

JUSTICE DEBRULER AND THE DISSENTING OPINION

KENNETH M. STROUD*

INTRODUCTION

I am honored to contribute to this symposium on the history of the Indiana courts, and I commend the Indiana Supreme Court and the *Indiana Law Review* for sponsoring such an interesting and informative event. For my part, I have been asked to make some comments about Justice Roger O. DeBruler, the second-longest sitting justice in the history of the Indiana Supreme Court. Upon his retirement on August 8, 1996, he had served almost twenty-eight years on the court, second only to the legendary Isaac N. Blackford who served for thirty-six years. DeBruler was born and raised in Evansville, Indiana. He served three years in the U.S. Army and graduated from Indiana University School of Law—Bloomington in 1960. His judicial career began at age twenty-nine when he was appointed to the Steuben Circuit Court in 1963 by Governor Matthew E. Welsh. He won the general election for that office in 1964, receiving more votes than President Lyndon B. Johnson and Democratic Governor Roger Branigin. Governor Branigin appointed him to the Indiana Supreme Court on October 1, 1968 to fill a vacancy caused by the death of one of its members, Judge Donald R. Mote. At that time, Justice DeBruler was thirty-four years old, making him the second youngest person to sit on the Indiana Supreme Court to date.

In 1970, Justice DeBruler ran for election to the court under the old system.¹ He was nominated at the Democratic State Convention and subsequently defeated his Republican opponent. Also on the ballot that year was a provision amending the Indiana Constitution by eliminating the system of electing judges to the court on a political basis and replacing it with the current system of appointing new members to the court.² This amendment was adopted by the voters. Therefore, DeBruler was the last member of the Indiana Supreme Court who went through the traditional political electoral process to gain membership on the court. DeBruler is also the only Indiana Supreme Court Justice to cite to the State Poem in an opinion.³

During his long tenure, Justice DeBruler wrote well over 500 dissenting opinions. Does this fact have any significance for evaluating his contribution to the operation of the court? I will examine several of his dissents to explore the role of dissenting opinions and their contribution to the appellate process.

We can only understand the role of dissenting opinions by placing them in the

* Professor of Law, Indiana University School of Law—Indianapolis. A.B., J.D., Indiana University—Bloomington. I would like to thank my research assistants, Greg Gordon and Sean P. O'Brien, for their help in completing this article.

1. IND. CONST. art. VII, § 2 (as amended 1881) (amended 1970). The 1970 amendment substantially changed this section. It now deals with the number of members on the Indiana Supreme Court. *Id.*

2. *Id.* § 10; IND. CODE §§ 33-2.1-4-6 to -7 (1993).

3. *Williams v. State*, 256 N.E.2d 913, 918 (Ind. 1970) (DeBruler, J. dissenting) (citing Act of Mar. 11, 1963, ch. 220, § 1, 1963 Ind. Acts 301 (codified at IND. CODE § 1-2-5-1 (1993))).

procedural context in which they arise. In a typical case, a party seeks review in the Indiana Supreme Court from an adverse judgment received in a trial court or in the court of appeals. The documents presented to the court for review are the judgment, the record of the trial proceeding and the briefs submitted by both sides. If the case is on transfer, there will also be an opinion by the court of appeals. Ideally, the issues to be decided have been narrowed and framed in such a way which clearly reveals the either-or nature of each issue presented to the court.

After the record and briefs have been filed with the supreme court, the court's internal procedures provide for the case to be assigned to one of the justices to draft the court's opinion. Even before this draft opinion is written, there will likely be informal discussions among the justices about the case. Eventually, the justice assigned to write the draft opinion issues it in the form of a majority opinion and circulates it to all other members of the court. It is only at this point that the *possibility* of a dissenting opinion arises. If all of the justices vote to concur in the draft opinion, then it becomes the court's opinion, and there will be no dissenting opinion. However, the final version of such a unanimous opinion may have been shaped by informal discussions among the justices, some of whom may have disagreed with some portions of the draft opinion. Also, the final opinion may have been written with some compromises in order to command a unanimous vote. These discussions and/or negotiations are not recorded, so it is impossible to know whether they occurred or what effect they had on the final opinion. If these discussions do not resolve the justices' differences, one or more of the justices may draft a dissenting or concurring opinion and circulate it to the members of the court. At this stage, the draft dissent is an in-house device that aids the deliberative process of the court and is circulated only to its members.

The draft dissent offers a counter holding to that of the draft majority opinion. The purpose of circulating it is to change the content of the draft majority opinion *before* the final vote. This can only be successful if it persuades a majority of the judges to prefer the dissent's opinion to the draft majority opinion on any given issue. There are a variety of specific changes or additions that could be sought by the dissenter. The goal could be to induce the author of the majority opinion to correct errors in the reasoning contained in the opinion or to change the case's disposition. This could be based on the view that the rule to be adopted is not theoretically wrong, but that it is unworkable in practice or beyond the jurisdictional power of the court to create. The dissent also could offer a way to narrow the scope of the opinion while retaining its ultimate holding. Finally, the dissent could be attempting to expand the majority opinion by persuading the author to explicitly address issues the dissenter believes are fairly presented by the case and not adequately discussed in the majority opinion.

A draft dissent will necessarily enhance the supreme court's deliberative process. The fact that the draft dissenter has made the effort to write a draft dissent should cause the other members of the court to re-examine their positions. Whatever the ultimate result, the draft dissent plays a vital role in the rational deliberative process by which appellate decisions are made. Of course, the dissenter's rational persuasive force is not the only consideration affecting the other judges. This draft dissent is, at the same time, a threatened *published* dissent. The *possibility* of publication provides added inducement for all of the justices to give

careful consideration to both the draft majority opinion (which may have been altered to address points made in the draft dissent) and the draft dissent, because, if the dissent is published, the justices will be forced to choose which opinion they wish to associate themselves with publicly.

If the author of the draft dissent is not successful in achieving the changes sought, the question of whether to *publish* the dissent arises. This is an altogether different question facing the dissenting justice because the purpose of a *published* dissent cannot be to convince the court to decide the matter differently in that particular case. That attempt has already been unsuccessful.

What is the justification for publishing the dissent, despite the fact that there are obvious social costs involved in doing so? For example, publication of the dissent could strain relations on the court, eroding the collegiality that is essential to the court's deliberative process. It could also erode public confidence in the court's ability to determine by rational processes what the law is. The public may be dismayed to see a difference of opinion on the court with each side claiming to have the correct answer. It could weaken the force of the rule of stare decisis by making the majority opinion less persuasive and thereby creating uncertainty in the lower courts and among attorneys as to which is the correct rule and how long it will prevail. Lastly, a dissenting opinion could undermine the certainty of rulings in those cases where certainty is more important than the substance of the rule. The dissenter should understand these costs when the dissenter decides to publish the dissent. Ideally, the judge determines that publication is justified because the benefits of the dissent outweigh the costs in that particular case. What considerations support such a determination by a supreme court justice?

The dissenter is consciously appealing to a wider audience than the members of the court deciding *that case*. He must believe that the constituents of this wider audience should be brought into the ongoing deliberative process for their contribution to it in the future, after the dissent is published. The published dissent is essentially future-oriented, and this wider audience includes those who might be influenced by the dissent and react favorably to it in the long run. The potential members of the dissenter's intended audience include:

1. *The Supreme Court of Which the Dissenter Is a Member*.—That court, as then constituted, rejected the dissenter's position in the case at hand or there would have been no question of *publishing* a dissent. However, the dissenter may be trying to influence the court in future cases dealing with similar issues. He may be hoping that some members of the court will change their minds over time or, more likely, he is counting on the inevitability of the court gaining new members. When a similar issue arises, and the new members consult this precedent, the dissent will be an essential part of the case and may be persuasive to them.

2. *Attorneys Who Practice in This Area of the Law*.—The dissent may encourage attorneys to continue litigating the issue in future cases, to preserve the issue in the trial court for appeal, to create more complete trial records, and possibly to provide a basis for the court taking judicial notice of any legislative facts supporting its position. As the rule announced in the majority opinion is litigated in different cases with different facts, the defects in that rule may be revealed, and the superiority of the dissenter's position may become apparent to

the court. This occurred in *Patterson v. State*.⁴ In that case, the court radically redefined the hearsay rule. Out-of-court statements not under oath made by witnesses who were subject to cross-examination at trial were, after *Patterson*, admissible as non-hearsay.⁵ Justice DeBruler dissented, stating:

Under the principle created by the majority, the cross-examination will come long after the witness gave the statement in some police station as part of the police investigation and by necessity will focus on the recollection of the witness of the circumstances in which the statement was made rather than upon the recollection of the witness of the events described in the statement.⁶

He predicted the unworkability of the new rule in practice and also demonstrated the rule's deleterious effect on the efficacy of cross-examination. In *Modesitt v. State*,⁷ the court finally overruled *Patterson* because experience with the rule in a variety of cases revealed the practical defects in its application.

3. *Trial Courts*.—The dissenter's audience will also include trial courts who are bound by the majority opinion, but who may, in practice, adopt certain suggestions made in the dissenting opinion because of the wisdom or practicality of the point made. For example, the majority opinion may uphold the trial court's written sentencing order in a criminal case as minimally adequate. The dissent, in arguing for a higher standard, may influence other trial courts to adopt the suggested technique as a way to improve the process, as well as ensuring that they avoid reversal for an inadequate order.

4. *Various Commentators on the Law*.—This audience would include law professors, law review editors, bar magazine writers, presenters in continuing legal education (CLE) programs, etc. The dissent may persuade these commentators of the importance of its position, and they may, in turn, make it known to their respective audiences.

5. *Organizations That Have an Interest in the Case*.—These groups may agree with the dissent and work to change the law. For example, they may lobby the legislature, publish stories in the press, file amicus curiae briefs, or otherwise engage in activities aimed at changing the law.

6. *The Losing Attorneys in the Case*.—The plausibility of their arguments has been recognized by the dissent; they may be encouraged to seek rehearing in that court or review in a higher court, e.g., by seeking certiorari in the U.S. Supreme Court. If certiorari is granted, the dissent's opinion could be used in the deliberative process in that Court.

Justice Brennan, in discussing dissents by U.S. Supreme Court Justices, has stated that certain dissents "reveal the perceived congruence between the

4. 324 N.E.2d 482 (Ind. 1975).

5. *Id.* at 484-85.

6. *Id.* at 488 (DeBruler, J., dissenting).

7. 578 N.E.2d 649, 652 (Ind. 1991). The history of the *Patterson* rule is well described in 13 ROBERT L. MILLER, *INDIANA PRACTICE, EVIDENCE* § 801.307 (2d ed. 1995). The current approach to this issue is found in Indiana Rules of Evidence 801(d)(1).

Constitution and the 'evolving standards of decency that mark the progress of a maturing society' and that seek to sow seeds for future harvest."⁸ In these dissents, he believes, the judge is speaking with a "prophetic" voice.⁹

It is important, as a matter of history, to honor judges who, by "transcend[ing] without slighting, mechanical legal analysis,"¹⁰ author opinions which are deemed by later courts as correct and just. However, it is important not to carry this idea of the prophetic dissent too far because it is problematic on two counts. First, the characterization is necessarily based on hindsight, and second, the "winning" dissenter's position may itself be reversed by a later case.

An attribution to a dissenting opinion of "prophetic" status can only be given in hindsight. It is only *after* the past dissent has been accepted by a later court as correct that we could know that the dissent was "prophetic." Thus, the fact that a dissent turned out to be "prophetic" is not a justification for publishing the dissent *when the decision was made to publish it*.

To call a dissent prophetic when published is an anomalous use of the word because we cannot then know whether the dissent has correctly perceived the direction of the development of the law. The word is honorific, conclusory, and celebratory. Although a dissenter may hope and believe the dissenting opinion is prophetic, he cannot know when he decides to publish it whether history will accord it that status or not. Moreover, an attempt at prophecy by a dissenting judge alone is, in my opinion, not a proper reason for publishing a dissent.

Because the word "prophetic" is honorific in this context, it assumes, without analysis, that the later decision accepting the dissenter's view is, itself, a correct decision. This seems to be a case of the winners awarding honorific titles to their own precursors. It is possible that the dissent and the later decision upholding the dissenter's view are both incorrect and will be reversed in the future. If this happens, does it mean the original majority's opinion was prophetic?

If we focus on when the decision to publish the dissent is made, we recognize that the dissenter is necessarily making that decision with deep uncertainty about the future development of the law. The most that the dissenter can have is the belief that the dissent presents the correct view of the law and that the benefits of publishing it outweigh the costs. The judge *can* be certain that it is a vital part of the appellate court's rational deliberative process which includes publishing dissents aimed at a wider audience than the then-members of the court.

There are three distinct issues involved in understanding the role of dissenting opinions. First, what is the purpose of the in-house draft dissent? Second, what is the purpose in *publishing* such a dissent? Third, can we ever make the later assessment of whether, in fact, the published dissent succeeded in persuading any part of the wider audience to adopt the dissenter's position? The latter is a question of historical fact and will seldom be capable of empirical determination.

To explore these issues, I will discuss several of Justice DeBruler's dissents

8. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431 (1986) (footnotes omitted).

9. *Id.*

10. *Id.* at 432.

and their fate at the hands of different parts of the wider audience.

I. THE DEPRAVED SEXUAL INSTINCT RULE AND *LANNAN v. STATE*¹¹

In *Kerlin v. State*,¹² the defendant was convicted of consensual sodomy with a fifteen-year-old boy. At trial, the State introduced testimony from two adult male witnesses who separately claimed that they had engaged in illegal sexual relations with the male defendant approximately six to eight years prior to the trial.

The defendant objected on the grounds that this evidence of unrelated misconduct by the defendant was a form of character evidence offered to prove the defendant's general tendency to commit such acts and was inadmissible in evidence against the defendant for that purpose.¹³ The majority agreed with the defendant that Indiana adhered to the general rule that evidence of other unrelated offenses offered to prove the defendant's propensity to commit such acts was inadmissible for that purpose. However, the court held that in prosecutions for crimes involving a "depraved sexual instinct," such as sodomy, there was an exception to that general prohibition.¹⁴ This exception made evidence of similar unrelated acts admissible to prove the propensity of the defendant to commit such acts and could be used as circumstantial evidence to prove the defendant committed the acts for which he was on trial.¹⁵

Justice DeBruler dissented, stating:

There was no connection between the offenses and the offense being tried. This testimony was not offered as bearing on an issue such as motive, intent, identity; nor could it evince any common scheme or plan, etc. This evidence was offered for the purpose of showing the appellant's character was bad and that he had a tendency to commit acts of sodomy. As such it was inadmissible. Evidence of other offenses cannot be admitted merely in an attempt to show some predisposition of the accused to commit criminal acts or to establish some likelihood that he might do so.

Even where offered to prove some issue such as intent, motive, knowledge, identity or a common scheme or plan, evidence of prior offenses might be properly excluded by the trial court if it deems the evidence as being too remote to be of probative value. But in the case at hand this testimony was not offered to prove any issue before the court and was, therefore, inadmissible regardless of the remoteness or closeness in time of the prior offenses.¹⁶

11. 600 N.E.2d 1334 (Ind. 1992).

12. 265 N.E.2d 22 (Ind. 1970).

13. *Id.* at 24-25.

14. *Id.* at 25; the depraved sexual instinct rule was applicable in prosecutions for incest, sodomy, criminal deviate conduct, and child molesting. See *Lannan*, 600 N.E.2d at 1335.

15. *Kerlin*, 265 N.E.2d at 25.

16. *Id.* at 26-27 (DeBruler, J., dissenting).

DeBruler would have abolished the depraved sexual instinct exception and required the admissibility of such evidence to be tested by its logical and legal relevance to some appropriate issue in the case, i.e., other than the defendant's propensity to commit such acts. And even if the evidence were offered to prove such an appropriate issue, the trial court could still exclude the evidence on the ground that it was too remote to be of probative value.

In *Lannan*, the Indiana Supreme Court wrote a lengthy opinion re-examining the history and bases for the depraved sexual instinct rule. The court identified two bases for this exception to the general rules on character evidence. There was a high rate of recidivism among "sexual deviates."¹⁷ Therefore, the fact that a defendant had previously committed similar acts would be probative of whether he did so in this particular case. There was also a need to bolster the victim's testimony where the victim was a child in order to overcome the common reluctance to believe that a normal adult could do such a thing to a child.¹⁸ The court acknowledged that, although both of these rationales had merit in at least some cases, "any justification for maintaining the exception in its current form is outweighed by the mischief created by the open-ended application of the rule."¹⁹ In *Lannan*, the State introduced evidence that the defendant had previously committed acts of depraved sexual conduct. This evidence was offered to prove that the defendant had a propensity to commit the charged crime. The mischief here is that it invited a jury to conclude that because the defendant had previously acted in a certain way, he probably did so in the present case.²⁰ The jury might use that inference to convict where they might not do so without the propensity evidence. Thus, its conceded probative value was outweighed by the potential prejudice²¹ from its use. In *Lannan*, Chief Justice Shepard stated:

The notion that the state may not punish a person for his character is one of the foundations of our system of jurisprudence. Evidence of misconduct other than that with which one is charged ("uncharged misconduct") will naturally give rise to the inference that the defendant is of bad character. This, in turn, poses the danger that the jury will convict the defendant solely on this inference.²²

Lannan identifies a problem with this evidence that stems from considerations of fairness, rather than from logical relevance. The *Lannan* court acknowledged society's need to convict sexual predators. But the court would not respond to this need by sacrificing the traditional protection of Anglo-American criminal jurisprudence—we do not convict people for who they are. This is an ethic

17. *Lannan*, 600 N.E.2d at 1338.

18. *Id.* at 1337-38.

19. *Id.* at 1338.

20. This was a permissible inference under the depraved sexual instinct rule.

21. The *Lannan* court made a previously permissible inference into an impermissible inference.

22. *Lannan*, 600 N.E.2d at 1338.

entirely consistent with the presumption of innocence and the desire to “get it right” when society punishes a criminal wrongdoer. This “getting it right” not only involves the aim of being correct in a factual sense (i.e., the defendant actually did it), but also of being right in a normative sense—the manner in which the state goes about taking a citizen’s liberty has to be understood by all to be just. Using evidence of the defendant’s past or subsequent conduct to prove he is a bad person and may have a propensity to commit such acts seems out-of-bounds. It may be very probative in many cases, but the idea of openly using it leaves a sense of unease, a sense that the state convicted the person because of the kind of person he is or has been, rather than for committing the offense charged.

In abolishing this rule, the *Lannan* court described *Kerlin* and quoted from DeBruler’s dissenting opinion. The court then made this remarkable statement about that dissent: “Twenty-two years later, Justice DeBruler has carried the day. His reasoning tracks the language of Federal Rule of Evidence 404(b), which we hereby adopt in its entirety, effective from this day forward.”²³ Indiana subsequently adopted its own version of Rule 404(b) which is substantially similar to the Federal Rule.²⁴ *Lannan* should, therefore, continue to influence Indiana evidence law for the foreseeable future.²⁵

When Justice DeBruler decided to publish his dissent in *Kerlin*, he did not know whether the Indiana Supreme Court would ever adopt his position. The justification for deciding to publish it had to be that he believed it was the correct position on an important legal issue; he hoped that his dissent would invite the wider audience to contribute to the deliberative process which would, over time, contribute to the best rule prevailing.

In hindsight, this dissent helped bring about the change in Indiana evidence law urged by its author. The Indiana Supreme Court did abolish the depraved sexual instinct rule and attributed some credit to Justice DeBruler’s dissent. He turned out to be “right.” The dissent was not by itself a *sufficient* condition for bringing about the change. If it had been, it would not have been published as a dissent because it would have prevailed in the *Kerlin* case itself. We cannot be sure what factors bring about complex social events such as the supreme court abolishing an old rule and adopting a new one. However, we know that Justice DeBruler, by dissenting, contributed all that he could have to a rational deliberative process, which includes inviting the wider audience to enter the debate on one side or the other.

Not surprisingly, other courts have dealt with the issue raised in *Lannan*. Some courts have taken positions similar to the *Lannan* court.²⁶ Other courts have retained a muted form of the depraved sexual instinct rule despite the fact that

23. *Id.* at 1339.

24. IND. R. EVID. 404(b). The only difference is the omission of opportunity as a listed purpose.

25. *See e.g.*, *Clark v. State*, 668 N.E.2d 1206, 1211 (Ind. 1996); *see also Sloan v. State*, 654 N.E.2d 797, 799-800 (Ind. Ct. App. 1995), *trans. denied*.

26. *See e.g.*, *State v. Carter*, 662 A.2d 289, 291 (N.H. 1995).

their jurisdictions have adopted a form of Rule 404(b).²⁷

Even if Justice DeBruler “carried the day” in *Lannan* by convincing three of his four colleagues on the Indiana Supreme Court, he still may have been wrong.²⁸ Justice Givan disagreed and authored an opinion advocating the retention of the depraved sexual instinct rule.²⁹ The U.S. Congress also disagreed. The Federal Rules of Evidence 413 and 414³⁰ were enacted by Congress as part of the Violent Crime Control and Law Enforcement Act of 1994.³¹ After the passage of these new evidence rules in the Act, the Supreme Court Advisory Committee recommended reconsideration,³² but Congress failed to act on the recommendation. Federal Rules 413 and 414 are broad rules of admissibility in criminal cases of sexual assault and child molestation; any evidence of the defendant’s commission of another offense of sexual assault or child molestation is admissible and “may be considered for its bearing on any matter to which it is relevant.”³³ Evidence of past offenses admitted under this rule may be used to prove that a defendant acted in conformity with those other offenses on the occasion in question. This is a modern version of the depraved sexual instinct rule.³⁴

It should also be noted that the Indiana Legislature also disagreed with DeBruler’s position as adopted by the Indiana Supreme Court in *Lannan*, and enacted a statute which apparently attempts to reinstate a version of the depraved

27. See e.g., *State v. Frazier*, 464 S.E.2d 490, 494 (N.C. Ct. App. 1995) (“North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges.”) (citations and internal quotations omitted); see also *Tabor v. State*, 529 N.W.2d 915, 919 (Wis. Ct. App. 1995) (“We conclude that *Lannan* is unpersuasive.”).

28. The *Kerlin* case really involved two separable issues. One was the logical relevance of prior *consensual* adult homosexual conduct to prove sodomy on a child. The other was the propriety of admitting this evidence, even after the determination of logical relevance. The modern practice is to exclude evidence of consensual homosexual conduct. See e.g., *State v. Lawton*, 667 A.2d 50, 55 (Vt. 1995) (evidence of prior homosexual conduct should be excluded because it is prejudicial).

29. *Lannan*, 600 N.E.2d at 1341 (Givan, J., concurring).

30. In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offense of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant. FED. R. EVID. 413(a).

In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant. FED. R. EVID. 414(a).

31. Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-37 (1994).

32. JUDICIAL CONF. OF THE UNITED STATES, REPORT ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), reprinted in 159 F.R.D. 51 (1995).

33. FED. R. EVID. 413.

34. Under these rules, evidence of consensual sex acts between adults would not be admissible as they were in *Kerlin*.

sexual instinct rule.³⁵ Under this statute, in a child molesting case, evidence that the defendant has committed another act of child molesting against the same victim or a similar act against a different victim “is admissible.” This would seem to include situations where the relevance of the evidence is to prove the defendant’s *propensity* to commit such acts, indicating that there is some likelihood he committed the charged act. However, the statute also states that this evidence may be excluded if the probative value is substantially outweighed by certain listed probative dangers.³⁶ Although the Indiana Court of Appeals has declared this statute a nullity because it conflicted with common law evidence

35.

(a) In a prosecution for child molesting under IC 35-42-4-3, a prosecution for incest under IC 35-46-1-3, or a prosecution for an attempt or a conspiracy to commit child molesting or incest, evidence that the defendant has committed another crime or act of child molesting or incest or attempted or conspired to commit another crime or act of child molesting or incest:

- (1) against the same victim; or
- (2) that involves a similar crime or act of child molesting or incest against a different victim;
is admissible.

IND. CODE § 35-37-4-15(a) (1993).

36.

(c) The court shall hold a hearing out of the presence of the jury regarding the admissibility of the evidence described under subsection (a). Even if the court determines that the evidence is relevant, the evidence may be excluded if the probative value of the evidence is substantially outweighed by:

- (1) the danger of:
 - (A) unfair prejudice;
 - (B) confusion of the issues; or
 - (C) misleading the jury; or
- (2) considerations of:
 - (A) undue delay;
 - (B) waste of time; or
 - (C) needless presentation of cumulative evidence.

However, if the court finds that all or some of the evidence is admissible, the court shall enter an order stating what evidence may be introduced.

(d) This section may not be construed to limit the right to introduce evidence at a trial that would otherwise be admissible to prove any of the following:

- (1) Motive.
- (2) Opportunity.
- (3) Intent.
- (4) Plan.
- (5) Knowledge.
- (6) Identity.
- (7) Absence of mistake or accident.

Id. § 35-37-4-15(c)-(d) (1993).

rules then in effect,³⁷ it demonstrates that not all parts of the wider audience agree with DeBruler and the *Lannan* court on this issue.

When major lawmaking institutions like Congress and state legislatures take a view directly contrary to a court, it makes it difficult to say that this dissent anticipated the direction of the development of the law in this area. At present, we simply do not know the direction of the law. This is not to say that Justice DeBruler's *Kerlin* dissent was wrong and the *Lannan* majority was wrong to adopt it. I believe they were both correct; *Lannan* was a valuable change in Indiana law. However, the value of dissents cannot be measured by positing some ability of certain judges to perceive the "enduring values" in the law and the direction of the tide of history so as to ride it to prophetic status.³⁸

The less grand and more modest hope for the dissenting judge is that by bringing a wider audience into the deliberative process, the best rule will emerge in the long run. Rather than seeing dissents as attempts at prophecies, they should be seen as commitments to a rational deliberative process coupled with a tenuous hope that the dissenter's view will prevail over time.

II. COMPETENCE TO STAND TRIAL—*JACKSON V. STATE*³⁹

Theon Jackson was a mentally deficient twenty-seven-year-old deaf-mute, blind in one eye, who had never been to school, could neither read nor write, and had only a rudimentary understanding of sign language. He was charged with two counts of robbery of street corner newspaper sellers; the amount allegedly taken totaled nine dollars.⁴⁰ He was declared incompetent to stand trial based on the testimony of two psychiatrists and a teacher from the State School for the Deaf.⁴¹ They agreed that he could not "comprehend the nature of the charges against him nor assist in his defense because he had a mental deficiency and also because he had almost no means of communication."⁴² The witnesses also agreed that he had virtually no chance of becoming sufficiently competent "to be tried, even if he could gain a means of communication."⁴³ The teacher testified that he knew of no facilities in the state which could help him and that the State School for the Deaf did not accept mentally retarded persons.⁴⁴

The Indiana statute then in effect required the trial court, upon a finding of

37. *Day v. State*, 643 N.E.2d 1 (Ind. Ct. App. 1994); *Brim v. State*, 624 N.E.2d 27 (Ind. Ct. App. 1993). This result is no different under the present evidence rules. IND. R. EVID. 101(a).

38. It should be noted that DeBruler's dissent in *Kerlin* may have been wrong when written, yet right when adopted by *Lannan*. The rationale for any rule can change or even disappear due to changing social conditions and values. A good rule for one historical era is not necessarily a good rule for a different era.

39. 255 N.E.2d 515 (Ind. 1970).

40. *Id.* at 518 (DeBruler, J., dissenting).

41. *Id.* at 515-16.

42. *Id.* at 518.

43. *Id.*

44. *Id.*

incompetency to stand trial, to order the defendant committed to the Department of Mental Health until he "shall become sane."⁴⁵ If and when the defendant became sane, he would then be returned to the court and put on trial for the pending charges.⁴⁶

On appeal, the defendant argued that this statutory procedure denied him due process of law because the unlikelihood of his improvement made his commitment permanent and, in effect, a life sentence.⁴⁷ The majority opinion disposed of that argument:

Appellant[']s argument, that the statute in question is unconstitutional because it imprisons appellant possibly for life, must fail. The legislature under its police power may provide for the safety, health, and general welfare. This necessarily includes the confinement, care and treatment of the mentally defective, retarded or insane.⁴⁸

This was the entire portion of the opinion which addressed the defendant's constitutional argument.

Justice DeBruler wrote a dissent which stated, in part:

The statute clearly contemplates a delay in the trial or a postponement, which implies that the commitment to the psychiatric institution is a temporary one.

When the defendant's condition is permanent, as in this case, and he cannot be helped by any known psychiatric technique, then the defendant cannot be committed under this statute because the purpose of the commitment cannot be accomplished.

What then is the purpose of the confinement of this appellant whose condition is permanent[?] Punitive? Protection of society? Protection of the appellant? Confinement to serve any of these purposes based merely on a trial court finding that [the] appellant "has not comprehension to understand the proceedings and make his defense," in my opinion, would violate the due process clause of the 14th Amendment to the United States Constitution. Appellant has not been convicted of any crime, nor found to be dangerous to the community or to himself. It has not been shown that he cannot continue to live in our society as he has for twenty-seven years. What conceivable reason is there for committing this appellant to a psychiatric institution, for what is in effect, life?

Clearly, the real basis for this commitment is the existence of the criminal charges against appellant. This is shown by the fact that if those charges were to be dismissed because another person confessed and plead

45. Act of Mar. 5, 1951, ch. 238, § 2, 1951 Ind. Acts 682, 683-84 (amended by Act of Mar. 11, 1967, ch. 291, sec. 2, § 2, 1967 Ind. Acts 946, 947-48) (codified as amended at IND. CODE § 35-5-3-2 (1971)) *repealed by* Act of Feb. 18, 1974, No. 148, § 4, 1974 Ind. Acts 630, 631-32.

46. *Id.*

47. *Jackson*, 255 N.E.2d at 516.

48. *Id.* at 518.

guilty to those crimes, or the complainant admitted he had lied in making the charges, the commitment of appellant under [this statute] would obviously be ended. Thus, the existence of unproved criminal charges operates to keep appellant confined in a state institution for life. This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution.⁴⁹

The core of this argument is that the length of a commitment must be justified by a court's finding of a legitimate purpose for the commitment. In effect, the statute equated the existence of criminal charges against an incompetent person with a finding that civil commitment of the person was necessary.

DeBruler also argued that this permanent commitment violated the Equal Protection Clause. He stated that the existence of the criminal charges against the defendant was not a rational basis for treating him in a radically different manner than a person civilly committed upon a finding that such commitment was required for his own welfare or for the welfare of others.⁵⁰

This case was then heard by the U.S. Supreme Court which reversed the Indiana majority opinion and issued an opinion agreeing with DeBruler's dissent that the commitment of Jackson in this case violated both the Equal Protection Clause and the Due Process Clause.⁵¹ In discussing the due process violation, the Court stated:

Jackson was not afforded any "formal commitment proceedings addressed to [his] ability to function in society," or to society's interest in his restraint, or to the state's ability to aid him in attaining competency through custodial care or compulsory treatment, the ostensible purpose of the commitment. At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.⁵²

Although the Supreme Court did not explicitly mention DeBruler's dissent, it did

49. *Id.* at 519 (DeBruler, J., dissenting).

50. *Id.*

51. *Jackson v. Indiana*, 406 U.S. 715 (1972).

52. *Id.* at 738 (alteration in original) (footnote omitted).

adopt the same reasoning that he relied upon.⁵³ A similar thing happened in *Thomas v. Review Board of the Indiana Employment Security Division*.⁵⁴ The Indiana Supreme Court held that the denial of unemployment compensation benefits to the petitioner, who had quit his job because of his religious beliefs, did not violate the Free Exercise Clause.⁵⁵ Justice DeBruler dissented, arguing that the petitioner's free exercise right had been violated.⁵⁶ The Supreme Court reversed the Indiana Supreme Court on the same grounds relied upon by DeBruler in his dissent, although it did not explicitly refer to the dissent in its opinion.⁵⁷ Of course, the result in neither *Jackson* nor *Thomas* means that the U.S. Supreme Court would not have granted certiorari or reversed the case but for DeBruler's dissent. That clearly could not be proven and is distinctly implausible.

However, the decision to publish a dissent does not rest on the likelihood that it will in fact influence the U.S. Supreme Court to take some action. There are other parts of the wider audience who will pay closer attention to an Indiana Supreme Court opinion. The central problem in *Jackson* was the inadequacy of the Indiana statutory procedures for committing a criminal defendant who was incompetent to be tried. The majority opinion did not agree that there was a defect in the statutory scheme, much less a constitutional defect.⁵⁸ The majority opinion contained only three sentences on this constitutional issue.⁵⁹ Obviously, DeBruler's draft dissent had not changed the majority's mind.

However, the Indiana Legislature subsequently adopted a new statute incorporating the U.S. Supreme Court's limitations on civil commitment of defendants deemed incompetent to be tried.⁶⁰ Again, there is no factual basis for saying DeBruler's dissent caused the legislature to act. But it is not implausible to believe that it contributed to that result.

Even if certiorari had not been granted and the legislature had not changed the procedure, the published dissent could have influenced the criminal trial courts and attorneys to conduct the competency hearing in order to avoid the problems with the statutory scheme pointed out by the dissenting opinion.

53. In *Reed v. Farley*, 512 U.S. 339, 345 (1994), the Court quoted from DeBruler's majority opinion in *Reed v. State*, 491 N.E.2d 182, 185 (Ind. 1986). The more likely situation would be a dissenting Supreme Court Justice quoting from DeBruler's dissenting opinion. See *Schiro v. Farley*, 510 U.S. 222, 237-38, 242 (1994) (Justice Blackmun, in dissent, quoted from DeBruler's dissenting opinion in *Schiro v. State*, 451 N.E.2d 1047, 1065 (Ind. 1983), and Justice Stevens, also in dissent, quoted from DeBruler's dissent in *Schiro v. State*, 533 N.E.2d 1201, 1209 (Ind. 1989)).

54. 391 N.E.2d 1127 (Ind. 1979).

55. *Id.* at 1133-34.

56. *Id.* at 1136-37 (DeBruler, J., dissenting).

57. *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).

58. *Jackson*, 255 N.E.2d at 518.

59. *Id.*

60. IND. CODE §§ 35-36-3-1 to -4 (1993).

III. THE CONSENSUAL SODOMY STATUTE—*DIXON V. STATE*⁶¹

In *Dixon*, the defendant was charged under the old Indiana criminal statute prohibiting sodomy, defined as the “abominable and detestable crime against nature with mankind or beast.”⁶² He was convicted of this offense based upon proof that he had committed cunnilingus, which had already been held to fall within this statute.⁶³ The Indiana Supreme Court affirmed Dixon’s conviction.⁶⁴

Justice DeBruler dissented on two distinct grounds. He found the statute void for vagueness and violative of an individual’s constitutionally protected “zone of privacy.” Justice DeBruler argued that the sodomy statute was void for vagueness under the Due Process Clause of the Fourteenth Amendment.⁶⁵

It is a fundamental principle of our system of law in Indiana that a statute attempting to create a public offense must convey an adequate description of the evil intended to be prohibited so that a person of ordinary comprehension subject to the law can know what conduct on his part will render him liable to its penalties A statute which does not do this also violates the due process clause of the Fourteenth Amendment to the United States Constitution.⁶⁶

DeBruler then analyzed the statute, phrase by phrase, as well as each case relied upon by the majority; he concluded that neither the statute nor the case law supplied the fixed meaning required, i.e., a person of ordinary comprehension could *not* know what conduct was prohibited.⁶⁷

The only reason ever offered by this court as to why this first clause of the statute is not void for vagueness is that it would offend delicate sensibilities to describe the conduct that is prohibited. The court in effect has held it justifiably vague. Whatever may have been the merits of that position in 1913[,] it has none now.⁶⁸

Therefore, DeBruler concluded, the statute was void for vagueness and could not support a criminal charge or conviction.⁶⁹

The U.S. Supreme Court did not agree with DeBruler’s position. In *Rose v. Locke*,⁷⁰ that Court affirmed a conviction for the act of cunnilingus under a Tennessee sodomy statute⁷¹ which was virtually identical to the Indiana statute in

61. 268 N.E.2d 84 (Ind. 1971).

62. Act of Mar. 10, 1905, ch. 169, § 473, 1905 Ind. Acts 584, 694 (repealed 1977).

63. *Dixon*, 268 N.E.2d at 87 (citing *Young v. State*, 141 N.E. 309 (Ind. 1923)).

64. *Id.*

65. *Id.* at 87-88 (DeBruler, J., dissenting).

66. *Id.* at 88.

67. *Id.* at 87-90.

68. *Id.* at 90.

69. *Id.*

70. 423 U.S. 48 (1975) (affirming conviction for *forcible* cunnilingus).

71. Act of Dec. 9, 1829, ch. 23, § 17, 1829 Tenn. Pub. Acts 27, 29-30 (codified at TENN.).

Dixon. The Court held that the statute defining sodomy as a “crime against nature” was *not* void for vagueness even though that statute had never been held to cover cunnilingus prior to that prosecution.⁷² That was a stronger case for a vagueness challenge than *Dixon*; nevertheless, the Supreme Court rejected that challenge.

DeBruler also dissented in *Dixon* on the ground that the statute was an unconstitutional use of the “police power to regulate the private sexual conduct between consenting adults.”⁷³ He relied upon *Griswold v. Connecticut*⁷⁴ for the proposition that the Constitution created a “zone of privacy” protecting certain human relationships.⁷⁵ He argued that “private sexual conduct between consenting adults is within that constitutionally protected zone.”⁷⁶

The Seventh Circuit Court of Appeals had already held that the Indiana sodomy statute was unconstitutional under *Griswold* when applied to married couples.⁷⁷ However, the majority in *Dixon* distinguished that Seventh Circuit case because the acts in this case were not between husband and wife.⁷⁸ DeBruler’s dissent argued that the *Griswold* principle should not be limited to married couples:

The majority opinion offers no reason why being married should make a difference in the applicability of the statute and I believe there is none. The moral preferences of the majority may not be imposed on everyone else unless there exists some harm to other persons. Sexual acts between consenting adults in private do not harm anyone else and should be free from state regulation.⁷⁹

The U.S. Supreme Court later extended the *Griswold* “zone of privacy” to unmarried people, thus precluding the state from restricting access to contraception.⁸⁰ However, when the Court was faced with the issue of whether the *Griswold* zone of privacy should be extended to preclude state regulation of consensual homosexual behavior between two males, it refused to do so and

CODE § 11184 (Williams 1955)) (repealed by Act of June 12, 1989, ch. 591, § 1, 1989 Tenn. Pub. Acts 1169, 1169). (Tennessee no longer criminalizes consensual heterosexual conduct between adults. However, it retained criminal penalties for consensual adult homosexual conduct. TENN. CODE ANN. § 39-13-510 (Michie 1995). This section, however, was found unconstitutional because it violates a right to privacy founded on the Tennessee Constitution. *Campbell v. Sundquest*, 926 S.W.2d 250 (Tenn. Ct. App. 1996), *appeal denied*).

72. *Rose*, 423 U.S. at 93.

73. *Dixon*, 268 N.E.2d at 90 (DeBruler, J., dissenting).

74. 381 U.S. 479 (1965).

75. *Dixon*, 268 N.E.2d at 90 (DeBruler, J., dissenting).

76. *Id.*

77. *Cotner v. Henry*, 394 F.2d 873 (7th Cir. 1968).

78. *Dixon*, 268 N.E.2d at 86.

79. *Id.* at 90 (DeBruler, J., dissenting).

80. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

upheld the constitutionality of a state sodomy statute⁸¹ criminalizing such behavior.⁸²

Although the U.S. Supreme Court did not reach the same conclusions reached by DeBruler on these two issues, he may have contributed to change closer to home. The Indiana Legislature adopted a new criminal code in 1977.⁸³ This code abolished the old sodomy statute and *did not criminalize* consensual sex acts between adults in private, whether married or not. In addition, the non-consensual sex acts prohibited were defined with great specificity and apparently with no concern for offending “delicate sensibilities.”⁸⁴

Do either of these outcomes tell us whether DeBruler’s dissent was ultimately “successful?”⁸⁵ Probably not. However, for DeBruler, the justification for publishing this dissent must have rested elsewhere and had to exist when he decided to do it. In part, he surely had some hope that his view would eventually prevail among thoughtful people. By publishing this dissent, DeBruler attempted to bring a wider audience into the rational deliberative process. This attempt, which may or may not have succeeded, is a powerful justification for this dissent. Generally, a dissenter’s attempt to bring others into the process, even with a slim hope of prevailing, is a justification for publishing a dissent.

IV. CONTINUING THE DISSENT—THE DEATH PENALTY

American courts have accepted published dissenting opinions as a justifiable part of the deliberative process engaged in by appellate courts. However, in the case of a recurring issue that continues to be raised on appeal and involves the same issue of law, there is no consensus on the justification for the judge to *continue* dissenting after it becomes clear his is a lost cause. One example of this is the issue of whether the death penalty is a per se violation of the U.S. and/or Indiana Constitutions.

Justice Brennan has taken the position in every case before the U.S. Supreme Court involving the death penalty that the death penalty is a per se violation of the Cruel and Unusual Punishment Clause. After it became clear that the Court was not going to adopt his position, he continued to publicly dissent in every such case. He justified this practice by saying:

This kind of dissent, in which a judge persists in articulating a minority view of the law in case after case presenting the same issue, seeks to do more than simply offer an alternative analysis—that could be done in a single dissent and does not require repetition. Rather, this type of dissent

81. GA. CODE ANN. § 16-6-2 (Michie 1996) (amended 1996).

82. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

83. IND. CODE §§ 35-42-4-1 to -9 (1993 & Supp. 1996).

84. *Id.* § 35-41-1-9 (1993) (defining deviate sexual conduct); *id.* § 35-41-1-26 (defining sexual intercourse).

85. Even though the Indiana Legislature “agreed” with DeBruler, it is impossible to know whether DeBruler’s dissent contributed at all to the legislature’s decision to decriminalize those acts. If it did, then DeBruler was successful.

constitutes a statement by the judge as an individual: "Here I draw the line."⁸⁶

Justice Brennan goes on to merge this issue with the very different question of the duty of private citizens to dissent from any given prevailing view if that is what the person believes to be required. However, a judge publishing a dissenting opinion in a case before the court is always and necessarily acting in his official capacity as a judge of an appellate court and should not be speaking as an individual. Brennan did not want his argument to "sound like too individualistic a justification"⁸⁷ for continuing to dissent, nor to be taken as self-indulgence on his part. I believe, however, that is precisely what his justification amounts to. He is free to write anything he chooses as a private citizen, but when he is publishing an official opinion in a case before the court, he is, of necessity, in the role of judge. The question, then, is not what a person acting in a private capacity has a duty to do, but what is the correct thing for a judge to do when acting in his official capacity as a judge in a case. Justice Brennan never really offers a justification for the continuing dissent, but that does not mean that it is not a common practice.⁸⁸

Justice DeBruler took a different approach to dissenting when the cause is lost. In *Adams v. State*,⁸⁹ the Indiana Supreme Court affirmed the trial court's imposition of the death penalty for first degree murder. DeBruler dissented,⁹⁰ arguing that the death penalty violated the Cruel and Unusual Punishment Clause and article I, section 16 of the Indiana Constitution.⁹¹ He also took the position that it violated another section of the Indiana Constitution which requires that the "penal code shall be founded on the principles of reformation, and not vindictive justice."⁹²

The other dissenting judge called this lengthy dissent a "scholarly opinion . . . which, in my judgment, has all of the weight of legal and social merit."⁹³ However, this remains a dissenting opinion. The *Adams* case was superseded in 1972 when the U.S. Supreme Court invalidated all death penalty statutes in *Furman v. Georgia*.⁹⁴ All nine justices wrote an opinion in that case, and only two of them, Justices Brennan and Marshall, adhered to the position that the death penalty was per se unconstitutional. The Supreme Court, in *Gregg v.*

86. Brennan, *supra* note 8, at 437.

87. *Id.* at 438.

88. For an excellent article on abandoning dissents by U.S. Supreme Court Justices, see Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227 (1985).

89. 271 N.E.2d 425 (Ind. 1971).

90. *Id.* at 431 (DeBruler, J., dissenting).

91. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); IND. CONST. art. 1, § 16 ("Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.").

92. IND. CONST. art. 1, § 18.

93. *Adams*, 271 N.E.2d at 443 (Prentice, J., dissenting).

94. 408 U.S. 238 (1972).

Georgia,⁹⁵ held that the death penalty was *not* per se unconstitutional, but could only be imposed if certain procedures were followed in determining the appropriateness of such a sentence. The Supreme Court rejected DeBruler's argument as far as the Eighth Amendment was concerned. The Indiana Legislature also rejected DeBruler's position and adopted a new death penalty statute⁹⁶ conforming to the Supreme Court's requirements in *Gregg*. In *Judy v. State*,⁹⁷ the first Indiana case involving the death penalty under the new statute, the Indiana Supreme Court held that the death penalty did not violate the Indiana Constitution.⁹⁸ Justice DeBruler dissented on the same grounds he relied upon in *Adams*. In *Judy*, he stated:

Ordinarily I would consider myself to be bound through the principle of *stare decisis* and would uphold this statute in an instance such as this consistent with Art. 1, § 18. But as Justice Frankfurter aptly stated:

[S]tare decisis is a principle of policy and not a mechanical formula of adherence to latest decision, however recent and questionable, when adherence involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Since considering this question in the *Adams* case, substantial views have surfaced which bear directly upon the proper understanding and applications of Art. 1, § 18, in relation to the penalty of death. This matter has given an added perspective to the penalty of death which placed it again and anew upon a collision course with that state constitutional provision and calls for reconsideration. I do not therefore deem myself constricted by *stare decisis*.⁹⁹

This new issue was that the plurality opinion in *Gregg* had stated that retribution was not a "forbidden objective" of the criminal law.¹⁰⁰ DeBruler's position was that, even if that were true for the Eighth Amendment, it was not a permitted objective of Indiana criminal law because of article I, section 18 of the Indiana Constitution.¹⁰¹

In several death penalty cases¹⁰² after *Judy*, DeBruler dissented based on specific legal defects in the proceeding. He did not argue that the death penalty

95. 428 U.S. 153 (1976).

96. Act of Apr. 12, 1977, No. 340, § 122, 1977 Ind. Acts. 1533, 1595-98 (codified as amended at IND. CODE § 35-50-2-9 (Supp. 1996)).

97. 416 N.E.2d 95 (Ind. 1981).

98. *Id.* at 105.

99. *Id.* at 112 (DeBruler, J., dissenting).

100. *Gregg*, 428 U.S. at 183.

101. *Judy*, 416 N.E.2d at 113 (DeBruler, J., dissenting) (citing *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

102. *Dillon v. State*, 454 N.E.2d 845 (Ind. 1983); *Daniels v. State*, 453 N.E.2d 160 (Ind. 1983); *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983); *Williams v. State*, 430 N.E.2d 759 (Ind. 1982); *Brewer v. State*, 417 N.E.2d 889 (Ind. 1981).

is per se unconstitutional. Then, in *Resnover v. State*,¹⁰³ after it became clear that the court was not going to adopt his position, DeBruler cast his first vote to affirm a sentence of death, thus abandoning his position that every death sentence was per se unconstitutional.

He did not make any statement concerning the matter in *Resnover*—he simply stopped dissenting on that basis and voted to affirm the death penalty. Clearly, Justice DeBruler thought his private views irrelevant. In his role as an Indiana Supreme Court Justice, he simply recognized the force of stare decisis and accepted the majority's view as the law in Indiana. However, there would be no inconsistency if he were to join a new majority that voted to adopt the view that the death penalty is per se unconstitutional. Until then, he would simply follow the law as announced by the court. This is not to suggest it would have been improper to state his position in this matter in an opinion. There are obviously a variety of ways to handle the problem of discontinuing the dissent, and there is no consensus in the matter.¹⁰⁴

CONCLUSION

It is clear that the fate of any dissent's reasoning cannot be known when it is published, nor controlled by anything the dissenter may say in the opinion. It is future-oriented in that the dissenter hopes to influence at least some part of the "wider audience" to accept his position on the issue involved. However, the justification for publishing it is a strong commitment to the rational deliberative process of including the "wider audience"; the dissent is a constitutive element in that process. Justice DeBruler's real contribution to the Indiana Supreme Court has been in following his duty to that process for so long in what is, at bottom, a very lonely enterprise.

103. 460 N.E.2d 922 (Ind. 1984).

104. See generally Kelman, *supra* note 88. In *Seymour Manufacturing Co. v. Commercial Union Insurance Co.*, 665 N.E.2d 891, 892 (Ind. 1996), the court held that the insurance company had a contractual duty to defend the manufacturer against claims by the EPA that the manufacturer had mishandled hazardous waste materials. The court relied upon a previous, nearly identical case, of *Kiger v. American States Insurance Co.*, 662 N.E.2d 945 (Ind. 1996). Chief Justice Shepard concurred with this opinion: "Although I dissented in part from the recent decision in *American States Insurance Co. v. Kiger*. . . . I accept it as *res judicata* for purposes of this case and thus join in the Court's opinion." *Seymour*, 665 N.E.2d at 893 (Shepard, C.J., concurring). See also *Citizens Nat'l Bank of Evansville v. Foster*, 668 N.E.2d 1236, 1242 (Ind. 1996) (Sullivan, J., concurring).