

ELEMENTS OF MODERN COURT REFORM

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The story of America's courts during the last century could easily have been told by reference to two large-scale trends, one institutional and one jurisprudential. This new century features a third story, one of a very different sort.

As for courts as institutions, the early decades of the twentieth century featured the first identifiable national trend since the debates about judicial selection during the 1830s. Dean Roscoe Pound's famous speech to the annual meeting of the American Bar Association in 1906 reflected the breadth of the movement it begat: "The Causes of Popular Dissatisfaction with the Administration of Justice."¹ Pound's formula for unifying courts and building a new field called court administration became the central feature of judicial change for at least two generations.

Subsequent to this broad movement in organizational reform, Earl Warren's years at the U.S. Supreme Court launched a thirty-year jurisprudential story that featured both trend and counter-trend. The trend, of course, was the federalization of a host of rules and doctrines, largely in the criminal law, and their imposition on state courts through vehicles like the Fourteenth Amendment. One need only mention case names to evoke this movement: *Miranda v. Arizona*,² *Mapp v. Ohio*,³ *Brady v. Maryland*.⁴ The counter-trend that began in the 1980s and ran full force for the remainder of the century was the rise of state constitutional law litigation, given new life as the Supreme Court took a more modest approach to recognizing new federal constitutional rights.⁵

This Article argues that a third great trend has been under way in the American legal system, one characterized by court innovation. It has been driven by multiple elements of the legal profession, but features a new and unusual role by the courts themselves, especially a new role by state supreme courts and enterprises inside the judicial system where judges and court staff hold sway.

This period of court innovation features a vast collection of examples and objectives, but there follows here a recitation of some of the most evident reforms. While many of the illustrations feature Indiana stories, in each of these fields shares common ground with court reformers elsewhere.

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1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906); see also Randall T. Shepard, *Introduction: The Hundred-Year Run of Roscoe Pound*, 82 IND. L.J. 1153 (2007).

2. 84 U.S. 436 (1966).

3. 367 U.S. 643 (1961).

4. 373 U.S. 83 (1963).

5. See generally Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996).

I. BETTER ATTENTION TO FAMILIES AND CHILDREN

When most Americans say they are “going to court,” they do not mean that their products liability claim is about to be heard by a jury in an Article III tribunal, or even that their bankruptcy is under way in an Article I court. Rather, they mean that they were tagged for a traffic violation, or that there is some family dispute to be heard in the county courthouses that have been a ubiquitous feature of American life since Alexis de Tocqueville examined the nation during the 1830s.⁶

Still, long after American reformers created the first juvenile delinquency courts during the first decade of the twentieth century, disputes in the nature of dissolution of marriage, child custody, and abused and neglected children often tended to proceed like standard civil litigation. The modern scene reflects a very different picture, one characterized by a high level of national activity and state and local innovation. Indiana’s part in this national story is a considerable one.

A. *Guardian Ad Litem/Court-Appointed Special Advocates*

While the government and parents long enjoyed legal representation in child custody and abuse and neglect cases, children themselves did not. Realizing that understaffed courts and public agencies meant that children entering the court and foster care systems might be leaving the frying pan and entering the fire, Judge David W. Soukup, a juvenile judge in Seattle, developed the first Court-Appointed Special Advocate (CASA) program in 1977.⁷ Soukup personally recruited and trained community volunteers to speak for the interests of children who entered the child welfare system.⁸

6. Tocqueville was impressed by the extent to which the legal system impacted all aspects of American society. As he put it:

There is virtually no political question in the United States that does not sooner or later resolve itself into a judicial question. Hence the parties in their daily polemics find themselves obliged to borrow the ideas and language of the courts. Since most public men either were or are lawyers, it is only natural for them to bring their professional habits and ways of thinking to their dealing with the public’s business. Jury duty makes people of all classes familiar with legal ways. In a sense, the language of the judiciary becomes the vulgar tongue. Thus the legal spirit, born in law schools and courtrooms, gradually spreads beyond their walls. It infiltrates all of society, as it were, filtering down to the lowest ranks, with the result that in the end all the people acquire some of the habits and tastes of the magistrate.

. . . [I]t envelops the whole of society, worms its way into each of the constituent classes, works on society in secret, influences it constantly without its knowledge, and in the end shapes it to its own desires.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 310–11 (Arthur Goldhammer trans., The Library of America 2004) (1835).

7. *About: History of CASA*, IND. JUDICIAL BRANCH: DIVISION OF STATE CT. ADMIN., <http://www.in.gov/judiciary/galcasa/2387.htm> (last visited May 9, 2012).

8. *Id.*

Indiana developed its own statewide CASA Program in 1989, when the legislature created the Office of Guardian Ad Litem and Court Appointed Special Advocate Services, part of the Division of State Court Administration.⁹ Now the law requires appointing either a guardian ad litem or a CASA in all abuse and neglect cases.¹⁰ In 2009, nearly 3000 active CASA volunteers advocated for children in Indiana court proceedings.¹¹ Nationally, nearly 70,000 CASA volunteers represented nearly 250,000 children in 2008.¹² This court innovation has empowered caring citizens to have a remarkably positive impact on the lives of children who might otherwise have fallen through the proverbial cracks.¹³

B. Family Mediation and Family Courts

Beyond the question of representation, court reformers have been concerned with the problems that arise when one family may have multiple cases pending in different courts at the same time (say, a dissolution of marriage, a protective order, and a delinquency matter). Resolving these matters before different judges risks uninformed decision making and conflicting orders that may even make things worse.

Taking cues from national conversations about such issues, the Indiana Supreme Court and the Indiana General Assembly developed the Family Court Project in 1999.¹⁴ The Family Court Project allows bundling cases under a one-family-one-court model, either permanently or for a limited time. Recent analysis of these techniques demonstrates significant progress in avoiding conflicting orders, avoiding relitigation, using alternative dispute resolution, and coordinating court and community services for families and children.¹⁵

C. Parenting-Time Guidelines

Countless facets of the courts, from the way they are structured to the

9. IND. CODE § 33-24-6-4 (2011); *see also* Act of May 9, 1989, Pub. L. No. 357-1989(ss), 1989 Ind. Acts 2599.

10. IND. CODE § 31-33-15-1 (2011).

11. *See About: History of CASA*, *supra* note 7.

12. *Id.*

13. *See, e.g.*, Alex Campbell, *GM Retiree Is Honored for Her Volunteer Work as an Advocate for Child in Foster Care System*, INDIANAPOLIS STAR, Oct. 16, 2011, <http://www.indystar.com/article/20111016/HELP05/110160373/GM-retiree-honored-her-volunteer-work-an-advocate-child-foster-care-system>.

14. *See About the Family Court Project*, IND. JUDICIAL BRANCH: DIVISION OF STATE CT. ADMIN., <http://www.in.gov/judiciary/family-court/2396.htm> (last visited May 15, 2012). A number of counties have taken advantage of this project to fundamentally change the way their family law cases are managed. *See, e.g.*, St. Joseph Cnty. Local R. LR71-FL00-419 (effective January 1, 2008).

15. *See generally* FRANCES G. HILL & LORETTA A. OLEKSY, VISION AND EVALUATION: THE INDIANA FAMILY COURT PROJECT (2008), *available at* <http://www.in.gov/judiciary/family-court/2361.htm>.

vocabulary they use, affect the quality of dispute resolution. For example, for many years it was common to speak of divorces, child custody proceedings, and visitation rights. Seeking even simple ways to mitigate the acrimony for which these disputes are famous, Indiana has been at the forefront of redefining these concepts as dissolutions of marriage and parenting time. Recognizing that children benefit from frequent, continuing, and meaningful contact with both parents, and that scheduling time is more difficult between separate households the heads of which may not be on good terms, the Indiana Supreme Court adopted Parenting Time Guidelines for resolving disputes over children and ensuring that both parents have time to be just that to their children.¹⁶ The shift in emphasis away from the rights of adults and toward the needs of children eventually led the Indiana General Assembly to abolish the idea of “visitation.”¹⁷

D. Domestic Violence and the Protective Order Registry

More dangerous disputes, however, demand a hard look at how courts interact with other institutions. For example, in the year ending June 30, 2009, more than fifty Hoosiers died in incidents of domestic violence, and 11,251 adults and children went to an emergency shelter to escape a dangerous home.¹⁸ The preventable nature of many of these tragedies underscores the need for courts to ensure that their traditional ways of doing things do not hinder or frustrate law enforcement’s ability to take effective action. In the old days (which might be as recent as four or five years ago), a police officer responding to a domestic violence call might encounter a dispute over what a protective order might actually require and have few reliable ways of finding out. Such problems were all the more difficult when the order issued from a court of a different locale.

Recognizing this crucial role of police officers, the Indiana Supreme Court, the Indiana Criminal Justice Institute, and the State Police created the Indiana Protective Order Registry, administered by the Judicial Technology and Automation Committee (JTAC).¹⁹ An officer can pull up an electronic version

16. INDIANA PARENTING TIME GUIDELINES (2008); *see also* MICHIGAN PARENTING TIME GUIDELINE, available at http://courts.michigan.gov/scao/services/focb/parentingtime/FOC_Forms/pt_guidelines.pdf (noting that the Guidelines are based on the standards set forth in Michigan Compiled Laws Section 722.27a, as adopted in 1989); SOUTH DAKOTA PARENTING TIME GUIDELINES, available at <http://www.sdjudicial.com/courtinfo/parenttimeguide.aspx> (select “Parenting Time Guidelines” link). South Dakota’s legislature required the South Dakota Supreme Court to “promulgate court rules establishing standard guidelines to be used statewide for minimum noncustodial parenting time.” S.D. CODIFIED LAWS § 25-4A-10 (2002).

17. *See, e.g.*, Act of April 25, 2005, Pub. L. No. 68-2005, § 45, 2005 Ind. Acts 1582 (amending Indiana Code Section 31-17-4-1, concerning the rights of a noncustodial parent, to replace “visitation” with “parenting time”).

18. *Fact Sheet: Protection Order Registry*, JTAC (Apr. 6, 2010), <http://www.in.gov/judiciary/jtac/files/jtac-factsheets-por-factsheet.pdf>.

19. *See generally* Incourts, Indiana’s Protection Order Registry, YOUTUBE (Oct. 21, 2010), <http://www.youtube.com/watch?v=3OXC8vRuoBU>.

of a protective order on the laptop in his cruiser, eliminating any guesswork about whether a court has authorized action in a particular situation. A potential victim can now apply for a protective order online, and when that order issues, it is immediately transmitted electronically to all relevant jurisdictions. JTAC has started sending text messages to potential victims to alert them when an officer is about to make service of process on the potential abuser—a particularly dangerous moment for the possible victim because of the anger it might arouse.

II. STRUGGLING AGAINST LEGAL COMPLEXITY

The profession regularly acknowledges that most sources of legal information upon which our work rests grow more voluminous, more detailed, and yes, more arcane, over time. The statute books expand, the regulations proliferate, the published decisions grow, and even the number of law reviews balloons. This expansion of law sometimes seems to threaten to overwhelm even law-trained participants; it is doubly true for the clients and citizens who find themselves with a legal problem. Against this tide, blows for simplicity are hard to come by. Still, there are multiple examples of beneficial reforms in the last decade.

A. Plain-English Jury Instructions

De Tocqueville observed that jury service in America “vests each citizen with a kind of magistracy. It teaches everyone that they have duties toward society and a role in its government.”²⁰ The U.S. Supreme Court has said that “[j]ury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.”²¹

Still, service as a juror can be a weighty burden beyond the issues of conscience and conflict to which they may be subjected. A citizen receiving a summons for jury duty must await the call to jury duty, spend time in the jury pool, waiting on a trip to court, and submit their backgrounds, beliefs, and perspectives to examination by judges and attorneys—all in front of strangers who live and work in their community. Then, if they are selected as jurors for a trial—which could run anywhere from days to several weeks, and for which they are reimbursed a pittance—they must attentively study the evidence, the arguments, and the witnesses and make a collective decision of guilt or innocence or civil recompense.

Immediately before the jury starts deliberating, of course, the judge must inform them about what law guides this process. While this sounds straightforward, it has long meant that we bombarded jurors with instructions drafted and phrased by lawyers and judges for lawyers and judges (actually, “for the appellate judges,” we sometimes say).

By way of example, in explaining the difference between circumstantial and direct evidence—a distinction that arises frequently, to say the least—our pattern jury instructions once said, “Circumstantial evidence means evidence that proves

20. DE TOCQUEVILLE, *supra* note 6, at 316.

21. Powers v. Ohio, 499 U.S. 400, 407 (1991).

a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts.”²² Nearly impenetrable, such instructions and dozens of others covering all manner of questions, often left jurors feeling like they were trying to drink from a legal fire hose.

Some things about the burdens of jury duty we cannot change, but this was not one of them. To that end, the Indiana Judges Association and the Indiana Judicial Center embarked on rewriting Indiana’s instructions in straightforward language that non-lawyers can comprehend and apply without losing the critical legal meanings of the instructions themselves. The IJA’s Civil Instructions Committee toiled for three years, assisted by an English and judicial studies professor, to complete the new Indiana Model Civil Jury Instructions, drafted in plainer English.

Now, a juror learning the difference between circumstantial and direct evidence receives a short explanation, “Circumstantial evidence is indirect proof of a fact,” and an illustration: “For example, direct evidence that an animal ran in the snow might be the testimony of someone who actually saw the animal run in the snow. On the other hand, circumstantial evidence that an animal ran in the snow might be the testimony of someone who only saw the animal’s tracks in the snow.”²³ Our profession owes jurors this kind of clarity so that they can intelligently fulfill the responsibility to which they are sworn.

B. Rules of Evidence

Confusing jurors about what law they should apply to the evidence in front of them is bad enough; confusing us lawyers and judges as to what evidence the jury may see likewise undermines the even application of justice. For 175 years, the admissibility and use of evidence in Indiana courtrooms existed only at common law. A lucky lawyer with a question about admissibility might find one appellate opinion that answered the question; an unlucky lawyer might find two such opinions, each providing conflicting answers. Then, in 1994, following a broad discussion among practitioners, scholars, and judges, we arrived at the Indiana Rules of Evidence. Twelve pages long, these rules modernized ancient common law, synthesized the Uniform Rules of Evidence and Federal Rules of Evidence, and incorporated comments and concerns from members of the legal profession.

Adopting the Rules of Evidence served multiple goals: “to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”²⁴ And it succeeded. “For the first time, the state has a single body of rules to consult for guidance on

22. IND. PATTERN CIVIL JURY INSTRUCTION 4.02 (1989 & Supp. 1998) (superseded effective 2010).

23. 1-300 IND. MODEL CIVIL JURY INSTRUCTIONS 305 (2011).

24. IND. R. EVID. 102.

evidentiary questions before and during litigation in all of the state's fora."²⁵

C. Self-Help Projects for Unrepresented Parties

Simplifying jury instructions and evidentiary rules may not be enough when a nonlawyer walks into court to represent himself. And self-representation has become ever more common place. Particularly in times of economic uncertainty, individuals may be more inclined to pursue legal redress and yet unable to afford an attorney.²⁶ The practice of self-representation, however, poses a quandary for judges and court staff: when the ultimate goal of litigation is to achieve a just result, how can a court system level the playing field for a self-represented litigant and still achieve impartiality?

Modern technology has provided part of the answer. In the last decade, the Indiana judiciary's Division of State Court Administration has created an extraordinary self-help website that is both functional and user-friendly, and also ensures that pleadings and documents are correctly structured. Located at www.in.gov/judiciary/selfservice, the site went live in 2001. Since then, it has been upgraded to include videos on self-representation and alternative dispute resolution, auto-filling packets of pleadings for most civil and family law matters, links to legal research and assistance, ways to file for protection orders,²⁷ and assistance with mortgage foreclosures. It is a resource of genuine value that provides exceptional service for its relatively low cost.²⁸

D. The Growth of Alternative Dispute Resolution

Still, a belt-and-suspenders approach never hurts. Indeed, all the efforts to simplify litigation notwithstanding, sometimes it is best avoided altogether. To that end, Indiana's formal effort at ADR started in the early 1990s, the Indiana Supreme Court adopted the Alternative Dispute Resolution Rules. These rules were the product of collaborating with the Indiana State Bar Association, particularly its section for young lawyers, and they reflect a goal "to bring some uniformity into alternative dispute resolution with the view that the interests of the parties can be preserved in settings other than the traditional judicial dispute resolution method."²⁹ One might say that the goal of the ADR process is to provide litigants "a sure and expedited resolution of disputes while reducing the

25. Charles M. Kidd et al., *Survey of 1994 Developments in the Law of Professional Responsibility*, 28 IND. L. REV. 1013, 1013 (1995).

26. This is a particular problem in the context of family law. See Randall T. Shepard, *The Self-Represented Litigant: Implications for the Bench and Bar*, 48 FAM. CT. REV. 607 (2010).

27. Unlike many filings, court staffs are specifically obligated to assist the self-represented litigant in filing protection orders. See IND. CODE § 34-26-5-3(d)(3) (2011).

28. Indiana is hardly alone in this work. For example, Maricopa County, in Arizona, has a very well-rounded online self-service center. See *Self-Service Center*, SUPERIOR CT. OF ARIZ.: MARICOPA COUNTY, <http://www.superiorcourt.maricopa.gov/superiorcourt/self-servicecenter> (last visited Jan. 9, 2012).

29. IND. A.D.R. PREAMBLE (2011).

burden on the courts.”³⁰ More plainly stated, though, it could be expressed as ‘making justice for all cheaper, faster, and better.’ While ADR may not be right for every dispute, it has changed the paradigm in which we attorneys and judges solve clients’ problems and administer justice fairly and efficiently.³¹

In this decade, our state courts worked to make this process more accessible to people at all ends of the financial spectrum. In 2003, the General Assembly authorized ADR programs for domestic relations cases across all ninety-two counties.³² The programs may collect a twenty dollar fee in family law matters towards a fund “to foster domestic relations alternative dispute resolution,” including mediation, reconciliation, and parental counseling—with priority going to those litigants demonstrating financial need.³³ So far, twenty-seven counties are operating approved ADR programs in this manner, providing low-cost services to financially needy families across our state.

III. BUILDING A BETTER PROFESSION

Most of the early twentieth century story of the American legal profession featured a prolonged effort to upgrade the path of preparation for becoming a licensed lawyer. So it was that legal education became affiliated with universities, became solely a post-baccalaureate experience, and led to a bar examination as the gateway to a legal career. That set of arrangements became the nearly universal paradigm by the middle of the century. The twenty-first century version of this story plays out in three or four ways.

A. *Valid and Reliable Tests and the International Issue*

Indiana slowly marched away from its historically Jacksonian approach to regulating admission to the practice of law.³⁴ Under the 1851 Constitution, the doors to legal practice stood open to every person of good moral character, imposing no educational or testing requirements for bar admission. This persisted until 1931, when the Indiana Supreme Court finally gained the power to regulate admission to the bar, and started requiring applicants to pass a written exam.³⁵

30. *MBNA Am. Bank, N.A. v. Rogers*, 835 N.E.2d 219, 222 (Ind. Ct. App. 2005) (quoting *Photopaint Techs., LLC v. Smartlens Corp.*, 335 F.3d 152 (2d Cir. 2003)) (interpreting the Federal Arbitration Act).

31. Litigant satisfaction is important to the system—if citizens lack faith in the fairness of the result, they will be less likely to seek redress or respect a verdict. *See generally* Tom R. Tyler, *Citizen Discontent With Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103 (1988).

32. *See* IND. CODE §§ 33-23-6-1 to -4 (2011).

33. *Id.* § 33-23-6-2(d), (e).

34. *See generally* Elizabeth R. Osborn, *Indiana Courts and Lawyers, 1816–2004*, in THE HISTORY OF INDIANA LAW 257, 265-68 (David J. Bodenhamer & Randall T. Shepard eds., 2006).

35. *See In re Todd*, 193 N.E. 865 (Ind. 1935) (recognizing 1932 “Lawyer’s Amendment” after reversing prior precedent on referendum voting rules). Indiana also required particular courses

For the next several generations, applicants endured a two-day essay test covering various facets of Indiana law.

Concerns arose over the reliability of tests and their limited and local scope amidst a practice of law nationalizing along with a nationalizing economy. There was growing worry that a traditional bar exam consisting only of a closed-book multiple-choice and essay test “does nothing to encourage law schools to teach and law students to acquire many of the fundamental lawyering skills.”³⁶

Finally, in 2001, the Board of Law Examiners adopted a new format for the bar exam, one comprising three sections: the Indiana Essay Test (IET), the Multistate Bar Exam (MBE), and the Multistate Performance Test (MPT). Applicants must also pass the Multistate Professional Responsibility Exam (MPRE).³⁷ Adopting the MBE gave access to rigorous psychometric design and grading, all guided by the National Conference of Bar Examiners, while still ensuring competence on fundamental, nationally-applicable legal theories. The MPRE provided increased emphasis on professional norms, and the MPT provides a means for evaluating “the applicant’s ability to evaluate undigested facts and integrate law and facts, and then to develop and employ that information using common lawyering tools.”³⁸

This effort likewise facilitates movement toward what modern lawyer regulation usually calls “portability” and “internationalization” of the license and the practice.³⁹ That trend has not stopped at the nation’s shores. Large American law firms (and indeed Indiana firms) have expanded into overseas markets,⁴⁰ and more foreign lawyers have set up shop in the United States, either in large law firms or in house at multinational corporations.⁴¹ Indiana joined this trend by

be taken in law school prior to applying to sit for the bar exam. Beyond the normal first-year student courses, applicants had to take additional courses in administrative law, business organizations, criminal procedure, and tax. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 274 (1992) [hereinafter MACCRATE REPORT].

36. MACCRATE REPORT, *supra* note 35, at 278.

37. See Randall T. Shepard, *Building Indiana’s Legal Profession*, 34 IND. L. REV. 529, 529-33 (2001) (explaining the history of some of these changes in greater depth and also recommending an Indiana version of the Minority Legal Education Resources bar review supplement).

38. MACCRATE REPORT, *supra* note 35, at 282 (quoting COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, DISCUSSION DRAFT REPORT ON ADMISSION TO THE BAR IN NEW YORK IN THE TWENTY FIRST CENTURY—A BLUEPRINT FOR REFORM 28 (Jan. 2, 1992)).

39. See generally Randall T. Shepard, *On Licensing Lawyers: Why Uniformity Is Good and Nationalization Is Bad*, 60 N.Y.U. ANN. SURV. AM. L. 453 (2004).

40. See Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL’Y INT’L BUS. 1093 (2000).

41. See Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT’L L.J. 1039 (2002).

being the first state to adopt the ABA's model rule on foreign legal consultants.⁴² And Indiana was an early adopter of the new Professional Rule 5.5(c) on temporary presence of American lawyers.⁴³

B. Diversity in the Profession

I have described Indiana's position on court reform as "Rarely first, occasionally last, frequently early."⁴⁴ One of those times when Indiana was first? Indiana was the first state to have its own program to assist minority, low-income, or educationally disadvantaged college graduates pursuing law degrees and legal careers.⁴⁵

This program, known as the Indiana Conference for Legal Education Opportunity, was a direct result of the Indiana General Assembly stepping up, in 1997, to fill a void created by the Congressional decision to stop financing a federal CLEO program.⁴⁶ Through this initiative, we pursue one of the ultimate objectives of our justice system: to create a system where all citizens are equal in the eyes of the law. For citizens to have confidence in the system, they must see people like themselves represented in it at all levels. Indiana CLEO is proven to accomplish this, and so much more, through a program of active recruitment, academic preparation, mentorship, financial assistance, and networking opportunities.

In 1997, twenty-five members of the first class of thirty ICLEO Fellows entered Indiana law schools, and the program has continued and flourished. There have now been 465 beginning law students certified as CLEO Fellows; ninety-five of these are still in school; of the 370 whose education has run its course, 323 have graduated from law school, a success rate of eighty-seven percent; some 172 of these are now admitted to practice in Indiana, and others are practicing in other states.⁴⁷ It should be a matter of great pride that, thanks in part to the success of the ICLEO program, the number of minority lawyers in our state has more than doubled since 1997.

Moreover, we have reached the point where those students who benefited from the ICLEO program have reached the highest levels of the legal community—in 2009, Rudolph Pyle III, a member of that inaugural 1997 class, was appointed as judge in the Madison Circuit Court—and re-elected to that

42. IND. ADMISSION & DISCIPLINE R. 5 (effective Jan. 1, 1994).

43. IND. PROF. CONDUCT R. 5.5(c) (amended to incorporate subsection (c) effective Jan. 1, 2005).

44. Randall T. Shepard, Chief Justice, Ind. Supreme Court, State of the Judiciary Address to Indiana General Assembly (Jan. 12, 2006), *available at* <http://www.in.gov/judiciary/supreme/stjud/2006.pdf>.

45. *See* IND. CODE § 33-24-13-2 (2011).

46. *See* Act of May 13, 1997, Pub. L. No. 202-1997, §§ 3, 8, 1997 Ind. Acts 2911–12, 2915 (establishing and funding Indiana's CLEO).

47. These figures are based off of a chart regarding the ICLEO program that will be published in the forthcoming 2011 Indiana Judicial Service Report.

position in 2010. He was the first Indiana CLEO graduate to become a judge in a court of record. The first CLEO judge in any court was Eduardo Fontanez, who became judge in the East Chicago City Court in 2003. And in 2012, we added another 1997 CLEO graduate to the judiciary: Judge Kenya Jones, who recently served in the Hammond City Court.

While the journey to equal justice for all still stretches ahead of us, we can certainly measure our progress based on these illustrious milestones.

C. *Mandatory Continuing Legal Education*

As Indiana's bar has become more organized, its members have undertaken to ensure the quality of their work. For many years, continuing legal education was a voluntary undertaking. But as government turned out more statutory and regulatory rules at faster rates, and as malpractice liability loomed, it became apparent that modern practice required greater efforts to keep current with the changing legal landscape. This led to the proposal from the Indiana State Bar Association that the Indiana Supreme Court make ongoing legal education a mandatory part of being a lawyer.⁴⁸

The further challenge has been to elevate the quality of CLEs.⁴⁹ To foster this end, in 2011 Indiana's Commission for CLE staged a conference entitled "Learning About Our Learners," aimed at helping Indiana-based, non-profit CLE providers and featuring experts in adult education. And to assess the state of CLE generally, representatives from Indiana attended a national symposium that assembled bar leaders, practitioners, legal educators, judges, and CLE and sought to create recommendations for improving legal education across the professional continuum.⁵⁰ This year, Indiana's commission has spearheaded a research project, in which Pennsylvania is joining and assisting, to seek answers to the question, "What is the relationship, if any, between mandatory CLE and the numbers and types of grievances and malpractice cases in Indiana (or other states)?"⁵¹

48. IND. ADMISSION & DISCIPLINE R. 29; *see also* Robert H. Staton, *The History of Mandatory Continuing Legal Education in Indiana*, 40 VAL. U. L. REV. 345 (2006).

49. In the last fiscal year alone, the Indiana Commission on Continuing Legal Education reviewed over 11,000 courses. *See also* Jack W. Lawson, *Mandatory Continuing Legal Education and the Indiana Practicing Attorney*, 40 VAL. U. L. REV. 401 (2006); Randall T. Shepard, *The "L" in "CLE" Stands for "Legal,"* 40 VAL. U. L. REV. 311 (2006).

50. This summit, held in October 2009, was headlined "Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century," and was a product of collaboration between the American Law Institute—American Bar Association Continuing Professional Education. The Executive Director for the Indiana Commission for Continuing Legal Education, Julia Orzeske, serves on the ALI-ABA Critical Issues Summit Working Group. More information about the ALI-ABA program can be found at <http://www.equippingourlawyers.org> (select "Summit Recommendations" for the output of the summit).

51. At least three other states are interested in joining in this project as well, which will

D. Rescuing Impaired Lawyers and their Clients

Like other professionals, lawyers experience at least our share of mental health and substance abuse issues. Such lawyers still represent clients, and owe those clients the same level of professional competence and diligence that a non-impaired lawyer must provide.⁵²

This black letter principle is complicated by the significant vulnerability lawyers, law students, and judges have to alcoholism and substance abuse. Research shows that susceptibility to these problems trends higher in those individuals who show lower tolerance for frustration, greater drive for perfection, and fears of failure.⁵³ And studies began to show that lawyers suffer from alcoholism at a much higher rate than the general population.⁵⁴ Moreover, an impaired lawyer may not demonstrate the impairment at a given time—the condition ebbs and flows, making it harder to identify when that lawyer is capable of providing competent representation.⁵⁵

To counter this trend, and in a collective effort to address this problem *before* it becomes a problem for clients, the legal profession has launched lawyer assistance programs. The first began in Washington State in 1975, with the ABA adopting a model program in 1995 and all fifty states now operating programs based roughly on this model.⁵⁶ Indiana's program—the Judges and Lawyers Assistance Program—was launched in 1997 through a merger of the Indiana State Bar Association's Lawyers Assistance Committee and the Indiana Supreme Court's Judicial Assistance Team, under the authority of Indiana Admissions and Discipline Rule 31.⁵⁷ Its purpose is “assisting impaired members in recovery; educating the bench and bar; and reducing the potential harm caused by impairment to the individual, the public, the profession, and the legal system.”⁵⁸ The program's fifteen-member JLAP Committee consists of judges and practicing

largely rely upon the assets at Indiana's commission but will result in a template to process and analyze research on this topic across jurisdictions.

52. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-429 (2003) [hereinafter ABA Formal Op. 03-429] (“Obligations with Respect to Mentally Impaired Lawyer in the Firm”); cf. IND. PROF. CONDUCT R. 1.16(a)(2).

53. George Edward Bailey, *Impairment, the Profession and Your Law Partner*, 11 No. 1 PROF. LAW. 2, 12 (1999). Other factors at play include genetics, economics, and societal issues. *Id.*

54. See *id.*

55. ABA Formal Op. 03-429, *supra* note 52, at 3.

56. Bailey, *supra* note 53, at 14. The ABA's Directory of Lawyer Assistance Programs provides contact information and web access to state and local programs around the country. ABA COMM'N ON LAWYER ASSISTANCE PROGRAMS, http://www.americanbar.org/groups/lawyer_assistance (select “State and Local Lawyer Assistance Programs” link) (last visited Jan. 23, 2012).

57. See *About JLAP*, IND. JUDICIAL BRANCH: JUDGES AND LAWYERS ASSISTANCE PROGRAM, <http://www.in.gov/judiciary/ijlap/2361.htm> (last visited May 15, 2012).

58. IND. ADMISSIONS & DISCIPLINE R. (31)(2).

attorneys and a law school representative, all of whom must have “experience with the problems of chemical dependency and/or mental health problems.”⁵⁹

To combat these problems of dependency and impairment, JLAP employs a number of case managers, counselors, and hundreds of volunteers. In 2009-2010, the agency fielded over two hundred new calls for help, and carried over two hundred active cases.⁶⁰

Once a case is opened, JLAP services also include a monitoring program to help the individual maintain accountability. In some instances this monitoring may involve a formal agreement with JLAP, the State Board of Law Examiners, or the Disciplinary Commission; in others, it may require reporting to an employer, family member, or local judge. There is little doubt that this enterprise both sustains lawyers who would otherwise be lost and protects clients who rely on the profession.

IV. ACCESS TO JUSTICE

A decent modern court system worries about how the public learns its way through the courts and how people who need legal advice but cannot afford it might be helped.

A. Judicial Technology and Automation Committee

The modern demand for access to court information makes aggressive use of technology a compelling objective. In recognition of the growing impact of modern computer technology and innovation on the business of the judiciary, the Indiana Supreme Court established its Judicial Technology and Automation Committee (JTAC) in 1999 to provide leadership and governance in court technology. The committee has been chaired by Justice Frank Sullivan, Jr. Among JTAC’s core goals are equipping every Indiana trial court with a twenty-first century case management system and connecting individual court’s case management systems with each other and with users of court information.

The need for an entity like JTAC becomes clear when one considers that Indiana has over 400 trial courts, including 300 general jurisdiction courts. The Indiana Supreme Court asked JTAC to provide courts and clerks with a connected, statewide case management system (CMS). A ten-month procurement process led by three review committees led to a contract with Tyler Technologies Inc. to provide its Odyssey Case Management System to Indiana courts and clerks. After winning national awards for innovation from organizations like the Council of State Governments, JTAC is just on the verge of deploying our new twenty-first century case management system in forty percent of the state’s cases.

Through extensive research, JTAC recognized that centralized, web-based software has many advantages over standalone software that must be managed and updated one locale at a time. Therefore, JTAC created a secure extranet

59. IND. ADMISSIONS & DISCIPLINE R. (31)(3).

60. TERRY L. HARRELL, 2009-2010 JLAP ANNUAL REPORT 2, *available at* <http://www.in.gov/judiciary/ijlap/2009-10-annual-report.pdf>.

website, dubbed INcite (Indiana Court Information Technology Extranet), to serve as a single environment for hosting the considerable array of web-based applications.

Among the applications INcite supports are the BMV SR16-Filing Application, the Department of Child Services Probation Program, Electronic Citation and Warning System Central Repository, Electronic Tax Warrants, the Jury Management System, the Jury Pool Export, the Marriage License E-file System, Mental Health Adjudication, Online Court Statistics Reporting, and the Protection Order Registry.⁶¹

Forty-four new law enforcement agencies began using JTAC's electronic citation system, bringing the total to more than 250, from the State Police to the St. Joseph County Sheriff's Department. Last year more than 1.3 million were issued using JTAC technology.

B. Pro Bono and Self-Help

Our profession's long-standing tradition is that lawyers help "the defenseless, the oppressed or those who cannot afford adequate legal assistance."⁶² In pursuing this aim, Indiana has taken a novel approach by committing itself to an energetic program of "service *pro bono publico*." The central vehicles for this mission are the Indiana Pro Bono Commission and the district pro bono committees, supported by the Indiana State Bar Foundation, to help "promote equal access to justice for all Indiana residents, regardless of economic status, by creating and promoting opportunities for attorneys to provide pro bono civil legal services to persons of limited means."⁶³

Most of the Commission's pro bono opportunities are financed through Indiana's Interest on Lawyer Trust Accounts (IOLTA) program.⁶⁴ In fact, since its establishment in 1998, the Commission has financed over \$8 million in programs through its district committees, using IOLTA money.⁶⁵ Additional programs are run by the key contributions from the state's law schools, state and local bar associations, lawyer referral services, and numerous non-profit legal aid clinics and providers.⁶⁶ When combined with the self-help programs discussed above, the pro bono efforts of Indiana's lawyers are helping to assure access to

61. Incite now has over 20,000 active users and averages 240 visits per hour during a normal business day.

62. IND. ADMISSIONS & DISCIPLINE R. 22.

63. IND. PROF. CONDUCT R. 6.6.

64. See IND. PROF. CONDUCT R. 1.15(f). Under this program, each lawyer or firm establishes an interest-bearing trust account for their clients' funds (an IOLTA account) with an approved financial institution. All interest and dividends accrued by those funds are given to the Indiana State Bar Foundation for use, amongst other things, in assisting or establishing pro bono programs.

65. *About the Commission*, IND. JUDICIAL BRANCH: IND. PRO BONO COMMISSION, <http://www.in.gov/judiciary/probono/2332.htm> (last visited May 15, 2012).

66. See *Find a Legal Aid Provider*, IND. JUDICIAL BRANCH: IND. PRO BONO COMMISSION, <http://www.in.gov/judiciary/probono/2343.htm> (last visited May 15, 2012).

justice.

C. Courts in the Classroom and Webcasts

The profession can either hope that other institutions convey to the public adequate information about the rule of law, or undertake to do so directly. Courts in the Classroom (CITC) is the educational outreach program of the Indiana Supreme Court that seeks to do the latter. CITC's primary objective is to help "educators, students, historians, and interested citizens learn more about the history and operation of Indiana's judicial branch."⁶⁷ Besides curriculum materials, the program also offers four interactive fieldtrips for students each school year and a two-week summer teacher workshop.

The project's website provides teachers and the general public with access to a multitude of lesson plans, scripts, historical documents, archive and live links to webcasts of oral arguments, a searchable database of webcasts, and other resources to help teach about the judiciary.⁶⁸

In addition, CITC provides multiple continuing legal education lectures each year on topics related to Indiana's legal history.

V. STEPPING OUTSIDE THE BOX, OF NECESSITY

It is no stretch to suggest that courts are finding themselves taking on new roles. The traditional and even popular view of courts is that they are reactive institutions, simply declaring the rights of parties and entering judgment accordingly when a case comes their way. Maybe in Blackstone's time, but today's environment does not afford them such luxury.

A. The Mortgage Foreclosure Crisis

The judicial response to record foreclosure filings in the present recession illustrates the more proactive approach taken by judicial leaders. To be sure, the public sector's response has featured actions by all the branches of government, but in the end it fell to the courts to put in place an effective plan for mortgage litigants.

In 2009 the Indiana General Assembly enacted new laws governing foreclosure prevention agreements on residential mortgages and entitling each borrower to a settlement conference with the lender.⁶⁹ But between July and December 2009, only 300 or so borrowers out of roughly 17,000 foreclosure matters requested a settlement conference,⁷⁰ and even when they did, the

67. *About the Project*, IND. JUDICIAL BRANCH: COURTS IN THE CLASSROOM, <http://www.in.gov/judiciary/cite/3293.htm> (last visited May 15, 2012).

68. *Id.*

69. *See* IND. CODE § 32-30-10.5 (2011); Act of May 7, 2009, Pub. L. No. 105-2009, § 20, 2009 Ind. Acts 904-11.

70. INDIANA SUPREME COURT, 2010 INDIANA JUDICIAL SERVICE REPORT 42-43 (2010) [hereinafter JUDICIAL REPORT], available at <http://www.in.gov/judiciary/admin/2494.htm>.

conference often failed because one or both parties came to the conference unprepared. Of course, the courts could have simply signed off on proper foreclosures, but each foreclosure destroys about \$40,000 in economic value in the state.⁷¹

Instead, Indiana's courts have taken a more active role. For example, courts began sending separate notices about the availability of settlement conferences. As a result, more than forty percent of homeowners respond by requesting a conference. The Division of State Court Administration has also set up a web portal through which citizens can learn more about this process and access the resources they need.⁷² The borrower must submit forms online, including a monthly budget, before the conference to help ensure that the parties can reach a settlement if one is possible. In calendar year 2012, roughly fifty percent of homeowners who go to a settlement conference leave with a revised loan, avoiding a foreclosure, and saving Indiana's economy a great deal of economic value in the process.⁷³ This would not be possible if courts had not taken a more proactive view of problem solving on an aggregate level.

B. Problem-Solving Courts

Another issue that has pushed the judicial system and legal community to expand their notions of traditional roles has been the friction between mandatory sentencing guidelines, prison overcrowding, and recidivism rates; between society's need to hold the guilty accountable and the need of the guilty for rehabilitative opportunities.

Traditional incarceration carries heavy costs for the individual and for the

71. G. THOMAS KINGSLEY ET AL., URBAN INSTITUTE, THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES: A PRIMER 20-21 (2009), available at http://www.urban.org/UploadedPDF/411909_impact_of_foreclosures.pdf. The report estimates the total cost of a single foreclosure at \$79,443, of which \$50,000 is primarily absorbed by the lender. The \$40,000 total used here incorporates roughly \$19,000 in cost to the local community and government, \$3000 in reduced equity to surrounding homes, \$7000 in loss to the homeowner, and approximately \$50,000 of the loss to the lender. See *id.*; see also *The Mortgage Foreclosure Task Force and Settlement Conference Statistics*, IND. JUDICIAL BRANCH: DIVISION OF STATE CT. ADMIN., <http://www.in.gov/admin/2364.htm> (last visited May 15, 2012).

72. See IND. JUDICIAL BRANCH: SELF-SERVICE LEGAL CENTER, <http://www.in.gov/judiciary/selfservice/index.htm> (last visited May 15, 2012) (select "Help with Mortgage Foreclosures" link).

73. This percentage reflects those homeowners in pilot counties who both respond to the notice and attend the settlement conference. About half the borrowers who receive the notice now respond. JUDICIAL REPORT, *supra* note 70, at 44. But only eighty-nine percent of those who respond qualify for a settlement conference, and only eighty-eight percent of that group then actually request one—and at roughly one-third of the conferences, the borrower fails to appear. *Id.* Thus, when compared to the entire population of borrowers receiving the initial notice, only about twenty percent receive a revised loan. *Id.* Even so, using the measure of the Joint Economic Committee of Congress, this program saved \$17.9 million during its first year of operation in only fourteen of Indiana's ninety-two counties. *Id.*

taxpayers of the incarcerating state or federal government. The value of these costs must be weighed against the effectiveness of incarceration in meeting the aims of punishment, deterrence, rehabilitation, or incapacitation.

Between 1970 and 2005, the prison population within the United States jumped by almost 700 percent, from less than 200,000 individuals to some 1.5 million,⁷⁴ and as of 2007 the prison population had ballooned to nearly 2.5 million individuals.⁷⁵ An additional 5 million or so are under some form of court-ordered probation or supervision, such that 1 in 31 Americans is under the control of a correctional system.⁷⁶

Indiana fares worse in these studies. In 1982, only 1 out of 106 Indiana adults was under correctional control—less than 50,000 individuals.⁷⁷ By the end of 2007, that number was virtually matched by just the number of individuals incarcerated in Indiana—43,203 people, to be precise.⁷⁸ Added to this by 2007, however, was an astounding 138,256 on probation or parole.⁷⁹ The resulting math means that at the end of 2007, one in twenty-six people in Indiana lived under the control of the correctional systems.⁸⁰

For most states, the correctional system trails only health care, educational costs, and transportation as the largest line-item in the budget.⁸¹ Indiana's FY 2008 budget allotted \$669 million for corrections—a number equal to roughly 5.3 percent of that budget.⁸² Compounding this cost is a resulting consequence of an expanding prison population: drastically overcrowded prisons and the necessary costs of expansion and new construction. Federal prisons are operating at sixty percent overfill, with the average state facility not far behind.⁸³

There are other costs associated with prison—those on the individual prisoner. In many states a felony conviction deprives the criminal of the opportunity to serve as a juror, disenfranchises them from the electorate by prohibiting them from voting, negatively impacts their standing in family and

74. PEW CTR. ON THE STATES, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007-2011, at ii, 1 (2007), *available at* <http://www.pewcenteronthestates.org> [hereinafter PUBLIC SAFETY] (search for report title in site).

75. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009), *available at* <http://www.pewcenteronthestates.org> (search for report title in site).

76. *Id.*

77. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS—INDIANA (2009), *available at* <http://www.pewcenteronthestates.org> [hereinafter INDIANA FACT SHEET] (search for Indiana fact sheet).

78. *Id.*

79. *Id.*

80. *Id.*

81. PUBLIC SAFETY, *supra* note 74, at 25. Compounding this dilemma is that federal funds pay for much of the first three line-items, whereas prisons are almost entirely state-funded. *Id.*

82. INDIANA FACT SHEET, *supra* note 77.

83. *Too Many Laws, Too Many Prisoners*, ECONOMIST, July 22, 2012, <http://www.economist.com/node/16636027>.

domestic law, and bars them from gun ownership or possession.⁸⁴ “Moving on” with their lives is also hindered for most criminals: most basic employment applications require disclosure of felony convictions, and even where the conviction is not itself a disqualifier to the job, it often is to the employer.⁸⁵ Criminals with professional degrees or training may lose licenses or certification as a result of the conviction, and may never be able to recover them.

Additional burdens fall particularly hard on certain classes of prisoners and relatives—most notably women and their children. Between 1995 and 2005, the number of female prisoners in the U.S. prison systems grew by fifty-seven percent.⁸⁶ As a consequence, by the end of the twentieth century, approximately 250,000 children in America had incarcerated mothers.⁸⁷

Often times, these children have no father or other family member willing to care for them during the incarceration, so they become wards of the state cared for by foster parents.⁸⁸ In fact, under the Adoption and Safe Families Act and related state adoption statutes, extended incarceration of a mother can result in termination of her parental rights entirely—severing the family and creating more costs for the state in terms of care and placement of the child.⁸⁹ The children themselves frequently suffer through substance abuse, post-traumatic stress, depression, homelessness, and an increased likelihood to themselves be convicted of a crime.⁹⁰

The questions that began to be asked, then, were whether strict incarceration was often enough the most effective sanction, and what the justice system could do to break the cycles of recidivism and shattered families. The response here in Indiana, and elsewhere, has been what we call “problem-solving courts.”

We call them problem-solving courts because they aim not just to conduct a trial and impose a sentence—the only two steps really available when I was a trial court judge—but also to focus on whether the particular sentence being imposed really does the best job, at the least overall expense to all involved, of preventing recidivism. To accomplish this, these courts focus on tangible case outcomes, promote reforms within the halls of the courthouse and without, actively enroll judges throughout the course of the case and subsequent treatment, encourage cooperation with non-judicial partners, and employ their personnel and representing attorneys in non-traditional functions.⁹¹

84. Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 43, 49 (Timothy Lynch ed., 2009).

85. *Id.*

86. PUBLIC SAFETY, *supra* note 74, at 10. By contrast, the male population increased only thirty-four percent. *Id.*

87. Myrna S. Raeder, *A Primer on Gender-Related Issues That Affect Female Offenders*, 20 CRIM. JUST. 4, 7 (Spring 2005).

88. See Chieko M. Clarke, *Maternal Justice Restored: Redressing the Ramifications of Mandatory Sentencing Minimums on Women and Their Children*, 50 HOW. L.J. 263, 271 (2006).

89. *Id.*

90. *Id.* at 266, 273.

91. CTR. FOR COURT INNOVATION, *PROBLEM-SOLVING COURTS: A BRIEF PRIMER* 8-9 (2001),

Indiana's first such courts opened in 1996, with two drug courts. Today there are forty-nine certified drug courts, fifty-six court-administered drug and alcohol programs, veterans' courts, and delinquency projects run in conjunction with school corporations and social agencies. Probation departments have been professionalized with training and effective tools to monitor those under their charge, and new risk assessment tools instruments help identify the most effective sanction for each individual offender. In doing so, they help effectuate the goal of identifying the worst criminals—those for whom a prison cell is appropriate and necessary—and distinguishing them from the offender who would be best treated through specialized and intense community programs.

The success of these techniques is undeniable. In 2006 and 2007, the Indiana Judicial Center commissioned a study of five adult drug courts.⁹² The results were promising: the five courts had completion rates of fifty to fifty-six percent, above the national average of forty-eight percent for non-court directed treatment programs.⁹³ Moreover, the recidivism rates in all five courts were substantially lower than those of a comparison sample of defendants who qualified for the same drug court but did not participate.⁹⁴ The study quantified the value of the savings in fewer recidivist arrests, a lightened case load, less probation supervision, and less incarceration, as totaling more than \$7 million.⁹⁵ The total return on the taxpayer investment in these programs? For every one dollar invested, up to \$5.37 in return.

It requires very little consideration of these numbers—compared to the norm—to understand that a problem-solving approach, though sometimes outside the traditional context of the court system, presents a better alternative than traditional model of try, sentence, incarcerate, and repeat. The development of our problem-solving court system is a step on a different path—a step in the right direction.

All of this is to say that lawyers and judges should not feel constrained by traditional roles in the face of non-traditional (or traditional) challenges. Particularly in times of economic and societal upheaval, the profession should

available at <http://www.in.gov/judiciary/pscours/2337.htm> (select “Problem-Solving Courts: A Brief Primer” hyperlink).

92. See NPC RESEARCH, INDIANA DRUG COURTS: A SUMMARY OF EVALUATION FINDINGS IN FIVE ADULT PROGRAMS 1 (2007), *available at* <http://www.in.gov/judiciary/pscours/files/pscours-eval-summary.pdf>.

93. *Id.* at 3.

94. *Id.* at 4. The differences were dramatic. Recidivism rates—defined in the study as “the number, or percentage, of participants who were re-arrested at least once in the two years after program entry out of the total number of participants in the sample,” *id.* at 4 n.1—for the comparison group ranged from thirty-three to forty-one percent. *Id.* at 4. The rates for graduates of the programs, however, ranged from a high of eighteen percent in one court to a low of seven percent in another. *Id.*

95. *Id.* This figure does not include additional, unquantifiable but still important ancillary cost savings, such as lowered health care fees, employment of those in the program and the corresponding tax revenue, and increased health and welfare of the offender's children and families.

feel free—and even obliged—to step in, help out, and raise up. Not all of our efforts will be successful, but as President Roosevelt so famously urged, we must remember to keep our eyes on “the triumph of high achievement,” and if we fail we shall at least do so “while daring greatly.”⁹⁶

CONCLUSION

A clear lesson of our historical experience since the Industrial Revolution has been that innovation is cumulative; it compounds and proceeds faster and faster apace. Admittedly, there may be no judicial equivalent of Moore’s Law, but as courts and professional organizations of judges within the judicial system adopt a more self-reflective and self-critical view of the way we promote justice among our citizens, we will surely be able to provide both a higher quantity and quality of it.

96. President Theodore Roosevelt, Speech at the Sorbonne in Paris, France: Citizenship in a Republic (Apr. 23, 1910). The full text of this famous excerpt is something that all members of the legal profession should take to heart:

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.

Id.