to "restrict[ing] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."<sup>95</sup> The proper functioning of the majoritarian process must not restrict the legislature's ability to pass self-correcting legislation. Note that Justice Boehm's malapportionment example falls snugly into this exception to my rule of non-justiciability.

As to the third—legislation prejudicing religious, national, racial, or other discrete and insular minorities—the point is that courts may need to step in to assure that the majoritarian political process respects the constitutional rights of minorities. Why? Simply because their being in the minority may prevent them from having sufficient political influence to protect their rights in a majoritarian process.

My position is that in judicial review for constitutionality, separation of powers counsels, if not demands, that the legislative branch has free reign when it comes to political and policy preferences, including those regarding taxes and annexation. The court's power of judicial review should be constrained to instances where the legislature has tread upon the very face of the constitution; tread upon the self-correcting features of the majoritarian process; or tread upon the rights of those whom the constitution, but not the majoritarian process, protects.

#### LESSON #6: JUDGING REQUIRES COLLEGIAL COLLABORATION, EVEN IN DISSENT

During my years on the court, I had the good fortune of serving with judges for whom collegiality was a conspicuous character trait. Here is a photograph of everyone I served with except Justices Richard Givan and

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<sup>94</sup> *Id.* at 152 n.4.

<sup>95</sup> *Id.*

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Mark Massa. From the left are Justice Robert Rucker, a graduate of this law school, former-Chief Justice Shepard, who will be honored here later this spring, Justices Ted Boehm, Myra Selby, Roger DeBruler, and Steven David, and Chief Justice Dickson.<sup>96</sup> Each was the most wonderful of mentors and friends, as were Justices Givan and Massa.

Let me start with the topic of dissent, about which I want to say two things. First, earlier I quoted Justice Brandeis: “[I]t is more important that the applicable rule of law be settled than that it be settled right.”<sup>97</sup> By the end of my judicial career, I had come to the conclusion that this was not always the case, but it sometimes was the case. People needed to know what the rules of law were by which they should organize their affairs—for example, buy insurance and the like—and that what the actual rules were was not nearly as important as whether they were clearly established. In such situations, I think dissent is of little utility and some detriment. Once a rule is established and reliance interests set in, the likelihood of abandoning that precedent is slight and the advisability of doing so questionable. What does dissent do in such a circumstance except to undermine the clarity of the rule?

I decided that in cases where it was more important that the applicable rule of law be settled than that it be settled correctly, and where no one else on the court shared my view of what the rule should be, I would throw my lot in with the majority and make the opinion unanimous. But what about those cases where I concluded that it was more important that the law be settled correctly, or where I had another justice with me? In such circumstances, I did dissent.

My muse was former Justice Roger O. DeBruler. Justice DeBruler, as many of you know, was the longest-serving justice on our court during the twentieth century—and the second longest-serving justice ever.<sup>98</sup> He sat on the court during a period of time when he frequently found himself in dissent. His dissents are models of decorum. Some judges or justices say they “respectfully dissent.” Justice DeBruler respectfully dissented. The fact that his dissents were tightly reasoned, not overstated, and were written in a straightforward, declarative style—not punctuated with hyperbolic rhetoric—meant that when a new generation of justices joined the court towards the end of his tenure and

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<sup>96</sup> For a replication of the photograph referred to in this lecture, see Charles F. Pratt, *Farewell to the Chief*, IND. CT. TIMES (May 2, 2012), <http://indianacourts.us/times/2012/05/farewell-to-the-chief/>.

<sup>97</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled in part by Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

<sup>98</sup> See Randall T. Shepard, *On the Retirement of Justice Roger O. DeBruler*, 30 IND. L. REV. 7, 7 (1997) (stating that Justice DeBruler was second in years of service only to Justice Blackford of the nineteenth century).

following—justices with names like Shepard, Dickson, Sullivan, and Boehm—the DeBruler dissents of years gone by became the majority opinions of the Indiana Supreme Court.<sup>99</sup> I know I did not achieve the high standard that Roger set, but whenever in dissent, I tried to emulate his style.

Now the last thing I want to say about collegial collaboration, and the last thing I want to say in this lecture, is about our court's record in what I will call "Democrat versus Republican" cases. To be clear, these are cases where the two political parties are literally on the opposite sides of the "v." I spoke at the outset of these remarks about the felicitous judicial selection system we have in Indiana for our appellate judiciary. Nevertheless, each of us is appointed by a governor of a particular party and, at least until this point in time, each appointment to the court has been a person of his or her appointing governor's party. Before appointment to the court, I was several times a campaign manager for a Democratic member of Congress; Randall Shepard was Vanderburgh County Republican Vice Chairman in Evansville.<sup>100</sup> Yet, separation of powers demands judicial restraint—that we not decide cases based on political or party preferences. Given where we came from, is that really possible?

I think you will be pleased with the result. For the entire time that I was on the Indiana Supreme Court, the political balance was 3–2 in favor of the Democrats from January 1995 to October 2010 and in favor of the Republicans before and after those dates. Yet, during that entire

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<sup>99</sup> Frank Sullivan, Jr., *A Tribute to Justice Roger O. DeBruler*, 30 IND. L. REV. 11, 11 (1997). By way of example are the following cases:

[Justice DeBruler's] dissent in *Kerlin v. State*, [265 N.E.2d 22, 25–27 (Ind. 1970) (DeBruler, J., dissenting),] arguing that certain evidence of prior offenses was inadmissible, was later adopted by the court in *Lannan v. State*[.] [600 N.E.2d 1334, 1339 (Ind. 1992)]; his dissent in *Patterson v. State*, [324 N.E.2d 482, 488 (Ind. 1975) (DeBruler, J., dissenting),] arguing that certain out-of-court statements were inadmissible hearsay, was adopted by the court in *Modesitt v. State*[.] [578 N.E.2d 649, 652–53 (Ind. 1991)]; and [Justice DeBruler's] dissent in *State ex rel. Rondon v. Lake Superior Court*, [569 N.E.2d 635, 636 (Ind. 1991) (DeBruler, J., dissenting),] 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*[.] [626 N.E.2d 802, 803 (Ind. 1993)].

*Id.* at 11–12. (footnotes omitted). Many other examples of Justice DeBruler's dissents that were subsequently adopted by the Indiana Supreme Court are also noted and explained. *Id.* at 12; see Kenneth M. Stroud, *Justice DeBruler and the Dissenting Opinion*, 30 IND. L. REV. 15, 15 (1997) (noting that Justice DeBruler authored more than 500 dissenting opinions).

<sup>100</sup> *Resume of Randall T. Shepard*, ST. IND., <http://www.ai.org/judiciary/press/docs/pr120711-shepard-resume.pdf> (last visited Oct. 16, 2013).

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nineteen year span, there was not one “Democrat versus Republican” case decided on a party-line vote. Not one. These cases included drawing new district boundaries for the City-County Council of Indianapolis,<sup>101</sup> determining who won the general election for mayor in Terre Haute,<sup>102</sup> contentious issues concerning satellite voting sites in Lake County during the 2008 general election,<sup>103</sup> deciding who would be the Secretary of State of Indiana when the incumbent was abdicated because of a felony conviction,<sup>104</sup> and determining the constitutionality of the Voter ID Law.<sup>105</sup> Each and every one of these was decided by a bipartisan vote.

It does not violate the confidentiality of the conference room to say that these results were not always easy to obtain—although as I think about it, they were not as hard to obtain as you might think. Each of us felt a special obligation to try to reach consensus in matters that were critically important for the parties before us but also critically important for the institutional integrity of our court. We each recognized that our own point of view was not the only point of view and that we could rely on each other’s good judgment and goodwill in reaching a solution. In each circumstance, we were able to do so.

I am very proud to be able to say that. I hope you will take pride too in the fact that by virtue of our merit selection system, the judgment of a collection of very good governors, and Hoosier good fortune, your Indiana Supreme Court has been able to put party preference aside in the acid tests of resolving disputes between the two political parties. I would go further still and say that our performance in the “Democrat versus Republican” cases is indicative of the fact that we were able to set aside personal political and policy preferences in all our cases. Of course, that is as it should have been, for before us in each such case were individuals and entities who had come to us to vindicate their legal rights and seek protection for their nearest and dearest interests.

## CONCLUSION

This has been a long and sprawling talk about some of the lessons I have learned about judging during the wonderful almost-nineteen years that I had the honor of serving on the Indiana Supreme Court. The court today is in great hands with five extremely intelligent and hard-working justices presiding over our state’s judicial system and giving their

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<sup>101</sup> Peterson v. Borst, 786 N.E.2d 668, 669 (Ind. 2003).

<sup>102</sup> Burke v. Bennett, 907 N.E.2d 529, 530 (Ind. 2009).

<sup>103</sup> State *ex rel.* Curley v. Lake Circuit Court, 899 N.E.2d 1271, 1271 (Ind. 2008).

<sup>104</sup> White v. Ind. Democratic Party, 963 N.E.2d 481, 482–83 (Ind. 2012).

<sup>105</sup> League of Women Voters of Ind., Inc., v. Rokita, 929 N.E.2d 758, 760 (Ind. 2010).

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considerable talents to deciding the cases before them. I hope my remarks today tell you as much about the challenges of their work as my own experiences. Further, I hope that you will give them that same full measure of support and encouragement that you have given me these past two decades.

Thank you for your kind attention.