A Tribute to Justice Roger O. DeBruler

JUSTICE FRANK SULLIVAN, JR.*

On August 8, 1996, Justice Roger O. DeBruler retired at age sixty-two after nearly twenty-eight years on the Indiana Supreme Court. His tenure was the second longest in the court's history and he had it within his power to break Isaac Blackford's record of thirty-five years simply by serving until he reached age sixty-nine and a half. But being a record-holder was just not as important to this modest man as being able to pursue the wide range of interests that he had been forced to neglect in the face of the relentless press of court business.

I hope that someone writes the story of Justice DeBruler's life because it is a story worth telling. And if that story is told properly, it will tell not only of his contributions to the law but also of his love and devotion to his wife, Karen, and their children and of his legendary friendship with Professor Ken Stroud; it will describe his growing up in an Evansville where, one suspects, "the inhabitants . . . always valued neighborliness, hospitality, and concern for others, even those who may be strangers;"[1] it will discuss his military service and his mastery of the German language; and it will explore his years at Indiana University where, one suspects, he engaged in "open debate and principled dissent to the conventional wisdom of the day."[2]

If the story of Justice DeBruler's life is written properly, it will tell not only of his supreme court service but also of his law practice in the office of legends John J. Dillon and L. Keith Bulen and their partners—for of that, I am sure, there is much to tell. And it will tell of his appointment to the Steuben Circuit Court at age twenty-eight by Governor Welsh; of his election to that position in 1964; of his noteworthy service on that bench; of his personal role in reviving the Lockerbie neighborhood in downtown Indianapolis; and of commitment to proper diet and exercise. And of so much more.

This essay cannot attempt those things. Nor can it provide a comprehensive survey of even his supreme court years. It will merely present four vignettes from the tenure of Justice DeBruler—in the form of four of his opinions.

I

Theon Jackson was charged with two robberies totaling nine dollars. Jackson, a twenty-seven year-old deaf and partially blind man, had never been to school and had only a rudimentary understanding of sign language. He could neither read nor write. At a competency hearing, three experts agreed that Jackson 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 other than a few gestures and pantomimes.

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1. Moran v. State, 644 N.E.2d 536, 541 (Ind. 1994) (DeBruler, J.).

2. Grody v. State, 257 Ind. 651, 658, 278 N.E.2d 280, 284 (1972) (DeBruler, J.) (striking down statute on First Amendment grounds).

The trial court ordered Jackson committed to the state mental health department pursuant to a statute which provided that if the court found that the defendant did not have the "comprehension sufficient to understand the proceedings and make his defense,"[3] the court was to order the defendant "confined" in an appropriate state psychiatric institution. Under the statute, when a defendant's sanity was restored, the commitment ended and the defendant was tried for the offense "the same as if no delay or postponement had occurred by reason of defendant's insanity."

But in Jackson's case, the psychiatrists agreed that there was almost no chance that he ever could improve his understanding sufficiently to be tried. Jackson appealed, arguing that under his circumstances the commitment amounted to a life sentence.

On February 19, 1970, the Indiana Supreme Court rejected Jackson's argument, holding that his confinement was within the state's "police power [to] provide for the safety, health, and general welfare" which "necessarily includes the confinement, care and treatment of the mentally defective, retarded or insane."[4] While the majority rejected Jackson's argument, Justice DeBruler found it compelling. Pointing out that the commitment statute contemplated a delay in or postponement of the trial "to alleviate the defendant's mental condition so that he can be tried," Justice DeBruler argued in dissent that the statute had to be construed to provide that the commitment be a temporary one.[5] "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," Justice DeBruler wrote. "[T]he existence of *unproved criminal charges* operates to keep appellant confined in a state institution for life,"[6] he concluded. "This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution."[7]

The United States Supreme Court had the last word. The high Court reversed and followed Justice DeBruler's dissenting position.[8] Writing for a unanimous Court, Justice Blackmun echoed Justice DeBruler's dissent: "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."[9]

II

Eddie Thomas was a Jehovah's Witness whose hobby was Bible reading. His religious beliefs prohibited him from producing or aiding in the manufacture of items used in the advancement of war. After working for a period of time in a factory's foundry, he was transferred to an assembly line which manufactured

3. Jackson v. State, 253 Ind. 487, 493, 255 N.E.2d 515, 516 (1970).
4. *Id.* at 492, 255 N.E.2d at 518.
5. *Id.* at 493, 255 N.E.2d at 518 (DeBruler, J., dissenting).
6. *Id.* at 494, 255 N.E.2d at 519 (DeBruler, J., dissenting) (emphasis in original).
7. *Id.*
8. Jackson v. Indiana, 406 U.S. 715, 738-39 (1972).
9. *Id.* at 738.

army tanks. Thomas diligently sought without success a transfer to another department. He requested a layoff, which was denied, and then quit due to his religious convictions. Thomas sought unemployment benefits but was denied on grounds that he had voluntarily terminated his employment.

The court of appeals reversed the unemployment compensation board's decision[10] but on July 18, 1979, the Indiana Supreme Court vacated the decision of the court of appeals and affirmed the board's denial of benefits to Thomas. The court reasoned that because Thomas was "not required by statute to violate a cardinal tenet of his religion," he was not entitled to unemployment compensation simply because he voluntarily quit work for religious reasons.[11]

In dissent, Justice DeBruler invoked the United States Supreme Court case of *Sherbert v. Verner*[12] in which Adell Sherbert, a Seventh Day Adventist, had been discharged for refusing a change in her work week which would have required her to work on the Sabbath. Justice DeBruler pointed out that the high Court had held that Sherbert's disqualification for unemployment benefits violated her rights under the Free Exercise Clause of the First Amendment. "I find no reason," he wrote, "to conclude that Thomas should not be accorded the same constitutional protection for the free exercise of his religious belief."[13]

Thomas appealed to the United States Supreme Court which held in his favor. Like Justice DeBruler, Chief Justice Burger invoked the *Sherbert* precedent: "Here, as in *Sherbert*, the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert*."[14]

III

In 1976, in response to health care provider fears of a medical malpractice crisis, the legislature adopted the Indiana Medical Malpractice Act.[15] The new act subjected negligence claims against health care providers to special controls limiting patients' remedies. In *Johnson v. St. Vincent Hospital*,[16] the Indiana Supreme Court considered four challenges to the constitutionality of these provisions.

Justice DeBruler wrote the opinion for a unanimous court. He began by setting forth the conditions in the health care and insurance industries that gave rise to the Act and then set forth the court's standard of review in considering challenges to the constitutionality of statutes: that the Act be accorded every presumption supporting its validity; that the burden was on the parties

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10. Thomas v. Review Bd. of Ind. Emp. Sec. Div., 178 Ind. App. 156, 381 N.E.2d 888 (1978).

11. Thomas v. Review Bd. of Ind. Emp. Sec. Div., 271 Ind. 233, 244, 391 N.E.2d 1127, 1133 (1979).

12. 374 U.S. 398 (1963).

13. *Thomas*, 271 Ind. at 249, 391 N.E.2d at 1136 (DeBruler, J., dissenting).

14. Thomas v. Review Bd., 450 U.S. 707, 717 (1981).

15. IND. CODE ANN. §§ 16-9.5-1-1 to 16-9.5-10-5 (Burns 1993) (repealed and replaced by IND. CODE ANN. §§ 27-12-1-1 to 27-12-18-2 (Burns 1994)).

16. 273 Ind. 374, 404 N.E.2d 585 (1980).

challenging the Act to show its unconstitutionality; and that a statute is not unconstitutional "simply because the court might consider it born of unwise, undesirable, or ineffectual policies."[17]

Justice DeBruler's opinion then began a lengthy and detailed examination of each constitutional challenge. The opinion has been discussed elsewhere[18] and it is beyond the scope of this essay to do so in any detail here. In brief, the constitutionality of the statute was affirmed in all respects because, in Justice DeBruler's view:

> In dealing with the constitutionality of a statute of our State, we do not sit to judge the wisdom or rightness of its underlying policies. When a state legislature enacts a statute such as this which is related to the public health and welfare, such statute in order to be consistent with due process "need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[19]

IV

On Justice DeBruler's last day in office, he handed down his final majority opinion in the case of *Schiro v. State*,[20] the most extensively litigated death penalty case in Indiana Supreme Court history—and the death penalty case on which the court had been most closely divided. On three previous occasions, Thomas N. Schiro's case had been before the court and, although his death sentence had been affirmed each time, never were there more than three justices in the majority. And, with changing membership on the court, three different justices had, at different times in the past, voted to vacate the death sentence.[21] The case is also the only modern Indiana death penalty case on which the United States Supreme Court has written.[22]

What closely divided the justices who had reviewed Schiro's case were not the facts. His crime made all who studied it recoil in horror. But several important aspects of the case raised concern, the most important of which was that the jury had unanimously recommended that Schiro not be put to death for his crime. In

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17. *Id.* at 381-82, 404 N.E.2d at 591.

18. *See, e.g.*, Daniel J. Harrington, *Torts*, 15 IND. L. REV. 425, 425-29 (1982); Marilyn Nickell, *A Remedy for Indiana's Product Liability Malady*, 21 VAL. L. REV. 159, 174-78 (1986).

19. *Johnson*, 273 Ind. at 387, 404 N.E.2d at 594 (citing Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487-88 (1955); *cf.* Steup v. Indiana Housing Finance Auth., 402 N.E.2d 1215 (1980)).

20. 669 N.E.2d 1357 (Ind. 1996).

21. Schiro v. State, 533 N.E.2d 1201, 1208 (Ind.) (DeBruler and Dickson, JJ., voting to vacate sentence), *cert. denied*, 493 U.S. 910 (1989); Schiro v. State, 479 N.E.2d 556, 562 (Ind. 1985) (DeBruler, J., dissenting), *cert. denied*, 475 U.S. 1036 (1986); Schiro v. State, 451 N.E.2d 1047 (Ind.) (DeBruler and Prentice, JJ., voting to vacate sentence), *cert. denied*, 464 U.S. 1003 (1983).

22. Schiro v. Farley, 510 U.S. 222 (1994).

three earlier dissents, Justice DeBruler had argued that the jury's recommendation should be followed.[23]

This time, Justice DeBruler's analysis prevailed. He pointed out that after Schiro's most recent appeal to the Indiana Supreme Court, the court had adopted "a form of closer appellate scrutiny for cases . . . wherein the jury recommends against death" and that Schiro specifically requested such scrutiny in his original appeal. Although "the jury fully appreciated the details of Schiro's crime," it "unanimously recommended that the death penalty not be imposed." Justice DeBruler wrote: "When the unanimous rejection by the jury of the predicate for imposition of the death penalty, with all such rejection imports, is placed in tandem with the evidence in mitigation, with all such evidence imports," he continued, "we conclude that it may not be said that the facts available in the record support the conclusion that the death penalty is appropriate." Thomas Schiro's death sentence was modified to a term of years.[24]

CONCLUSION

These four opinions—but a sliver of Justice DeBruler's work—give a feel, I think, for his humanity, his devotion to constitutional rights, his respect for the role of the people's elected representatives, and his strict and persistent scrutiny of the appropriateness of the sanction in death penalty cases. His retirement is a great loss for the Indiana Supreme Court, the law, and the people of our state. But, as the foregoing opinions illustrate, though Justice DeBruler himself has left the court, his extraordinary legacy remains.

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23. Schiro v. State, 533 N.E.2d at 1208 (DeBruler, J., dissenting); Schiro v. State, 479 N.E.2d at 562 (DeBruler, J., dissenting); Schiro v. State, 451 N.E.2d at 1064 (DeBruler, J., dissenting).

24. *Schiro*, 669 N.E.2d at 1358-59.