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# THE INFLUENCE OF THE ARKANSAS SUPREME COURT'S OPINIONS ON POLICY MADE BY THE GENERAL ASSEMBLY: A CASE STUDY

*Chuck Smith\**

Courts do more than interpret the law; they are also politically-influenced policymakers. This view became a departure point for the research of political scientists after Peltason<sup>1</sup> focused attention on courts as actors in the political process. Since then, scholars have explored the political aspects of courts at every point in the judicial process. An indication of the extent of this research can be found by surveying the literature on state supreme courts. Social scientists and legal scholars have examined every facet of state courts of last resort. They have explored variables that influence the selection of judges,<sup>2</sup> the decision-making

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\* Assistant Professor of Political Science, West Virginia State College; B.A. West Virginia State College, 1987; M.A. University of New Mexico, 1989; Ph.D. University of Kentucky, 1994. Data from my Ph.D. dissertation was used to write this article. Professor Bradley C. Canon, Department of Political Science, University of Kentucky, contributed useful criticism and suggestions for both the dissertation and this article. Members of the Supreme Court of Arkansas and of the Arkansas Senate graciously consented to be interviewed for this research. Their insights contributed greatly to the understanding of the policy-making dynamics between state supreme courts and state legislatures.

1. JACK PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* (1955).

2. Burton M. Atkins & Henry R. Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427 (1974); Kathleen L. Barber, *Ohio Judicial Elections—Nonpartisan Premises With Partisan Results*, 32 OHIO ST. L.J. 762 (1971); Bradley C. Canon, *The Impact of Formal Selection Processes On the Characteristics of Judges—Reconsidered*, 6 LAW & SOC'Y REV. 579 (1972); Victor Fango & Craig Ducat, *What Difference Does the Method of Judicial Selection Make? Selection Procedures In State Courts of Last Resort*, 5 JUST. SYS. J. 25 (1979); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228 (1986); Charles H. Sheldon, *Influencing the Selection of Judges: The Variety and Effectiveness of State Bar Activities*, 30 W. POL. Q. 397 (1977).

behavior of judges,<sup>3</sup> the political nature of their decisions,<sup>4</sup> the compliance with the decisions,<sup>5</sup> and the implementation and impact of the decisions.<sup>6</sup>

My research interest is in a somewhat different aspect of judicial politics: the influence of state supreme courts<sup>7</sup> on the policy-making of legislatures. By examining fifty-two legislative responses to court opinions in twenty-six states, I discovered that including a policy message to the legislature in a state supreme court opinion is an effective method for the court to influence legislative policy-making.<sup>8</sup> This article illuminates these findings by presenting a case study of five opinions of the Arkansas Supreme Court concerning the compensation of court-appointed counsel that contain a series of progressively stronger and more direct policy messages addressed to the General Assembly. The article then explores the influence of those messages on subsequent policy made by the Arkansas legislature.

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3. Burton M. Atkins & Henry R. Glick, *Environmental and Structural Variables As Determinants of Issues in State Courts of Last Resort*, 20 AM. J. POL. SCI. 97 (1976); Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236 (1981); Gibson, *From Simplicity to Complexity: The Developments of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7 (1983); HENRY R. GLICK, STATE SUPREME COURTS IN STATE POLITICS (1971); Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing In State Supreme Courts, 1870-1970*, 21 LAW & SOC'Y REV. 403 (1987); John T. Wold, *Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges*, 27 W. POL. Q. 239 (1974).

4. Edward N. Beiser, *The Rhode Island Supreme Court: A Well-Integrated Political System*, 8 LAW & SOC'Y REV. 167 (1973); SUSAN FINO, THE ROLE OF STATE SUPREME COURT IN THE NEW JUDICIAL FEDERALISM (1987); Robert A. Kagan, et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977); Robert A. Kagan, et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978).

5. CAROL JENSON, THE NETWORK OF CONTROL: STATE SUPREME COURTS AND STATE SECURITY STATUTES, 1920-1970 (1982); G. ALAN TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS (1977).

6. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Robert D. Brussack, Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976); Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83 (1983); Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975 (1981); Bradley C. Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC'Y REV. 969 (1979); MARY C. PORTER & G. ALAN TARR, STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (1982); G. ALAN TARR & MARY C. PORTER, STATE SUPREME COURTS IN THE STATE AND NATION (1988).

7. In this article, the term "supreme court" is used to refer to a state's court of last resort; I recognize that in a few states that court is identified as the court of appeals or the supreme court of appeals. When the national supreme court is referred to, it is identified as the United States Supreme Court.

8. Charles E. Smith, *No Thicket Too Political: A Cross-State Analysis of State Supreme Court Opinions' Influence on Legislative Policy-Making* (1994) (unpublished Ph.D. dissertation, University of Kentucky).

## I. JUDICIAL INFLUENCE ON LEGISLATIVE POLICY-MAKING

Policy made by a state's supreme court is only part of the state's overall policy-making process. To understand the policy-making by state supreme courts, studies of these courts need to be linked to the policy-making and political roles of other policy-making institutions in the state. Research into the dynamics between the legislative and judicial branches of the same government has been limited in two ways. First, the study has almost exclusively focused on Congress and the United States Supreme Court.<sup>9</sup> Second, that focus was primarily on policy confrontations between Congress and the Warren Court and on various attempts at court-curbing.<sup>10</sup> More needs to be known about the interactive role of state supreme courts and legislatures in the development of state policy regulating social and economic life. As Henry Glick has argued, "We need to explore more fully the distinctive role of each institution, their interactions in formulating policy, and their effects on the states."<sup>11</sup>

A limited amount of research has examined the policy-making dynamic between state supreme courts and legislatures. Glick argued that state supreme courts demonstrate an interest in legislative policy-making and convey their policy preferences to legislatures through several channels of communication.<sup>12</sup> John Felice and John Kilwein found that Ohio legislators

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9. For example, a recent essay on the relationship between the coordinate branches of government cites 43 references, all addressing the federal government. See Jeffrey A. Segal, *Courts, Executives, and Legislatures*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* (John B. Gates & Charles A. Johnson eds., 1991). An institutional-level examination of congressional modifications of United States Supreme Court decisions is presented in *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 *HARV. L. REV.* 1324 (1958). A more ambitious case study examined congressional response to four cases that resulted in the overturning of convictions of Communists in the mid-1950s, WALTER MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964).

10. Examples of such research are Harry P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 *J. PUB. L.* 377 (1965); C. HERMAN PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT 1957-1960* (1961); JOHN R. SCHMIDHAUSER & LARRY L. BERG, *THE SUPREME COURT AND CONGRESS: CONFLICT AND INTERACTION 1945-1968* (1972); Roger Handberg & Harold F. Hill, *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress*, 14 *LAW & SOC'Y REV.* 309 (1980); Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 *AM. POL. Q.* 441 (1983).

11. Henry R. Glick, *Policy Making and State Supreme Courts*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 115 (John B. Gates & Charles A. Johnson eds., 1991).

12. Henry Robert Glick, *Policy Making and State Supreme Courts: The Judiciary as an Interest Group*, 5 *LAW & SOC'Y REV.* 271, 276-277 (1970). Based on a survey of 43 chief justices, he discovered that every court in his sample used court opinions to convey their policy preferences to the legislature. Other methods of communication were conferences with legislators, testimony at legislative hearings, advisory opinions, and copies of certain opinions being sent to the legislature. Forms of indirect communication of policy preferences

do take note of the activities of their state supreme court.<sup>13</sup> Further, three studies of state supreme court policy-making on particular issues also provide knowledge about the courts' influence on legislatures. Especially valuable is Glick's cross-state comparison of the development of right-to-die policy.<sup>14</sup> In addition, the sometimes bitter policy disputes between state supreme courts and legislatures over the issue of school finance are portrayed in Richard Lehne's exhaustive case study of the early New Jersey litigation and by Gregory Rocha and Richard Webking's study of the Texas school finance cases.<sup>15</sup>

These studies indicate that written opinions of the court are a particularly important channel of communication because both legislators and justices see them as the court's chief means to convey its policy views to the legislature.<sup>16</sup> However, two important points need to be stressed. First, policy messages to the legislature are not a commonplace feature of supreme

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were made through conferences with governors and other executive officials, recommendations of judicial councils, and lobbying by allied interest groups such as bar associations. *Id.*

13. John D. Felice & John C. Kilwein, *High Court-Legislative Relations: A View from the Ohio Statehouse*, 77 JUDICATURE 42 (1993). Their research is based on interviews with 127 members (96%) of the Ohio General Assembly. They found that legislators most common source of information about the Ohio Supreme Court was from mainstream media. The next most common sources of information, listed in descending order according to the frequency with which they were mentioned were *The Ohio Bar* (a publication of the Ohio Bar Association), court opinions, lobbyists, personal contact with members of the court, other legislators, the Legislative Service Commission, constituents, word of mouth, governor's office, other judges, and state agencies. *Id.*

14. Henry R. Glick, *The Right-to-Die: State Policymaking and the Elderly*, 5 J. AGING STUD. 283 (1991); HENRY R. GLICK, *THE RIGHT-TO-DIE: POLICY INNOVATION AND ITS CONSEQUENCES* (1992).

15. RICHARD LEHNE, *THE QUEST FOR JUSTICE: THE POLITICS OF SCHOOL FINANCE REFORM* (1978). This study examines the New Jersey Legislature's response to state supreme court's decision in *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973). Since that time the court and legislature have again struggled with the issue. See *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985); and *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990). GREGORY G. ROCHA & RICHARD H. WEBKING, *POLITICS IN PUBLIC EDUCATION: EDGEWOOD V. KIRBY AND THE REFORM OF PUBLIC SCHOOL EDUCATION FINANCING IN TEXAS* (2d ed. 1993). This work provides a step-by-step description of the legislative response to three school finance cases: *Carrollton-Farmers Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 488 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); and *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

16. See Glick, *supra* note 11, at 276; LEHNE, *supra* note 15, at 53, reporting a New Jersey Supreme Court justice's striking claim about the influence of court opinions:

The quality of judicial writing is one of encouraging the legislature, setting activities in motion which will have secondary consequences to lead senators and assemblymen to act. This is the essence of democracy. We can encourage the legislature to pass laws or taxes without directing them to do that. This is the wonder of our system, and besides it works to accomplish judicial objectives.

court opinions. In most cases, the court interprets, applies, or enforces existing policy. Courts tend to show great deference to the legislative-made policy and infrequently criticize or strike down statutes.<sup>17</sup> Therefore, in the bulk of its decisions, a court has no reason to express its policy views to legislators. Second, while communication between the state supreme court and the legislature is a significant part of a state's policy-making process, such communication is neither extensive nor frequent. Compared to the amount of communication between the legislature and the executive branch, the communication between the legislature and the court is occasional and limited. However, such communication tends to address consequential policy issues. Accordingly, it is important that the role of court communication in policy-making is understood.

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17. Widely accepted principles of constitutional interpretation provide that the constitutionality of a statute is presumed. Where a statute may be interpreted in two ways, one interpretation being constitutional and the other unconstitutional, the constitutional interpretation is to be used. *See, e.g.,* *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976), *cert. denied*, 429 U.S. 1029 (1976). The Supreme Court of Missouri argued that “[j]udicial deference is not indicative of the avoidance of a duty but to the contrary is the performance thereof with an appreciation that judicial interference with the legislative process should occur only when there is an unavoidable and legally compelling reason to do so.” *Id.* at 721.

Courts are also reluctant to strike down legislative policy for fear of engaging in judicial legislation. *See, e.g.,* *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975). Explaining its reluctance to overturn the state's public school finance policy, the Idaho Supreme Court contended that “to do otherwise . . . this Court would convene as a ‘super-legislature,’ legislating in a turbulent field of social, economic and political policy.” *Id.* at 640.

Courts have also argued that the more extensive resources of legislatures better equip them to make complex policy. *See, e.g.,* *Rasmussen ex rel. Mitchell v. Fleming*, 741 P.2d 674 (Ariz. 1987). The Supreme Court of Arizona called on the legislature to develop a detailed right-to-die policy for the state. It maintained that “the Legislature is best suited to address these matters in a comprehensive manner. Only the Legislature has the resources necessary to gather and synthesize the vast quantities of information needed to formulate guidelines that will best accommodate the rights and interests of the many individuals and institutions involved in these tragic situations.” *Id.* at 692.

Courts also recognize that state constitutions give legislatures plenary authority to make policy in certain areas. *See, e.g.,* *Lujan v. Colorado State Bd. of Educ.*, 694 P.2d 1005 (Colo. 1982). The Colorado Supreme Court held that “financing . . . education in Colorado is not only the proper function of the General Assembly, but this function is expressly mandated by the Colorado Constitution.” *Id.* at 1025.

It has also been argued that legislatures are more suited than courts to formulate comprehensive policy. *See, e.g.,* *Cruzan ex rel. Cruzan v. Harmon*, 760 S.W.2d 408, 426-27 (Mo. 1988) (presenting a four point argument favoring legislative policy-making about right-to-die issues).

## II. ARKANSAS CASES

Significant communication of policy views are present between the Arkansas Supreme Court and the Arkansas General Assembly. Each institution, however, is careful in the way it communicates its policy preferences to the other and respects the authority of the other. "The influence between these two branches is very real but very subtle," according to Justice Steele Hays. "It gets very sticky if the court actively lobbies for substantive change in the law."<sup>18</sup> My interviews with Arkansas's policymakers indicated that the court's primary means of communicating its policy preference to the legislature is through its opinions. Chief Justice Jack Holt acknowledged, "The court makes conscious use of its opinions to make suggestions to the legislature."<sup>19</sup>

When the court conveys its policy preferences in its published opinions, however, it does not (as some state supreme courts do) send copies of the opinions to the legislature. Nor does it convey, beyond comments in the opinions themselves, that the legislature should take note of particular opinions. The court does use several other channels to communicate with the General Assembly. The channel chosen depends primarily on the nature of the message. Formal state of the judiciary messages are delivered to the legislature by the chief justice; these are limited to a discussion of the operation of the state courts and matters of procedural law concerning the court system. On extremely rare occasions justices have testified before legislative committees or the legislative council. This testimony has concerned either the structure of the state's court system or procedures concerning the removal of judges. Also, when the legislature requests it, the court administrator provides information on the operation of the courts.<sup>20</sup>

### A. Policy Background

This study examines Arkansas's system of providing compensation to court-appointed counsel representing indigent defendants in criminal cases. Over a period of forty years the United States Supreme Court gradually expanded the obligation of the states to provide counsel for indigent criminal

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18. Interview with Steele Hays, Justice, Supreme Court of Arkansas, in Little Rock, Ark. (Dec. 14, 1993).

19. Interview with Jack Holt, Chief Justice, Supreme Court of Arkansas, in Little Rock, Ark. (Dec. 14, 1993).

20. The information identifying channels of communication the Arkansas Supreme Court uses to convey its policy views to the General Assembly is based on interviews I conducted with members of the court and the state senate in December 1993.

defendants.<sup>21</sup> Furthermore, the states themselves were expanding this right, and in 1963 when the Supreme Court decided the landmark case *Gideon v. Wainwright*,<sup>22</sup> only five states did not provide, either by statute or practice, for appointed counsel in noncapital felony cases.<sup>23</sup> In the 1970s, the states began to face increasing constitutional requirements to provide counsel for indigent persons accused of crimes. The spiraling cost of compensating court-appointed counsel was so great it could no longer be absorbed by the private bar. As lawyers began to resist appointment as counsel unless they received reasonable compensation, state supreme courts began to call on the legislatures to restructure the system for compensation.<sup>24</sup> To do this, courts often included in their opinions a call for the legislature to restructure the statutory provisions for compensating court-appointed counsel.<sup>25</sup>

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21. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that states must provide counsel in all cases when deprivation of liberty is a possible outcome); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that state courts must provide counsel in all serious criminal cases); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that states must provide counsel to indigent persons convicted of crimes who pursue an appeal when such review is generally available to persons able to pay for such an appeal); *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (holding that the states must provide counsel to defendants who face capital punishment and are incapable of providing their own defense because of ignorance, illiteracy, or some other similar deficiency).

22. 372 U.S. 335 (1963).

23. The five states were Alabama, Florida, Mississippi, North Carolina, and South Carolina. For arguments supporting the extension of this requirement to all states see, Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 CHI. L. REV. 1, 19 (1962); William Beaney, Comment, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150, 1153 (1963).

24. The Supreme Court of Kansas reviews these cases in *State ex rel. Stephan v. Smith*, 747 P.2d 816, 838-41 (Kan. 1987). For a comprehensive history of the development of law concerning the compensation of court appointed counsel before state supreme courts were actively involved in the issue, see B. Finberg, Annotation, *Construction of State Statutes Providing for Compensation of Attorney for Services Under Appointment by Court in Defending Indigent Accused*, 18 A.L.R.3d 1074 (1968); C.T. Dreschler, Annotation, *Right of Attorney Appointed by Court for Indigent Accused to, and Court's Power to Award, Compensation by Public, in Absence of Statute or Court Rule*, 21 A.L.R.3d 819 (1968).

25. In addition to the Arkansas cases discussed in this article, other states' supreme courts have included such policy messages to the state legislature in the following opinions: *DeLisio v. Alaska Superior Court*, 740 P.2d 437 (Alaska 1987); *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987); *People v. Randolph*, 219 N.E.2d 337 (Ill. 1966); *State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987); *State ex rel. Wolfe v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), *cert. denied*, 454 U.S. 1172 (1982); *State v. Green*, 470 S.W.2d 571 (Mo. 1971); *Brown v. Comm'rs of Washoe County*, 451 P.2d 708 (Nev. 1969); *Smith v. State*, 394 A.2d 834 (N.H. 1978); *State v. Rush*, 217 A.2d 441 (N.J. 1966); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Bias v. State*, 568 P.2d 1269 (Okla. 1977); *Bedford v. Salt Lake County*, 447 P.2d 193 (Utah 1968); *Honore v. Washington State Bd. of Prison Terms and Paroles*, 466 P.2d 485 (Wash. 1970); *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989); *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W. Va. 1976).



The Arkansas Constitution requires the court to appoint counsel for indigent defendants.<sup>26</sup> Attorneys in Arkansas have been appointed to defend indigent persons since the current constitution was adopted in 1874; however, not until 1953 were they compensated for their services to indigent defendants. At that time, the legislature enacted statutes delegating the payment of indigent defense fees to the counties.<sup>27</sup> Since that time, the statutes providing compensation for court-appointed counsel and setting the fees to be paid were revised several times. It was not until 1985 that the legislature established a public defender system for larger counties and placed partial responsibility for payment of indigent defense fees on the state.<sup>28</sup> Between 1980 and 1993, five Arkansas Supreme Court opinions called on the legislature to reform the method of compensating court-appointed counsel. An examination of these policy messages to the General Assembly provides insight into various ways these messages expressed the court's policy preferences and how effectively they influenced legislative policy. What is learned from this analysis can then be compared to similar data from other states.

## B. Court Calls for Legislative Action

*State v. Ruiz & Van Denton*<sup>29</sup> was the first Arkansas Supreme Court opinion concerning the compensation of court-appointed counsel that included a policy message from the court to the General Assembly. The court had addressed this issue in an earlier decision, but that opinion did not include a policy message to the legislature.<sup>30</sup> In *Ruiz*, the court-appointed defense challenged the statutory limit on compensation for counsel appointed to represent indigent defendants. He argued the maximum payment of \$100 for investigation expenses and \$350 for attorney fees was legislative interference with a judicial function and violated the provisions of the Arkansas Constitution for separation of powers.<sup>31</sup> The court, however, ruled

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26. ARK. CONST. art. II, § 10 (providing that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be heard by himself and his counsel."). The supreme court has held this to guarantee the right to counsel. See *Philyaw v. State*, 288 Ark. 237, 704 S.W.2d 608 (1986).

27. Act of Mar. 11, 1953, 1953 Ark. Acts 276 (codified at ARK. STAT ANN. §§ 43-2415 to -2418 (repealed 1971)).

28. Act of Apr. 17, 1985, 1985 Ark. Acts 1076 (codified at ARK. CODE ANN. § 16-92-108 (repealed by Act of Apr. 19, 1993, 1993 Ark. Act 1193)).

29. 269 Ark. 331, 602 S.W.2d 625 (1980).

30. *Pulaski County ex rel. Mears v. Adkinson*, 262 Ark. 630, 560 S.W.2d 222 (1978).

31. *Ruiz*, 269 Ark. at 332, 602 S.W.2d at 626.

that the legislature did not usurp judicial power by setting these monetary limits.<sup>32</sup>

This opinion was a textbook example of judicial restraint. Although it deferred to the General Assembly's authority, the court did criticize the system of compensation created by the legislature, stating, "We do not imply that the present statutory allowances even come close to providing adequate compensation for the services performed in this case."<sup>33</sup> The court also questioned the wisdom of requiring the counties to compensate court-appointed counsel and contended that logic suggests that if counties are unable to pay the statutory fees then the state should do so, but the court concluded, "this question of adequate compensation is not a matter to be addressed by the court but is within the province of the legislature."<sup>34</sup> Even though the court was critical of the inadequate compensation provided by the fee system and of the great burden it placed on the counties, the court found that the arguments in this case did not provide a basis to find the system unconstitutional. The court maintained that designing a system to compensate counsel for indigent people "is a matter that must be left to the sound discretion of the General Assembly."<sup>35</sup>

In this opinion, the court's policy message to the legislature was characterized by criticism of the existing policy and by an indication that statutory reform was needed. However, the court suggested no alternative to the county-funded system it criticized. The General Assembly enacted no changes in response to the court's call for revisions of the statutes. This issue continued to be brought before the court, and in each case the court's opinion included a stronger call for legislative action.

### C. Two Opinions Warn Legislature of Coming Changes

Ten years after *Ruiz*, the Arkansas Supreme Court decided two cases that challenged the statutory fee system for compensating court appointed lawyers. Although the court continued to uphold the constitutionality of the statutes, in these opinions the court indicated that it had not closed the door on Fifth Amendment "taking" or Fourteenth Amendment due process challenges to the fee system. In *Pickens v. State*,<sup>36</sup> the court implied that it might favorably consider a takings argument;<sup>37</sup> however, the lawyer in this

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32. *Id.* at 335, 602 S.W.2d at 627.

33. *Id.*

34. *Id.*

35. *Id.*

36. 301 Ark. 244, 783 S.W.2d 341, *cert. denied*, 497 U.S. 1011 (1990).

37. *Id.* at 248, 783 S.W.2d at 343.

case had volunteered to serve as counsel.<sup>38</sup> Therefore, the court reasoned, he had no standing to base a claim on the takings clause of the Fifth Amendment.<sup>39</sup> Concluding the opinion, the court wrote, "Whatever the trend may be to hold such fee limits unconstitutional, this is not the case in which we will consider the issue."<sup>40</sup> The court's message in *Pickens* was a different than *Ruiz*. In *Pickens*, the court expressed dissatisfaction with the fee system in a way that threatened the policy by suggesting it might be constitutionally unsound. But this case did not provide the situation necessary to challenge the statute's constitutionality. The legislature took no notice of the court's hint of dissatisfaction with the statutory limits on compensation and introduced no legislative reform.

Less than a year later *Coulter v. State*<sup>41</sup> presented the court with a second opportunity to address the constitutionality of the fee system. In *Coulter*, an indigent person convicted of a capital offense claimed that his defense was prejudiced by the \$1000 statutory cap on reimbursement of appointed counsel fees in capital cases.<sup>42</sup> The court agreed with the appellant's arguments that the cap might be unconstitutional for several reasons, including denying due process by preventing adequate representation by counsel; however, the court found that, in this case, the fee cap did not prevent an effective defense.<sup>43</sup>

The court's opinion again threatened the statute by telegraphing the clear message that it was willing to reconsider a due process challenge to the statutory fee system stating, "We give notice that, in an appropriate case, we will reconsider our earlier decisions on this issue. This is not the case."<sup>44</sup> This view of the majority was augmented by Chief Justice Holt's concurring opinion. It underscored the call for legislative action stating:

Under these present arrangements, it is obvious that our judicial system is not complete, and will not be, until funds are provided to reasonably compensate the attorneys who are required to represent truly indigent defendants. This could be accomplished by the creation of a state-wide public defender system for both trial and appellate work. Hopefully, the General Assembly of Arkansas will readdress this issue expeditiously; otherwise the burden and responsibility will soon fall up on the courts to erase this blotch on our system.<sup>45</sup>

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38. *Id.* at 256, 783 S.W.2d at 348.

39. *Id.*

40. *Id.* at 257, 783 S.W.2d at 348.

41. 304 Ark. 527, 804 S.W.2d 348 (1991).

42. *Id.* at 545, 804 S.W.2d at 358.

43. *Id.*

44. *Id.*

45. *Id.* at 547, 804 S.W.2d at 359.

Chief Justice Holt stated that this concurrence was intended to suggest mechanisms the legislature might adopt to adequately compensate court appointed counsel.<sup>46</sup> He noted that “[t]he court usually uses concurring opinions as a means of suggesting ways the legislature can meet statutory needs created by a court opinion.”<sup>47</sup> Chief Justice Holt also confirmed that the *Coulter* opinion was intended to warn the legislature that given the appropriate case, the court would strike down the cap on compensation.<sup>48</sup> His concurring opinion reiterated the court’s call for the legislature to change the system, and then suggested that the legislature create a state-funded public defender system as a means of providing court-appointed counsel.<sup>49</sup>

The General Assembly was in its biennial session when the *Coulter* opinion was issued and the legislature responded to the opinion. Senator Wayne Dowd, chairman of the Senate Judiciary Committee, stated that the committee took note of the opinion and began to draft legislation. However, not enough time remained in the session to act on the court’s message.<sup>50</sup> Five months later, in 1991, the court accepted a case that allowed it to review the constitutional questions raised by *Pickens* and *Coulter*.

#### D. Court Call to Replace a Constitutionally Voided Statute

The appeal of *Arnold v. Kemp*<sup>51</sup> provided the court with the facts it needed to overturn the fee limits on compensation for court-appointed counsel. In *Arnold*, the appointed counsel for an indigent defendant in a capital murder prosecution refused to proceed after the trial court denied him reimbursement for out-of-pocket expenses and refused to supply his client with the funds to hire necessary investigatory and expert assistance.<sup>52</sup> After the trial judge found defendant’s counsel in contempt, he appealed the

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46. Interview with Jack Holt, Chief Justice, Supreme Court of Arkansas, in Little Rock, Ark. (Dec. 14, 1993).

47. *Id.*

48. *Id.*

49. *Coulter*, 304 Ark. at 548-49, 804 S.W.2d at 360.

50. Telephone Interview with Wayne Dowd, Senator, Arkansas State Senate (Nov. 16, 1993).

51. 306 Ark. 294, 813 S.W.2d 770 (1991); see also John B. Arango, *Arkansas Supreme Court Finds Cap on Fees and Expenses for Appointed Counsel Unconstitutional*, 6 CRIM. JUST. 47 (Fall 1991); Terri Schull, *Constitutional Law—Indigent Defense—Arkansas Statutory Fee and Expense Limitation Unconstitutional, Arnold v. Kemp*, 14 U. ARK. LITTLE ROCK L.J. 595 (1992).

52. *Arnold*, 306 Ark. at 296, 813 S.W.2d at 771.

contempt ruling to the supreme court.<sup>53</sup> In its decision, the supreme court held that (1) the legislatively established caps for death penalty cases (\$1000 for fees and \$100 for expenses) constituted an unconstitutional taking of property, and (2) a mixed public defense system in which attorneys in non-public-defender counties were required to financially subsidize the state's responsibility for indigent representation violated attorneys' equal protection rights.<sup>54</sup> Therefore it declared the statute, as applied, unconstitutional.<sup>55</sup> Although the decision originated in a death penalty case, the court applied its findings to the entire system for compensating court-appointed counsel.

The court opinion contained a clear message to the General Assembly. The court noted that since 1971 the legislature had been addressing, in a piecemeal way, the problem of financing compensation for court-appointed counsel, but held that this treatment was not sufficient. "Even though the legislature may take 'one step at a time' in addressing complex problems, it does not have license to infringe upon the guaranteed constitutional rights of the citizens it represents."<sup>56</sup> The court's message in the *Arnold* opinion was a third type. The statute was held to be unconstitutional in its application, but the court did not suggest an alternative policy to fill the policy vacuum it created.

The court's decision left a constitutional void that the legislature needed to fill. As a member of the Senate Judiciary Committee, Senator Mike Bebee stated that the legislature is "by necessity more responsive to policy vacuums created when the court strikes down an unconstitutional policy."<sup>57</sup> When the *Arnold* opinion was issued, the Senate Judiciary Committee had already drafted reform legislation in response to the *Coulter* decision. The court issued its *Arnold* decision while the legislature was between sessions. When a special session was called in November 1992, the leadership of the General Assembly and Governor Bill Clinton made the decision not to include the compensation-for-counsel issue in the call for the special session. They determined that the special session should address more pressing matters.<sup>58</sup> These interviews confirmed the assumption that some legislation introduced in response to court opinions never gets enacted or is only enacted after being introduced over a period of several years.

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53. *Id.*

54. *Id.* at 306, 813 S.W.2d at 777.

55. *Id.*

56. *Id.* at 304, 813 S.W.2d at 776.

57. Interview with Mike Bebee, Senator, Arkansas State Senate, in Little Rock, Ark. (Dec. 14, 1993).

58. *Id.*

After *Arnold*, the court issued an opinion, *State v. Post*,<sup>59</sup> that made even more sweeping constitutional determinations. Although the changes to the system were not enacted by the legislature until after the court had issued its decision in *Post*, it is not unreasonable to claim that the *Arnold* opinion played a role in bringing this change about. *Post*<sup>60</sup> and *Arnold*,<sup>61</sup> along with *Pickens*<sup>62</sup> and *Coulter*,<sup>63</sup> are part of a string of cases that contributed to legislative changes. This author considers the reform legislation enacted in 1993 to be, in part, a response to the court's message in *Arnold*.

#### E. Court Recommendations to Replace a Constitutionally Voided Policy

The Arkansas Supreme Court's calls for statutory reform of the system for compensating court-appointed counsel extended over more than a decade. In its *Ruiz* opinion, the court held that the statutory caps on fees were constitutional, but urged the legislature to develop a state-financed system for funding this expense.<sup>64</sup> The legislature took no action. In the *Pickens*<sup>65</sup> and *Coulter*<sup>66</sup> decisions, the court left the statutory caps intact, but warned that in an appropriate case it would reconsider challenges to the systems constitutionality. These warnings elicited no response from the legislature. In *Arnold*,<sup>67</sup> the court found an appropriate case to hold the statutory caps unconstitutional in their application. Before the next legislative session convened, the court issued an even more expansive decision addressing the compensation statutes in *State v. Post*.<sup>68</sup>

As a result of the *Arnold* decision, the cost of indigent defense rose substantially. In a capital murder case, one of the defense attorneys was awarded \$23,138. Before *Arnold* was decided, the fee would have been limited to \$1000. The judge allocated the responsibility for paying the fee:

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59. 311 Ark. 510, 845 S.W.2d 487 (1993). See also John B. Arango, *Arkansas Supreme Court Rules State Responsible for Indigent Defense Costs*, 8 CRIM. JUST. 40 (Summer 1993).

60. 311 Ark. 510, 845 S.W.2d 487 (1993).

61. 306 Ark. 294, 813 S.W.2d 770 (1991).

62. 301 Ark. 244, 783 S.W.2d 341 (1990).

63. 304 Ark. 527, 804 S.W.2d 348 (1991).

64. *State v. Ruiz & Van Denton*, 269 Ark. 331, 602 S.W.2d 625 (1980). See *supra* notes 29-35 and accompanying text.

65. *Pickens v. State*, 301 Ark. 244, 783 S.W.2d 341 (1990). See *supra* notes 36-40 and accompanying text.

66. *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348 (1991). See *supra* notes 41-49 and accompanying text.

67. *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991). See *supra* notes 51-56 and accompanying text.

68. 311 Ark. 510, 845 S.W.2d 487 (1993). See *supra* note 59 and accompanying text.

\$450 to the county, and the remainder to the state. The state appealed this award to the supreme court in *State v. Post*.<sup>69</sup> The state argued that in a context where *Arnold* made the state's fees statute ambiguous, legislative intent should determine responsibility, and the legislature clearly intended that counties pay. In its *Post* decision, the court invalidated the entire fees statute and any county ordinances derived from it.<sup>70</sup> The court held that striking down the statutory delegation of responsibility for payment of fees to the county returned the responsibility for payment to the state.<sup>71</sup> The practical consequence of the decision was that the state was left without a comprehensive system to provide monies to pay compensation to counsel representing indigent criminal defendants. This message to the legislature in the *Post* opinion differed from that in the *Arnold* opinion. The court not only struck down the existing policy, but it also suggested the possible alternative that the legislature develop a state-funded system for compensating court-appointed counsel.

In its 1993 session, the legislature responded to the court's rulings in both *Arnold* and *Post*. The General Assembly thoroughly complied with the court's policy recommendation by enacting Act 1193.<sup>72</sup> The Act established the system recommended by the court in *Post*. It created trial public defender's offices and required that an indigent defense fund be established by each county.<sup>73</sup> The Act provided alternative ways for the quorum courts (county commissions) to set up public defender offices in counties.<sup>74</sup> Provisions were made for more than one county to work together in establishing and maintaining such offices.<sup>75</sup> Furthermore, additional personnel were provided to county courts to administer the assignment of indigent cases.<sup>76</sup> Finally, a statewide public defender's office was established to assume the responsibility for defending all indigent persons charged with capital crimes.<sup>77</sup>

The response of the Arkansas General Assembly to the *Post* opinion restructured the statutory system for providing compensation for court-appointed counsel. The new statutes provide a solution to the problems that

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69. 311 Ark. 510, 845 S.W.2d 487 (1993).

70. *Id.* at 516-17, 845 S.W.2d at 490.

71. *Id.* at 521, 845 S.W.2d at 492.

72. Act of Apr. 19, 1993, 1993 Ark. Acts 1193 (codified as amended at ARK. CODE ANN. §§ 16-87-104 to -214).

73. ARK. CODE ANN. § 16-87-206 (Michie Supp. 1995).

74. *Id.*

75. *Id.*

76. ARK. CODE ANN. § 16-87-208 (Michie Supp. 1995).

77. ARK. CODE ANN. § 16-87-205 (Michie Supp. 1995).

the court pointed out to the legislature in its opinions in the compensation cases decided over the previous thirteen years.

### III. JUDICIAL-LEGISLATIVE POLICY MAKING IN ARKANSAS

A former New Jersey Supreme Court justice, discussing the court's willingness to make politically controversial decisions, commented that "no thicket was too political for us."<sup>78</sup> It is unlikely that more than a few state supreme court justices would concur in that view. A broad survey of the literature on state supreme courts leads one to expect that not many state supreme courts would so boldly claim an activist role for themselves. This is true of the justices of the Arkansas Supreme Court; yet, they are clearly aware of the political nature of their decision making. At least from time to time, the Arkansas Supreme Court enters a thorny thicket and makes policy in areas generally seen as the bailiwick of the General Assembly. At other times the court must resolve pressing political issues presented by the cases that come before it.

The four justices of the Arkansas Supreme Court who were interviewed expressed respect for the General Assembly and an overall willingness to defer to the policy-making authority of the legislature. None of them, however, expressed a reluctance to strike down legislative policy when they felt it was necessary. Justice Hays expressed the same sentiment heard from the other three justices, "The court exercises a degree of restraint when it deals with legislative enactment, and will usually only strike down deficiencies when they are so glaring that they cannot be ignored."<sup>79</sup> Justice Hays is well acquainted with the court opinions that require substantial legislative action and an increase in state spending. He wrote the court's opinion in Arkansas's landmark school finance case.<sup>80</sup>

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78. LEHNE, *supra* note 15, at 43.

79. Interview with Steele Hays, Justice, Supreme Court of Arkansas, in Little Rock, Ark. (Dec. 14, 1993).

80. *Dupree v. Alma Sch. Dist. #30*, 279 Ark. 340, 651 S.W.2d 90 (1983). This case is another example of policy messages in opinions of the Arkansas Supreme Court influencing legislative policy-making. In *Dupree*, the court found that the system for financing public schools resulted in inequitable per-student funding among the state's school districts. This inequality was held to be a violation of the Arkansas Constitution's requirement that the state "maintain a general suitable and efficient system of free public schools." ARK. CONST., art. XIV, § 1. The court struck down the statutory provisions that financed the schools. The governor called the legislature into extraordinary session. The General Assembly's response was prompt, positive, and extensive. The School Finance Act of 1984 was enacted and provided for equalization of funding based on a weighted average daily attendance in the school districts. See Act of Nov. 1, 1983, 1983 Ark. Acts, First Extraordinary Session 34.



Each of the justices agreed that they consider the potential political and economic impact of their decisions; however, they also downplayed the influence such considerations had on their decisions. Justice Hays said there is a significant awareness on the part of the court of the cost of requiring certain policies, such as financing the public schools. "Judges are very aware of the political repercussions of their decisions," he said, "especially when they are going to increase spending by the state. The court has discussed the budgetary implications for the state that decisions might have."<sup>81</sup> Hays's colleagues on the Arkansas Supreme Court agree. Justice David Newbern elaborated,

We are not blind to the consideration of the political, social, and economic impact of our decisions. In formal conferences we examine what the effect of a decision we are about to make will be and its impact on the state budget. We are sensitive to the state's funding priorities. That doesn't control what we decide, but we do discuss it.<sup>82</sup>

Chief Justice Holt agreed that the court considers the political implications of its decisions, but he added that judges are still bound by what the facts of the case are and what the law requires them to do. He explained,

I think about the social and economic effects that a decision may have, but I make my decision based on what I think is the correct answer to the question of law presented by the case. An awareness of the far-reaching effects of a decision makes me look at the question and my answer three or four times.<sup>83</sup>

At times, the court feels compelled to render decisions the judges would rather settle in a different way. Justice Newbern said, "We are sometimes criticized for decisions we would have rather decided another way, but couldn't because the law didn't permit that decision." But, he explained, if the court's opinions are written in a way that points out how a statute is inconsistent or too narrowly drawn, the legislature will often adjust or change it.<sup>84</sup>

Justice Donald L. Corbin expressed what seems to be the controlling factor in constitutional decision making on the Arkansas Supreme Court. He said,

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81. Hays, *supra* note 79.

82. Interview with David Newbern, Justice, Supreme Court of Arkansas, in Little Rock, Ark. (Dec. 14, 1993).

83. Interview with Jack Holt, Chief Justice, Supreme Court of Arkansas, in Little Rock, Ark. (Dec. 14, 1993).

84. Newbern, *supra* note 82.

Being a supreme court judge is like living on a mountain. We must face constitutional issues and are less aware than legislators of the moods and opinions of the people. We are conscious of the overriding legal issues. Our responsibility, as we see it, is if there is a [constitutional] wrong, we right the wrong. It is what we were hired to do. The legislature has the purse strings, it is their responsibility to meet the problems. It is not my problem to find the funds.<sup>85</sup>

The justices are aware of and consider the political ramifications of their decisions. They also maintained strongly that although they are willing to make decisions with far-reaching economic and political implications, the controlling factor in all of their decisions is the application of the law and legal principles to the questions before them.

Members of the General Assembly are aware of the policy messages sent in supreme court opinions. Senator Wayne Dowd said that the Senate Judiciary Committee staff monitors court opinions.<sup>86</sup> Senator Mike Bebee said that members of the legislature are especially aware of policy messages in supreme court opinions. The Senate tends to have a disproportionate number of lawyers; it is not unusual for more than half of the senators to be attorneys. Bebee said that most of the lawyers in the Senate practice before the supreme court and are alert to litigation that may have significance for the legislature.<sup>87</sup>

The General Assembly is generally receptive to the policy ideas expressed in supreme court opinions. Although he acknowledged that legislators' feelings about such policy messages vary, Larry Holifield, Assistant Director of the Arkansas Bureau of Legislative Research said,

There was not much negative feeling in the legislature about the court's several decisions requiring a change in the provisions for paying court-appointed lawyers. The focus was on what to do, the general consensus [among legislators] was that the court's decision was correct.<sup>88</sup>

The legislature is receptive to the court's suggestions for policy direction; however, it is also willing to make changes in policy that the court

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85. Interview with Donald L. Corbin, Justice, Supreme Court of Arkansas, in Little Rock, Ark. (Dec. 14, 1993).

86. Telephone Interview with Wayne Dowd, Senator, Arkansas State Senate (Nov. 16, 1993).

87. Interview with Mike Bebee, Senator, Arkansas State Senate, in Little Rock, Ark. (Dec. 14, 1993).

88. Interview with Larry Holifield, Assistant Director, Arkansas Bureau of Legislative Research, in Little Rock, Ark. (Dec. 14, 1993).

establishes, Holifield said.<sup>89</sup> When legislators think the court has misread legislative intent in its interpretation of a statute, a new statute will be enacted, and it will be noted in the legislative finding, in the emergency clause appended to the act, that the legislation is intended to correct the court's interpretation of the statute it amends.<sup>90</sup>

The communication between the Arkansas Supreme Court and the General Assembly is healthy, informal, and relatively effective. Senator Bebee would like to see a more formal structure for communications between the court and the legislature. "Both branches should be sending their concerns to the other branch," he said, "the communications need to be balanced and apolitical."<sup>91</sup> It is not known how widely this view is held by other legislators. Members of the court, however, are satisfied with the largely informal channels of communication between the two branches.

#### IV. ARKANSAS AND THE NATIONAL PATTERN OF COURT-LEGISLATIVE COMMUNICATION

The patterns of policy communications between the Arkansas Supreme Court and the General Assembly are a reflection of findings from examinations of the supreme courts and legislatures in other states. Research has shown that state supreme courts seek to influence policy-making by the state legislature.<sup>92</sup> It has also been found that including policy messages in court opinions is the principal way that courts convey their policy messages to the legislature.<sup>93</sup> Interviews with supreme court justices and state senators indicate that opinions are the means the Arkansas Supreme Court uses to convey its policy views to the General Assembly. Members of both institutions indicated that they are comfortable with this way of communication and believe it is reasonably effective.<sup>94</sup>

The General Assembly's response to the policy messages the court included in the five opinions concerning the compensation of court-appointed counsel indicates that it responds sooner and more favorably to policy messages that create a policy vacuum than to those that merely

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89. *Id.*

90. *Id.*

91. Interview with Mike Bebee, Senator, Arkansas State Senate, in Little Rock, Ark. (Dec. 14, 1993).

92. Glick, *supra* notes 12 and 14; ROCHA & WEBKING, *supra* note 15.

93. Glick, *supra* note 12.

94. I interviewed members of the legislatures and supreme courts in three other states: Kentucky, Texas, and West Virginia. The relationship between the court and legislature seemed to be somewhat more amiable in Arkansas than the other three states. Among the four states the least amiable relationship is in Texas.

criticize the existing policy or lack of policy and call for the legislature to remedy the situation. The pattern of communication between the court and legislature in Arkansas is similar to that which I found in other states.

I examined fifty-two legislative responses to the policy-messages contained in fifty-six opinions of the supreme courts of twenty-six states.<sup>95</sup> The opinions concerned three policy areas: the right to die, equality in public school finance, and provisions for compensating court-appointed counsel. The policy-messages varied greatly in their tone, authority, and specificity. The messages implied, lamented, cajoled, suggested, recommended, insisted, and required. I designed a taxonomy of eight message types (four of these types are found in the Arkansas cases reviewed in this article).<sup>96</sup> The legislatures responded to these messages at four levels. The first level is no response: the legislature does not enact a statute in response to the court's message. Another level is a deficient response: the legislature responds by enacting statutes that either partially meet the needs identified by the court or that fail to meet constitutional requirements set by the court. A third level is a positive response: the legislature amends existing provisions or enacts new statutes in response to the court's general call for the legislature to address a policy problem, perhaps hinting at the general

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95. At times, the legislatures responded to two or more court messages, because more than one opinion contained a message that was delivered during the time frame in which the legislature could respond. For example, during one legislative session, the court may issue more than one opinion on a subject and ask for legislative action. This reduced the author's number of legislative responses from 56 to 52.

96. Following are the types and examples of opinions that contain such messages. (1) General call for legislation to rectify a lack of policy. This type notes or criticizes lack of policy and calls for legislative action, but offers no policy preferences. See *Severns v. Wilmington Med. Ctr.*, 421 A.2d 1334 (Del. 1980). (2) Recommendations for legislation to rectify a lack of policy. This type notes or criticizes lack of policy and suggests policy. See *Lovato v. 10th Dist. Court in & for the 10th Judicial Cir.*, 601 P.2d 1072 (Colo. 1979). (3) General call for changes in or expansion of statutes. This type criticizes existing policy and calls for legislative action; however, it offers no policy preferences. See *State v. Ruiz & Van Denton*, 269 Ark. 331, 602 S.W.2d 625 (1980). (4) Recommendations for changes in or expansion of statutes. This type criticizes existing policy, and it suggests alternative policy or recommends policy direction. See *State v. McAfee*, 385 S.E.2d 651 (Ga. 1989). (5) Decisions threatening to existing policy. This type expresses displeasure with existing policy or practice in a way that endangers or threatens the policy but does not strike it down. See *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348 (1990). (6) General call to replace constitutionally voided policy. This type strikes down a policy without suggesting an alternative policy. See *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991). (7) Recommendations for replacing constitutionally voided policy. This type strikes down a policy and suggests possible policy alternatives; however, it doesn't require its adoption. See *State v. Post*, 311 Ark. 510, 845 S.W.2d 487 (1993). (8) Requirements for replacing constitutionally voided policy. This type strikes down policy and establishes policy requirements that must be adopted. See *State ex rel. Stephen v. Smith*, 747 P.2d 816 (Kan. 1986).

direction the policy should take. The fourth level of response is thorough compliance: the legislature incorporates the court's specific policy recommendations or requirements into the statutes it enacts.

The legislatures responded in these fifty-two cases by enacting legislation in thirty-eight cases. In thirty of those cases the enactments complied with the recommendations or requirements made by the court. In the remaining eight cases the statutes enacted were inadequate in that they partially complied with the court's request by establishing a study commission, adopting some of the court's suggestions, or the statutes were deficient because they did not make the changes the court required. In the fourteen cases in which the legislatures enacted no law, it should be noted that in six of the cases the legislature enacted statutes in response to messages that made the same or similar suggestions or recommendations in later opinions.

My cross-state examination of the state supreme court opinions and the legislative responses to them demonstrates that state supreme court opinions are an effective way for the courts to communicate their policy preferences to state legislatures. Generally, state legislatures make full or partial responses to policy messages contained in the opinions of state supreme courts. Several conclusions were drawn from this research. First, legislatures usually enacted new statutes in line with the suggestions, recommendations, or requirements made by the state supreme courts. This was discovered to be true in thirty-eight (seventy-three percent) of the fifty-two cases reviewed. Second, when state supreme court decisions established policies or rules that addressed the question at hand and then called for the legislature to enact more comprehensive policy, the legislature was more likely to delay a response or make no response. Legislative priorities are established partly in response to outside pressures. The pressure for legislative action can be diminished when court rules and decisions meet immediate policy demands. Third, when state supreme court decisions created a policy void, there was a higher probability that legislatures would respond to the courts' call for legislative action. The legislatures responded with statutory amendment or enactment to eighty-eight percent of the court opinions that struck down the existing policy. The affirmative response rate to the other opinion types was fifty-nine percent. Finally, when the legislature did not respond to state supreme court calls for new statutes, the courts usually succeeded at prodding legislatures to adopt the recommended policies if they persisted in making similar recommendations in successive opinions.

## V. CONCLUSIONS

The examination of the political dynamic between the Arkansas Supreme Court and the General Assembly confirms the findings from my larger cross-state study, but more importantly, it illustrates the findings by providing insights and color from individual cases that aggregate data do not provide. Over a period of thirteen years, the Arkansas Supreme Court called for the General Assembly to restructure the state's system of compensating court-appointed counsel. During that time the court's call for reform became stronger and its stated policy preferences became more specific. The policy message in *Ruiz* was a general call for changes in the statutes; although the court criticized the existing policy, it held the compensation system to be constitutional and did not suggest policy alternatives for the legislature to consider. The court's messages in *Pickens* and *Coulter* were stated more strongly. The court implied that it saw constitutional deficiencies in the statutes and threatened to find them unconstitutional in future cases. In the *Coulter* opinion, the court suggested specific alternatives to the existing policy. In *Arnold*, the court found the existing policy unconstitutional in its application, without suggesting an alternative to fill the policy vacuum. Finally, in *Post*, the court declared the existing policy to be unconstitutional on its face and suggested an alternative policy but did not require its adoption.

The legislature did not enact any legislation in direct response to the *Ruiz* opinion; however, in the years between the *Ruiz* and *Pickens* opinions, there was some tinkering with the statutes. Justice Donald L. Corbin, who served in the Arkansas House of Representatives during this period, told me that a number of bills intended to reform the compensations system were introduced.<sup>97</sup> Some of these proposals were enacted.<sup>98</sup> Legislation was introduced in response to the *Coulter* decision, but was not enacted before the court's decisions in *Arnold* and *Post*. The legislative process is time consuming, and it seems reasonable to speculate that the reform set in motion by *Coulter* would have become law without the influence of *Arnold* and *Post*. The later decisions, however, kept the pressure on the legislature and created a policy void that was difficult for the legislators to ignore. This sequence of developments supports the argument that when the legislature does not respond to state supreme court calls for new statutes, the courts will usually succeed at prodding legislatures to adopt new policy if

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97. Interview with Donald L. Corbin, Justice, Supreme Court of Arkansas, in Little Rock, Ark. (Dec. 14, 1993).

98. Act of Apr. 17, 1985, 1985 Ark. Acts 1076 (codified at ARK. CODE ANN. § 16-92-108 (repealed by Act of Apr. 19, 1993, 1993 Ark. Acts 1193)).

they persist in making similar recommendations. The Arkansas cases also support the contention that if the court sends stronger messages and/or creates policy vacuums, the legislature is more likely to follow the directions the court recommends.

This examination of the Arkansas cases and the interviews conducted in Arkansas indicates that the policy-making influence between the Arkansas Supreme Court and the General Assembly is similar to that in other states. The five successive court opinions that included increasingly stronger policy-messages to the General Assembly, as well as the General Assembly's response to them, provide a clearer, more detailed picture of this dynamic than do the data from the larger cross-state study. The candid, informative interviews with the Arkansas justices and senators provided an insight into the substance of the human and political dimensions of the policy-making relationship between state legislatures and supreme courts that is described by the aggregate cross-state data.