

TRIBUTES

ON THE RETIREMENT OF JUSTICE ROGER O. DEBRULER

CHIEF JUSTICE RANDALL T. SHEPARD*

As the Indiana Supreme Court works its way towards being two centuries old, the court has experienced in rapid succession the retirement of two of the most prominent justices in its history.

Not since the adoption of the current constitution brought to a close the nearly thirty-six-year career of Justice Isaac N. Blackford in 1853 has anyone left the court after so long a term of service. Justice Roger O. DeBruler's twenty-eight years on the court began during the court's final partisan elections and concluded at a moment when all the members have been appointed under the Missouri Plan adopted by the voters who re-elected Justice DeBruler in 1970.¹ Just as the court changed in this period, so did the society itself. DeBruler arrived at the supreme court during the turbulent 1960s and served until one of those Baby Boomer war protesters had found his way to the White House.

Roger DeBruler has been serving on the supreme court during my entire career as a lawyer. Indeed, he signed the certificate admitting me to the bar. It was a singular honor and a great personal and professional pleasure to end up serving with him for the last eleven years. I am glad to have this chance to share a few thoughts about his work on the court.

One cannot help but start with the sheer monumentality of Roger DeBruler's contribution as it appears in the case reporters. He wrote some 1750 opinions during his service on the supreme court. Of these, about 890 were majority opinions, 590 were dissents, and 270 were concurrences.

Roger was famous for staking out a position as a dissenter and holding to it until he managed to recruit enough converts to carry the day. Some of these campaigns lasted a long time. Almost everybody who served with Roger eventually became part of such a story. My own most memorable conversion occurred during a debate on the operation of the rule for obtaining a change of judge in a post-conviction proceeding. I had always understood that the rule contemplated an automatic change of judge, just as in civil cases. In a well-publicized 1991 death penalty case, I succeeded in forging a majority to order a

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1. The third longest-serving justice, of course, was Richard M. Givan, who won election in the fall of 1968 and retired in January 1995. The two men thus sat beside each other at the court's conference table for more than a quarter of a century. Both also served as chief justice.

change of judge over Roger's dissent.² In the course of some later discussion about rule amendments, however, Roger took great lengths to describe the court's original agreement about changes of judge in post-conviction cases, and his explanation finally turned on a light bulb in the duskiest recesses of my mind. When the matter came around again in the context of an actual case, I voted with Roger and found myself writing the following:

The Whiteheads seize on language in this author's opinion in *State ex rel. Rondon v. Lake Superior Court* (1991), Ind., 569 N.E.2d 635, to contend that once a petitioner has complied with the form required by the rule, the trial judge is obliged to grant the motion for a change of judge. Actually, although a majority saw fit to order a change of judge in *Rondon*, the better description of the operation of the rule is found in Justice DeBruler's dissent. *Id.* at 636.³

Reading this opinion sometime later, our new colleague Justice Frank Sullivan, Jr., said to me: "I only recently realized how totally you capitulated."⁴

Roger DeBruler worked out these and thousands of other cases with a cordiality and a care for detail that made working with him both delightful and instructive. In the several thousand working days we served together, I can remember but a single time that he raised his voice in anger.

The body of Roger's work reflects in many ways his own assessment about the lives and aspirations of his fellow Hoosiers.⁵ It is on the whole a positive assessment. In a recent case about search and seizure of garbage left at the curb, Justice DeBruler painted a fine picture about this place called Indiana:

[T]he inhabitants of this state have always valued neighborliness, hospitality, and concern for others, even those who may be strangers. Here, an open front walk leading to the front porch of a house is accurately judged by the passerby to be an open invitation to seek temporary shelter in the event of a sudden downpour. Stepping on that part of a yard next to the street or sidewalk to seek shade from a tree or to pick edible yet valueless plants growing in the lawn has been regarded

2. *State ex rel. Rondon v. Lake Superior Court*, 569 N.E.2d 635 (Ind. 1991).

3. *State ex rel. Whitehead v. Madison Circuit Court*, 626 N.E.2d 802, 803 (Ind. 1993).

4. In my own defense, I record here a similar exchange that occurred after one of the court's appointees became a problem. I had wanted someone else in the first place, but a three-justice majority including Justice DeBruler had carried the day on the appointment. When push came to shove and a change needed to be made, Roger said in conference that it was all my fault. "My fault!" I said, "You're the one who voted for him." "Yes," replied Roger, "but if you had been more eloquent in stating your position I probably would have done the right thing in the first place."

5. Being a Hoosier means a good deal to Justice DeBruler. My law clerks tell me that he has used the word "Hoosier" more times in his opinions than anybody on the court, just a bit ahead of me. It is not an accident that Roger's biography in the court's brochure reads straightforwardly: "A native of Evansville, Indiana, and a product of Hoosier schools and universities."

proper conduct. It is permissible for children at play on the street or in the alley to examine the contents of garbage cans to find interesting items, so long as they do not make a mess. It is not infrequent that valuable items are placed in the trash in hopes that someone passing by will see them there and will take them and make good use of them. It has often been said that if you do not want others to know what you drink, don't put empties in the trash.⁶

Justice DeBruler has been especially firm about the importance of automobiles in the everyday lives of Hoosiers. In another search and seizure case, he wrote:

Americans in general love their cars. It is, however, particularly important, in the state which hosts the Indy 500 automobile race, to recognize that cars are sources of pride, status, and identity that transcend their objective attributes. We are extremely hesitant to countenance their casual violation, even by law enforcement officers who are attempting to solve serious crimes.⁷

These descriptions of Hoosier life and countless other observations about important topics, legal and societal, constitute a distinguished body of work that is cited from county courthouses to the U.S. Supreme Court.⁸

Standing right alongside DeBruler the adjudicator all these years has been the somewhat more elusive DeBruler the person. Countless times during the past eleven years, people have posed questions more or less like the one former Governor Robert D. Orr asked me within a few months of my appointment: "What's that fellow really like, anyway?"

It always seemed that Roger heard drummers whose beat the rest of us could only dimly surmise. I always thought the spirit of the man had been captured by the first group photograph taken after he came to the court in the fall of 1968. In this picture, the newest thirty-something Democrat justice sits up proudly in a full 1960s beard (fluffed up, no doubt, during the bicycle ride over from Lockerbie Square) and faces the camera with a restrained grin that says: "I'm not like them." By "them," Roger frequently meant the Republicans on the court.

With those justices and others, Roger relished the give and take of debating cases. And, he developed an elegant way of bringing discussions to the close. On those days when even his lengthiest effort to corral a majority failed, Justice DeBruler would turn toward me and say, "Chief, I think we need to come to closure on this case." Sometimes he would simply bark out, "Closure!" We all knew what this meant.

There were a few such habits that long seemed mysterious even to supreme court justices. Justice DeBruler always referred to us by using our titles, even in the most informal situations. "Justice Dickson, can you go to lunch today?" or

6. *Moran v. State*, 644 N.E.2d 536, 541 (Ind. 1994).

7. *Brown v. State*, 653 N.E.2d 77, 80 n.3 (Ind. 1995).

8. *Schiro v. Farley*, 510 U.S. 222, 237-38 (1994) (Blackmun, J., dissenting); *Duckworth v. Eagan*, 492 U.S. 195, 216-217 (1989) (Marshall, J., dissenting).

“Justice Selby, I failed to record your vote in this case. What was it?” For a very long time, I viewed this practice as a method Justice DeBruler used for placing some distance between himself and those around him. I finally came to understand that it was in fact a gentle way of affirming his respect for the office and the officeholder.

Justice DeBruler was an ardent fan of Indiana University, utterly undeterred as he found himself surrounded by Boilermakers, Michiganders, Dartmouths, and Princetonian Yalies.

He was an ardent Democrat (except when adjudicating). He was a man who proved that many of us judicial appointees do still remember where we came from and feel continuing gratitude to those who gave us the chance to be supreme court justices.

Justice DeBruler was a daily watcher of Wall Street, completely conversant with the intricacies of investing in municipal bonds.

He is a man who lifted our hearts even when he talked about his own plans for retirement. “I understand you plan to spend some time in France,” said one of my colleagues over our last lunch together. “How long will you be there?” “A year,” replied Roger. “When will you be going?” “After the winter in Martinique,” Roger said.

Those of us who have served on the court with Roger DeBruler will miss him “sorely bad.” We take heart, however, by reflecting on the great gift he has given us and the rest of his fellow Hoosiers. The gift is his very career, about which we might say, in the poet’s words inscribed in brass at the Statehouse rotunda: “Ain’t God Good to Indiana?”