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From the Pen of Justice Butler

Daniel R. Suhr, GOP3.com
daniel.suhr@marquette.edu
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Introduction

Since his appointment to the Wisconsin Supreme Court by Governor Jim Doyle four years ago, Justice Louis Butler has cast votes in hundreds of cases, authored 34 majority opinions, and several concurring and dissenting opinions. While his votes in cases are important for the impact they have on the safety, prosperity, and culture of our state, it is his opinions that are the most direct evidence of his judicial philosophy.

The reasoning employed in these opinions is in many ways more important than which party won and lost. In the individual case, the opinion sets the precedent for how judges should approach similar cases in the future. Taken together, the opinions both reflect and affect the role of the Court in our constitutional system. To paraphrase Richard Weaver's book title, judicial philosophies have consequences.

Opinion leaders and observant voters are familiar with a handful of major decisions from the Court the past three years. But the activism evident in those decisions is also often present in lesser-known cases. This paper reviews over twenty of Justice Butler's substantive opinions in cases where the Court was divided. In each instance, I provide a brief context for the case, Justice Butler's opinion, and excerpts from critiques of that opinion. At the end, I draw conclusions about Justice Butler's judicial philosophy by evaluating common practices in these opinions.

N.B. The numbers in parentheses after quotations from cases indicates the paragraph of the case from which the quotation is taken. Other parenthetical citations are pin cites to the sources listed at the end of the paper. Cases are listed chronologically under each topic heading. You can find the full opinions at <http://www.wicourts.gov/opinions/sopinion.htm>.

Crime and Public Safety

State v. Trujillo, 2005 WI 45.

In a truth-in-sentencing case, the majority holds that when the legislature passes a new maximum sentence for a crime that is lower than the previous maximum sentence, that change does not constitute a new factor justifying lowering the sentence of a defendant convicted under the old law. In dissent, Justice Butler straightforwardly asks the Court to overrule its precedent on the matter and to ignore the legislature's decision not to make the statute apply retrospectively. He would let prisoners run to trial courts across the state seeking an early release from the sentences imposed on them.

State v. Love, 2005 WI 116.

In an armed robbery case, Justice Butler writes for the majority that the convict is entitled to an evidentiary hearing based on ineffective assistance of counsel and new material facts warranting a new trial. Though the standard of review is very deferential, Justice Butler orders the hearing based solely on affidavits from the convict and another prisoner. In dissent, Justice Prosser says the ruling "seriously dilutes the sufficiency requirements for post-conviction evidentiary hearings" (103; also 59 and 87). The decision will make it easier for convicted offenders to receive court dates, placing additional demands on already stressed prosecutorial and judicial resources (86).

State v. Armstrong, 2005 WI 119.

In a rape and murder case brought by the Innocence Project, Justice Butler writes for the majority, reversing the conviction based on new DNA testing methods. He says the "real controversy" was never "fully tried." In dissent, Justice Roggensack points out that "the majority opinion misapplies our precedent and equates the idea of the matter not being fully tried with new scientific identification procedures in a way that threatens to reopen convictions statewide every time a scientific improvement occurs, regardless of the lack of a probable effect on the issues underlying the jury's verdict" (180).

State v. Dubose, 2005 WI 126.

A majority of the Court, including Justice Butler, holds that "showup" identifications were "inherently suggestive" and generally should not be admitted as evidence. In doing so, the Court significantly departed from its own prior precedent and that of the U.S. Supreme Court. Justice Butler wrote a concurring opinion especially defending the majority's extensive use of social science studies to conclude that showups were unreliable. He says that the studies prove that it is a "legal fiction" that eyewitness identifications are generally reliable, and "we can no longer proceed as though all is good in the Land of Oz" (49). In dissent, Justice Wilcox says such studies are "not a valid basis to determine the meaning of our constitution. The majority fails to adequately explain how the meaning of the text of the constitution can change every time a new series of social science 'studies' is present to the court. If the text is so fluid,

then our constitution is no constitution at all, merely a device to be invoked whenever four members of this court wish to change the law” (65). Justice Wilcox also makes a separation of powers argument: “It is not the function of this court to create what it considers to be good social policy based on data from social science ‘studies.’ That is the province of the legislature” (66).

State v. Knapp, 2005 WI 127.

Setting aside the U.S. Supreme Court’s interpretation of the Fifth Amendment, Justice Butler writes for the majority that Wisconsin’s self-incrimination clause, which is virtually identically worded, provides greater protection to suspected criminals. In a murder case, a bloody sweatshirt is ruled inadmissible as evidence because the suspect told officers of its location before the officers read his *Miranda* rights to him. Justice Wilcox, in dissent, says he is “troubled by this court’s recent trend of departing from our long history of interpreting similarly-worded provisions of the state and federal constitutions in concert” (101). This departure from precedent “seriously undermines the prestige, influence, and function of the judicial branch” (102). The Court’s “pure, unvarnished result-orientation” in this case undermines the respect of the people for their judiciary (Diane Sykes, Hallows Lecture, at 733). *Knapp’s* embrace of “New Federalism” has drawn harsh criticism from many legal scholars (See Richard Esenberg, *A Court Unbound*, 9-10).

State v. Shomberg, 2006 WI 9.

A defendant accused of sexual assault seeks to introduce expert testimony that eyewitness identification is scientifically suspect. The circuit court denies the request, saying that concerns about the reliability of eyewitness testimony based on environmental factors are within the common competence of the trier of fact. The Court, applying erroneous exercise of discretion scrutiny, says that determination by the trial judge was rational, and moreover if it was error it was harmless because of the other evidence of guilt. Justice Butler dissents, citing a litany of psychology and social science studies about eyewitness identification. He concludes that in his judgment the expert witness would have helped the trier of fact. He further concludes that the denial of the expert witness request denied the defendant his constitutional right to present a defense, and therefore the other evidence of guilt is irrelevant.

State ex rel. Coleman v. McCaughtry, 2006 WI 49.

A defendant had pled guilty to nine counts, including sexual assault and armed robbery. While in prison, he reviewed his options for appeal with his counsel, and together they concluded none looked promising. Sixteen years later, he had the financial resources to hire a new attorney, who brought a habeas petition alleging ineffective assistance of appellate counsel, because one of the original options on appeal should have seemed promising. Justice Butler, in a concurrence, argues that sixteen years is not an unreasonable delay.

State v. Johnson, 2007 WI 32.

It is dark out when a car is pulled over by two police officers for failure to signal a turn. The two officers observe the driver lean forward furtively, and believe, based on their training and experience, that he has concealed contraband or a weapon under the seat. After the driver exits the car, the officers conduct a protective search and discover a baggie of marijuana under the front seat. They then arrest and pat down the driver, and find a bag of crack cocaine. Justice Butler writes for the majority that the police lacked reasonable suspicion to search the car. Justice Roggensack, dissenting, says this “demonstrates only that the majority of this court, none of whom have any experience conducting traffic stops, is merely substituting its judgment for that of two experienced police officers” (85).

State v. Bannister, 2007 WI 86.

In a delivery of controlled substances case, Justice Butler dissents and argues that the defendant is entitled to a new trial in the interests of justice. Bannister was investigated by police after the brother of a victim of a drug overdose identified him as the source of the drugs. Bannister voluntarily confessed to the police that he was the source of the drugs, but then pled innocent at trial. During trial, the death of the user was mentioned several times. Justice Butler believes these mentions prejudiced the jury, prompting a verdict based on blood lust rather than the facts, and that a new trial was thus necessary in the interests of justice. For the majority, Justice Wilcox explains the relevancy of the death (48): the State proved Bannister supplied the drugs to the victim by showing their presence in the victim’s blood and on the items found in his house.

Jobs and Business Climate

Kohn v. Darlington Community Schools, 2005 WI 99.

The legislature enacted a ten year statute of repose from tort liability for businesses that make improvements to real property. An injured person challenged the statute on equal protection grounds for differentiating between manufacturers of materials and designers and installers of improvements. The Court, applying a very deferential rational basis test, found the legislature’s classification was a purposeful differentiation based on conduct and fungibility. Justice Butler, in dissent, says he would strike the statute down for violating his expansive reading of the federal and state constitutions’ equal protection clauses.

Thomas v. Mallet, 2005 WI 129.

Writing for the majority, Justice Butler makes an expansive reading of the “right to a remedy” provision of the Wisconsin constitution (111-113). He engages in an extensive review of the scientific literature and public health history of lead paint (29-98). He concludes that “the problem of lead poisoning from white lead carbonate is real, it is widespread, and it is a public health catastrophe that is poised to linger for quite some time” (133). Thus, he decides that the plaintiff may sue any manufacturer of white lead

paint who could have been responsible for his particular injuries based on the “risk-contribution” theory of industry-wide negligence.

The dissents are scathing. Writes Justice Wilcox, “The end result of the majority opinion is that the defendants, lead pigment manufacturers, can be held liable for a product they may or may not have produced, which may or may not have caused plaintiff’s injuries, based on conduct that may have occurred over 100 years ago when some of the defendants were not even part of the relevant market” (177). “The majority cannot hide the fact that its results-oriented approach is simply unprecedented and unsupported by Wisconsin case law or any case from another jurisdiction” (180 fn1). Justice Prosser feels similarly: “[T]he majority opinion creates a cause of action that violates due process of law, equal protection of the law, and nearly every principle of sound public policy in tort cases” (269).

If the Court chooses to extend its decision in *Thomas* to other contexts, “it will represent a major reordering of the purposes of our tort system from adjudicating individual remedies for private civil wrongs to finding funding sources to address broad public policy problems” (Diane Sykes, Hallows Lecture, at 731). The Wall Street Journal editorial board said that “This decision is the first of its kind in the country and establishes a dangerous precedent ... [It ratifies] a chain of speculation and conjecture, making it all but impossible for a company to exculpate itself. In short, the decision gives defendants every incentive to settle rather than risk a trial, rigging the system in favor of the trial lawyers.” *Thomas* drew heavy fire from scholars and the business community for its embrace of “an unprecedented and radical theory” for industry-wide liability disconnected from causation (Charles Sykes at 3).

Bartholomew v. Wisconsin Patients Compensation Fund, 2006 WI 91.

The lead opinion decides to explicitly overturn the Court’s decision just two years earlier in *Maurin v. Hall*. Justice Butler, concurring, labels the *Maurin* decision “unsound in principle” in his opinion and votes to overturn it (155 fn6).

Meyers v. Bayer AG, Bayer Corp., 2007 WI 99.

Justice Butler’s majority opinion explodes the scope of Wisconsin’s antitrust act to encompass valid, patent protected pricing done nationwide. Justice Prosser, in dissent, said Butler’s new rule lacked “any meaningful limitation on antitrust suits against illegal activities outside this state” (69). Justice Roggensack argues that the decision attacks intellectual property rights granted by federal government patents.

Stoughton Trailers, Inc. v. Labor & Industry Review Commission, 2007 WI 105.

Writing for the majority, Justice Butler says that an employer failed to extend appropriate clemency and forbearance to an employee who was fired after missing a set number of days of work when some but not all of those absences were due to a medical disability. In dissent, Justice Prosser charges that the majority excuses employees from proving that their absences were related to their medical condition; “[t]he majority therefore requires an employer to suspend its attendance requirements even if an

employee fails to submit medical documentation confirming that his absence was disability related” (103).

Estate of Szleszinski v. Labor & Industry Review Commission, 2007 WI 106.

“The effect of this case is to punish a trucking company that discontinued the services of an over-the-road commercial truck driver whom it believed posed an unreasonable risk on the highway” (Justice Prosser’s dissent at 50). Writing for the majority, Justice Butler holds that a driver can file a disability discrimination claim under state law prior to receiving a determination of medical qualification from the federal DOT. The majority also shifts to the employer the burden of seeking a DOT determination. In doing so, it leaves standing “extreme” and “mistaken” Court of Appeals holdings (75); it also disregards and shows no deference to the conclusions of LIRC (68). In dissent, Justice Prosser writes that the majority’s burden shifting “forces the employer to exhaust an administrative procedure that it may not need” (97).

Culture and Family

In re Termination of Parental Rights to Diana P., 2005 WI 32.

Wisconsin law says that a parent shall be deemed unfit if a court order has denied physical placement of the child with the parent and one year has elapsed since that order was entered without any modification to the order. Justice Butler argues in dissent that this scheme violates the parent’s right to an individualized judicial finding of unfitness. Justice Roggensack, writing for the majority, counters that the placement order considers 14 factors that all reflect on parental abuse, neglect, and unfitness (29). Justice Prosser, concurring, further points out that a fit parent would not fail to challenge the placement order for a year while his child is separated from him (53).

In re Termination of Parental Rights to Max G.W., 2006 WI 93.

Writing for the majority, Justice Butler determines that it violates the substantive due process rights of incarcerated parents for the State to say that their imprisonment alone justifies termination of parental rights. In dissent, Justice Wilcox writes that, “The majority creates a special class of children who will be left to linger while their parents serve time... In its effort to protect incarcerated parents, the majority inadvertently imposes on the children of incarcerated parents a sentence in limbo” (85). “This frustration of legislative purpose may have been avoided had the court not proceeded by the formulation of a broad constitutional command that appears to rule out incarceration as a grounds for termination” (Richard Esenberg, *A Court Unbound*, at 6).

Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107.

Writing for the majority, Justice Butler overrules the Court’s decision two years earlier in *Panzer v. Doyle*. Showing an unsettling disregard for precedent (contrast 93 with 292 fn6 and 318-19), he essentially negates any impact on tribal gaming by the 1993 constitutional amendment. Justice Roggensack dissents, charging that the majority

pushes the Court further towards being an institution that merely “establishes only the personal preferences of the men and women who hold office on the court at any given time” (303). She concludes that, “[I]n order to permit the expansion of Indian gambling, the majority opinion completely ignores basic precepts of constitutional law” (330). Professor Esenberg concludes that Justice Butler’s impairment of contracts discussion “is simply not good constitutional law” (Richard Esenberg, *Activist v. Restraint*, at 3). Judge Sykes identified *Dairyland* as the leading case from the 2005-2006 term showing “a highly aggressive mode of judging, hardly in keeping with the themes of judicial restraint and modesty that are preached and practiced elsewhere.” (Diane Sykes, *A New Direction*, at 13).

Separation of Powers

Solie v. Employee Trust Funds Board, 2005 WI 42.

In a case brought by the Wisconsin Education Association Council, Justice Butler wrote for the majority that “creditable service” by teachers is equivalent to a monetary deposit in a retirement fund. In dissent, Justice Wilcox says the decision “is in contravention of both common sense and the definition of the words” at issue (58). “[T]he majority cites no statute, administrative rule, or case for the proposition that the retirement deposit fund may contain something other than money. It simply declares it to be so” (64). This assertion is nothing more than “judicial fiat” in Justice Wilcox’s view (70).

Dane County v. McGrew, 2005 WI 130.

Justice Butler dissents in a speeding ticket case, saying “[T]hat the United States Supreme Court has concluded in *Williams v. Florida* (1970), that the Sixth Amendment did not require that a jury be comprised of 12 persons has limited import on what the Wisconsin Constitution secures. See *State v. Knapp*; *State v. Dubose*” (98) (internal citations omitted). This is a classic statement of his “New Federalism” inclination.

Wisconsin Auto Title Loans, Inc. v. Jones, 2006 WI 53.

Justice Butler writes as a concurrence a rhetoric-heavy screed attacking the auto title loan industry. Writing an op-ed rather than a judicial opinion, he does not cite a single case or other source of authority, only his own moral outrage. Labeling auto title loan companies “predatory lenders” (94), he says the interest they charge to consumers is “ridiculous, unreasonable, and unconscionable” (91). Calling for intervention in the market, he writes: “[T]he legislature can put an end to this practice in future cases by capping auto title loans at an annual percentage rate it determines to be reasonable. ... I urge the legislature to act now to protect the citizens of this great state” (95).

Kolupar v. Wilde Pontiac Cadillac, Inc., 2007 WI 98.

Justice Butler inserts, by judicial fiat, the word “reasonable” before “costs” in the State’s lemon law statute. This is, in Justice Wilcox’s view, a “contorted interpretation” that disregards the plain language of the statute (72).

Conclusions

There have been many attempts to define “judicial activism.” Judge Michael Brennan and Professor Rick Esenberg have already set out good definitions in relation to the Wisconsin Supreme Court (Michael Brennan and Richard Esenberg, *A Court Unbound*, at 1-2). Drawing on their ideas, I have identified the following indicators that Justice Butler is a judicial activist:

Arrogance Over Deference

Justice Butler often substitutes his own judgment for that of another institution when that institution is entitled by law to deference.

Failure to defer to the trial court – *Love, Armstrong, Dubose, Shomberg*

Failure to defer to the legislature – *Trujillo, Kohn, Diana P., Max G.W., Kolupar*

Failure to defer to the U.S. Supreme Court – *Knapp, Dubose, McGrew*

Failure to defer to a government agency – *Johnson, Meyers, Szleszinski*

Overturing Precedent

Justice Butler often fails to show appropriate respect for the Court’s decisions in past cases. *Trujillo, Knapp, Dairyland, Bartholomew*

Acting Like a Legislator

Justice Butler often fails to respect the constitutional and practical limitations of the judicial office.

Extensive citations to non-legal authorities – *Dubose, Shomberg, Thomas*

Moral outrage substituted for sound legal reasoning – *Thomas, Jones*

Justice Butler does not show every indicator of judicial activism in every case. On the whole, however, his opinions show a disturbing proclivity for activist methods of reasoning. Other essays catalogue the practical policy impact of his votes in cases. This paper has evaluated the reasoning employed in his opinions to conclude that Justice Butler is a judicial activist as that term is commonly and academically defined.

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