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## Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One

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*Indiana Supreme Court*

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## ESSAY

### Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One

CHIEF JUSTICE RANDALL T. SHEPARD\*

#### INTRODUCTION

Appellate courts have two central functions with respect to deciding cases. They correct errors which may have been made in the initial trial of a case, and they "give" law by interpreting statutes and constitutions and by making common law. A state supreme court represents the final step in a state's appellate process. As a court of last resort, its opinions carry the precedential value which shapes the state's law. For supreme courts, therefore, the law-giving function is pivotal. However, increases in the number of cases being heard at both the trial and appellate level threaten the ability of a court of last resort to act in its law-giving role.

Although the increase in litigation in America is a subject of popular discussion, the national explosion in appeals is much less widely understood. The latter, of course, is fueled in significant part by the former. The dimensions of the national trend toward more lawsuits and more appeals can be readily seen in Indiana. The number of cases in the state's trial courts

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rose from 130,703 to 1,292,541 between 1935 and 1985.<sup>1</sup> Similarly, the number of appellate opinions by the state's appellate courts rose from 342 in 1935<sup>2</sup> to 1,370 in 1985.<sup>3</sup>

In response to the nationwide trend of burgeoning caseloads, the nation's courts of last resort have employed a variety of tools to deal with the problem. From the time growing population and greater industrialization generated caseloads which made it impossible for state supreme court justices to travel across their state hearing cases, states have experimented with various measures to increase decisionmaking capacity and restrict access to appellate courts. The search for effective solutions continues.

This Article will first explore the solutions which Indiana and other states have adopted to deal with rapidly increasing appellate caseloads. It will then examine a proposed constitutional amendment which the Indiana electorate is about to consider. If adopted, this amendment would divert a significant number of criminal cases from the Indiana Supreme Court to the Indiana Court of Appeals. This amendment would relieve the supreme court from hearing an inordinately high number of criminal cases and, in turn, allow the court to advance its law-giving function in other areas of substantive law.

## I. EARLIER RESPONSES TO THE GROWING APPELLATE CASELOAD

Indiana's responses to the expanding appellate caseload have followed the traditional development of most state appellate systems. As was universally the case in other states, the volume of litigation at the time of statehood was so low that a single appellate court was adequate. Then, as populations and industrial economies grew in the 19th century, Indiana and other states added intermediate appellate courts to ease the burden on the state's highest courts. State legislatures also added judges to increase appellate capacity further. To save time in the decisionmaking process, courts issued summary dispositions and unpublished memoranda. Finally, appellate courts increasingly relied on staff support to boost output.

Most of these responses were attempts to accommodate the growing demand on appellate courts by increasing the supply of appellate resources.

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1. The 130,703 cases filed in 1935 included civil and criminal cases filed in juvenile courts, city courts and justice of the peace courts, as well as those cases filed in circuit, superior and probate courts, including divorces. See 1937 JUDICIAL COUNCIL OF INDIANA, SECOND ANNUAL REPORT Table I, at 48, 51, 56, Table II, at 61, 64, 66, 68. In 1985, the 1,292,541 cases filed included civil and criminal cases filed in circuit, superior and probate courts, Marion County municipal courts, county courts, Marion County small claims courts, and city and town courts. See DIVISION OF STATE COURT ADMINISTRATION, 1985 INDIANA JUDICIAL REPORT 26, 33, 35 [hereinafter 1985 INDIANA JUDICIAL REPORT].

2. This figure results from examining the cases reported in volumes 208 and 209 of the Indiana Reports and volumes 100 to 102 of the Indiana Appellate Reports.

3. 1985 INDIANA JUDICIAL REPORT, *supra* note 1, at 10, 16.

Other responses attempted to reduce the demand on the courts by restricting access to the appellate process. The following sections will examine each of these responses and describe how they have been implemented in Indiana.

### A. *Intermediate Appellate Courts*

During the late nineteenth century, the industrialization of the nation's largest states overwhelmed the two-tiered arrangements adequate for earlier times. Because appellants went directly from the trial court to the appellate court, state supreme courts had little or no discretion to select cases. They heard every case appealed.

One common solution to this problem was the creation of intermediate appellate courts. These courts were typically established at a time when a state's population reached approximately one and a half million people.<sup>4</sup> Although New Jersey created an intermediate appellate court as early as 1844,<sup>5</sup> the nineteenth century movement to establish such courts occurred largely in the last decades of the century.<sup>6</sup> By 1911, there were thirteen intermediate courts, a number which remained constant for nearly half a century.<sup>7</sup> The twentieth century wave occurred between 1964 and 1984 when the majority of the thirty-seven intermediate courts now in existence were created.<sup>8</sup> These courts now carry the bulk of the workload in appellate decisionmaking.<sup>9</sup>

Indiana witnessed its own explosion in population and level of industrialization during the late nineteenth century.<sup>10</sup> With this growth came an increase in its appellate caseload.<sup>11</sup> It became clear that a single supreme

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4. See Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Court, 1870-1970*, 30 STAN. L. REV. 121, 128-32 (1977) [hereinafter Kagan].

5. N.J. CONST. art. VI, § 5 (1844).

6. See, e.g., Act of Apr. 29, 1895, ch. 76, 1895 Tenn. Pub. Acts 113.

7. Marvell & Kuykendall, *Appellate Courts—Facts and Figures*, 4 ST. CT. J., Spring 1980, at 11.

8. The states without intermediate appellate courts in 1985 were Delaware, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wyoming. See NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANN. REP. 1985 App. A, table 2 (1987) [hereinafter 1985 CASELOAD STATISTICS]. Utah has since added an intermediate appellate court. Utah Code Ann. § 78-2a-1 to -5 (Michie Repl. 1987) (codifying 1986 Utah Laws ch. 47, §§ 44-48).

9. Of the 47,727 cases decided with opinions in states with both kinds of courts in 1985, for example, 42,158 were decided by intermediate courts and 5,569 were decided by courts of last resort. Of course, some of these cases are counted twice. 1985 CASELOAD STATISTICS, *supra* note 8, at App. A, table 6.

10. The state's population grew from 1,681,000 in 1870 to 1,978,000 in 1880 to 2,978,000 in 1890. 1 BUREAU OF THE CENSUS, U.S. DEP'T OF COM., HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 at 27, Series A, at 195-209 (1976).

11. The number of opinions issued by the Indiana Supreme Court grew from 332 in 1870, see cases reported in volumes 32 to 35 of the Indiana Reports, to 435 in 1880, see cases reported in volumes 69 to 73 of the Indiana Reports, to 546 in 1890, see cases reported in volumes 124 to 128 of the Indiana Reports.

court of five members could not handle the work, and in 1881 the legislature responded by creating a board of commissioners. The legislature directed the court to appoint five persons, "citizens of this State, of high character for legal learning and personal worth" as commissioners of the supreme court.<sup>12</sup>

The supreme court assigned appeals to the commissioners for review. One of the five commissioners would prepare a draft opinion for approval by the other commissioners, after which they submitted it to the supreme court.<sup>13</sup> The system required that the members of the court, then called judges, pass on the merits of every question, a relatively inefficient way of combatting growth in caseload.

The legislature intended that the commissioners serve for only two years because the supreme court was reportedly two years behind in 1881. In 1883, however, the legislature extended the life of the commission for two more years.<sup>14</sup> During the four years of the commission's operation, the supreme court docket had been relieved of its congested condition. The legislature saw no need to extend the commission or create a new appellate court.

By 1889, however, the high court's docket had again become unmanageable. The legislature decided to create another commission, with one fatal difference—the legislature would select the commissioners.<sup>15</sup> The supreme court resented the intrusion into the judicial branch and promptly declared the act unconstitutional. Chief Judge Byron Elliott, writing for a unanimous court, declared, "The power of deciding, the duty of deciding, and the duty of writing opinions, are specifically imposed upon the court."<sup>16</sup>

Finally, in 1891, the legislature created an intermediate appellate court consisting of five judges.<sup>17</sup> The legislature's power to create the appellate court derived from the constitutional amendment adopted March 4, 1881.<sup>18</sup> The newly created appellate court was of limited jurisdiction.<sup>19</sup>

Once an intermediate court is in place, increasing its membership to accommodate additional appeals is relatively simple and efficient. Because

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12. 1881 Ind. Acts ch. 17, § 1.

13. L. MONKS, COURTS AND LAWYERS OF INDIANA 297-99 (1916).

14. 1883 Ind. Acts ch. 60, § 1.

15. 1889 Ind. Acts ch. 32, § 1.

16. State *ex rel.* Hovey v. Noble, 118 Ind. 350, 364, 21 N.E. 244, 249 (1889).

17. 1891 Ind. Acts. ch. 37. See also L. MONK, *supra* note 13, at 362-64; C. TAYLOR, THE BENCH AND BAR OF INDIANA 79-80 (1895).

18. The amendment substituted the word "other" for the word "inferior" making the section read: "The judicial power of the state shall be vested in a Supreme court, in Circuit Courts and in such other courts as the General Assembly may establish." IND. CONST. art. VII, § 1 (1851, amended 1881).

19. Regarded initially as a temporary expedient, the court was authorized to exist for only six years. 1891 Ind. Acts ch. 27, § 26. In 1897, the court's existence was extended for four years. 1897 Ind. Acts ch. 9, § 3. Finally, in 1901, the General Assembly directed that it be a permanent body. 1901 Ind. Acts ch. 247, § 19.

intermediate courts typically decide cases while sitting in three-judge panels, they resolve an initial appeal in fewer hours of judicial time than courts of last resort, which usually sit *en banc*.<sup>20</sup> This method of increasing appellate capacity can be used almost indefinitely, producing some very large institutions. For example, California had seventy-seven members on its intermediate court in 1985 and more judges were added in 1987.<sup>21</sup> Analysis of the caseload in the Indiana Court of Appeals during the mid-1970's suggested that the work required more than nine judges and the legislature added a panel of three.<sup>22</sup>

### B. Adding Judges to Supreme Courts

An alternative way to create greater decisional capacity is for the legislature to increase the number of judges in a court of last resort.<sup>23</sup> Although this idea seems quite natural, its utility for a state supreme court is not nearly as great as it is for intermediate courts. Judge Richard Posner has recently demonstrated what many appellate judges have sensed for quite a while: an increase in membership does not provide a proportionate increase in the capacity to decide cases. An expansion from five judges to seven, for example, does not yield a forty percent increase in decisional capacity. When seven rather than five people decide something, so many more communications are necessary that the relative efficiency per member actually declines.<sup>24</sup> If there is any discernible trend in the country, it is in favor of reducing the membership of state supreme courts.<sup>25</sup>

From 1851 to 1970, Indiana's constitution provided that the number of members on the supreme court could be no less than three and no greater than five.<sup>26</sup> As a part of substantial amendments to the judicial article in 1970, the Indiana Constitution now permits the legislature to set the number

20. Address by Richard M. Givan, Chief Justice, State of the Judiciary Message to the Indiana General Assembly (Feb. 3, 1987), reprinted in 30 RES GESTAE 19 (Mar. 1987).

21. 1987 Cal. Stat. ch. 1211, §§ 2-4.

22. Pub. L. No. 137, § 1, 1978 Ind. Acts.

23. For example, the Mississippi Supreme Court consisted of six justices in two divisions in 1940. See 187 Miss. iii. The Court increased to six justices and three commissioners by 1950, see 209 Miss. iii, and finally to its current nine member status. 511 So. 2d vii. See also Kagan, *supra* note 4, at 130.

24. As Judge Posner explains:

The number of links required to connect all the members of a set grows exponentially with the size of the set, in accordance with the formula  $n(n-1)/2$ . Thus, 36 links are necessary to connect all the members of a set of 9 and 55 for a set of 11—half again as many. But the reduction in the number of opinion assignments per capita would be less than one-fifth (it would be  $2/11$ ).

R. POSNER, THE FEDERAL COURTS 14 (1985).

25. For example, Minnesota has recently reduced its supreme court from eight members to six. Minn. Stat. Ann § 480.01 (West Supp. 1988).

26. IND. CONST. art. VII, § 2 (1851).

of members anywhere between five and nine.<sup>27</sup> The legislature has considered using this authority to enlarge the court from its present membership of five to a complement of seven.

Commenting on the proposed legislation, former Chief Justice Givan told the legislature that merely increasing the number of supreme court justices would not relieve the increased caseload, citing the necessity that each member pass on every case. Advancing a two-fold proposal, he urged the General Assembly to increase the number of justices and simultaneously reduce the number of cases brought to the supreme court by changing the court's jurisdiction.<sup>28</sup> The legislation to expand the court failed.<sup>29</sup> The progress of the other proposal prompts this Article.

### C. *Altered Work Product*

For nearly two centuries, Anglo-Saxon courts have been searching for ways to save time by explaining a court's decision in fewer words. In eighteenth and nineteenth century England, appellate court opinions were delivered *seriatim*, with each member of a panel announcing his own reasons for voting a particular way.<sup>30</sup> This tradition gained some ground in early American practice, but it soon gave way to a method by which one member of the court signed an opinion outlining the views of the majority.<sup>31</sup> In the twentieth century, some courts responded to larger caseloads by using unpublished opinions or an even more draconian measure, summary dispositions.

Even an unpublished opinion is superior to summary disposition. Because an unpublished opinion commits thoughts to paper, it serves two goals which summary dispositions do not. First a written opinion permits the parties to see that the judges have considered their arguments and to know the court's reasoning. Second, written expression is a discipline which improves the

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27. IND. CONST. art. VII, § 2 (1851, amended 1970).

28. Address by Richard M. Givan, Chief Justice, State of the Judiciary Message to the Indiana General Assembly (Feb. 7, 1985), *reprinted in* 28 RES GESTAE 471 (Mar. 1985).

29. In 1985, the House passed H.B. 1089, which proposed that the number of justices on the Indiana Supreme Court be increased from five to seven, on the third reading by a vote of 72 yeas, 24 nays. 104th General Assembly, 1st Sess., HOUSE JOURNAL, 397-98 (1985) [hereinafter 1985 HOUSE JOURNAL]. Upon entering the Senate, E.H.B. 1089 was amended on the second reading in the senate to increase the number of justices to six, rather than seven. 104th General Assembly, 1st Sess., SENATE JOURNAL, 545 (1985) [hereinafter 1985 SENATE JOURNAL]. The bill passed the Senate in that form on the third reading, with the President casting the deciding ballot in a vote of 26 yeas to 25 nays. *Id.* at 590. The House dissented from the Senate amendment, 1985 HOUSE JOURNAL, *supra*, at 656, and the bill was referred to conference committee. 1985 SENATE JOURNAL, *supra*, at 600. No further action was taken.

30. R. POSNER, *supra* note 24, at 227 n.7.

31. Compare *Chisholm v. Georgia*, 2 U.S. (1 Dall.) 419 (1793) (opinion delivered *seriatim* by each of the five Justices) with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (opinion by Chief Justice Marshall writing for the Court).

clarity and organization of ideas. These two purposes relate to the error-correcting function of an appellate court and can be advanced whether an opinion is published or not.<sup>32</sup>

Publishing an opinion is critical, however, in a case which bears importance to the development of the law beyond the immediate dispute between the parties who brought the case. A published opinion disseminates to both the parties and the public a court's interpretation of a statute or constitution and thereby furthers the development of the common law.<sup>33</sup> If a case will result in a published opinion, however, a judge must have adequate time and energy for thorough research and reflection.

Given the demanding task of publishing an opinion, using an unpublished opinion can save time. Judges have reported that writing opinions takes more time than any of their other tasks: oral arguments, conferences, research, administration, or miscellaneous duties.<sup>34</sup> Research is the second most time-consuming task.<sup>35</sup> Unpublished opinions can be short, because they need not cite all the applicable law nor relate all the facts.<sup>36</sup> Unpublished opinions often turn on facts that require an intuitive judgment without in depth reflection on a new area of law. Furthermore, because they are written only for the parties, they need not be polished.<sup>37</sup>

Indiana's long-standing policy of issuing signed, published opinions has recently given way to less formal methods of disposing of cases on the merits. The 1851 Constitution was quite explicit about the way in which the supreme court should render its decisions: "The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon."<sup>38</sup> No such constitutional requirement existed for the Indiana Appellate Court, and the legislature provided a less stringent statutory directive: "In every case reversed by a division of the Appellate Court, an opinion shall be given

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32. R. LEFLAR, *APPELLATE JUDICIAL OPINIONS* 315 (1974).

33. *Id.*

34. *STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS* 1 (Federal Judicial Center Research Series No. 73-2) (1973). See also P. CARRINGTON, D. MEADER & M. ROSENBERG, *JUSTICE ON APPEAL* 32 (1976).

35. *STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS*, *supra* note 34, at 1.

36. Joiner, *Limiting Publication of Judicial Opinions*, 56 *JUDICATURE* 195, 196 (1972).

37. See Silas, *To Publish or Not*, 71 *A.B.A. J.*, June 1985, at 28 (presenting arguments both for and against the limitations on publication).

38. *IND. CONST.*, art. VII, § 5 (1851). It is apparent that certain members of the constitutional convention believed the supreme court needed such a specific direction. Delegate Thomas W. Gibson offered the section, saying: "[T]he object I have in view, is to put an end to a species of dodging questions which has been practiced in our Supreme Court from its first organization, and which has increased, from year to year, until it has become an intolerable evil." 2 *DEBATES IN IND. CONV. 1850* [hereinafter *DEBATES*]. Gibson cited a murder case in which the court had ordered a new trial, deciding only one of two asserted errors, and noted that a second trial could well have led to yet another reversal. *Id.* Delegate John Pettit asserted that reasons for either affirmance or reversal should be recorded. *Id.*

on the material questions therein in writing, and the appropriate judgment shall be entered with directions to the lower court."<sup>39</sup> This provision clearly did not require a written opinion for affirmances. The supreme court, however, imposed a higher standard. The court interpreted another statutory directive, which mandated that appeals to the appellate court be decided in the same manner as those docketed in the supreme court, as requiring a written statement of reasons for an affirmance.<sup>40</sup>

The supreme court itself, however, had occasionally stretched this writing requirement a bit. It sometimes regarded three paragraphs and a mandate as an adequate explanation.<sup>41</sup> Other times two paragraphs was enough.<sup>42</sup> Indeed, even one paragraph apparently satisfied the constitution.<sup>43</sup> The court had taken to heart delegate Gibson's intent: "The section I offer does not require of the court a long argumentative opinion—about that the judges can consult their own taste."<sup>44</sup>

Revision of the constitution in 1970 abolished altogether the requirement of a written statement of reasons.<sup>45</sup> Similarly, the legislature rendered more general the statute concerning issuance of decisions. The statute now provides that "[t]he judicial opinion or decision in each case determined by the Supreme Court or Court of Appeals shall be reduced to writing."<sup>46</sup>

The state's appellate courts have made use of this new authority. In 1976, the supreme court amended appellate rule 15 to grant panels of the court of appeals the power to decide which opinions would be published.<sup>47</sup> Exer-

39. 1901 Ind. Acts, ch. 247, § 17.

40. *Hunter v. Cleveland, Cincinnati, Chicago & St. Louis Ry.*, 202 Ind. 328, 174 N.E. 287 (1930).

41. See *Watts v. Dixon*, 28 Ind. 276 (1867).

42. See *Clouser v. March*, 15 Ind. 82 (1860).

43. *Norris v. State*, 69 Ind. 416 (1879) (forty-six words) ("This was a prosecution for selling 'one gill of whiskey' without license. The same question is made in this case as that decided in the case of *Arbintrode v. The State*, 67 Ind. 267. Upon the authority of that case, the judgment in this case must be reversed. Judgment reversed.").

44. *DEBATES*, *supra* note 38, at 1862.

45. 1969 Ind. Acts, ch. 457, § 2 (deleting the first twenty sections of article seven, including section five, which required a statement in writing).

46. Pub. L. No. 427, § 4, 1971 Ind. Acts; IND. CODE § 33-2.1-3-2 (Burns 1975).

47. Rule 15 of the Indiana Rules of Appellate Procedure provides:

(A) Publication and precedential value of dispositions by Court of Appeals.

(1) The Court of Appeals may dispose of an appeal either by written opinion or by written memorandum decision.

(2) Disposition by written opinion shall be made if such disposition:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Criticizes existing law, or

(c) Involves a legal or factual issue of unique interest or substantial public importance.

Provided, however, dissent from a memorandum decision may be expressed by written opinion. Such dissenting opinions may be designated "For Publication" if the dissenting judge determines that the standard for written opinions is satisfied. Disposition of appeals shall otherwise be by memorandum decision.

cising this discretion, the court of appeals published less than forty percent of its opinions last year.<sup>48</sup> Although the knowledge that the opinion will not be published theoretically makes it possible to write a shorter, less polished piece, the judge who drafted the rule believes that pride of authorship has led the members of the court of appeals to spend nearly as much time on unpublished opinions as on those which are to be published.<sup>49</sup> Of course, this practice reduces the efficiency of using unpublished opinions.

The supreme court has also used the greater flexibility of the 1970 constitution for its own operations. In 1986, the court began disposing of disciplinary actions against lawyers by issuing orders in cases in which the sanction imposed is a private reprimand. One year later, the supreme court also amended appellate rule 11 to provide that cases transferred to the supreme court from the court of appeals might be decided by summary adoption of all or part of that court's opinion.<sup>50</sup> This change in rule 11 has resulted in a number of summary affirmances of decisions issued by the Court of Appeals, thus giving the case the precedential authority of a supreme court decision.<sup>51</sup> Summary disposition has also been used to adopt part of a dissent while affirming the majority on other issues.<sup>52</sup>

Still, Indiana's appellate courts remain nearly unique in their determination to write an opinion in virtually every case decided on the merits.<sup>53</sup> The supreme court's decision to use its authority to adopt summarily opinions of the intermediate courts together with its decision that the court of appeals must use written opinions may be fairly characterized as constituting a judicial policy that every litigant is entitled to one written explanation of his

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(3) Unless specifically designated "For Publication," memorandum decisions shall not be published nor shall they be regarded as precedent nor cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case.

IND. R. APP. PROC. 15(A).

48. A survey of 502 N.E.2d through 517 N.E.2d indicated that 706 opinions were not published in 1987. The Court of Appeals issued 1,114 opinions during the year.

49. Interview by George T. Patton with Patrick D. Sullivan, Judge, Indiana Court of Appeals, in Indianapolis (Jan. 13, 1988).

50. IND. R. APP. PROC. 11(B)(3).

51. See, e.g., *Berns Constr. Co. v. Miller*, 516 N.E.2d 1053 (Ind. 1987); *Cook v. Wozniak*, 500 N.E.2d 231 (Ind. App. 1986), *aff'd*, 513 N.E.2d 1222 (Ind. 1987); *Lehiy v. State*, 501 N.E.2d 451 (Ind. App. 1986), *aff'd*, 509 N.E.2d 1116 (Ind. 1987).

52. See *Romack v. Public Serv. Co. of Ind.*, 499 N.E.2d 768 (Ind. App. 1986), *modified*, 511 N.E.2d 1024 (Ind. 1987).

53. In 1985, the Indiana Court of Appeals disposed of 97% of the cases it heard by opinion. 1985 INDIANA JUDICIAL REPORT, *supra* note 1, at 16. The supreme court issued opinions in 99% of the cases it decided on the merits. *Id.* at 2, 10. This figure does not include denials of requests for transfer of cases previously heard by the court of appeals. Some other jurisdictions dispose of less than one fourth of the cases heard by opinion. For example, the New Jersey Supreme Court issued opinions in 18% of the cases it heard, while the Kentucky Supreme Court issued opinions in 23%. 1985 CASELOAD STATISTICS, *supra* note 8, at 16.

case. The price paid for this policy is a high one, but it doubtless a policy strongly supported in the state's legal community.

#### *D. Staff Support*

Another principal method which has been used to increase the decision-making capacity of a court has been the addition of staff, other than judges, to assist in part of the work of a court. While the first staff members added are generally law clerks working for a particular member of a court, the growth of central staffs has been a hallmark of twentieth century court reorganization.

Central staffs generally fall into two categories. First, courts frequently add administrators to work on matters of budget and finance, personnel, and libraries. Second, courts have more recently added staff to assist in the court's decisionmaking process. For courts of last resort, this frequently entails a staff that evaluates the incoming requests for review and provides an initial analysis of whether the court should take the case. It may also include a staff that drafts orders and even opinions for the whole court. While these staff efforts increase a court's decisional capacity, many in the legal community share a concern that we risk converting appellate judges into "administrators processing paper in a large bureaucracy, rather than judges writing opinions."<sup>54</sup>

Indiana has implemented all these methods of increasing staff. On the administrative side, the first supreme court administrator was hired in 1967. By 1988, his staff has grown to seven, consisting of the administrator, three attorneys and three secretaries. This staff provides support in budgetary control, personnel, and other internal administrative matters. The first administrator of the division of state court administration was hired in 1975. His office acts as the supreme court's liaison with the trial courts. His staff now consists of eleven people: the administrator, two attorneys, two professional records managers, and six paralegals.

To facilitate the decisionmaking process, the supreme court uses the court administrator to analyze civil petitions for transfer from the court of appeals. The administrator's office reviews the record and briefs in these cases and presents a memorandum of his analysis to the court. This memorandum usually includes a recommendation about whether the court should take or deny transfer and whether it should grant oral argument. If all five members of the court respond to this written recommendation in the same way, the matter is disposed of without court conference.<sup>55</sup>

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54. Bird, *The Hidden Judiciary*, 17 JUDGES J. 4, 6 (1978).

55. This method was described in more detail in a letter by Justice Donald Hunter to Justice George Rose Smith of the Arkansas Supreme Court. See Smith, *The Appellate Decisional Conference*, 28 ARK. L. REV. 425, 428 (1975).

The supreme court has also used the division of state court administration to draft disciplinary opinions. Opinions in such cases were formerly written and signed by individual members of the court.<sup>56</sup> In 1976, the court began issuing these opinions *per curiam*.<sup>57</sup> Each disciplinary case is discussed at court conference, and the staff is directed to draft a *per curiam* opinion which reflects the views expressed at the conference. This draft is subsequently circulated for consideration by each member of the court.

A non-conference method is used by the supreme court for virtually all direct criminal appeals.<sup>58</sup> Such appeals are assigned to individual members of the court for review. The justice reviews the transcript and the briefs of each assigned case, researches the legal questions, and then tenders to the other four members a proposed opinion disposing of the case. Other members of the court respond by joining the opinion, voting against it without opinion, or circulating a competing opinion. Where the proposed majority opinion fails to win a majority vote, the case is reassigned to someone in the majority.<sup>59</sup>

This method of deciding criminal cases largely eliminates two common features of appellate decisionmaking: court conference and oral argument. While it saves the time which would be consumed by these two activities, it carries with it corollary disadvantages. Judges and lawyers alike lament losing the opportunity for interaction which oral argument represents. Moreover, the non-conference method leads an author to draft an opinion without knowing much about the views of other members of the court. It also places other members of the court in the position of first learning about a case after a colleague has already invested many hours in writing an opinion. It also generates a subtle pressure to defer to the views of the colleague who has invested his time in the case. This pressure to concur can result in the court issuing an opinion without having a firm commitment to its principles. Such a decision may not last long as precedent.<sup>60</sup>

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56. The last such opinion was authored by Justice Dixon W. Prentice and handed down on February 3, 1976. See *In re Farr*, 264 Ind.153, 340 N.E.2d 777 (1976).

57. The first *per curiam* opinion was issued on February 13, 1976. See *In re Perrello*, 341 N.E.2d 499 (Ind. 1976).

58. The exception is appeals of capital cases. While these cases were distributed in rotation from 1978 to 1987, the court now holds oral argument on all such cases and assigns each for an opinion after the argument.

59. The court has traditionally made public certain information about the number of times each year this occurs, noting in its annual report the number of cases from one member to another, including "cases reassigned where the Justice initially given the case cannot obtain a majority for his proposed opinion." DIVISION OF STATE COURT ADMINISTRATION, 1986 INDIANA JUDICIAL REPORT 14 [hereinafter 1986 INDIANA JUDICIAL REPORT].

60. The Indiana Supreme Court's decision in *Phillips v. State*, 492 N.E.2d 10 (Ind. 1986), which held that to establish admissibility of a statement made after an accused has invoked his right to remain silent during custodial interrogation, the state must show that the accused later initiated the dialogue and knowingly waived the previously invoked right to remain silent, was set aside less than six weeks later in *Moore v. State*, 498 N.E.2d 1 (Ind. 1986), which held that a showing that the dialogue was initiated by the accused was not necessary.

### E. Restrictions on Access

Another means of combatting growing caseloads is to restrict access to the court of last resort. Just as courts in the nineteenth century used rules of procedure as a way of restricting access to appeal,<sup>61</sup> courts in this century have continued to reduce the right of automatic appeal as a way of restricting access.<sup>62</sup>

Without some restriction on access to a court of last resort, that court's ability to act in its law-giving function will eventually be destroyed in favor of its error-correcting function. Creation of an intermediate court can limit access to the state's supreme court and protect its law-giving function from the dangers of an unrestricted docket. That protection is only as successful as the supreme court's authority to select what it will consider from the trial courts or the intermediate court.<sup>63</sup>

Nevertheless, many states with a two-tiered appellate system have retained initial or mandatory jurisdiction in the state's highest court for certain kinds of cases. Most common among these are capital cases<sup>64</sup> and cases in which the constitutionality of a statute is at issue.<sup>65</sup>

Use of these measures to restrict access to a state's court of last resort is a part of Indiana's judicial history. From its beginning as the state's only appellate court, Indiana's supreme court has been a court of shrinking mandatory jurisdiction. The first significant departure from a wholly mandatory docket occurred when the legislature created the Indiana Appellate Court to hear appeals of civil cases and misdemeanors.<sup>66</sup> This left all criminal matter as mandatory appeals for the supreme court. When the 1970 amend-

61. See generally K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); R. POUND, *CRIMINAL JUSTICE IN AMERICA* 160-66 (1945); Horowitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975).

62. In Florida, the state supreme court reviews primarily court of appeals decisions that reflect a conflict with another district or are certified by the court of appeals to the high court. See generally England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (1980).

63. An example of a constitutional provision destructive of the exercise of discretion is New Jersey's rule allowing an appeal to the supreme court when a member of the intermediate court panel files a dissent. N.J. CONST. art. 6, § 5, para. 1(b).

64. CAL. CONST. art. 6, § 11 (1879, amended 1966); WASH. CT. R. (RAP) 4.2(a).

65. ILL. CONST. art. 6, § 4(c); WASH. CT. R. (RAP) 4.2(a).

66. 1891 Ind. Acts. ch. 37, § 1. The act provides:

[The Appellate Court shall] have exclusive jurisdiction of all appeals from the Circuit, Superior and Criminal Courts, in cases of misdemeanor; cases originating before a Justice of the Peace where the amount in controversy exceeds fifty dollars (\$50) exclusive of costs; all cases for the recovery of money only where the amount in controversy does not exceed one thousand dollars, and all cases for the recovery of specific personal property; actions between landlord and tenant for the recovery of the possession of the leased premises, and in all cases of appeals from orders allowing or disallowing claims against decedents' estates. In all such cases the decision of the Appellate Court shall be final . . . .

*Id.*

ments to the constitution were adopted, the legislature gave the new court of appeals jurisdiction to hear criminal cases in which the sentence was ten years or less.<sup>67</sup> The Judicial Study Commission, which developed the 1970 amendments, proposed this division of jurisdiction between courts because direct appeal was "felt desirable when liberty, for an extensive period of time, or life was involved."<sup>68</sup> The commission believed that "the flexible mechanism of rules will adjust all remaining matters."<sup>69</sup>

## II. THE INDIANA SUPREME COURT TODAY

### A. *The Present Dilemma*

Although a great many of the tools available to appellate judges have been used as ways to manage the increasing caseloads in the Indiana Supreme Court, by the 1980's it became clear that additional reforms were needed. By the end of 1985, the number of pending cases in the court had reached an all-time high of four hundred.<sup>70</sup> For a court which had not written more than 334 opinions in any of the previous eight years, this represented more than a year's worth of work.<sup>71</sup>

This backlog translated into substantial delay for litigants. At the end of 1987, the time between submission of a fully briefed criminal case and a decision averaged thirteen months.<sup>72</sup> This average was far short of the ABA Standards for Appellate Courts, which suggest that sixty to ninety days is an appropriate time between submission and a decision.<sup>73</sup> The court's struggle to reduce this delay by writing as many opinions in as little time as possible occasionally produces conflicting authority,<sup>74</sup> undermining the essential func-

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67. Pub. L. No. 427, §§ 3, 8, 1971 Ind. Acts (providing for the organization of the new Court of Appeals and repealing all prior provisions, including the former Appellate Court).

68. REPORT OF THE JUDICIAL STUDY COMM'N 437 (1967) (available in Indiana Supreme Court Library).

69. *Id.*

70. 1986 INDIANA JUDICIAL REPORT, *supra* note 59, at 11.

71. See DIVISION OF STATE COURT ADMINISTRATION, 1984 JUDICIAL REPORT at 10. See also DIVISION OF STATE COURT ADMINISTRATION, 1983 JUDICIAL REPORT at 10; DIVISION OF STATE COURT ADMINISTRATION, 1982 JUDICIAL REPORT at 10; DIVISION OF STATE COURT ADMINISTRATION, 1981 JUDICIAL REPORT at 191; DIVISION OF STATE COURT ADMINISTRATION, 1980 JUDICIAL REPORT at 114; DIVISION OF STATE COURT ADMINISTRATION, 1979 JUDICIAL REPORT at 94; DIVISION OF STATE COURT ADMINISTRATION, 1978 JUDICIAL REPORT at 93; DIVISION OF STATE COURT ADMINISTRATION, 1977 JUDICIAL REPORT at 137.

72. A review of the last twenty-five opinions issued on direct criminal appeals shows that the average time between submission of the case and disposition was 13.12 months.

73. STANDARDS RELATING TO APPELLATE COURTS § 3.52 (Approved Draft 1977).

74. Compare *Groves v. State*, 456 N.E.2d 720 (Ind. 1983) (admitting Regiscope picture without foundation of evidence about the manner in which the picture was processed and complete chain of custody was reversible error) with *Stark v. State*, 489 N.E.2d 43 (Ind. 1986) (admitting Regiscope photograph without evidence of manner of processing or complete chain of custody was proper).

tion of the published opinion. Moreover, quite aside from the delay of individual cases which this backlog represented, the court's ability to accept discretionary appeals, particularly appeals of civil cases, was severely constrained.<sup>75</sup>

Two principal forces created this increase in criminal appeals docket in the supreme court. One was the revision of the substance of the criminal code in 1976. A number of criminal statutes which formerly did not result in sentences greater than ten years now routinely do so.<sup>76</sup> The other contributing factor was the adoption of the habitual offender statute and its increased use by prosecutors.<sup>77</sup> The result is a larger number of criminal convictions which may be appealed by right to the supreme court and a supreme court which spends nearly ninety percent of its writing time on opinions for direct criminal appeals.

Besides deploying a number of measures to increase its capacity to decide this deluge of criminal matters, the court has acted in two ways to retard it. First, the supreme court held that its mandatory direct jurisdiction did not include cases in which the total sentence was more than ten years but for which ten years or less was the maximum on any one offense.<sup>78</sup> Second, the court revised appellate rule 4 to provide that appeals from the denial of

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75. The following table illustrates the constraints placed upon the court by the direct appeal mandate:

<u>Year</u>	<u>Opinions</u>	<u>Direct Appeal Opinions (%)</u>	<u>Civil Transfer Opinions (%)</u>
1986	445	395 (89%)	21 (5%)
1985	330	291 (88%)	22 (7%)
1984	327	280 (86%)	19 (6%)
1983	323	281 (87%)	24 (7%)
1982	334	285 (85%)	23 (7%)
1981	304	246 (81%)	38 (13%)
1980	270	226 (84%)	21 (8%)
1979	262	210 (80%)	21 (8%)
1978	275	234 (85%)	21 (8%)
1977	164	138 (84%)	12 (7%)
1976	165	137 (83%)	7 (4%)

76. For example, entering to commit a felony carried an indeterminate term of one to ten years. IND. CODE § 35-13-4-5 (Burns 1975). The current burglary statute provides for conviction of a class B burglary, with a potential twenty-year sentence. IND. CODE §§ 35-43-2-1, 35-50-2-5 (Burns Repl. 1985). Personal injury inflicted during a robbery led to an indeterminate sentence of ten to twenty-five years. IND. CODE § 35-13-4-6 (Burns 1975). Conviction of a class A robbery now results in a fixed term of thirty years. IND. CODE §§ 35-42-5-1, 35-50-2-4 (Burns Repl. 1985).

77. IND. CODE § 35-50-2-8 (Burns Repl. 1985). The number of habitual offenders being committed to the state's prisons tripled between 1985 and 1987. Letter to Kelly J. Bauman from Ronald R. Vail, Supervisor, Research and Statistic Section, Reception-Diagnostic Center (Jan. 20, 1988).

78. *Hawkins v. Jenkins*, 268 Ind. 137, 374 N.E.2d 496 (1978).

post-conviction relief received after January 1, 1986, be docketed in the court of appeals.<sup>79</sup> These had previously been docketed as though they were criminal actions. Because they are styled as civil actions, the court had authority under the constitution to redirect them.

The only two available remaining tools are use of summary dispositions of criminal cases by the supreme court and the further restriction of access to the court for criminal defendants. The former creates difficult problems for federal district courts attempting to resolve habeas corpus claims because a summary disposition does not reveal whether the state court has rejected an allegation of error on its merits or on procedural grounds.<sup>80</sup>

Having used virtually every tool of modern judicial administration to build its capacity to decide appeals and having exhausted a relatively short list of measures by which the number of appeals can be reduced, the supreme court still finds itself overwhelmed by direct criminal appeals. Because the forces which have created the increase in such appeals seem unlikely to abate, it is now clear that constitutional modifications to the supreme court's jurisdiction are a necessity.

### *B. The Constitutional Amendment*

At the instigation of the Judicial Nominating Commission and with the support of the supreme court, the Indiana legislature proposed an amendment which would alter the present provision in the constitution which requires that all criminal cases with sentences or more than ten years be appealed directly to the supreme court. The amendment would require that only cases involving a sentence of more than fifty years be treated as direct appeals.<sup>81</sup>

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79. Order amending IND. APP. R. PROC. 4(a), 485 N.E. 2d xxiii (1985). Appeals from the denial of post-conviction relief in cases involving the death penalty or life imprisonment continue as direct appeals.

80. See Note, *On the Threshold of Wainwright v. Sykes: Federal Habeas Court Scrutiny of State Procedural Rules and Rulings*, 83 MICH. L. REV. 1393 (1985).

81. The legislation reads as follows:

SECTION 1. The following proposed amendment to the constitution of the State of Indiana, which was agreed to by the One Hundred Fourth General Assembly and referred to this General Assembly for reconsideration and agreement, is agreed to by this, the One Hundred Fifth General Assembly of the State of Indiana.

SECTION 2. ARTICLE 7, SECTION 4 OF THE CONSTITUTION OF THE STATE OF INDIANA IS AMENDED TO READ AS FOLLOWS: Section 4. Jurisdiction of Supreme Court. The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from judgment

Approved by successive meetings of the General Assembly, the matter is now before the electorate.<sup>82</sup>

Granting the supreme court authority to divert initial criminal appeals to the court of appeals would permit the supreme court to develop law in other areas. Criminal defendants would still receive a written opinion when the court of appeals reviews the trial court's judgment, and they could seek further review in the supreme court through petition to transfer. Notwithstanding the additional burden which this would place on the court of appeals, eleven of the twelve members of that court favor the amendment because it will allow the state's court of last resort to speak more often on issues of civil law.

Adoption of this amendment by the electorate would permit the supreme court to define through rule the division of initial appeals between its jurisdiction and that of the court of appeals.<sup>83</sup> Were the court to use the full authority of re-direct the initial appeals of criminal cases to the intermediate court, the number of direct criminal appeals in the supreme court would fall drastically.<sup>84</sup> The number of new, direct appeals received by the court in 1987 suggests that the number of mandatory appeal would be approximately thirty per year.<sup>85</sup>

The amendment would allow the supreme court to hear more oral arguments, deliberate more thoroughly, and write more reasoned opinions on legal questions of state-wide importance. It will give the supreme court time

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imposing a sentence of death, life imprisonment or imprisonment for a term greater than fifty years shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentences imposed.

Pub. L. No. 375, 1987 Ind. Acts.

82. Originally introduced in 1985 as H.J.R. 8, the house approved this proposed amendment by a vote of 87 yeas to 9 nays. 1985 HOUSE JOURNAL, *supra* note 29, at 164. The senate passed the bill by a vote of 45 yeas to 1 nay. 1985 SENATE JOURNAL, *supra* note 29, at 508 (1985). The bill became Pub. L. No. 373, 1985 Ind. Acts. At the next General Assembly, the house approved the proposed amendment, introduced as H.J.R. 1, by a vote of 97 yeas to 2 nays. 105th General Assembly, 1st Sess., HOUSE JOURNAL, 60-61 (1987). The senate approved the bill by a vote of 47 yeas to 2 nays. 105th General Assembly, 1st Sess., SENATE JOURNAL, 633-34 (1987) [hereinafter 1987 SENATE JOURNAL]. This bill became Pub. L. No. 375, 1987 Ind. Acts. The Indiana Constitution requires that any amendment thereto must be approved by a majority of two successive terms of the General Assembly before it is submitted to the electors of the state. If approved by a majority, the amendment becomes a part of the constitution. IND. CONST. art. 16, § 1.

83. IND. R. APP. PROC. 4(A)(7); IND. CODE § 33-2.1-3-1 (Burns Repl. 1985).

84. Of the 182 direct criminal appeals decided by the supreme court during the last six months of 1987, 14 were appeals from sentences of more than fifty years, two involved a sentence of life, and four were capital cases. Of the remaining cases, 18 were post conviction relief appeals still coming from the backlog.

85. During 1987, some 286 direct criminal appeals were submitted to the court for decision. SUPREME COURT OF INDIANA, 1987 PROGRESS REPORT 2 n.3. About 11% of these involved sentences of over fifty years, life, or execution.

for creativity, for lawmaking, for rethinking and readjusting the common law. That is the proper function of a state's court of last resort.

Although the caseload of the court of appeals would, by definition, be increased substantially, it appears that the increase would not be immediate. Redirectly newly-docketed cases would gradually shift this caseload over a two year period.<sup>86</sup> Moreover, because the court sits in smaller panels and uses unpublished opinions, the work load does not translate directly in terms of man hours per case. Still, it seems likely that the re-direction of such a substantial number of appeals would lead shortly to the need for an additional panel of the court of appeals. This probability was broached with the legislature before its second adoption of the amendment.<sup>87</sup>

### CONCLUSION

Indiana's appellate system, like those of other states, will continue to face the challenge of increasing numbers of appeals. The tools available do not change dramatically through the decades. Which of these solutions is employed in any given state at any given moment may differ, but the objectives remain remarkably similar. I described my vision concerning these objectives upon taking office as Chief Justice:

We aspire as a court to dedicate more of our time to the legal problems which affect the average citizen: child support and custody, landlord-tenant disputes, commercial law, negligence, product liability, and the like. We hope to work our way out from under the mountain of repetitive matters and have the time to write fewer opinions and write them better. We hope that lawyers will more often have the chance to argue their cases in person and that the public will more often have the occasion to see us in the courtroom.<sup>88</sup>

Passing the proposed amendment to Indiana's constitution is critical to this vision.

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86. The delayed effect of such a change is apparent from the results of the supreme court's decision that all post-conviction relief cases be docketed in the court of appeals effective January 1, 1986. Two years later, the supreme court was still deciding post-conviction appeals. *See Bates v. State*, 517 N.E.2d 379 (Ind. 1988).

87. Address by Richard M. Givan, *supra* note 20 (mentioning that an additional panel of the Court of Appeals might be required). This address, given on February 3, 1987, preceded the Senate vote on April 3, 1987. 1987 SENATE JOURNAL, *supra* note 82, at 633.

88. Remarks by Randall T. Shepard on Assuming the Office of Chief Justice, Old Vanderburgh County Courthouse, Evansville, Indiana (Mar. 4, 1987).

