

# Comment

## Some Observations Regarding Crime Control

*Andrew Jacobs, Sr.\**

This is a commentary upon three aspects of the criminal justice system. Part one will suggest the proper role of the system in dealing with the criminal. Part two will probe some evidentiary defects in the present system and their effects on criminal justice. Finally, part three will point out and explore the inconsistencies and other shortcomings of the Indiana change-of-venue and change-of-judge laws.

### I. WHAT SHOULD BE DONE WITH CRIMINALS?

Generally, there are two schools of thought regarding methods of crime control: Behavioral change through psychotherapy or other means of persuasion, and punitive deterrence. The "change" group leans toward the doctrine of "determinism," which alleges that a person is birth-launched as a guided missile and turned toward, or away from, crime as his genetic structure or environment—mostly the latter—impels him. The "punitive" group ascribes to all persons (save the insane) a free will or choice; that is, each person is accountable for his conduct, and punishment for crime tends to compel lawful choices. There are vast tomes advocating each doctrine, or a mix of both;<sup>1</sup> but which doctrine, punitive deterrence or gentle persuasion, is the most effective?

At the risk of falling victim to simplistic nonsense,<sup>2</sup> it is submitted that laws are made to be obeyed and enforced when necessary. The quaint belief that enforcement consists of detecting, prosecuting, and punishing criminals is not invalidated by its ancient lineage. Not to be overlooked is Indiana's constitutional mandate for a penal code "founded upon the principles of reformation and not

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\*Former Judge of the Marion County Criminal Court. L.L.B., Benjamin Harrison Law School, 1928.

<sup>1</sup>For those desiring to pursue the subject further, I recommend three works: H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); J. WILSON, *THINKING ABOUT CRIME* (1975); and S. YOCHELSON & S. SAMENOW, *THE CRIMINAL PERSONALITY* (1976-1977). Each presents extensive bibliographical notes from which one can find enough reading for a lifetime.

<sup>2</sup>See Germann, *Criminal Justice Leadership: Bankrupt Forever?* 15 *CRIMINOLOGY* 3, 5 (1977), where the author, in an editorial comment on the ineffectiveness of the present criminal justice system, characterizes as "simplistic nonsense" the criminal justice solutions that are "programmed neatly: more, better-armed, better-equipped police; tougher judges and harsher sentences; larger and more punitive detentions."

vindictive justice."<sup>3</sup> However, note that this constitutional provision recognizes the value of "penal" laws. It does not proscribe society's right of self-defense, nor does it belie the fact that criminal abstinence is, in some measure, effected by punishment and the threat thereof.

Reformation is most likely with so-called "first offenders," who are usually, in truth, "first caught." If the first offender is amenable to reform, a moderate sentence will suffice. This is because of the frightful experience of being first imprisoned. Even though he may have committed other crimes, the crucial point is this first distressing penalty, which is apt to cause the criminal to resolve to avoid a life of crime. Experience indicates that recidivism is less among young criminals who have suffered such a distressing imprisonment than among those who are placed on probation.<sup>4</sup> Therefore, a moderate sentence is most often best for the first offender, or "first caught," as well as for society. However, such is not the only consideration from the viewpoint of protecting society. The youthful criminal probationer is considered "turned loose by the judge." All of his peers have the same concept and will fear the law less and be more apt to begin or continue criminal activity. Probationers thus become, even unconsciously, a silent recruiting agent for the criminal culture.

Evidence indicates that society's greatest protection comes from the isolation of criminals, thereby suspending their criminal con-

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<sup>3</sup>IND. CONST. art. 1, § 18.

<sup>4</sup>J. WILSON, *supra* note 1, at 168.

Professor Robert Martinson, of New York City College, writes: "What kind of a science is criminology when, after half a century of research, it cannot decide whether the reported recidivism rate is one-third or two-thirds?" CORRECTIONS MAGAZINE, Dec. 1976, at 57. Martinson demonstrated the validity of his observations by use of coded computer cards. He discovered an average recidivism rate of 23.5%, which is a much lower percentage than past studies have indicated. *Id.* (FBI statistics reflect recidivism rates, within three years of release for the crimes mentioned, as follows: Burglary, 76%; robbery, 70%; auto theft, 68%; rape, 64%; murder, 63%; theft of property, 61%; forgery, 60%; assault, 60%; narcotics, 57%; larceny, 55%; weapons, 55%, fraud, 54%; gambling, 40%; embezzlement, 22%; and all others, 54%. [1974] U.S. DEP'T JUST., FBI, UNIFORM CRIME REPS. 51.)

Like this writer, Professor Martinson does not know what the true recidivism rate is, but we all know that it is too high and that what we have done in recent years—at least until the last two years—has not produced favorable results. Recent improvements are still not enough.

Bear in mind that all recidivism rates are based upon later crimes for which the convict has been caught. Presently, we will see that not more than one of five *reported crimes* is "cleared," *see* note 10 *infra* and accompanying text, which means detection of the perpetrator with adequate evidence to bring him to trial. To this confusion add the respectable evidence that only one of every four serious crimes is reported. *See* note 8 *infra* and accompanying text. Of course, the situation would be worse were it not for the present efforts exerted by the system.

duct.<sup>5</sup> For this reason, habitual criminals should be incarcerated for life. Harsh? Yes! Yet if it reduces crime, as experience teaches, the future will witness fewer people harshly treated, victims as well as criminals. The former are harshly, often cruelly, treated. A stern policy is calculated to reduce human suffering. In the long run, it is more apt to reform the early offender, inhibit the tempted, and immobilize the habitual criminal. Under the realities of life, a stern policy is the most humane policy. Let those who recoil from "locking up a human being like an animal" bear in mind that each of us makes our own passport to freedom or prison. Furthermore, even now, we would imprison fewer than we are apt to think at first blush. Repeaters probably commit a vast majority of serious crimes. Too often we are prone to think there is a different criminal for each crime. Careful investigations confirm that some criminals commit thousands of unsolved crimes.<sup>6</sup>

The FBI's 1974 *Uniform Crime Reports* stated that an estimated 10.1 million serious crimes were committed within the United States during that year.<sup>7</sup> However, a Census Bureau survey discovered that in 1974 only one of every four victims had reported the crime.<sup>8</sup> From their sampling, the Census Bureau estimated that there were not merely 10.1 million but 39.6 million serious crimes committed in the United States during 1974.<sup>9</sup> The FBI's report also estimated that there had been a 21% clearance rate of reported crimes in 1974 based upon their reported figures;<sup>10</sup> therefore, if the Census Bureau's findings are accurate, only 5.2% of all crimes were cleared. The failure is largely in what we do, or usually do not do, with the convicted criminal, especially the repeater. Sight must not be lost of the fact that locking up the "once caught" criminal will cancel many future crimes.

Regarding probation, one should never say "never." It is estimated that some states put as many as 70% of their convicted felons on probation.<sup>11</sup> The figure in Indiana is 58%.<sup>12</sup> In the federal system, it is more than 45%.<sup>13</sup> In my judgment and experience, no

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<sup>5</sup>J. WILSON, *supra* note 1 at 162-82, 198-202. See also, J. PETERSILIA, P. GREENWOOD, & M. LAVIN, *CRIMINAL CAREERS OF HABITUAL FELONS* 121 (1977).

<sup>6</sup>See 1 S. YOCHELSON & S. SAMENOW, *supra* note 1, at 221-26. Cf. J. PETERSILIA, P. GREENWOOD, & M. LAVIN, *supra* note 15, at 115-16 (many criminals commit an average of 20 crimes per year).

<sup>7</sup>[1974] U.S. DEPT JUST., FBI, *UNIFORM CRIME REPS.* 10.

<sup>8</sup>Los Angeles Times, May 24, 1976, § 1, p.13, col. 1.

<sup>9</sup>*Id.*

<sup>10</sup>[1974] U.S. DEPT JUST., FBI, *UNIFORM CRIME REPS.* 42.

<sup>11</sup>Wilson, *U.S. Prison Population Sets Another Record*, *CORRECTIONS MAGAZINE*, Mar. 1977, at 5.

<sup>12</sup>[1976-1977] IND. DEPT CORR., DIV. PROB., *ANN. REP.* 3.

<sup>13</sup>[1976] DIR. AD. OFF. U.S. COURTS, *ANN. REP.* 368-69.

more than 2% of convicts qualify for probation. Admittedly, this is a subjective judgment, yet it seems indisputable that probation is excessively used. Of those placed on probation, 48% are caught in other crimes within three years.<sup>14</sup> Some will claim that this reflects a substantial degree of public protection. Not so. It does not account for those among the remaining 52% who commit crimes and are not caught. In this context, it is pure folly to ignore the truth, which is plain, and to lack the fortitude to deal harshly with harsh people.

The 58% of the convicted felons who emerge from our Indiana courts scot-free do so because judges are persuaded that the criminal behavior of people can be altered by the gentle persuasion of a probation officer. The greatest experts confess they do not know how to accomplish this desirable end.<sup>15</sup> There is a powerful desire to believe in such a cure, but until evidence warrants reliance, we would be wise not to be misled by our fervent hope. Impractical romanticism will not reduce crime; stern law enforcement will, as it is now doing: "Reports of serious crime in the United States fell seven percent during the first six months of 1977, when compared with the same period of 1976 . . . . The downward trend in serious crime first appeared in the last quarter of 1976 . . . ." <sup>16</sup> Taking the mean figure of 10 million serious crimes per year, the 7% reduction means 700,000 fewer annual crimes in the United States. In addition, prisoners in all state and federal prisons increased from 218,466 at the outset of 1975 to 242,750 at the beginning of 1976, and

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<sup>14</sup>[1974] U.S. DEPT JUST., FBI. UNIFORM CRIME REPS. 52.

<sup>15</sup>In *The Criminal Personality*, the authors quote Dr. Hervey M. Cleckley, as follows:

Having regularly failed in my own efforts to help [psychopaths] alter their fundamental pattern of inadequacy and antisocial activity I hoped for a while that treatment by others would be more successful. I have now, after more than two decades, had the opportunity to observe a considerable number of patients who were kept under treatment not only for many months but for years. The therapeutic failure in all such patients observed leads me to feel that we do not, at present, have any kind of psychotherapy that can be relied upon to change the psychopath fundamentally.

1 S. YOCHELSON & S. SAMENOW, *supra* note 1, at 484.

The authors devoted much space to this theme. They concluded, however, by claiming to have discovered a reliable method of behavioral change. Their proposals do not appear to be different than past efforts and proposals of others, nor do they appear, for that matter, likely to be more effective. After fifteen years of practical research and effort, they claim only thirteen cases of "changed criminals" as of May 1976. *Id.* at 436. On November 12, 1977, Samenow addressed a seminar of the Indiana Lawyers Commission and the Indiana University School of Medicine. When asked to give the number of criminals successfully treated by him, he stated that there were nine, a reduction of almost one-third over an 18-month period when an increase would have been expected to result.

<sup>16</sup>Press release by Attorney General Griffin B. Bell (Oct. 12, 1977).

increased again to 283,145 at the beginning of 1977.<sup>17</sup> This is an increase of 64,679 persons imprisoned over the two-year period. Taken together, these facts indicate 10.82 fewer crimes per increase of one prisoner, and 43.28 fewer if the reduced ratio holds under the census figures that indicated 3 of every 4 serious crimes were not being reported. This relief should increase once the message is heard loud and clear throughout the land. An added benefit could very well be an increased respect for law and order, which would serve as a strategic inhibitor of crime.

We have strained our resources in a vain attempt to effectively use gentle persuasion upon ungentle people. The unvarnished truth is that Indiana law prescribes adequate criminal sanctions. However, the General Assembly proceeds to construct numerous escape hatches, such as the Criminal Sexual Deviancy Act,<sup>18</sup> the Drug Abuse Act,<sup>19</sup> and the probation laws.<sup>20</sup> It is then argued, with evangelistic fervor, that the courts must open these escape hatches because the law "so allows." The judge who does not respond favorably is condemned for "refusing to follow the law."

When we gird ourselves for the unpleasant task and let it be known that *all criminals* must pay their penalty, crime rates will continue to go down, even more rapidly. We are still quite addicted to the "good ole boy" probation syndrome. Crime is still a cancerous growth on our society. The limited relief here noted simply indicates that the malignancy does respond to the strong medicine herein suggested.

## II. SOME EVIDENTIARY DEFECTS

The legal profession proclaims that a trial is a search for the truth. Usually this is true. However, under some judge-made evidentiary rules, letting the truth creep into the record is reversible error. Evidentiary rules designed to establish the truth should be adopted and followed. Those calculated to shut out the truth or confuse the fact-finding process should be abandoned. Following are two examples of the former and one of the latter.

### A. *The Exclusionary Rule*

The exclusionary rule holds that if officers violate a defendant's rights against unreasonable search, no evidence thereby discovered

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<sup>17</sup>National Criminal Justice Information and Statistical Service, U.S. Department of Justice, Prisoners in State and Federal Institutions on December 31, 1975, at 16 (1976); *id.*, Prisoners in State and Federal Institutions on December 31, 1976, Advance Report at 1 (1977).

<sup>18</sup>IND. CODE §§ 35-11-3.1-1 to -37 (1976) (amended 1977).

<sup>19</sup>*Id.* §§ 16-13-6.1-1 to -34.

<sup>20</sup>*Id.* §§ 35-7-1-1 to -5-12.

may be used against the defendant. In 1914, the United States Supreme Court held that if such evidence could be used, "the Fourth Amendment . . . might as well be stricken from the Constitution."<sup>21</sup> By this rescript, the Court proclaimed that the exclusionary rule was the only possible remedy for an unreasonable search. That assertion was then untrue and still is.

In 1968, the Indiana Court of Appeals held that one could recover for damages sustained from violation of his civil rights.<sup>22</sup> The decision held that the city, county, or state was liable for such damages caused by their officers. This is an alternative remedy for violation of a defendant's rights against unreasonable search. Furthermore, it is a fair one. It holds each party responsible for his own wrongdoing. It does not free known criminals on a theory that two unredressed wrongs equal justice.

The exclusionary rule has a checkered career and an inglorious history. During prohibition, bootleggers rolled in money and hired the best legal talent who then "sold" their legal sophistry to pliant judges who, in turn, enshrined the exclusionary rule in our "temples of justice." The rule blossomed into an impenetrable hedge of protection for those affluent criminals. It then stood sentinel for less wealthy scofflaws because the sacrament could not be defiled and then reused in big-fee cases.

Today this specious rule most often protects the human flotsam that deal in drugs and narcotics. In its inglorious history, it has never protected an innocent defendant. It has, on the other hand, freed untold thousands of persons known to be guilty. Those who worship this doctrine, and profit by it, claim the damage remedy would be inadequate because, they say, if the aggrieved person were guilty, a jury would award him little or no damages. Quite so, I hope. That is how the scales of justice should balance. The damage rule would protect the innocent person wrongfully set upon by the police; the exclusionary rule turns away the innocent with indifference while yielding tender loving care for the scofflaw. That is not how the scales of justice should balance.

In 1926, Justice Cardozo issued the following warning: "The criminal is to go free because the constable has blundered . . . . A room is searched, against the law, and the body of a murdered man is found . . . . The privacy of the home has been infringed, and the murderer goes free."<sup>23</sup> Forty-seven years later, Justice Cardozo's prophecy came true in Indiana, when the exclusionary rule freed a murderer.<sup>24</sup> Three armed robbers engaged deputy sheriffs in a shoot-

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<sup>21</sup>Weeks v. United States, 232 U.S. 383, 393 (1914).

<sup>22</sup>Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967).

<sup>23</sup>People v. Defore, 242 N.Y. 13, 23-24, 150 N.E. 585, 587-88 (1926).

<sup>24</sup>Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973) (3-2 decision).

out. One deputy was killed and one robber was wounded by the slain deputy's shots. Under authority of a search warrant, bullet fragments were removed and used in evidence to prove the defendant's presence at the scene. The Indiana Supreme Court reversed, holding that the murderer's constitutional rights had been violated by unreasonable search, hence the bullets could not be lawfully used as evidence. The defendant went free. The deputy was still dead.

Chief Justice Givan and Justice Prentice dissented, but only to hold that the search was reasonable. The majority held the search was unreasonable, warrant or no warrant. The whole court upheld the discredited rule. So, Indiana balanced this safe extraction of bullet fragments with bringing a murderer to justice and read the scales in favor of the criminal.

Lest you think this is merely an aberration of mine, let me quote from other opinions. In 1954, the United States Supreme Court stated in *Irvine v. California*:<sup>25</sup> "It [the exclusionary rule] protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."<sup>26</sup> In 1971, Justice Harlan wrote in a concurring opinion to *Bivens v. Six Unknown Federal Narcotics Agents*:<sup>27</sup> "[A]ssuming innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in *Bivens*' shoes it is damages or nothing."<sup>28</sup>

In *Bivens*, the Supreme Court recognized, as did the Indiana Court of Appeals, that one has an inherent damage action for a civil rights violation. However, unlike Indiana, which abolished state sovereign immunity, the United States Supreme Court did not abolish federal sovereign immunity. Hence, it recognized the remedy but left intact an insurmountable barrier, as well as the discredited exclusionary rule. Chief Justice Burger agreed in principle with the majority opinion in *Bivens*. Nevertheless, he dissented from the Court's holding, "which judicially [created] a damage remedy not provided for by the Constitution and not enacted by Congress."<sup>29</sup> The Chief Justice overlooked the fact that the exclusionary rule was judicially created. He did, however, write a powerful argument against the exclusionary rule and urged Congress to fashion a new damage remedy in its stead.<sup>30</sup>

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<sup>25</sup>347 U.S. 128 (1954).

<sup>26</sup>*Id.* at 136.

<sup>27</sup>403 U.S. 388 (1971).

<sup>28</sup>*Id.* at 410 (Harlan, J., concurring).

<sup>29</sup>*Id.* at 411 (Burger, C.J., dissenting).

<sup>30</sup>In July 1975, considering the foregoing, I set up a test case by holding that the rule had been superseded in Indiana by the damage remedy. The order denying applicability of the exclusionary rule was supported by a nine-page memorandum opinion.

Despite all of this condemnation, the exclusionary rule is still intact and performing its traditional function of freeing known criminals. This rule is virtually devoid of friends save criminals and most of their lawyers. It deserves a judicial burial.<sup>31</sup>

### B. *The Fruit of the Poisonous Tree*

The *Miranda*<sup>32</sup> rule requires authorities to advise in-custody suspects of their constitutional right to remain silent plus other related rights. Failure to properly advise precludes the use in court of anything the suspect might say. The "poisonous fruit" exclusionary rule is a branch of the *Miranda* rule that was developed to preclude any evidence discovered by following investigative leads gleaned from what the suspect said. Such evidence is scorned as "the fruit of the poisonous tree."

An Indiana Supreme Court decision furnished a graphic example of these rules. In *Dowlut v. State*,<sup>33</sup> police questioned a murder suspect in violation of his *Miranda* rights. He confessed and led police to a remote spot where the murder gun was unearthed. This case is an excellent example of the validity of the *Miranda* rule and the folly of the "poisonous fruit" rule. The logical and just reasons for excluding improperly procured confessions are their unreliability and their almost conclusive effect upon juries. For example, police had told the murder suspect that his father might be charged with the murder. Thus, the confession, given under such stress, was unreliable without corroboration. No fair court would admit such a confession into evidence. However, the corroboration in this case was so powerful as to render it reliable enough for jury consideration. The suspect's knowledge of where the murder weapon was hidden was conclusive proof that he had knowledge of the murder. In

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State v. Wilson, No. CR74-112 C (Ind., Marion Cr. Ct., July 29, 1975), *rev'd*, No. 2-1075 A 302 (Ind. Ct. App., Dec. 22, 1976). The Indiana Court of Appeals reversed with an unpublished memorandum opinion that totally ignored the questions raised in the trial court opinion. State v. Wilson, No. 2-1075 A 302 (Ind. Ct. App., Dec. 22, 1976). The Indiana Supreme Court denied transfer without opinion.

<sup>31</sup>This rule was created by the courts. As stated in my opinion in State v. Wilson, No. CR74-112 C (Ind., Marion Cr. Ct., July 29, 1975), *rev'd*, No. 2-1075 A 302 (Ind. Ct. App., Dec. 22, 1976):

I hold that the judiciary should correct its own errors to the end that we can cope with [drugs] and other evils. I simply hold that given the respectable company with which this ruling is associated I cannot share the reverence which has, in some quarters, raised the exclusionary rule to the level of a political sacrament.

<sup>32</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>33</sup>250 Ind. 86, 235 N.E.2d 173 (1968).

the absence of any explanation of innocent knowledge, the inference of guilt was next to inescapable.

The trial judge admitted the evidence. On appeal the Indiana Supreme Court reversed, holding that the corroborative evidence was the "poisoned fruit" of the unlawfully obtained confession.<sup>34</sup> Criticism is due the United States Supreme Court rather than the Indiana Supreme Court, however, because under the former's decision in *Watts v. Indiana*,<sup>35</sup> the Indiana Supreme Court had no choice but to decide as it did.

Nevertheless, a weak shaft of light has dawned over the United States Supreme Court. This was manifested in the recent Supreme Court decision in *Brewer v. Williams*.<sup>36</sup> A murder defendant was driven by police back to the jurisdiction of the crime. Defense counsel and the police agreed that the latter would not question the defendant during the drive. During the journey, an officer who knew the accused to be deeply religious bemoaned the fact that the whereabouts of the little girl's body were unknown, that it was Christmas, and that her parents should be enabled to give their little ten-year-old daughter a decent Christian burial. The accused then led the police to the little girl's hidden remains.

The trial court admitted the evidence of the finding of the body. The Supreme Court held the admission to be reversible error. In his dissenting opinion, the Chief Justice stated:

The result of this case ought to be intolerable in any society which purports to call itself an organized society. It continues the Court—by the narrowest margin—on the much criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross misconduct or honest human error.

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Today's holding fulfills Justice Cardozo's grim prophecy that some day some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of

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<sup>34</sup>*Id.* at 92, 235 N.E.2d at 177 (citing *Watts v. State*, 229 Ind. 80, 95 N.E.2d 570 (1950)).

<sup>35</sup>338 U.S. 49, *rev'g*, 226 Ind. 655, 82 N.E.2d 846 (1949). Final decision: *Watts v. State*, 229 Ind. 80, 95 N.E.2d 570 (1950).

<sup>36</sup>431 U.S. 925 (1977) (5-4 decision). Justices Stewart, Brennan, Marshall, Powell and Stevens voted for the reversal. Chief Justice Burger, Justices White, Blackmun and Rehnquist dissented.

the means by which it was found. In so ruling the Court regresses to playing a grisly game of "hide and seek," *once more exalting the sporting theory of criminal justice* which has been experiencing a decline in our jurisprudence. . . . Apart from a brief comment on the merits, however, I wish to focus on the irrationality of applying the increasingly discredited exclusionary rule to this case.<sup>37</sup>

C. *Confusing the Fact-Finding Process  
With Unsupported Issues*

The Chief Justice of the United States Supreme Court complained above of "once more exalting the sporting theory of criminal justice." In recent years, Indiana's trial courts and the Indiana Court of Appeals have shown criminals their spirit of judicial sportsmanship. They have held that the jury must be told it can convict upon a lesser crime despite the total lack of evidence to warrant a finding that it was the lesser crime that was committed.

In the act of committing certain crimes, the criminal automatically commits other crimes. For example, to commit murder in the act of robbery one automatically commits robbery or attempted robbery. In committing armed robbery, one commits simple robbery, theft from the person, theft (of \$100 or less, or over \$100, with each category prescribing different penalties), assault, and perhaps battery. The Indiana Supreme Court has clearly ruled in *Hester v. State*<sup>38</sup> and *Hash v. State*<sup>39</sup> that, absent any evidence that the lesser crime was committed rather than the crime charged, the trial court was not required to instruct the jury that it could find guilt upon any lesser-included crime. In short, the accused was guilty of the crime charged or he was innocent.

There were Indiana trial and appellate court judges who overlooked the supreme court's rulings and viewed a trial, as Chief Justice Burger noted, with a spirit of sportsmanship. So it became a rather common practice to instruct the jury that it could find guilt on lesser offenses regardless of the complete lack of evidence warranting such a verdict. This gave the accused a sporting chance of getting off with a lighter penalty.

In the 324 jury trials over which I presided, the juries were instructed according to the rule promulgated by the Indiana Supreme Court. Lawyers were righteously indignant. They apparently believed they had acquired the sporting chance due to the common practice

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<sup>37</sup>*Id.* at 932 (Burger, C.J., dissenting) (emphasis added).

<sup>38</sup>262 Ind. 284, 315 N.E.2d 351 (1974).

<sup>39</sup>258 Ind. 692, 284 N.E.2d 770 (1972).

of ignoring the supreme court's holding. So appeal followed appeal. Most, being from judgments of ten years or less, were appealed to the Indiana Court of Appeals, whence came reversal after reversal. Of these, only *Arbuckle v. State*<sup>40</sup> is here cited. Arbuckle was charged with and convicted of armed robbery. There was no evidence that the crime was any less than plain armed robbery. The court of appeals reversed because the trial court had not told the jury it could find against the clear and undisputed evidence and thereby find the defendant guilty of a lesser included offense.

Nine days later, the Indiana Supreme Court affirmed my judgment of a twenty-year sentence in *Harris v. State*,<sup>41</sup> another armed robbery case. Reversal was urged because of my refusal to instruct the jury that it might find the defendant guilty of the lesser offenses of robbery (while unarmed), assault with intent to commit a felony, theft, assault and battery, and assault. The total evidence was that the defendant held up the victim with a gun. Stated otherwise, there was no evidence that any element of armed robbery was absent. The defendant was either guilty of armed robbery or he was innocent. In this decision, the supreme court again laid down the *Hash* and *Hester* rule so plainly that "he who runs could read."

Presumably, that sporting program has now become "inoperative." At least it should be, but do not count on it at the trial level. Trial judges who refuse to continue this sporting aspect of criminal trials will be ordered off the bench by criminals, as the supreme court has held they have the absolute right to do without any cause whatever.<sup>42</sup>

### III. HOW VENUE LAWS AFFECT JUSTICE

#### A. *Stonewalling the Issue*

Our venue laws are "anachronistic and unique to Indiana. Their daily abuse is the most serious impediment to the administration of justice in Indiana today." So wrote Justice Hunter in *State ex rel. Benjamin v. Criminal Court*.<sup>43</sup> He did not exaggerate. Indiana's venue statutes and supreme court venue rules constitute a conglomeration of incongruities genuflecting to a thinly disguised professional chauvinism. Space permits but a few examples. These examples will amply prove Justice Hunter's statement.

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<sup>40</sup>366 N.E.2d 200 (Ind. Ct. App. 1977).

<sup>41</sup>366 N.E.2d 186 (Ind. 1977).

<sup>42</sup>See notes 75-97 *supra* and accompanying text.

<sup>43</sup>341 N.E.2d 495, 498 (Ind. 1976) (consolidated appeal of *State v. Benjamin*, No. CR75-472 C (Ind., Marion Cr. Ct., April 2, 1976) and *State v. Green*, No. CR75-421 C (Ind., Marion Cr. Ct., Dec. 24, 1975)).

In any civil case, even a one dollar civil case not triable by jury, a change of county must be granted upon mere demand without assigning any ground.<sup>44</sup> In no non-capital criminal case can a change of county be granted unless sufficient grounds are proven.<sup>45</sup> In any case, civil or criminal, a change of judge must be granted upon demand with no grounds required.<sup>46</sup> These simple truths instantly provoke two questions: Why any change without grounds?, and why greater protection for a one dollar bill than for a person facing prison?

During 1976, these questions were vainly presented to the Indiana Supreme Court in quest of a solution. First to discuss the issues were *State v. Benjamin*<sup>47</sup> and *State v. Green*<sup>48</sup>—both will be more fully discussed below.<sup>49</sup> In its February 11, 1976, decision, which consolidated the appeals of these two cases, the Indiana Supreme Court acknowledged the “quite persuasive arguments” that the criminal change-of-judge rule should be modified.<sup>50</sup> The opinion then stated: “This matter has been referred to the rules committee of this court where it will be thoroughly studied and reconsidered.”<sup>51</sup>

Indiana Trial Rule 80 prescribed a preliminary study by the supreme court’s rules committee and required that the committee’s recommendations be submitted to the court *and be made public* by July 1, 1976.<sup>52</sup> This date passed without any known, formal reports by the committee. Trial Rule 80 further prescribes: “The committee *or the court* shall accept for consideration suggestions with reference to the proposed rules or other rules during the ensuing month [July].”<sup>53</sup>

On July 29, 1976, the Criminal Court of Marion County, in general term, petitioned the supreme court to modify the criminal change-of-judge rule. This petition was submitted to the supreme court, not to the rules committee. By its own rule, the supreme court was required to act upon this petition by November 1, 1976. It did not and to this day has not.

On August 4, 1976, six days after the general term petition was filed, Chief Justice Givan wrote a letter to the four Marion County

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<sup>44</sup>IND. R. TR. P. 76.

<sup>45</sup>IND. R. CR. P. 12.

<sup>46</sup>*Id.*; IND. R. TR. P. 76.

<sup>47</sup>No. CR75-472 C (Ind., Marion Cr. Ct., Apr. 2, 1976).

<sup>48</sup>No. CR75-421 C (Ind., Marion Cr. Ct., Dec. 24, 1975).

<sup>49</sup>See notes 80 & 81 *infra* and accompanying text.

<sup>50</sup>*State ex rel. Benjamin v. Criminal Court*, 341 N.E.2d 495,497 (Ind. 1976).

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

<sup>52</sup>IND. R. TR. P. 80.

<sup>53</sup>*Id.* (emphasis added).

Criminal Court judges. In it he stated: "The members of this Court, while not in total accord, are aware of the abuses of the present rule and recognize its inherent deficiencies. Nevertheless, we have heretofore been convinced that a change such as you have recommended would do more harm than good."<sup>54</sup> The letter then described one feared "harm": "Among the considerations that trouble some members are the 'substantive v. procedural' issue and the propriety, both constitutionally and as a matter of policy, of denying the change to defendants in criminal actions while granting it to civil litigants."<sup>55</sup> Thusly, the Justices raised a valid and unresolved question of great enormity. It was the constitutionality and fairness of affording greater protection to a one dollar bill than to personal liberty. Overlooked was their change-of-county rules, which do exactly that. This oversight was quickly brought to their attention.

Octavius Demon Engram, an armed robbery defendant facing up to thirty years in prison, demanded a change of county. His written demand admitted that he could not show cause under the criminal rule. He asserted that he had a constitutional right, as well as a right based upon concepts of fundamental fairness, to as much protection as the supreme court prescribed in civil cases.<sup>56</sup> I denied the motion for reasons stated in a memorandum opinion, which concluded: "I favor even handed justice, not even handed injustice or folly."<sup>57</sup>

Engram's attorneys petitioned the supreme court to mandate the change. They urged the same argument the Chief Justice had urged against modifying the criminal change-of-judge rule. I agreed with the petitioners to the extent that the disparity was indefensible but urged that it be eliminated by requiring cause for any change of county or judge. The supreme court simply denied the writ, without opinion, and left their own question "twisting slowly in the wind," where it still hangs.

The justices will again be confronted with the same question. Engram was convicted and has appealed, assigning the denial of the writ as the alleged error.<sup>58</sup> The implications are enormous. If the supreme court eliminates the disparity by prescribing no-cause change of county, as in civil cases, there will be a flood tide of criminal cases venued. This excess will be inspired by the fat fees

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<sup>54</sup>Letter from Chief Justice Richard M. Givan to the Marion County Criminal Court Judges (Aug. 4, 1976).

<sup>55</sup>*Id.*

<sup>56</sup>Brief for Appellant at 5, *State v. Engram*, No. 2-677 A 242 (Ind. Ct. App., filed Oct. 4, 1977).

<sup>57</sup>Memorandum Opinion Denying Motion to Correct Errors at 2, *State v. Engram*, No. CR76-279 B (Ind., Marion Cr. Ct., Mar. 29, 1977).

<sup>58</sup>*State v. Engram*, No. 2-677 A 242 (Ind. Ct. App., filed Oct. 4, 1977).

loaded upon urban counties by the courts in the smaller venue counties. For example, take two cases venued from Marion County. The first went to the Superior Court of Hamilton County. That court appointed public defenders and allowed them fees of \$24,541.37, which were billed to and paid by Marion County.<sup>59</sup> The second case was first venued to the Superior Court of Hancock County thence re-venued to the Wayne Circuit Court.<sup>60</sup> The private attorney representing the two defendants in the case had petitioned the Hancock court to withdraw from the defense of one of the two defendants, asserting that he had been paid nothing by that defendant but had been "fully paid" by the other. This was granted. After the case reached Wayne County, the same lawyer petitioned the Wayne court to withdraw from the defense of the remaining defendant, asserting that he had not been "fully paid." This petition was granted, and the same lawyer was instantly appointed as a public defender to defend the same defendant. He was later allowed a \$5,000 fee. The total public defenders' fee billed to Marion County was \$17,047.07. This appears to be a quite profitable practice.

Perhaps the reluctance to equalize the civil and criminal change-of-county rules by also allowing groundless changes in criminal cases stems from discretion being the better part of valor, or perhaps we should say, greed. To open the floodgates in criminal cases might kill the goose that laid these golden eggs. To equalize the rules by requiring grounds for changes of county in civil actions would raise a "furor," as we will presently see. There are subtle ways of protecting these high fees from the judgment of the original judge. The original judge has some responsibility to the taxpayers of the original county. It is they who must pay the bills. Nevertheless, the venue judges assume the authority to fix these fees despite the fact that the law specifically prescribes that the amount of the fees for such public defenders appointed by the venue courts "shall be settled and allowed by the judge of the court from which the change of venue was first granted."<sup>61</sup> This statute was not repealed by a later act of the General Assembly as some of the interested parties have contended.<sup>62</sup> This is but one phase of the thinly disguised professional chauvinism mentioned above.

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<sup>59</sup>State v. Banks, No. SCR73-012 (Ind., Hamilton Super. Ct., Jan. 16, 1975).

<sup>60</sup>State v. Statz, No. CR74-117 B (Ind., Marion Cr. Ct., change of venue granted July 8, 1974), renumbered No. SCR-626 (Ind., Hancock Super. Ct., change of venue granted Mar. 12, 1975), renumbered No. 308-CR (Ind., Wayne Cir. Ct., June 18, 1975).

<sup>61</sup>IND. CODE § 35-1-25-13 (1976).

<sup>62</sup>Ch. 169, § 216, 1905 Ind. Acts 631 (presently codified at IND. CODE § 35-1-25-13 (1976)), was not repealed by ch. 210, § 1, 1913 Ind. Acts 612 (presently codified IND. CODE § 34-2-15-1 (1976)). Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 514, 29 N.E.2d 405, 414 (1940).

### B. *Jurisdiction of the Supreme Court or the General Assembly*

Chief Justice Givan's letter also posed the question of whether jurisdiction to modify the requirements for changes of venue was with the supreme court or with the Indiana General Assembly. As we will see, the question is presently moot in civil cases because the General Assembly and the supreme court have both mandated groundless changes of venue. The following discussion is useful in disclosing how the court has ignored the questions Chief Justice Givan raised.

Even as the Chief Justice Givan posed the question, the court had already prescribed the grounds for changes of venue—that is to say, no grounds are needed, except for county changes in criminal cases. In 1969, the General Assembly had ceded procedural jurisdiction to the supreme court,<sup>63</sup> and had repealed all of its existing procedural statutes.<sup>64</sup> This “repealer” was incorporated in the supreme court's order establishing its new rules of procedure in 1969.<sup>65</sup> Significantly, the “repealer” did not repeal the statutes prescribing grounds for changes of judge or county.<sup>66</sup> In its rules, the court, in turn, did not prescribe any grounds for changes. In Trial Rule 76, it merely provided for changes “[i]n all cases where the venue of a civil action may now be changed from the judge or the county,” and prescribed as the proper procedure “an unverified application or motion.”<sup>67</sup> However, this very procedure made a dead letter of all the unrepealed “grounds” statutes by the simple provision in Trial Rule 76 that “an unverified application or motion” for change of judge or county “shall be granted . . . without specifically stating the ground therefor.”<sup>68</sup>

Since 1881, an Indiana statute has prescribed grounds for changes of judge or county in civil cases.<sup>69</sup> A requested change of judge is mandatory upon filing an affidavit averring one or more of the following: (1) The judge has been counsel in the case, (2) is kin to a party, (3) is a witness in the case, or (4) is guilty of bias or prejudice of interest.<sup>70</sup> The same Act prescribes three grounds for a change of county, which is mandatory upon filing an affidavit aver-

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<sup>63</sup>Ch. 191, § 2, 1969 Ind. Acts 715 (presently codified at IND. CODE § 34-5-2-1 (1976)).

<sup>64</sup>*Id.* § 3 (presently codified at IND. CODE § 34-5-2-2 (1976)).

<sup>65</sup>Supreme Court of Indiana Order Adopting Rules (July 29, 1969), *reprinted in* IND. CODE Court Rules, Book 1 at xxxii (Burns 1973).

<sup>66</sup>IND. CODE §§ 34-1-13-1 to -5 (1976) (originally enacted as ch. 38, § 255, 1881 Ind. Acts (Spec. Sess.) 285).

<sup>67</sup>IND. R. TR. P. 76.

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

<sup>69</sup>IND. CODE § 34-1-13-1 (1976) (originally enacted as ch. 38, § 255, 1881 Ind. Acts (Spec. Sess.) 285).

<sup>70</sup>*Id.*

ring one or more of the following: (1) The opponent's undue influence or local prejudice against the movant, (2) the county is a party, or (3) the convenience of witnesses.<sup>71</sup>

Thus, Trial Rule 76 merely substituted "an unverified application or motion" for the statute's required affidavit. However, both proclaim, in effect, the mandate that the requested change be granted. Left unresolved is the separation-of-powers issue: that is, who is competent to modify rights to a change—the court by rule or the General Assembly by statute? As a legal and perhaps a constitutional question, the justices should at least resolve the two serious questions Chief Justice Givan has posed.

*C. Do Present Laws and Rules Really Mandate Groundless Changes of Judge in Criminal Actions?*

The answer to the above question depends upon which statutes remain in force, the interpretation of those that are, and the interpretation of Criminal Rule 12.

The same disparity between civil and criminal change of county has been the law since 1852.<sup>72</sup> The present separate statutes prescribing criminal and civil changes of judge were enacted in 1881.<sup>73</sup> The civil statute is clearly mandatory. The criminal statute itself was not, and is not, clearly mandatory. It was the 1925 decision in *Barber v. State*,<sup>74</sup> which held the following language from the criminal statute to be mandatory:

The defendant may *show to the court*, by affidavit, that he believes he cannot have a fair trial, owing to the bias and prejudice of the judge against him, or the excitement or prejudice against the defendant in the county or in some part thereof, and demand to be tried by disinterested triers.<sup>75</sup>

The word "show" means: "To make apparent or clear by evidence; to prove (or) to reasonably satisfy."<sup>76</sup>

In *State v. Benjamin*<sup>77</sup> and *State v. Green*,<sup>78</sup> I interpreted the criminal statute to require evidence of facts susceptible of creating a

<sup>71</sup>*Id.*

<sup>72</sup>See ch. 1, § 207, 2 IND. REV. STAT. 74 (1852) (civil change of venue) (current version at IND. CODE § 34-1-13-1 (1976)); ch. 1, §§ 75-78, 2 IND. REV. STAT. 370-71 (1852) (repealed 1881) (criminal change of venue) (current version at IND. CODE §§ 35-2-1-1 to -6 (1976)).

<sup>73</sup>See ch. 38, § 225, 1881 Ind. Acts. (Spec. Sess.) 285 (current version at IND. CODE § 34-1-13-1 (1976)); ch. 36, §§ 194-195, 1881 Ind. Acts. (Spec. Sess.) 151 (current version at IND. CODE §§ 35-2-1-1 to -6 (1976)).

<sup>74</sup>197 Ind. 88, 149 N.E. 896 (1925).

<sup>75</sup>IND. CODE § 35-1-25-1 (1976) (emphasis added).

<sup>76</sup>BLACK'S LAW DICTIONARY 1549 (4th ed. 1951).

<sup>77</sup>No. CR75-472 C (Ind., Marion Cr. Ct., April 2, 1976).

<sup>78</sup>No. CR75-421 C (Ind., Marion Cr. Ct., Dec. 24, 1975).

belief of bias and prejudice. Note that the statute does not require proof of bias and prejudice. It requires a showing that the defendant believes the judge is biased. It is common sense and fair that one should not have to worry at his trial that the judge has it in for him. The statutes do not provide for a change of judge because a civil party or a criminal defendant disagrees with the judge's rulings, hence his views of the law; and the supreme court has so held.<sup>79</sup>

I followed this principle in both *Benjamin* and *Green*. Both defendants were complete strangers to me. With Benjamin present in open court, I told his attorney: "If you can show me any basis upon which this defendant has grounds to believe the Presiding Judge is biased or prejudiced against him I will grant your change and I will give you the opportunity to present any such evidence." Benjamin refused to offer evidence. His motion was overruled. He later wrote in his brief that he "would accept drug abuse treatment in this case if in fact he were to be otherwise eligible under the law," and that he knew I would not agree to that.<sup>80</sup> He was correct, because he was charged with first degree burglary, which carried a sentence of ten to twenty years,<sup>81</sup> and he was therefore ineligible for any kind of probation.<sup>82</sup>

In *Green*, the defendant stated why she wanted a change of judge as follows: "Because of my record and because of the fact that I hear that he doesn't give continuances nor probation nor suspended sentences." The supreme court ordered that she be given the change. She then "granted" herself a permanent continuance by absconding.

Both Benjamin and Green successfully petitioned the supreme court to order me to grant their demands.<sup>83</sup> The supreme court was confronted with traditional liberality in changes of judge. Yet the challenge I created was not precipitous. My court had become virtually paralyzed by wholesale changes. It was pretty common knowledge that most changes were demanded for the same reasons given by Benjamin and Green, plus objections to prompt trials.

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<sup>79</sup>Day v. State, 207 Ind. 273, 192 N.E. 433 (1934); Hays v. Morgan, 87 Ind. 231 (1882).

<sup>80</sup>Relator's Supp. Brief for Writ of Mandamus at 4-5, State v. Benjamin, No. CR75-472 C (Ind., Marion Cr. Ct., April 2, 1976).

<sup>81</sup>IND. CODE § 35-13-4-4 (1976) (repealed 1977).

<sup>82</sup>*Id.* §§ 35-7-1-1, 16-13-6.1-2, -16 (amended 1976). I later granted his change under order of the supreme court. He must have done his time by magic calendar. Eight months later he was back in court charged with the new crime of assault and battery with intent to rob. State v. Benjamin, No. CR76-437 B (Ind., Marion Cr. Ct., filed Dec. 28, 1976).

<sup>83</sup>State *ex rel.* Benjamin v. Criminal Court, 341 N.E.2d 495 (Ind. 1976) (consolidated appeal of *Benjamin* and *Green*).

Chief Justice Givan had discussed the problem with me several times. He was sympathetic and as helpful as possible in view of past precedents. Finally, I told him that I was "of a mind to deny" some demands and to seek a reconsideration of the precedents. He assured me that if I did, such matter would be given careful consideration.

I had some reason for hope. In 1974, the supreme court had modification under consideration. The outcry was so great that the project was aborted. The Chief Justice so told us at the November 1974 meeting of the Indiana Judges Association; and the chairman of the court's rules committee publicly confirmed all of this, stating that the 1974 movement "met such a furor of opposition that the proposal was dropped."<sup>84</sup> I suspect the same "furor" renewed itself while *Benjamin* was pending in 1976.

Be that as it may, the supreme court's opinion in *State ex rel. Benjamin v. Criminal Court*<sup>85</sup> did not discuss the merits of the case presented. The court did refer the matter to its rules committee for study and reconsideration—the equivalent of appointing criminal lawyers as special judges to try each others' cases (which I never did). At any rate, no one ever saw a report from the rules committee; or heard where it met, if it did; or learned who it heard, if anybody. Certainly, Chief Justice Givans' letter of August 4, 1976,<sup>86</sup> indicated that the matter had not been studied and reconsidered sufficiently for resolution of the issues he raised. Yet, all this was minor compared with how the legal question was shunted.

The supreme court's opinion asserted: "In oral presentation to this Court, the respondent conceded the . . . fact that even under the prior statute no evidentiary hearing concerning bias and prejudice was anticipated before the trial judge."<sup>87</sup> This is simply untrue. I was the respondent. In my brief, I quoted the statute and stated:

We believe the statute meant the changes should be granted upon the defendant's belief that the judge is biased.

But it is in the order of life that beliefs are based upon something which is subject to objective proof. Upon a showing of any fact or facts susceptible of producing such belief the change should be granted.

. . . .

But this does not mean he is entitled to enter trial believing

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<sup>84</sup>Indianapolis Star, Jan. 19, 1977, at 5, col. 5.

<sup>85</sup>341 N.E.2d 495 (Ind. 1976) (consolidated appeal of *Benjamin* and *Green*).

<sup>86</sup>See pp. 414-15 *supra*.

<sup>87</sup>341 N.E.2d at 497.

the judge will turn him loose, despite his guilt, hence that he has a right to shop for a different forum and better odds.<sup>88</sup>

At the oral presentation, this position was clearly understood by the justices. As proof, and to illustrate, Justice Prentice asked me what I would think of a rule requiring the trial judge to accept as true the allegation of fact or facts giving rise to the defendant's claim that he believed the judge to be biased. I replied that I thought such would suffice if the allegations were under oath; that such would then be the same as in the case of purging of criminal contempt; and that the sworn statement, being taken as true, would present a pure question of law as to the sufficiency of the facts sworn—the affiant being, however, liable for perjury if he swore falsely.

The prime, and almost only, argument urged in favor of the present groundless change of judge rule was voiced by Justice Arterburn: "I don't think a judge ought to have the right to decide if he is prejudiced."<sup>89</sup> Obviously, Justice Arterburn did not comprehend the issues presented in *Benjamin* and *Green*. Nor, except for Justice Hunter, do any of the justices who were then serving appear to see the irony of the present rules, which prescribe that the "biased judge" nominate the one who takes his place to try the case.<sup>90</sup> Under the rule, the groundless change is available for only ten days after arraignment.<sup>91</sup> Beginning on the eleventh day, the judge does decide if the defendant is entitled to the change. What magic made the judge fair and competent at the stroke of midnight ending the tenth day?

Also, under my suggested interpretation of the statute, the judge would only decide if some fact were susceptible of causing the defendant to believe that the judge was biased. The judge would not decide if he was or was not biased, or even whether the defendant really believed he was; he would only decide whether the defendant had sworn to facts giving him reason to be fearful that the judge was biased.

Finally, bear in mind that abuses are admitted even by the justices. It is their responsibility to devise a fair rule and to eliminate these abuses. Of course when the rule is absolute, they are relieved of any duty to pass upon any controversy in this regard. If the justices were willing to assume this responsibility, they could fashion a fair and viable rule. Other states and the federal courts

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<sup>88</sup>Brief for Respondent at 5, State *ex rel.* Benjamin v. Criminal Court, 341 N.E.2d 495 (Ind. 1976).

<sup>89</sup>Indianapolis News, May 14, 1977, at 15, col. 5.

<sup>90</sup>IND. R. CR. P. 12.

<sup>91</sup>*Id.*; IND. R. CR. P. 13.

have done so. A rule could prescribe that another judge pass upon the law question—that is, whether the facts alleged were susceptible of causing a defendant to believe that the judge was biased. The supreme court would ultimately review any denial in light of an appeal record that would reflect whether or not the judge had been fair. There must be a fair balance. There are some judges who are pretty bad. Most judges are dedicated. The supreme court has the authority, hence the duty and responsibility, to decide which is which when a judge is challenged. Instead of doing so, they have delegated this authority to the criminals, among others.

The supreme court's Code of Judicial Conduct defines every conceivable cause for which a judge should be disqualified. It is a good Code. The court has the authority and the duty to enforce it. In bad cases, it does so.<sup>92</sup> However, acting only in bad cases is the easy course. Where there is a will there is a way. I do not question the desires of the justices to be fair. I do question their willingness to face up to the opponents of modification and to the extra work that would be required in reviewing denials of demands for changes of judge.

Under the present rules, it is impossible for a criminal judge to conduct court in the proper way. To the criminal, the good judge is the bad judge; so the criminal judge who forces prompt trials and metes out sure punishment to the guilty will be divested of his office by leave of the Indiana Supreme Court. Of course a judge can always trim back and make himself tolerable to criminals and their lawyers, and this can be an almost unconscious reaction.<sup>93</sup>

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<sup>92</sup>See e.g., *In re Terry*, 360 N.E.2d 1004 (Ind. 1977); *In re Evrard*, 333 N.E.2d 765 (Ind. 1975); *In re Littell*, 260 Ind. 187, 294 N.E.2d 126 (1973).

<sup>93</sup>I firmly believe, as a matter of abiding principle, that no judge should preside in any case where he has an interest. However, be assured that the supreme court will not carry this principle to extremes. Thirty-two days after its decision in *State ex rel. Benjamin v. Criminal Court*, 341 N.E.2d 495 (Ind. 1976), the supreme court decided the "Touch-Tone-Phone" case. *State ex rel. Indianapolis—Marion County Bldg. Auth. v. Superior Court*, 344 N.E.2d 61 (Ind. 1976).

A trial judge "adjudicated" that the court's dial phones were too coarse for his liking and ordered touch-tone phones installed by fiscal authorities, who promptly asked for a change of judge. There was, and is, a statute prescribing that any such fiscal officers, in precisely this kind of case, "[are] entitled to a change of venue from the judge," IND. CODE § 34-5-1-1 (1976), and in such case, the supreme court shall name a special judge who lives at least two counties removed. The aesthetic trial judge declared this statute unconstitutional, denied the change, and threatened to toss his opponents into the local bastille. They applied for a writ of mandate, precisely as was done in *State v. Benjamin* and *State v. Green*; but the results were quite different. The supreme court held that the statute was not *totally* unconstitutional; but that it was unconstitutional if applied to a case like this, where all the poor trial judge had ordered were basic necessities, such as touch-tone-phones. Only time, and further test cases, can seal the fate of other basic necessities, such as spittoons and wigs.

Defendants Benjamin and Green were total strangers to the judge, who could not

*D. We Are Strictly Bound By Our Rules—In Most Cases, That Is.*

The *State ex rel. Benjamin v. Criminal Court*<sup>94</sup> opinion states: "The Supreme Court, in adjudicating any particular case, must determine the rights of the parties as they appear under the existing statutes, rules and case law of this state."<sup>95</sup> The opinion then stated that modification of existing law must be done under regular procedures and concluded: "Such a change, however, must operate prospectively and not retroactively."<sup>96</sup>

The rule for amending the supreme court's rules prescribes a calendar schedule.<sup>97</sup> The rules committee must submit its proposed amendments only once a year—on or before July 1. Others may then submit proposed amendments during July. The general term petition was filed on July 29, 1976, in accordance with this time schedule.<sup>98</sup> The amendment rule further prescribes that the court "adapt the rules with such modifications as it determines to be proper on or before November first. Such rules as adopted shall become effective on January 1 of the following year unless the court, in the rule, orders otherwise."<sup>99</sup> The amendment rule further prescribes that: "[E]xcept in cases of emergencies, as otherwise directed by the Supreme Court," the foregoing procedure and time schedule shall govern.<sup>100</sup>

I was aware of this rule when I decided *State v. Benjamin*<sup>101</sup> and *State v. Green*.<sup>102</sup> It was not mentioned when I discussed a possible test case with Chief Justice Givan. In the context of the problem, a delay in effective date until January 1, 1977, would have mattered but little, and it was rather insignificant whether any modified rule applied to *Benjamin* or *Green* or, for that matter, to any pending case. The objective, as the justices knew, was to obtain eventual relief from the abuses admitted in the *Benjamin* opinion, in Chief Justice Givan's letter,<sup>103</sup> and from those so graphically described by Justice Hunter.<sup>104</sup> The direct challenge also presented a concrete

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have had a personal interest in the outcome. Besides, their cases were triable by jury. In the Touch-Tone-Phone case, the judge decided his own case; it was not triable by jury. The justices are dead set against a judge deciding his own case—in some cases, that is.

<sup>94</sup>341 N.E.2d 495 (Ind. 1976).

<sup>95</sup>*Id.* at 497.

<sup>96</sup>*Id.*

<sup>97</sup>IND. R. TR. P. 80.

<sup>98</sup>See p. 414, *supra*.

<sup>99</sup>IND. R. TR. P. 80.

<sup>100</sup>*Id.*

<sup>101</sup>No. CR75-472 C (Ind., Marion Cr. Ct., April 2, 1976).

<sup>102</sup>No. CR75-421 C (Ind., Marion Cr. Ct., Dec. 24, 1975).

<sup>103</sup>See note 59 *supra* and accompanying text.

<sup>104</sup>See note 45 *supra* and accompanying text.

case clearly proving the enormity of these abuses. Finally, it put the matter of correcting the rule before the justices<sup>105</sup> and avoided the futile exercise of appealing to the rules committee. I knew from experience that the court could, and had, ordered modification of venue rules in mid-year and mid-case with retroactive effect.

Early in 1972, I was appointed special judge by the Honorable John L. Niblack, Judge of the Marion Circuit Court, in what was known as the Airport case.<sup>106</sup> On May 8, 1972, I overruled a Motion for Change of Venue from Marion County. This ruling was correct under Trial Rule 76(6) as it existed on that day. The very next day the supreme court made an order that put into effect, retroactively as of March 28, 1972, an amendment to Trial Rule 76(6). This amendment required me to vacate my denial and grant the change of county, which I did.

This question assaults one's mind: Why was the court able to act overnight in regard to Trial Rule 76(6) and yet has not been able to act in two years in regard to the admitted abuses in Criminal Rule 12? After all, the supreme court's opinion in *State ex rel. Benjamin v. Criminal Court*<sup>107</sup> stated: "The respondent then proceeded to argue, quite persuasively, that the rule should be changed." This was in January 1976. Yet, after this lapse of time, the court has not addressed itself to the admitted abuses of Criminal Rule 12; nor has it addressed itself to its amazing prescriptions whereby it affords greater change of county protection to a one dollar bill than it does to one facing life imprisonment—a question Chief Justice Givan himself raised. Instead, as we will now see, the court has drawn the noose tighter on the trial courts.

This was done in *State ex rel. Barlow v. Marion Criminal Court*.<sup>108</sup> Had my ruling in this case been affirmed, it would have afforded no real relief from Criminal Rule 12. My ruling was simply that Criminal Rule 12 required the defendant to personally sign his demand for change of judge. This problem had come to my attention when a defendant appearing before me disclaimed his attorney's signed request for a change of judge.<sup>109</sup> It was after this that I made the ruling in question. The ruling was correct. The supreme court,

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<sup>105</sup>The supreme court does overrule some of its earlier decisions. Generally, such rulings do have retroactive effect. Essentially, I was asking the court to overrule *Barber v. State*, 197 Ind. 88, 149 N.E. 896 (1925). See note 77 *supra* and accompanying text.

<sup>106</sup>*Merchant's Nat'l Bank & Trust Co. v. Indianapolis Airport Auth.*, No. C72-26 (Ind., Marion Cir. Ct., change of venue granted May 17, 1972); renumbered No. C72-137 (Ind., Boone Cir. Ct., Jan. 7, 1974).

<sup>107</sup>341 N.E.2d 495, 497 (Ind. 1976).

<sup>108</sup>361 N.E.2d 1206 (Ind. 1977).

<sup>109</sup>*State v. Hutcherson*, No. CR76-272 C (Ind., Marion Cr. Ct., Feb. 25, 1977).

however, ordered that the changes be granted, holding that Criminal Rule 12 did not require the moving defendant to personally sign the motion. Justice Hunter dissented. The majority, even as it so ordered, conceded: "Repondent's interpretation of [Criminal Rule 12] is not unreasonable, but is nonetheless erroneous."<sup>110</sup>

My interpretation depended upon several factors. Prior to the adoption of the supreme court's rules, in both civil and criminal actions, the moving party was required to sign, in person, any affidavit for a change of judge.<sup>111</sup> The supreme court's opinion concedes this was the law prior to the adoption of the rules. When the court adopted its rules, it expressly provided that in civil actions the unverified application could be signed "by a party or his attorney."<sup>112</sup> In criminal actions, the court prescribed: "In all cases where the venue of a criminal action may now be changed from the judge, such change shall be granted *upon the execution* and filing of an unverified application therefor by the State of Indiana or *by the defendant*."<sup>113</sup> The criminal rule clearly prescribes execution by the defendant. The affirmative change of prior law in civil cases, and omission of such change in criminal cases, was quite convincing, and I think conclusive:

It has been held that what is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in a particular act, and it has been stated that the maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite an contrary treatment.<sup>114</sup>

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<sup>110</sup>361 N.E.2d at 1207.

<sup>111</sup>McHargue v. State, 193 Ind. 204, 139 N.E. 316 (1923) (criminal); Fidelity & Cas. Co. v. Carroll, 186 Ind. 633, 117 N.E. 852 (1917) (civil).

<sup>112</sup>IND. R. TR. P. 76(1).

<sup>113</sup>IND. R. CR. P. 12.

<sup>114</sup>26 IND. L. ENCYCLOPEDIA Statutes § 119 (1960).

A statute for a drug abuse program was interpreted (by the court of appeals) regarding eligibility for the program. The court of appeals stated:

When a limitation is imposed in a particular instance, the limitation will not be read into other statements in which it is not specifically provided. . . .

The legislature did limit the types of crime which would give rise to ineligibility with respect to subsections (a) and (c). We must therefore assume that the same limitation would have been made in subsection (d) if it had been intended.

Trabue v. State, 328 N.E.2d 743, 744 (Ind. Ct. App. 1975).

It follows that when an exception (*e.g.*, allowing counsel to sign) is prescribed in one rule and omitted in the second rule, it should be assumed that the same exception would have been made in the second rule if it had been so intended.

The superficial significance of this decision is the contrast with the court's rescript in *State ex rel. Benjamin v. Criminal Court*<sup>115</sup> that it could not amend its rules retroactively. In this case, it did. The court, in order to mandate me to rule for the defendants, had to rationalize the alteration of the plain language of its rule in a specific case, in mid-year, and with retroactive effect. That is precisely what it said it could not do, despite its having literally done so before in the 1972 Airport case.<sup>116</sup> Furthermore, it again literally did so in late 1977.<sup>117</sup>

The further significance of *Barlow* is that it constituted an epilogue conclusively proving that the supreme court would grant no relief from the "anachronistic" venue rules. This refusal is at odds with the court's recent notable service in establishing other needed reforms. For example, the court approved an excellent and comprehensive criminal discovery procedure.<sup>118</sup> This was the greatest and most beneficial criminal procedure reform during the statehood of Indiana. The court has also overruled some truth-suppressing precedents;<sup>119</sup> approved sensible procedures for calling, organizing, and managing regular jury panels;<sup>120</sup> and approved jury instructions in plain and understandable language.<sup>121</sup>

The court's willingness to improve these problems, and others not mentioned here, but not its venue rules, warrants a belief that it has yielded to pressures from the bench and bar. Of course, no one knows what percentage of the bench and bar favors modification, although we know many do. The Indiana State Bar Association is a bit bashful about an open discussion or debate upon the issue. Some of its members and one of its high officials, who are members of the General Assembly, have blocked any hearing or vote on the issue. All of these members are very vocal. I suspect the supreme court and General Assembly may be like the farmer who contracted to

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<sup>115</sup>341 N.E.2d 495 (Ind. 1976).

<sup>116</sup>See note 110 *supra* and accompanying text.

<sup>117</sup>See *Davis v. State*, 368 N.E.2d 1149 (Ind. 1977); *Logal v. Cruse*, 368 N.E.2d 235 (Ind. 1977).

<sup>118</sup>See *State ex rel. Keller v. Criminal Court*, 317 N.E.2d 433 (Ind. 1974).

<sup>119</sup>See *Sharp v. State*, 369 N.E.2d 408 (Ind. 1977); *McGowan v. State*, 366 N.E.2d 1164 (Ind. 1977); *Patterson v. State*, 324 N.E.2d 482 (Ind. 1975).

<sup>120</sup>See *Holt v. State*, 365 N.E.2d 1209 (Ind. 1977); *Brown v. State*, 360 N.E.2d 830 (Ind. 1977); *Johnson v. State*, 362 N.E.2d 1185 (Ind. Ct. App. 1977).

<sup>121</sup>See *Holt v. State*, 365 N.E.2d 1209 (Ind. 1977); *Brown v. State*, 360 N.E.2d 830 (Ind. 1977); *Johnson v. State*, 362 N.E.2d 1185 (Ind. Ct. App. 1977).

furnish a restaurant a million frog legs from his horse pond. When he fell down on his contract he explained: "I was evidently misled by the noise."

#### IV. SUMMARY

Though inadequate, only punitive deterrence affords any real measure of crime control. It is folly to reject it in favor of theories disproven in practice. A firm commitment to consistently punish crime will breed, not only fear of, but respect for the law. Pride in a law abiding life has declined during, and due to, our recent tolerance for crime. Alexander Pope, in *An Essay on Man*, put this succinctly:

Vice is a monstor of so frightful mien,  
As to be hated needs but to be seen.  
Yet seen to oft, familiar with her face,  
We first endure, then pity, then embrace.<sup>123</sup>

To be feared and respected the law must not be foolish. A precedent that fails in any respect to serve the cause of truth and justice should be, in that respect, modified. That the precedents here discussed have so failed is attested to by experience and eminent authorities. There is a trend toward modification of the exclusionary rule. Indiana courts have established a firm basis for this reform by approving a damage remedy and by abolishing state sovereign immunity. It would be gratifying if our supreme court would be first to complete this needed reform.

Recently, the supreme court has rendered notable service in tailoring other precedents so as to serve truth and justice. These, and other reforms, reduce the aspect of sportmanship that has become so evident in criminal procedure. They can speed up and increase the disposition of a court's business without detracting from the quality of justice. Yet, these benefits can be, and often are, eclipsed by what Justice Hunter correctly called our "anachronistic" venue laws.

The February 11, 1976, *State ex rel. Benjamin v. Criminal Court*<sup>124</sup> opinion conceded that the court's venue rules were questionable, whereupon the court ordered that those rules be "thoroughly studied and reconsidered." The court's rules prescribed a public report upon such study by July 1, 1976. When none was issued, a General Term Petition was filed on July 29, 1976. The chief justice's letter of August 4, 1976, to the judges of the Marion Coun-

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<sup>122</sup>A. POPE, AN ESSAY ON MAN (1733).

<sup>123</sup>*Id.* at epis. II, l. 217.

<sup>124</sup>341 N.E.2d 495 (Ind. 1976).

ty Criminal Court, admitted the abuses practiced under the courts venue rules. However, he wrote that two legal questions should be resolved in the process of any revision. Since these were law questions, they were for the court to decide; and it therefore should have decided if it or the General Assembly had jurisdiction to revise, and if, in doing so, the Indiana Constitution required equal venue rights for criminal defendants facing life imprisonment and civil litigants facing loss of one dollar.

The justices raised these two questions as problems to be dealt with in passing upon the General Term Petition. By their own rules, resolution of these questions was due by January 1, 1977, but has not been forthcoming. Judicial responsibility is the concomitant requirement of judicial authority. This also applies to trial judges. The law imposes upon trial judges the responsibility to dispose of litigation with dispatch and according to law; the venue rules undermine the trial judge's concomitant authority to do so.

For example, the justices ruled that defendants Benjamin and Green had the absolute right to emasculate the regular judge's authority without having or claiming any reason whatever. Nevertheless, these defendants disclosed their objections to him. Green swore she feared the regular judge would try her speedily and deny her probation because of her bad criminal record. Benjamin said he feared the judge would deny him "drug probation," which in his case—first degree burglary—the law forbade. So, under the court's rules, the trial judge is duty-bound to try cases with dispatch and follow the law—unless, that is, a litigant (including an admittedly guilty criminal) objects. The unvarnished truth is that with few exceptions, these changes are not sought in quest of a fair trial but rather to avoid any trial whatever with a soft plea bargain. The further truth is that the supreme court has armed criminals with a weapon whereby they can paralyze a busy criminal court. It is impossible for such a court to schedule and dispose of its business with one court facility, one staff, and dozens of special judges.

These admitted abuses could be reduced to manageable proportions by the proposal made, ignored, and indeed misstated in the *State v. Benjamin*<sup>125</sup> decision. This end could be accomplished by simply overruling *Barber v. State*,<sup>126</sup> which a reasonable interpretation of the 1905 statute fully warrants.<sup>127</sup> This is wholly within the jurisdiction of the supreme court.

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<sup>125</sup>No. CR75-472 C (Ind., Marion Cr. Ct., April 2, 1976).

<sup>126</sup>197 Ind. 88, 149 N.E. 896 (1925). See note 77 *supra* and accompanying text.

<sup>127</sup>IND. CODE § 35-1-25-1 (1976) (Originally enacted as ch. 169, § 203, 1905 Ind. Acts 628). See note 78 *supra* and accompanying text.

If, however, the justices disagree with this solution, then it still remains their long-neglected responsibility to resolve the two questions they raised and then act, insofar as their asserted jurisdiction permits, to eliminate the abuses they admit. Courts should not be too timid to think nor too flaccid to act, even in the face of a potential "furor."

