

**“Good Enough’ Isn’t Good Enough”**

**State of the Judiciary Address**

**To a Joint Session of the Indiana General Assembly**

**By Chief Justice Randall T. Shepard**

**January 19, 2005**

Over the last year or so, I have been co-editing a book on the history of Indiana law to be published this fall. In the course of that work, I’ve come to appreciate an observation about our state by a professor at Bloomington named James Madison, who is probably the leading Indiana historian of his generation. Professor Madison says that Indiana is still influenced by the spectacular failure of the biggest venture the state ever launched, the internal improvement plan of 1836, the most famous piece of which was the Wabash-Erie Canal. The resulting financial calamity brought the state government to the brink of bankruptcy, provoked the constitutional convention of 1850, and shaped the 1851 constitution.

Madison says that the lesson Hoosiers of the time drew was that big and bold is dangerous and that small and incremental is safer. Whether this was the right lesson to be learned from this great 19<sup>th</sup> century financial disaster is open to debate, he says, but “it is the lesson generations of Hoosiers have chosen to learn.” Thus, if things are “good enough,” we often decide to leave them alone rather than strive for a great leap up. In short, he says, the lesson has been that “good enough” is good enough.

As I report to you today on the state of the third branch, Professor Madison's analysis is echoed in the observation by one of my colleagues that nothing really titanic has happened in the Indiana judiciary since the 1970s. Back then, in one five-year period, the legislature and the voters fundamentally restructured the appellate courts, created consolidated trial courts in the urban areas, and abolished the venerable justices of the peace. Now we have hardly stood still since then, but systemic changes have proven very difficult. But there have been ways in which the Indiana court system hasn't worked all that well, and I've come today to argue that "good enough" isn't good enough, and to lay out what we've been doing to make our part of the government much better than "good enough."

### **How Do You Find Out What's Going On?**

Nearly every opinion poll shows that people find their courts mysterious and complicated and hard to learn about. In the course of resolving people's disputes, we generate tens of millions of documents a year, and until the 1980s, we did this according to methods largely shaped by inertia and passed down from one generation of deputy county clerks to another -- in offices that frequently suffer very high turnover rates. This made going from one courthouse to another a little like traveling from Latvia to Estonia. Changing that has been like altering the course of an oceanliner, but at least now every document is called by the same name in every courthouse, every document carries a standardized number, and we have state-wide rules about how long you have to keep that paper and when it's all right to throw it away.

Still, we have only begun to catch up with what a modern economy needs from its judicial system, and we're determined to move faster. Under the energetic leadership of Justice Frank Sullivan and the Supreme Court's Judicial Technology and Automation Committee -- we call it JTAC -- a project is well underway to make available to every Indiana court a state-of-the-art computer system to keep track of and manage the nearly two million new cases -- from murder to child support to domestic violence to business disputes -- that people ask us to resolve each year.

When our project is complete, every Indiana court will have a 21<sup>st</sup> century case management system -- with obvious benefits to our constituents who are in court and tangible savings to the government's bottom line. And Indiana courts will be able to share information electronically both with courts in other counties and with state agencies that need and use court information like the Bureau of Motor Vehicles and the State Police -- with obvious benefits to public safety. This is the single most ambitious project ever undertaken by Indiana's judiciary, and we are grateful to the many members of the General Assembly of both houses and both parties (in particular Senators Bray, Clark, and Kenley and Representative Kuzman and former Representatives Gregg and Sturtz) for your support in past sessions that has made it possible.

In the course of this ambitious project, we have had to examine some of the most sensitive issues of the information age, like: "How do you create easily accessed information about divorces or business disputes without handing the identity thieves the

tools of their trade?” and “How do you process a domestic battery case without giving the batterer a roadmap?” Justice Brent Dickson led a task force that met every week for a year to craft some of the country’s most thoughtful and balanced rules about access and confidentiality. The Supreme Court approved these, and they became effective two weeks ago.

And once there are rules on that topic or any other, how does a citizen find them? For most of Indiana history, we communicated largely by tacking rules up on courthouse bulletin boards, but beginning this year rules adopted for the operation of local courts will be posted on the Internet and follow a uniform format so that citizens and lawyers who travel outside their home counties can have a fighting chance at finding and understanding them.

And we’re committed to using the power of electronics to help people understand the court system in a host of other ways. Litigants and reporters can watch webcasts of oral arguments in the appellate courts, teachers can download educational materials, lawyers can learn about court decisions and orders, college students can read Indiana legal history or learn how to get into our program for minority and low-income law students. The use of these resources by citizens jumped 73% last year, to 2.8 million unique visits.

We're creating a virtual revolution at the Indiana Judiciary in what people now call "transparency". The pioneer dreamers of the 1830s would be proud of what's happening.

### **Fractured Structure**

One of the perennial barriers to reform has been the framework of the state's court system, largely unaltered since before the turn of the last century. In effect, it hasn't been a court system but rather 92 court systems or even 150 court systems, and the result is sometimes what you'd get by sending a football team out onto the field with instructions that each of the eleven should choose his own play for the next down.

The framework we inherited from the 19<sup>th</sup> century is okay, but that's the most you could say for it. That's why we have supported various bills the General Assembly has passed to place the judges in a given courthouse under a single umbrella, taking joint responsibility for the cases people file there. You've now created such arrangements in a majority of the urban counties. That's why we supported the proposal by Governor Frank O'Bannon to change the financial base of the trial court system. It's why I support measures to change the selection of trial judges in Marion County. The existing arrangements on structure, finance, and selection work well enough, but not as well as they should or can.

Problems of structure are the reason why we have to put in so much effort on the problem of uneven caseloads. Let me tell you why that matters to people other than judges. Imagine two women who file for divorce in the same courthouse on the same day, both needing an order for temporary child support. One gets an order quickly because she's in a court that isn't very busy and the other waits for weeks because she's in a court that's overloaded. We now study the workload of Indiana judges every year, and we periodically direct reallocation of cases when we uncover huge disparities. Toward the same end, we deploy one of the most valuable tools we have to rectify these problems -- the work of senior judges, and next week we plan to revise the way we use their time to focus on the most overburdened courts.

And while I'm talking about people, I want to urge passage of House Bill 1777, designed to give judges and prosecutors a cost of living adjustment for the first time in eight years. You know that we supported last year's bill to create the Public Officers Compensation Commission, and I believe their recommendations for the three branches represent good policy. It is, of course, up to you how those recommendations are treated.

As for the men and women who serve as judges and prosecutors, House Bill 1777 restores the loss of purchasing power over the years since the legislature last passed a pay bill and not a dollar more than that, to be financed by the users of the courts. I thank Representatives Foley and Richardson for their willingness to carry this legislation, and I thank Governor Daniels for his declaration that this is one of his priorities for the session.

For the families of the judges and prosecutors and for the people who rely on them for justice, I ask you to tend to this need.

### **Costly and Complicated**

Despite all the efforts of recent years, many Americans still regard the court system as a place where it's easy to stumble your way in and costly and time-consuming to find your way out.

The burdens of this reality weigh especially hard on children, and we have to change that. It's one of the reasons we focus so strongly on mediation. You gave us legislation last year that will make possible for the first time the widespread use of mediation in cases involving families and children. In the six months since that legislation took effect we have created mediation programs in counties representing forty percent of the state's population. This spring we will commence a vigorous round of training for lawyers and others interested in family mediation, offering it free for people willing to take some family law mediation assignments without pay.

You also made it possible to pursue our relatively inexpensive experiments in Family Courts. These experiments keep families from bouncing around multiple courtrooms, and I think they improve our chances of protecting children who are actually threatened by their living situation. Some of those children are threatened because they bounce around from one placement to another, and we've recently been able to focus

some federal money on fighting foster care drift and getting children into permanent homes more quickly.

The number of Indiana lawyers who donate their time helping people of modest means through these problems – we call it “pro bono” service -- has reached a new all-time high, and the system that Indiana has adopted has attracted attention all over the country. While the lawyers volunteer their services, it takes money to sustain the recruiting, training, and matching of the lawyers and counties. To keep this effort vibrant and growing, the Supreme Court recently decided to oblige all members of the profession who hold funds in trust to place those funds in interest-bearing accounts benefiting the pro bono system.

### **Rebuilding the American Jury**

Something else that’s needed attention for a long time is the way we manage that birthright of all Americans, trial by jury. Most schoolchildren know that when the nobles confronted King John on the field at Runnymede in 1215 that one of the promises Magna Carta contained was the right to a trial by your peers, but these days the legal press is running stories about the disappearance of the American jury trial. We’ve too long taken it for granted.

We are determined to put a 21<sup>st</sup> century burnish on this ancient right -- to treat people better when they come to the courthouse for jury service, to give them a quality

orientation about the task ahead, and hand them better tools for their job. For example, as long as I can remember, every time jurors left the courtroom for lunch or recess the judge would say, “You must not talk about this case among yourselves until the trial is over.” That, of course, treated them like children; it hardly reflects how adults make group decisions. The crucial thing for a juror, or a judge, or any other decision maker, is to keep an open mind until you’ve heard it all. Starting this month that’s what we’ll tell jurors: “If you want to discuss this among yourselves, that’s fine, but don’t get yourself locked in to an outcome until you’ve heard both sides.”

We also have to make juries more representative, which is why we support eliminating the many statutory exemptions from jury service that give certain classes of citizens the right not to do what all the rest of us have to do. And it’s why we’ve required using more than voter registration lists in creating pools of potential jurors. We hope this year to be able to provide every county with easy to use, up-to-date lists of names and addresses from sources like the Bureau of Motor Vehicles and the Department of Revenue. And there are two things the General Assembly could do to help, neither of which will cost anything: give us better access to the existing state-wide voter lists and make it clear that we can summon jurors using whatever mix of lists will produce the widest participation in jury service. I think we could probably do this by court rule, but it would be cleaner if the court rule and the Indiana Code lined up.

And this last change will do something else very important. It’s a terrible fact that some people refrain from registering to vote because they know it means they might get

called for jury service. Breaking that linkage will be better for the system of trial by jury, but it will also be good for democracy.

### **Criminal Alternatives Not Good Enough**

Something that was just “good enough” for a very long time was the set of arrangements that we used for correction of those convicted of crime. Until the 1980s, the state simply left to happenstance the development of alternatives to prison, and virtually every incentive militated in favor of committing offenders to the Department of Correction, putting more demand on the state’s general fund. This hasn’t been good fiscal policy, and it certainly wasn’t good public safety policy. Most of the alternatives to incarceration have been the product of local effort led largely by judges and prosecutors. More recently these alternatives have been assisted by the Department of Correction, but the growth of these simply isn’t fast enough to keep up with rising demand. Please know that we stand prepared to be your partners both to produce better outcomes and to help relieve the enormous pressure the DOC budget represents.

I want to tell you some good news about the effort we have made together to create more credible public defender offices. In 1963, the U.S. Supreme Court required states to provide counsel at public expense, a hundred years after Indiana began doing so. The leading book on that decision was Gideon’s Trumpet, by Anthony Lewis of The New York Times. He came to a recent meeting of Chief Justices of state supreme courts to

speaking about what he called The Promise of Gideon. He said that on the whole the promise has gone unfulfilled and that he saw little reason for general optimism. “Except in Indiana” he said, and proceeded to tell those assembled about what Indiana has done.

### **Conclusion**

It is my aspiration, and the aspiration of my fellow judges, to create a system of justice to lead people all across America to appreciate Indiana for the decent place that it is – and lead our own citizens as they encounter their courts to regard them as places where judges and others do as much as human beings can do to deliver on the promise of substantial justice.

On that point, “good enough” can never be good enough.