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Kurt Schwarz

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MY FAVORITE YEAR: WHAT A LAW CLERK LEARNED ABOUT JUSTICE, JUDGING, AND LITIGATION FROM WORKING ON ONE CASE WITH BAREFOOT SANDERS

Kurt Schwarz*

BAREFOOT Sanders was a man who administered justice “without respect to whether he was addressing the rich or the poor, the powerful or the powerless,”¹ and was “a special person because he was comfortable with the powerful but cared about everyone.”² He is remembered most for his deft handling of *Tasby*, the decades-long case that desegregated the Dallas Independent School District; when he announced that he was taking inactive status, the front-page headline in the *Dallas Morning News* read “Desegregation Judge to Retire.”³ The case that best demonstrates the depth of Judge Sanders’ commitment to justice, however, where he demonstrated how a judge could simultaneously be fair and impartial and, as he said of his parents, be “strong for the underdog,”⁴ is *Lelsz v. Kavanagh*.⁵ *Lelsz* was a lengthy class action concerning the treatment by the State of Texas of its most vulnerable, powerless, and largely invisible citizens—the mentally retarded who are housed in state institutions.⁶ This is the story of just one small aspect of that

* Kurt Schwarz clerked for the Honorable Barefoot Sanders, then Chief Judge of the United States District Court for the Northern District of Texas, from July 1990 through September 1991. He is a partner in the Litigation Section of Jackson Walker LLP’s Dallas, Texas, office.

1. Remarks by Judge Barbara Lynn at September 2008 memorial service for Judge Sanders.

2. Statement of Chief Judge Sidney Fitzwater upon the death of Judge Sanders.

3. Tim Wyatt, *Desegregation Judge to Retire: Federal Jurist Who Monitored DISD says He Will Go to Inactive Status*, DALLAS MORNING NEWS, July 8, 2006, at 1B.

4. Bryan Woolley, *Barefoot Sanders: The Forthright Pragmatist*, DALLAS TIMES HERALD, June 1, 1986, at 11, 12.

5. See 903 F. Supp. 1037 (N.D. Tex. 1995); 783 F. Supp. 286 (N.D. Tex. 1991), *aff’d*, 983 F.2d 1061 (5th Cir. 1993); 824 F.2d 372 (5th Cir. 1987); 807 F.2d 1243 (5th Cir. 1987); 673 F. Supp. 828 (N.D. Tex. 1987); 629 F. Supp. 1487 (N.D. Tex. 1986); 112 F.R.D. 367 (N.D. Tex. 1986); *Lelsz v. Kavanagh*, 98 F.R.D. 11 (E.D. Tex. 1982), *appeal dismissed*, 710 F.2d 1040 (5th Cir. 1983).

6. I recognize that there is a campaign to stop using the “r-word”—“retard” and its cognates—in discussing people with below-average intellectual abilities, on the ground that such words are derogatory and, in certain contexts, may amount to hate speech. Anti-r-word activists prefer phrases such as “mentally disabled” or “developmentally disabled.” Although sympathetic to the anti-r-word crowd, or at least their motives, I use the term

lawsuit, a case within the case, that revealed some of Barefoot Sanders' unique virtues as a jurist.

"The mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude."⁷

They have been subjected to a history of unfair and often grotesque mistreatment. Until the 1970s, they were universally denied admittance into public schools in the United States. In addition, the Eugenic Society of America fought during the first half of [the twentieth] century to have retarded persons eradicated entirely through euthanasia and compulsory sterilization. Euthanasia was rejected; but thirty-two states have had statutes providing for the sterilization of retarded individuals. . . . Mental retardates have been segregated in remote, stigmatizing institutions.⁸

The prevailing attitudes of the past, which still hold some sway in our culture, were summed up by Justice Holmes when he declared, while upholding Virginia's law mandating the sterilization of the mentally retarded: "Three generations of imbeciles are enough."⁹

"retarded" rather than "mentally disabled" or "developmentally disabled" in this Essay for several reasons. First, "mental retardation" is the term used by the overwhelming majority of experts on the topic—or at least the ones who wrote the books and articles I read to learn about the condition(s). Related to its acceptance and common usage by experts is the fact that, at the time of the events described here, the r-word was acceptable to both lexicographical descriptivists and prescriptivists, as well as the various courts that grappled with defining and defending the rights of the mentally retarded, and using a different word where my voice is expressed in this Essay would produce a disorienting "then/now" linguistic disorder, which I would call bipolar were it not for the fact that such use of "bipolar" would be tantamount to the disapproved use of the r-word. Third, used properly, it is not (to my mind) a dysphemism—indeed, the anti-r-word campaign is largely aimed at stopping the incorrect or inaccurate use of the r-word (when one refers to a person who has made a mistake or has had a lapse in judgment as a retard), and I believe I use the r-word properly in this Essay. Finally, "mentally disabled" is simply too broad a term; for the purposes of this Essay, it is over-inclusive and inaccurate, inasmuch as it includes the retarded, the mentally ill, persons with depression, persons with post-traumatic stress disorder, and so on. "Developmentally disabled" is equally fuzzy, albeit in a different way, as it suggests all manner of physical and emotional maladies, as well as mental or intellectual ones. So, "mentally retarded" it is.

7. *Romeo v. Youngberg*, 644 F.2d 147, 163 n.35 (3d Cir. 1981) (en banc), *vacated*, 457 U.S. 307 (1982). The American Psychiatric Association's definition of mental retardation is as follows:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000).

8. *Cleburne Living Ctr. v. City of Cleburne*, 726 F.2d 191, 197 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432 (1985). The Fifth Circuit opinion in *Cleburne* was written by a close friend of Judge Sanders, Judge Irving Goldberg.

9. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

“It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.”¹⁰ Of that one to three percent of the population that is mentally retarded, approximately eighty-five percent are mildly retarded, with IQs ranging from fifty to seventy-five; about ten percent are moderately retarded, with IQs in the thirty-five to fifty-five range; and about three to four percent are severely retarded, meaning that they have IQ scores of twenty to forty.

Debra Lynn Thomas is profoundly retarded, the result of two bouts of spinal meningitis when she was an infant. She is part of the one to two percent of the retarded population whose IQ is under twenty. In fact, in 1990, Ms. Thomas was a thirty-two-year-old woman with an IQ of twelve—equivalent to that of an infant. Like an infant, Ms. Thomas required what the American Association on Mental Retardation calls pervasive support—that is, daily support for virtually all aspects of living. Unlike an infant, Ms. Thomas could not even move herself around; she was confined to a wheelchair, her legs were splayed and rigid, and she had limited control of her arms and hands. What movements she could control were due in large part to a heavy regimen of anti-seizure drugs. Due to the constant, all-encompassing support she needed, Ms. Thomas, through no fault of her own, was a ward of the State of Texas—specifically, the Texas Department of Mental Health and Mental Retardation, or MHMR¹¹—and was confined and cared for at the Lubbock State School. As such, she was a member of the plaintiff class in *Lelsz v. Kavanagh*.

By 1990, *Lelsz v. Kavanagh* was sixteen years old. The case had been filed in the United States District Court for the Eastern District of Texas in 1974, when the family of John Lelsz challenged the adequacy of conditions, care, and habilitation at three of the thirteen large Texas institutions for the mentally retarded. It was hardly debatable that Texas’s treatment of the retarded was substandard: “By [the State’s] own admission, Texas rank[ed] ‘fifty-first out of fifty’ states in financial commitment to its mentally retarded citizens.”¹² The fact of the matter was that the State warehoused the mentally retarded in large “schools” where “residents” were treated like prisoners of a Third World junta—frequently restrained with belts and straightjackets, drugged into lengthy stupors,

10. *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002) (citing 2 KAPLAN & SADOCK’S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (B. Sadock & V. Sadock eds., 7th ed. 2000)).

11. MHMR ceased to exist as of September 1, 2004; it was put out of its misery by a legislative reshuffling of the bureaucratic deck. Following the reorganization, mental retardation services were provided by the Texas Department of Aging and Disability Services (with the feel-good acronym “DADS”), although the new name and fancy new logo (which features faceless silhouettes of people inexplicably jumping or dancing) did not improve the actual services provided to the retarded citizens who found themselves in the State’s care. See *infra* note 74.

12. *Lelsz v. Kavanagh*, 673 F. Supp. 828, 831 (N.D. Tex. 1987).

physically abused and raped, and held in filthy facilities where disease was rampant. As the father of the lead plaintiff said, "[t]hey were locked in these huge rooms with no toys, no stimulation, to wallow in their own feces."¹³ The conditions at the Fort Worth facility were so horrid that in July 1989 the residents rioted for two days.¹⁴

The *Lelsz* plaintiffs alleged that MHMR had forced them into large, regimented institutions by failing to provide less restrictive alternatives. They also alleged that the care received in the large institutions was wholly inadequate and violated the rights guaranteed them by the due process clause of the Fourteenth Amendment to the Constitution of the United States.¹⁵

Plaintiffs specifically alleged that they had been denied individualized, appropriate habilitative services; that they were treated and cared for by inadequate numbers of qualified staff; that they had been subjected to diseases, neglect, excessive medication, unnecessary restraint, unsafe buildings, inadequate medical and dental care, and physical abuse from other residents and staff.¹⁶

The class, at the time the case was filed, comprised approximately 2,400 residents of the Austin, Denton, and Fort Worth state schools for the mentally retarded. The case was certified as a class action in 1981. Over the years, the case encompassed more schools and the plaintiff class grew to over 5,500 members.

After it was filed, the case languished for seven years and was on the verge of dismissal when a new attorney, David Ferleger, took over, replacing the underfunded and overextended Dallas Legal Services Foundation. Ferleger has been called a "pertinacious attorney" who took up the *Lelsz* case "with a vengeance" and was "difficult to work with"—all accurate assessments.¹⁷ Ferleger is the child of Polish Holocaust survivors. His mother was from Warsaw and survived the Ghetto and Auschwitz; his father was from Chmielnik, a town whose Jewish population was almost entirely annihilated by the Nazis in Treblinka. The focus of Ferleger's career has been representing disabled, incapacitated, and marginalized persons, often in actions against governmental institu-

13. Tracy Everbach, *Parents' Crusade 28-Years to Improve Retarded Son's Care Paying Off, But Landmark U.S. Suit Not Settled*, DALLAS MORNING NEWS, May 30, 1991, at A1.

14. Leona Allen, *Judge Gives State Deadline to Replace School Facility*, DALLAS TIMES HERALD, Oct. 2, 1990, at A11.

15. Those rights include: (1) A right to adequate food, shelter, clothing, and medical care; (2) a right to reasonably safe conditions of confinement; (3) a right to be free from undue bodily restraint; (4) a right to the training and development of those skills needed to ensure safety and to facilitate clients' ability to function free from bodily restraint. See *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Mills v. Rogers*, 457 U.S. 291, 298-302 (1982); *Vitek v. Jones*, 445 U.S. 480, 491-94 (1980). For a full discussion of these rights within the context of the *Lelsz* case, see *Lelsz v. Kavanagh*, 673 F. Supp. 828, 833-35 (N.D. Tex. 1987).

16. *Lelsz v. Kavanagh*, 783 F. Supp. 286, 287 (N.D. Tex. 1991), *aff'd*, 983 F.2d 1061 (5th Cir. 1993).

17. FRANK KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 318-19 (1991).

tions.¹⁸ Judge Sanders called him a zealot, in a nice way.

On the other side of the litigation was an agency that strenuously fought against change and resented court oversight. A letter to MHMR employees from its commissioner expressed the agency's view of the litigation and the attorneys involved.

The department is always the fall guy, [Dr. Gary Miller] wrote.

If something goes wrong in our facilities, it is our fault; whatever progress is made is, of course, to the credit of the lawsuits and the court monitors. The court monitors can do no wrong; they do not have to account directly or indirectly to the people of Texas for the correctness of their conclusions about TDMHMR facilities or for the accuracy of their statements to the press. . . . A lot of people make money as long as the lawsuits continue. There are attorneys' fees, expensive outside experts, and of course, the money that pays the salaries of the monitors and members of their organizations.¹⁹

Added to this institutional attitude was "an aggressive, abrasive attorney who takes her cases seriously."²⁰ The Assistant Attorney General on the case, Toni Hunter, was described by a colleague as someone who "gets so immersed into her cases and cause and the people she's defending that it takes on a personal flavor."²¹ Once, she objected to a proposed settlement of a lawsuit because, in her view, the settlement would impose continuing legal obligations on the State; she reportedly said of the settlement: "It is like the state is giving permission to be raped."²² She was as driven in her defense of the State as Ferleger was in attacking it.

In 1983, on the eve of trial, the parties reached a settlement. That settlement, called the Resolution and Settlement (R & S), was a broadly-worded document designed to provide a "final resolution of the defendants' obligations towards the members of the plaintiff class and of the

18. Ferleger's cases include: *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), *rev'g* 673 F.2d 647 (3d Cir. 1982) *remanded by* 451 U.S. 1 (1981), *rev'd* 612 F.2d 84 (3d Cir. 1979), *aff'g in part, rev'g in part*, 446 F. Supp. 1295 (E.D. Pa. 1977); 415 F. Supp. 233 (E.D. Pa. 1978) (landmark case on state treatment of the retarded); *City of Philadelphia v. Commonwealth Department of Public Welfare*, 564 A.2d 271 (1989) (holding that Department of Public Welfare would be required to seek interim grant from General Assembly to fund nonresidential habilitation services for retarded persons); 91 F.R.D. 451 (E.D. Pa. 1981) (declaring unconstitutional state civil commitment statute as unconstitutionally vague); *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976); *Griffith v. Ledbetter*, 711 F. Supp. 1108 (N.D. Ga. 1989) (holding that resident of mental health/retardation institution has due process right to have treatment decisions made by qualified professionals); *In re Gross*, 382 A.2d 116 (Pa. 1978) (holding that patients in mental institutions have a right to refuse treatment); *Lombard v. Eunice Kennedy Shriver Center for Mental Retardation, Inc.*, 556 F. Supp. 677, 680 (D. Mass. 1983) (holding that there is constitutional right to adequate medical care and state cannot delegate its obligations to private contractor); and *Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 699 F. Supp. 1106 (E.D. Pa. 1988) (finding a right to community services for people with retardation who are living at home).

19. KEMERER, *supra* note 17, at 333.

20. Denise Gamino, *Actions of State Attorney Spark Federal Hearing*, AUSTIN AM. STATESMAN, May 9, 1991, at B1, B8.

21. *Id.*

22. *Id.*

issues raised by this litigation."²³ Approved by Judge William Wayne Justice on July 19, 1983, the R & S imposed obligations on the State to reach minimally adequate goals in a wide range of areas pertaining to the care and treatment of the mentally retarded in Texas. The R & S also called for the appointment of an Expert Consultant to monitor the implementation of the R & S. The parties later agreed that Dr. Linda O'Neill, a sociologist, should be appointed Expert Consultant.

Thus, when *Lelsz* was transferred to Judge Sanders' court in November 1985, it already had been settled.²⁴ Notwithstanding the court-approved settlement, the case was becoming more contentious than ever. The parties' interpretations of the requirements of the R & S could not have diverged more—seemingly every word in the R & S was capable of two contradictory meanings—and what the State was required to do to implement the R & S became the fodder of intense and bitter litigation. It is only a modest exaggeration to say that the State felt that it had been in compliance with the R & S from the day it was signed, and the Plaintiffs believed the R & S called for the wholesale dismantling of MHMR's system of housing and treating the retarded.²⁵

In 1987, Judge Sanders held a lengthy hearing on the State's compliance with the R & S, and found the State in contempt. The Court found that the State had violated numerous obligations under the R & S by failing to provide, among other things, "required habilitation, required freedom from abuse and neglect, required individual treatment, and required safe conditions."²⁶

Not long after the contempt hearing, the parties agreed to an Implementation Agreement, which was designed to provide MHMR with clear

23. *Lelsz v. Kavanagh*, 783 F. Supp. 286, 287 (N.D. Tex. 1991) (quoting R&S ¶ 5).

24. The case was transferred from Judge Justice at the urging of the Fifth Circuit Court of Appeals because Judge Justice's caseload was overwhelming—he had over 1,100 civil actions on his docket, including a massive class action concerning the Texas prison system, *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980). The case was transferred to Judge Sanders because he was handling a similar class action directed at MHMR concerning the State's treatment of the mentally ill, *R.A.J. v. Miller*, 590 F. Supp. 1319 (N.D. Tex. 1984); 590 F. Supp. 1310 (N.D. Tex. 1984). Although Judge Justice was glad to be free of *Lelsz*, he stated that he "wouldn't have agreed to [the transfer]" if the case went to "anyone other than Barefoot Sanders." *KEMERER, supra* note 17, at 334-35.

25. Consider this example: The R & S required the State to "provide each member of the plaintiff class with the least restrictive alternative living conditions possible consistent with the person's particular circumstances, including age, degree of retardation and handicapping condition." *Lelsz v. Kavanagh*, 807 F.2d 1245 (1987) (quoting the R&S). The Plaintiffs argued that this language required "community placements"—placing those persons capable of living outside the state schools in group homes, with supervision, in their communities and, because it was believed a large percentage of the plaintiff class would be placed in such homes, closing some of the state schools. The State vigorously fought against community placements, in part because of the cost involved, and partly because no one wanted such homes in their neighborhoods. (Some parents of plaintiff class members also opposed community placements because they feared the group homes would be worse than the state schools.) Judge Sanders initially found that the R & S required community placements, but the Fifth Circuit disagreed and ruled that the District Court lacked jurisdiction to compel the State to set up community facilities. *See Lelsz v. Kavanagh*, 807 F.2d 1243, 1254-55 (5th Cir. 1987).

26. *Lelsz v. Kavanagh*, 673 F. Supp. 828, 831 (N.D. Tex. 1987).

and concrete standards by which it could achieve compliance with the R & S. The great advantage of the Implementation Agreement was its specificity; that was also its greatest drawback.²⁷ Although there were occasional disagreements about what a particular provision of the Implementation Agreement called for, the parties constantly battled over whether the State was in compliance with many of the Agreement's provisions. The litigation got increasingly aggressive, even nasty. The natural animosity which arose from the conflicting legal interests of the parties was magnified by the personalities of the principal attorneys.

By July 1990, when I joined the Sanders court family as a law clerk,²⁸ the *Lelsz* litigation was pretty ugly, and my predecessor warned me to prepare for a contempt hearing within the year. I had no idea what such a hearing might entail—and my understanding of just what a contempt hearing might actually be was a foggy and wholly abstract image natural for a new law school graduate—but the tone in which the warning was conveyed suggested that it would require skills and knowledge I plainly did not possess (it did not help my confidence that I succeeded a superlative law clerk on the case). The short of the matter is that I started my clerkship feeling like I did when I was about twelve years old and first climbed to the top of the high dive: I reached the pinnacle of something, but felt uncomfortably exposed and vulnerable, and was scared to the point of hyperventilation about what was going to happen next.

The first few weeks of my clerkship were—inside the court—relatively uneventful: learning the rhythms and habits of the court, handling discovery disputes, handling the pretrial motions and preparing the jury charge in my first criminal trial, reviewing reports in *Tasby* and *Lelsz*. The big news was outside the court—the start of what we now call the First Gulf

27. The Implementation Agreement contained forty-five paragraphs that outlined the State's obligations in the suit. Paragraphs one through four stated the conditions for accreditation by the Accreditation Council on Developmental Disabilities. Paragraphs five through ten, referred to as the "Interim Measures," established minimum standards for the delivery of professional services in the Texas state schools, including medical, psychological, and educational services, as well as institutional protections against abuse, neglect, and injury. Paragraphs eleven through twenty-four established a variety of other requirements designed to improve the quality of care within the state schools. Paragraphs twenty-five through forty concerned the quality of placements and standards of care in the State's community programs for the mentally retarded. Finally, paragraphs forty-one through forty-five directed the State to provide the Expert Consultant and the Court with reports detailing various aspects of the treatment received by class members and the State's compliance with the Implementation Agreement.

28. My use of the term "family" is intentional. Barefoot and Jan Sanders welcomed all fifty-seven of his law clerks into their family, with annual summer reunions, winter holiday parties, and other get-togethers. Former clerks who worked nearby were frequent visitors to the Judge's chambers at lunch; former clerks who visited from out of town prompted large clerk alumni gatherings, which never were sedate affairs—the Judge loved arguing politics over a turkey sandwich. The Judge's amazing secretary for his entire judicial tenure, Phyllis Macon, was responsible for most of the logistics of court family-building, and for that all of the clerks are very grateful. Anyone who understands the maddening logistics of administering justice at the trial court level would recognize that Phyllis deserves an article about her contributions to the Sanders court.

War, prompted by Iraq's invasion of Kuwait.²⁹ The clerks' lunches with the Judge at the time were occupied with discussions and debates about the merits of the war, with only occasional discussions of pending cases. Still, even in that environment, the *Lelsz* litigation was a fairly steady source of complaints from the attorneys and questions on my part. There seemed to be no end to the disputes between the parties—which state officials could be deposed; when could Dr. O'Neal and her staff inspect which schools, and where could they go within the schools; what areas of discovery were permissible given the scope and terms of the R & S and Implementation Agreement—for which I needed guidance.

In the second month of my clerkship, Judge Sanders called me into his office. This was unusual—not talking with the Judge, as we did that all of the time, particularly at lunch, but being summoned into his office. His office was his sanctuary. It was a large room on the fifteenth floor of the Earle Cabell Federal Building on Commerce Street in downtown Dallas. He had a corner office, overlooking Commerce and Griffith Streets, with a view west towards Grand Prairie and Fort Worth and north to Love Field. The room smelled of cigars. Above his desk was a large oil painting of the Texas Hill Country in spring bloom. Above a sofa on an interior wall were documents and photographs attesting to his service as United States Attorney under President Kennedy; as head of the Civil Division of the Department of Justice and Legislative Counsel to President Johnson; and his appointment to the federal bench by President Carter. And on the north wall of the office, alone between two windows, there was a framed pen—one of the pens President Johnson used when signing the Voting Rights Act of 1965 into law, arguably Barefoot Sanders' greatest professional achievement.³⁰

I sat in one of the chairs facing the Judge's desk. I expected to be criticized for something—why else would I be here?—but the Judge didn't seem to be upset. He sat in his big leather chair, leaned back, and

29. It happened that I visited friends in Austin the first weekend of the war. I shall not soon forget strolling along a street in downtown Austin, picking up a newspaper, and seeing on the front page a photograph of the Judge's wife Jan, a peace activist, protesting the war.

30. As head of the Civil Division of the Department of Justice at the time, Barefoot Sanders was instrumental in gaining passage of the Voting Rights Act—he was President Johnson's lobbyist for the law. Political scientists and constitutional law scholars agree that the 1965 Act was, after the Constitution and its amendments, the most important piece of legislation ever enacted in the United States. See, e.g., GEORGE KATEB, *THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE* 2 (1992) (arguing that, after the rights enumerated in the Bill of Rights, the most important right required to protect the dignity of individuals is "the right to vote and take part in politics"). In this regard, consider what Walt Whitman said about the right to vote nearly a century before the Voting Rights Act was enacted:

[T]o become an enfranchised man, and now, impediments removed, to stand and start without humiliation, and equal with the rest; to commence, or have the road clear'd to commence, the grand experiment of development, whose end, (perhaps requiring several generations) may be the forming of a full-grown man or woman—that is something.

WALT WHITMAN, *DEMOCRATIC VISTAS* 476 (1871).

said, "We have a problem in *Lelsz*. I'm not sure what to do, or whether to do anything."

"Is Ferleger raising hell again?" Ferleger was always raising hell.

"He will be soon. And he's got a reason to be upset." Judge Sanders handed me a handwritten letter; I read far enough to see that it was from someone named Dori Wooten, whose sister was a resident of the Lubbock State School, but Judge Sanders didn't give me time to finish reading. He started talking and I started taking notes.

"A retarded woman named Debra Lynn Thomas was raped at the Lubbock School, in April or May. She's pregnant. The family wanted an abortion. That didn't happen for some reason. Her health is at risk. Serious risk, Dr. O'Neill says." Of course, he had consulted Dr. O'Neill immediately. I did not look up from taking notes; that is why I am able to recreate this conversation. "The family and Dr. O'Neill want us to intervene to protect this poor girl."

I looked up from my note pad. "What do they want you to do?"

"The first question is, should we do *anything*? There's no way to know if she was raped at the school. The school may not be responsible for the rape . . . it really makes more sense that she was raped at home, but that's ugly to think about. Anyway, it sounds like MHMR messed up plenty no matter how you look at it. We've got a real problem here." I kept my head down taking notes. All I could think of was his saying "we" repeatedly. I was thrilled to be treated, so early in my clerkship, more as a colleague than an employee. I stayed silent; who was I to chime in?

"The Court can't get involved in every incident at every state school. We're not here to run those places. And I'm no OB/GYN." He paused for a couple of seconds. "But at the same time, you know, I get tired of reading reports of abuse and neglect after the fact—there's nothing to be done about it then. Here's a case where we might be able to actually help someone."

"Why not wait for Ferleger to file a motion?" I asked.

"No," the Judge said. "If we do something, I don't want it to be in response to Ferleger. He has no sense of restraint, no limits." Then the Judge explained why this lawsuit was so different from other civil rights class actions, like *Tasby*: The mentally retarded are so small in numbers, so dispersed, and so stigmatized, they have no natural constituency of advocates other than their families. There was no one to lobby for the funds needed to improve their care, no one to educate the public about their plight. The officials who ran the state schools had severely limited budgets; the Judge could not simply order them to do the right thing because the Texas Legislature wouldn't fund MHMR adequately. The institutionalized retarded got immeasurably less attention and concern than the schoolchildren at issue in *Tasby*, and even less consideration than prisoners. *No one cares about them—even the people who are paid to care for them abuse them.* In addition, while the *Lelsz* plaintiffs had an attorney, he really didn't have clients—not clients who could tell him what

they wanted or how to proceed in the lawsuit. Debra Lynn Thomas certainly could not tell David Ferleger what she wanted; her vocabulary was limited to a few words like “doll” and “paint.” Since the parties on one side of the lawsuit could not speak for themselves, Judge Sanders had to delve more deeply into their circumstances than would be merited in a normal civil lawsuit.

“All of that puts an extra burden on us,” the Judge said. “We have to wear a couple of extra hats.” The Judge paused again. “What do you think?”

Oh, no. I looked up from my pad and stared at the Judge for a couple of seconds. It was plain that he actually wanted to hear my opinion. “I don’t know what we should do, but we can’t do *nothing*.”

The Judge nodded and reached for his cigar, which had been smoldering behind him since I had entered the office. “A lot of dirt is going to fly,” he said.³¹ “But if we handle this right, this poor girl will be alright and we’ll accomplish something . . . we can do some good. It will require a lot of your time. A *lot* of time. I need to know that you will be able to devote the time to it that it will require. We’re going to have a lot on our plate with this.”

We chatted about the appropriate level of intervention. The Judge did not want to make a big fuss out of Ms. Thomas’ situation; he certainly did not want to hold a hearing or order that she be removed from the Lubbock State School, as Ms. Wooten requested. Judge Sanders merely wanted to ensure her safety and care.

The Judge gave me a short list of preliminary tasks—most importantly, to make sure that the pregnant woman was a member of the plaintiff class in *Lelsz*, so the court had jurisdiction over her care. She was; it did. Next, talk to Dr. O’Neill about preliminary steps for protecting Ms. Thomas’ health. Then draft an order.

I went back to my office.³² I spoke to Dr. O’Neill, who explained in language I could understand the seriousness of Ms. Thomas’ condition. Ms. Thomas was twenty-five weeks pregnant, but had gained less than ten pounds; this fact alone, she said, was alarming. She was on a daily regimen of 1300 milligrams of Tegretol and 200 milligrams of Dilantin, anti-seizure medications that had been associated with birth defects. She could not be taken off those medications, because a seizure would threaten both Ms. Thomas and the fetus. Dr. O’Neill was unsure

31. Actually, he said something like that, but used more potent language.

32. There were two clerk offices. One was adjacent to, and had a door to, the Judge’s office. My co-clerk, Ginger Levy, got that office. My office was separated from the Judge’s office by the spacious library. While Ginger was closest to the Judge, I had a window. What both offices had in common was a wall of floor-to-ceiling bookcases that were choked with the pending motions it was our job to review and draft opinions for. My office also had the distinction of being the “baby office,” so called because a remarkable number of the female law clerks who had occupied the office had become pregnant during their tenure as law clerks. Some jokes were directed at me at law clerk reunions about this factoid; as with most lawyer humor, it was not funny and does not merit repeating.

whether the medical staff at the Lubbock State School was qualified to handle Ms. Thomas' pregnancy. "She is in danger," Dr. O'Neill told me.

I tried to imagine what this poor woman was experiencing. Ms. Thomas didn't know that she was pregnant—she felt the life inside her, of course, but she could not comprehend the concepts of procreation and pregnancy. She could not understand why she vomited her meals. At times, she cried and pounded her stomach with her hand.³³ It was impossible for me to imagine her experience; I could observe, through reports, what her life was like, but I could not comprehend what it was to be her. I could only believe that it was a terrifying existence.

I drafted an order that afternoon, and took it to the Judge. He scribbled a few notes on it, I made the changes, the Judge signed it, and it was filed and served. The order recited some basic facts—that the Court had been informed of Ms. Thomas' situation; that she was a *Lelsz* class member; that "her life and health are in danger"—and ordered the State to: (1) immediately send a developmental medicine specialist to Lubbock to examine Ms. Thomas and evaluate the medical care available to her at the Lubbock facility; (2) appoint a single physician to assume responsibility for Ms. Thomas' care; (3) provide Dr. O'Neill all records concerning Ms. Thomas; and (4) file a report with the Court explaining the failure to report the incident to Dr. O'Neill.³⁴ It was a brief, simple order. It caused all hell to break loose.

Although a few papers, notably the *Austin American-Statesman*, had already reported on the story—Ms. Thomas' sister and legal guardian, Dori Wooten, had sent letters complaining about the situation to newspapers as well as Judge Sanders—with the issuance of an order, media all over the state, and the nation, descended on Lubbock and the Court. The headlines and editorials were not subtle: *State School Rocked By Rape, Pregnancy*;³⁵ *Shocking Case: Rape Case Complicated By Institutional Neglect*;³⁶ *Attorney Says Rape Not First At School*;³⁷ *Doctor Calls State School "Time Bomb," Says Superintendent Hid Patient Abuse*;³⁸ *Grim Crossroads: Rape, Retardation and Abortion*.³⁹ A national television news show did a piece on Ms. Thomas; I actually got to see an order I had drafted on TV. Because I was the law clerk responsible for the school desegregation case, I was used to handling a variety of telephone inquir-

33. Denise Gamino, *Bearing the Burden*, AUSTIN AM. STATESMAN, Sept. 30, 1990, at A1, A12.

34. Denise Gamino, *Court Acts for Retarded Rape Victim*, AUSTIN AM. STATESMAN, Oct. 2, 1990, at A1, A7.

35. *State School Rocked by Rape, Pregnancy*, DALLAS TIMES HERALD, Oct. 2, 1990.

36. Editorial, *Shocking Case—Rape Case Complicated by Institutional Neglect*, DALLAS MORNING NEWS, Oct. 4, 1990, at A30.

37. Valerie Ullman-Avery, *Attorney Says Rape Not First At School*, LUBBOCK AVA-LANCHE-JOURNAL, Oct. 31, 1990, at 9A.

38. Alan Van Zelfden, *Doctor Calls State School 'Time Bomb'*, DALLAS TIMES HERALD, Nov. 2, 1990, at A17, A19.

39. Lisa Belkin, *Grim Crossroads: Rape Retardation and Abortion*, N.Y. TIMES, Oct. 19, 1990.

ies,⁴⁰ but I was completely unprepared for the flood of calls about Ms. Thomas. In addition to the media, there were scores of calls from people who just wanted to speak their minds about the case and what needed to be done about poor Ms. Thomas, or who the rapist was, or who should be fired and why.

I could not say anything of substance to anyone, of course.⁴¹ But the media firestorm immediately cranked up the tension of the case. It was obvious that MHMR could have handled Ms. Thomas' situation much more sensitively and efficaciously, and the way it did handle the matter showed not so much contempt for the rules, as some argued, but a complacency and lack of urgency that suggested a culture of carelessness (in the literal sense of the word) at MHMR.

Just a few examples: MHMR waited until Ms. Thomas had missed not one, but two menstrual cycles before testing for pregnancy. When the test came back positive, they delayed—in violation of MHMR rules, which required “immediate” action—in notifying Ms. Wooten and the Lubbock Police Department.⁴² Officials at the Lubbock State School did not conduct an investigation of the assault on the advice of their attorney, who said that he gave that advice after the Lubbock Police told him to postpone an investigation—an allegation the police denied. MHMR said that Ms. Wooten had not been notified of the rape within the prescribed twenty-four hour notification period because they did not believe that the assault took place at the State School—notwithstanding the fact that Ms. Thomas was a ward of the State and they presented no evidence the assault occurred elsewhere. When she was first informed of the pregnancy, Ms. Wooten immediately signed forms authorizing an abortion and amniocentesis (which could provide genetic information identifying the rapist), but was not told that she, Ms. Wooten, was responsible for locating a physician to perform the procedure, so it never happened.⁴³

40. In part because of a quasi-official policy at the Dallas Independent School District, employees there regularly forwarded angry callers to Judge Sanders “because he runs the school district,” and Phyllis would politely transfer them to me. Thus, I regularly received complaints about school bus routes; school assignments; teachers, administrators, and school board members; and even curriculum issues. There wasn't much to say to such people other than to let them rant, then politely hang up. Fielding those phone calls was a task that was about as pleasant as teenage circumcision.

41. Although Judge Sanders allowed his law clerks to take calls from attorneys, we were never to speak to the press beyond advising the dates and times of hearings and like matters. I still have a copy of a newspaper article which cited “court officials” saying that a hearing about ending court supervision of MHMR was imminent. The Judge scribbled a note on the article: “K—What in hell is this about?” I had no idea.

42. In yet another tussle over the meaning of words, an MHMR official said that “‘Immediately’ obviously is subject to interpretation.” Gamino, *supra* note 31, at A12.

43. By the time she was informed that she was responsible for obtaining the abortion, Ms. Thomas was past the first term, and no doctors in Lubbock performed abortions after the first term. When Ms. Wooten found another doctor to perform the abortion, the State refused to pay for it, even though it pays for all other medical services for State School residents. Ultimately, time ran out; an abortion became too dangerous to Ms. Thomas, and she had to carry the baby to term. The amniocentesis was never performed. Belkin, *supra* note 37.

Judge Sanders was disturbed to learn about Ms. Thomas' ordeal, but he did not dwell on what had happened before he received Ms. Wooten's letter. Instead, he focused on the health and safety of Ms. Thomas and her fetus, and on the parties' responses to his actions. He felt fairly confident that, between his order and the attendant publicity, Ms. Thomas would receive appropriate treatment; the State was under such intense scrutiny Ms. Thomas was certain to receive excellent care, and MHMR had replaced all of the male workers with access to Ms. Wooten's living area.

David Ferleger's response to the Judge's order was in character: he commenced an all-out assault on MHMR, seeking, among other things, expanded discovery and removal of Ms. Thomas from the Lubbock State School. Toni Hunter fought back just as fiercely. Judge Sanders denied the request to remove Ms. Thomas, reasoning that she now was being well cared for, and he could not allow her to be taken to the Wooten's home, since Ms. Wooten's husband and son were suspects in Ms. Thomas' rape. In addition, the Judge was always concerned with the cost of remedies he ordered the State to perform; he understood that if he ordered MHMR to provide extraordinary services for Ms. Thomas, other state school residents would see their circumstances suffer—the money had to come from somewhere in MHMR's meager budget. The Judge wanted to protect Ms. Thomas, but he always considered the rest of the plaintiff class as well as the resources of MHMR.

Judge Sanders' understanding of, if not deference to, the State's position, did not prevent him from being puzzled by, even irritated at, its response to the crisis—a response he viewed as inconsistent, even erratic, and disproportionate. He had expected—or at least hoped—that when he issued his initial order about Ms. Thomas, the State would respond with a coherent narrative of what had happened and what was being done about it—after all, the officials at the Lubbock State School had known of Ms. Thomas' condition for several months. Instead, the State accused the Judge of acting on press accounts, not the facts possessed by MHMR (even though MHMR never reported the facts to Dr. O'Neall);⁴⁴ maintained that Ms. Thomas was just fine, notwithstanding the fact that she was pregnant as a result of rape, the State's own doctor characterized her condition as high-risk, and she suffered multiple seizures;⁴⁵ and even stated that “[w]e're not convinced it was rape as such.”⁴⁶ Even more strange was the State's argument that it had done no meaningful investi-

44. Valene Ullman Avery, *Woman to Stay in State School*, LUBBOCK AVALANCHE-JOURNAL, Oct. 10, 1990; Tracy Everbach, *Pregnant Retarded Woman Not in Danger, State Says—Inquiry Continues Into Sexual Assault of Lubbock State School Resident*, DALLAS MORNING NEWS, Oct. 10, 1990, at A23.

45. Valerie Ullman Avery, *Judge Criticizes MHMR on Handling of Rape: Sanders Allows Investigation of Pregnancy Case by Victim's Attorney*, LUBBOCK AVALANCHE-JOURNAL, Oct. 16, 1990; Everbach, *supra* note 41, at A23; Denise Gamino, *Pregnant Rape Victim Suffers Seizures at State School*, AUSTIN AM. STATESMAN, Oct. 26, 1990, at B4.

46. Valery Ullman Avery, *Rape, Pregnancy of State School Client Causes Stir*, LUBBOCK AVALANCHE-JOURNAL, Oct. 5, 1990. The mind boggles.

gation of the incident, but that it strongly believed that Ms. Thomas had been assaulted during one of her visits to the Wooten's home. These positions were not exactly contradictory, but they didn't make sense.

An explanation for the State's seemingly conflicting positions emerged from the documents about Ms. Thomas that were produced to Dr. O'Neill: the Superintendent of the Lubbock State School had suspected since 1987—three years before the pregnancy—that Ms. Thomas was being sexually assaulted during her home visits, but he overruled a staff member's recommendation and refused to refer the matter to the Texas Department of Human Services for investigation.⁴⁷ School officials knew that Ms. Thomas often slept in the same bed as Mr. and Ms. Wooten, and that routine medical examinations showed signs of sexual contact. It turned out that MHMR did, after all, have reason to suspect Ms. Wooten's husband, Jimmy, of the rape, but apparently felt it could not disclose why Mr. Wooten was a suspect because that would reveal additional neglect of Ms. Thomas—a three-year history of ignoring evidence of sexual assaults.

As if this revelation were not enough, other issues were rocking MHMR. Reports emerged that another resident of the Lubbock State School had been sexually assaulted and had given birth to a child less than a year earlier, and the police were not notified of the rape in that instance, either. In addition, two other Lubbock State School residents had been raped in the past two years.⁴⁸ In the wake of these revelations, a former employee of the Lubbock State School testified that sex between state school residents was commonplace, and that staff members were instructed by their supervisors not to interfere.⁴⁹ Such reports eventually prompted David Ferleger to seek medical records of AIDS test results from the state schools.⁵⁰ On top of the turmoil in West Texas, Judge Sanders ruled that the State had to allow Dr. O'Neill to inspect a dormitory at the Fort Worth State School that the State had argued was excluded from the Implementation Agreement because it was really more a prison than a dormitory.⁵¹ The facility was one of the true horror stories of the *Lelsz* litigation, and everyone involved understood that an inspection by Dr. O'Neill would produce more ugly revelations. As if all of this were not enough to generate animosity among the parties, Judge

47. Tracy Everbach, *MHMR Revises Sex Policy, Pregnancy at School Prompts Decision*, DALLAS MORNING NEWS, Jan. 28, 1991, at A17.

48. Alan Van Zelfden, *Lubbock State School's Director Suspected Sexual Abuse, Records Say*, DALLAS TIMES HERALD, Nov. 30, 1990.

49. Alan Van Zelfden, *Probe of School Sex Planned*, DALLAS TIMES HERALD, Dec. 6, 1990, at A23, A25.

50. Gayle Reaves, *AIDS Data Sought from State School, Lawyer Says Retarded May Be at Risk*, DALLAS MORNING NEWS, May 7, 1991, at A26.

51. Tracy Everbach, *Judge OKs Inspection of Unit at State School for Retarded*, DALLAS MORNING NEWS, Oct. 13, 1990, at A33; Alan Van Zelfden, *Judge Orders Investigation of F.W. State School Conditions*, DALLAS TIMES HERALD, Oct. 13, 1990, at A19. The State actually presented that argument. I did not make that up.

Sanders had scheduled a hearing for May 28, 1991, to determine if the State was in contempt of the Implementation Agreement.

The State's response to these events—which surely comprised a litigant's nightmare—was not merely to dig in its heels, but to commence an aggressive campaign to effectively shut down Court oversight of MHMR. Presumably, the idea was that a finding of contempt could not be made without probative evidence. The Debra Lynn Thomas imbroglio was now about much more than Ms. Thomas—indeed, by December of 1990 her tragic situation was a relatively minor issue—it was about MHMR's treatment of the mentally retarded statewide. It was about the whole *Lelsz* lawsuit, which was exploding because of boiling tensions between the attorneys.

The denouement began in early December 1990, when counsel for MHMR called me and asked permission to file an emergency motion.⁵² I said fine, but gave no assurance that the motion would be considered on an emergency basis. The motion was filed a few days later, on December 5. It sought cancellation of depositions of MHMR officials that had been long scheduled to start the next day, December 6, on the ground that the deponents were out of the state. Judge Sanders denied the motion, but the depositions had to be postponed in any event. He was livid at being blind-sided; particularly by the fact that when MHMR's counsel called for permission to file the motion, she failed to disclose the material fact that she knew the MHMR officials were unavailable for their depositions.

Early in the new year, on a Friday afternoon, MHMR filed another "emergency" motion, this time seeking to prevent Dr. O'Neill from conducting on-site reviews of the Austin State School, Fort Worth State School, and San Antonio State School. The reviews were scheduled to begin the following Tuesday, so relief had to be granted, if at all, no later than the coming Monday. The reviews had been scheduled months before, and Judge Sanders could not fathom why MHMR's counsel was trying to disrupt inspections that were at the core of the case.

MHMR next filed a motion seeking a protective order regarding depositions of Accreditation Council on Developmental Disabilities (ACDD) officials, suggesting that by deposing these officials Plaintiffs would attempt to influence the methods or outcomes of ACDD accreditation surveys, in violation of the Implementation Agreement. As Judge Sanders later found:

[MHMR's] motion was based on the Assistant [Attorney General]'s unsubstantiated insinuation that Plaintiffs' counsel would use the depositions to intimidate and harass the ACDD officials with the goal of preventing further accreditation being granted to TDMHMR facilities. Bluntly put, the Assistant AG accused [David Ferleger] of noticing depositions with the intent of violating an order of this Court, as well as fundamental standards of attorney conduct. At the

52. The following events are discussed at length in *Lelsz v. Kavanagh*, 137 F.R.D. 646, 648 (N.D. Tex. 1991).

May 10 hearing [discussed below,] the Assistant AG admitted that she had made no inquiry into the factual basis of her motion, but instead filed it based on her general understanding of the discovery process and her personal feelings about Plaintiffs' counsel.⁵³

A couple of weeks after that episode, the Court attempted to accommodate MHMR's concerns about Court-authorized experts' tours of MHMR facilities by having the Expert Consultant establish rules for their conduct; MHMR alternatively was allowed to have Dr. O'Neill present during the tours if they did not wish to abide by rules she established. Even though Dr. O'Neill issued her rules after consulting with all parties, MHMR's counsel objected to them. After a new set of rules was issued in an attempt to accommodate MHMR's concerns, Toni Hunter raised new objections. Each time Dr. O'Neill developed a new set of rules, Hunter interposed new objections.⁵⁴ The upshot of all of this was simple: the institutional reviews were made more burdensome and contentious, and issues that should have been resolved, or decided by the Court, were postponed.

Then, within days of that episode, Hunter filed objections to Dr. O'Neill's budget and to an upcoming hearing. The reasons for the objections were transparently contrived; indeed, some of the reasons Dr. O'Neill's budget was delayed were because of the inordinate amount of time she had to deal with MHMR's repeated attempts, discussed just above, to prevent her from doing her job. The objections were denied.

If you want a blueprint of how to piss off a federal judge and torpedo your own case, you have just read it: serial obstructionist conduct; a devotion to your client's interests that blinds you to your obligations to the Court and other parties; an arrogance that suggests contempt for the judicial system; and imposing unnecessary work on the Judge (and his less even-tempered law clerk).⁵⁵ Every order Judge Sanders issued concerning the above-listed transgressions, as well as others earlier in the case, found violations of Federal Rule of Civil Procedure 11 and *Dondi Properties Corp. v. Commerce Savings & Loan Ass'n*.⁵⁶ Why MHMR's counsel kept on a course that was so obviously self-defeating remains a mystery.

The rest of the story can be quickly recited. In early May 1991, Judge Sanders held a hearing on the conduct of MHMR's counsel—a sanctions

53. *Id.* at 650.

54. Hunter admitted that in one instance she consented to rules during a discussion with Dr. O'Neill on a Sunday evening, only to file objections to them with the Court on Monday. *Id.* at 651.

55. I have listed just the motions that prompted the sanctions hearing discussed below. Judge Sanders had been dealing with such motions for years. In *Lelsz v. Kavanagh*, 112 F.R.D. 367 (N.D. Tex. 1986), for example, Judge Sanders complained about repeated motions for reconsideration filed by MHMR: "Once again—it is becoming habitual—the Court is confronted with a request from [MHMR] to change an Order entered after all parties had been afforded to present their respective positions." *Id.* at 370-71.

56. 121 F.R.D. 284 (N.D. Tex. 1988) (en banc). *Dondi* was the response of the judges of the Northern District of Texas to the rise of so-called Rambo litigation tactics in the 1980s. The en banc opinion set forth standards for attorney conduct and civility, and remains required reading (literally) for all attorneys practicing in the Northern District.

hearing that lasted the better part of the day. MHMR's attorney was unapologetic; in her view she was zealously representing her client and was fighting an unscrupulous opponent. All of that may have been true, but it was no excuse for her conduct. Judge Sanders ordered that Hunter be removed from the case:

The Court finds that the Assistant Attorney General maintained a pattern of combative and improper conduct even after repeated and strident warnings from the Court. The Assistant Attorney General's conduct has prejudiced the rights of her adversaries and impaired the administration of justice in this case. Furthermore, when an attorney's conduct diverts the Court's attention from the merits of a motion to the circumstances of its filing, her clients' interests are disserved. Also, as the above recitation indicates, the Assistant AG's improper conduct has been so frequent and disruptive that the Court's focus on this case has meant that other deserving cases have gone unattended. . . .

In the present case, the Court finds that the interests of all of the parties, as well as the administration of justice, require that the Assistant Attorney General be removed from this case. This sanction is the least severe sanction that is appropriate in this case, . . . particularly in light of the futility of a monetary sanction and the Assistant AG's disregard of the Court's repeated warnings over the course of several months.⁵⁷

Someone, somewhere in MHMR or the Attorney General's office got the message.⁵⁸ A highly regarded and exceptionally talented lawyer in private practice, Paul Coggins, was retained to represent MHMR.⁵⁹ He promptly met with the Judge. Coggins later said, "The judge basically told us to negotiate a settlement in good faith. I took that seriously, and we came up with something."⁶⁰ The *Lelsz* lawsuit was settled within three months.⁶¹

The magnitude and scope of the settlement, and what it meant to the mentally retarded residents of the state schools, was remarkable. Under the settlement, hundreds, and potentially thousands, of retarded citizens were to be moved out of state schools and into group homes of six residents or fewer, two state schools would be shuttered, new services would be provided to MHMR's clients, and new procedures implemented

57. *Lelsz*, 137 F.R.D. at 655.

58. After the sanctions hearing, but before the Judge ruled, a board member of MHMR, Frank Melton, expressed dissatisfaction with the agency's legal representation, saying "[i]f it were my decision, I would use a private firm and get the best and most skillful representation available and bring [the lawsuit] to an end." Gamino, *supra* note 20, at B8.

59. Mr. Coggins subsequently served as United States Attorney for the Northern District of Texas during the Clinton Administration. Judge Sanders had served in that position under Presidents Kennedy and Johnson before moving to Washington to serve in the Justice Department and as Legislative Counsel to President Johnson.

60. Tracy Everbach, *Pact Offered in State Care for Retarded, Judge Sanders to Rule in '74 Class-Action Suit*, DALLAS MORNING NEWS, Aug. 8, 1991, at A1.

61. *Lelsz v. Kavanagh*, 783 F. Supp. 286, 289 (N.D. Tex. 1991), *aff'd*, 983 F.2d 1061 (5th Cir. 1993).

to prevent abuse and neglect.⁶² That is, the State of Texas agreed to do that which MHMR had consistently refused to do and the Fifth Circuit had ruled it could not be compelled to do—move state school residents to community placements.⁶³ The case was effectively over, and it was entirely dismissed a few years later, after the State had substantially fulfilled its obligations under the settlement.⁶⁴

Less than a year after Judge Sanders received Dori Wooten's letter announcing Debra Lynn Thomas' rape and pregnancy, the entire seventeen-year-old class action had erupted into a chaotic fury and then been resolved in a comprehensive settlement that completely reformed the way the mentally retarded were treated. After the May sanctions hearing, the *Lelsz* case hardly occupied the Court's time, and we were able to move on to other cases.⁶⁵ It was a great achievement; instead of holding a contempt hearing in 1991, as I had been warned at the beginning of my clerkship, the Court held a hearing to consider a comprehensive settlement.

Judge Sanders and I didn't discuss the *Lelsz* case at any length for a long time—not because of any reluctance to revisit old battles, but because we always had more current issues to discuss. By coincidence, several years after I left the Court, I was having lunch with the Judge in his library when Phyllis came in and announced that Justice Scalia (who serves as Circuit Justice for the Fifth Circuit) was on the phone. Judge Sanders took the call in his office, and came back a minute or two later and said, "You'll love to hear about this."

"About what, Judge?"

"That attorney in the *Lelsz* case that I sanctioned . . . well, it seems like she's applying for admission to the Supreme Court bar and reported that I sanctioned her. Justice Scalia called to ask whether she should be admitted. 'Oh, hell, yes,' I said. 'She just got carried away in a case where she let the other side bait her. Don't hold one bad case against her. She's a fine lawyer.'"

Justice Scalia's call turned our conversation to *Lelsz*. It was more important to me in retrospect than it was at the time when I was immersed in it; with the perspective of some years in private practice, I marveled at how he achieved such great results from as bad a set of facts as one could

62. *See id.* at 289-91.

63. After the Fifth Circuit held that the class members had no constitutional right to habilitation in the least restrictive environment, it appeared that the goals of school closure and expedited community placement were unattainable. Now, under the proposed settlement, the State has waived its Eleventh Amendment defense and entered into an enforceable agreement to give the Plaintiffs much of what they originally requested.

Id. at 290 (citation omitted).

64. *See Lelsz v. Kavanagh*, 903 F. Supp. 1037 (N.D. Tex. 1995).

65. Most notably, a major obscenity case that was filed in December 1990 (right when MHMR went on its self-destructive motion binge) and tried in the summer of 1991. *See United States v. Cal. Publishers Liquidating Corp.*, 778 F. Supp. 1377 (N.D. Tex. 1991), *aff'd in part, remanded in part*, 10 F.3d 263 (5th Cir. 1993). It was a busy year for smut in Judge Sanders' court. *See also Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801 (N.D. Tex. 1991), *aff'd*, 970 F.2d 82 (5th Cir. 1992).

imagine and a group of attorneys straight out of central casting. This was a rare moment. Judge Sanders almost never spoke about his achievements. He was like a great artist who could take the conflict and pettiness and struggles of everyday life and create something wondrous of it all, but he was too modest to talk about how he did it. But that afternoon, he gave me a couple of clues.

I recalled to him how, when we first learned of Debra Lynn Thomas' pregnancy, the Judge said that some good would come out of the incident—how did he know that? That was easy, he replied. Knowing that the media would pick up on the case, there was little doubt that the heightened scrutiny would bring public condemnation and political pressure to bear on MHMR, and agency officials would fear for their budgets, jobs, and reputations. People who previously had ignored the mentally retarded as a matter of course would now enter the fray. Some would be altruists; most would have self-serving agendas—that didn't matter. They would become part of the fight and break the long-running stalemate.⁶⁶

Just as importantly for the litigation, MHMR officials would employ its lawyers in fighting its public-relations and political battles. "It happens all the time," the Judge said of lawyers trying to win political battles in court. "And it never works."⁶⁷ With the personalities involved in that case—he was referring to Ferleger and Hunter—"I knew things would get out of control, there would be a huge hue-and-cry, and there would be no choice but to step in and put things in order." The personalities of the lawyers drove the case as much as the facts or the law.⁶⁸

But did he know he would replace the State's attorney? Not at first, he said. "But after a little while, it was pretty clear that she was going to dig herself a hole so deep I wouldn't have much choice about it." The Judge had been dealing with the attorneys for years, and knew how they would respond to each other's provocations. He went on to say that one of the reasons things worked out well is that he knew he could largely ignore MHMR's abusive litigation conduct because he knew I wouldn't. He said something to the effect of, "I knew you'd get angry and want to sanction her at every turn, and I'd just tone everything down until it was time to let the axe fall."

66. Political scientists call this phenomenon "expanding the scope of conflict." See ELMER E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 16 (1960). The idea is fairly simple, but profound: In any public fight, the audience is the most important party because the audience is never really neutral, and if the audience opts to participate in the conflict, the side it supports generally will prevail. The privatization of conflict (limiting the scope of conflict) favors the more powerful combatant, while socialization of conflict tends to be the strategy of the weaker party. If the weaker party can expand the scope of conflict, it increases its chances of success.

67. This conversation predated *Bush v. Gore*, 531 U.S. 98 (2000).

68. David Ferleger was not without difficulties in the case. In the fall of 1991, the parents of John Lelsz, Jr.—the named plaintiff—asked Judge Sanders to remove Ferleger from the case. Judge Sanders declined, but noted their concerns in his order approving the final settlement. See *Lelsz v. Kavanagh*, 783 F. Supp. 286, 299 (N.D. Tex. 1991), *aff'd*, 983 F.2d 1061 (5th Cir. 1993).

Why did he decide to intervene in the Thomas pregnancy in the first place? Why not just let MHMR handle it? That was a tougher call, he said. "I could have gone either way. I figured that if you were willing to do the work, we should help that girl."

"You're kidding me, Judge," I said.⁶⁹

No he wasn't. He didn't spend so much time selecting law clerks⁷⁰ so they could sit in the library writing memos; he wanted to know what they thought. Judge Sanders had a close relationship with all of his law clerks; he once said of that relationship: "It's a family relationship in a way, a professional relationship in a way, and a friendship in a way." He used his clerks "as a sounding board to bounce off or argue points with."⁷¹ He gave his law clerks a great deal of responsibility, which is, of course, one of the reasons why working for him was so much fun.

Judge Sanders has been called a "forthright pragmatist,"⁷² and to him, the important thing about *Lelsz* was that everything turned out pretty well. Two of the worst of the state schools had been closed, and hundreds of residents were moved to community homes, where they had greater autonomy, received more individualized treatment, were safer, and had far greater social interaction—that is, their dignity was recognized more than ever before and they were treated with a degree of respect that had been unimaginable by John Lelsz's parents when they initiated the lawsuit in 1974.

In 1997, Judge Sanders sent me a copy of a note from John Lelsz's mother. Aside from the sad news that her husband had died, the note recited great strides John had made in his group home:

69. Actually, I used more colorful language.

70. Judge Sanders reviewed each of the roughly 250 clerkship applications he received each year and read dozens of the writing samples that were submitted. His law clerks also reviewed applications to help select those who would be given interviews. The applicants who were invited for interviews not only spoke at length with the Judge, but also spent several hours with Phyllis Macon and the law clerks, all of whom had input on the decision. Phyllis' input was critical to the hiring of the twenty-two male law clerks. Judge Sanders had a propensity for hiring women—who comprise thirty-five of the fifty-seven clerks who served the Judge—and Phyllis operated her own affirmative action program for men. The guys are grateful to Phyllis.

71. Tracy Everbach, *Courting Experience—Clerks for Judge Found Insider View Worth Long Hours, Low Pay*, DALLAS MORNING NEWS, Sept. 28, 1993, at A20.

72. Woolley, *supra* note 4, at 11. Actually, "pragmatic" is too simple a word to describe Judge Sanders' approach to his work. He understood the tension between what Max Weber called the ethic of absolute ends (by which great things may be achieved, but at great cost) and the ethic of responsibility (by which desirable ends may be forsaken by shirking distasteful or difficult decisions). See *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 118-27 (H.H. Gerth & C. Wright Mills eds., 1991). In *Lelsz*, as in *Tasby* and other difficult cases with significant public consequences, Judge Sanders pursued ends that were worthy, even if, at the time, his actions were enormously unpopular and caused hurt to some. (He once debunked a popular saw by saying, in his brusque way, "If the ends don't justify the means, what does?") At the same time, he was a servant of the law and the Constitution; there were hard lines which he never would cross. He had both passion and perspective, and was able to live and work in a way such that "an ethic of ultimate ends and an ethic of responsibility are not absolute contrasts but rather supplements, which only in unison constitute a genuine man." *Id.* at 127.

The changes in John Jr. . . . are almost unbelievable—he is in his own house out in the country and he loves it—sings and laughs a lot [H]is anger and hostility are almost nonexistent. He loves to go shopping in nearby communities and is well behaved when he is out among strangers. . . . The men who are working with him are very kind and gentle with him and he is learning to trust people again. . . . The final Court Order helps to keep the State to do what is right for John and he is becoming again happy like he was in his early years. Just wished John Sr. could have lived to see it happen.⁷³

Judge Sanders did not believe that the final settlement of the case was ideal, but he felt that it cured the most egregious problems and restructured the services provided to the mentally retarded in a way that made a recurrence of the systemic horrors of the past unlikely. He was convinced that the State had done the least it could do—and a little more.⁷⁴

Finally, Debra Lynn Thomas gave birth to a healthy baby boy on New Year's Day 1991, and her rapist—her brother-in-law, Jimmy Wooten—was arrested shortly thereafter.⁷⁵

As the Judge had predicted, we did some good.⁷⁶

73. Letter from Ruth Lelsz to Judge Barefoot Sanders, December 29, 1997 (on file with author).

74. As the Judge said in a 1987 opinion, the rights of the mentally retarded “should be secured by the ethics and decency of civilized society,” but in any event, absent such societal recognition, their rights “are secured by the U.S. Constitution, by federal and state laws, and by the 1983 R & S in this case.” *Lelsz v. Kavanagh*, 673 F. Supp. 828, 831 (N.D. Tex. 1987).

75. *Retarded Rape Victim Gives Birth, Sister of Lubbock State School Resident to Care for Infant Now*, DALLAS MORNING NEWS, Jan. 2, 1991, at A25; *Man Is Charged in Sex Assault, Retarded Woman's Relative is Arrested*, DALLAS MORNING NEWS, Jan. 18, 1991, at A30; Lisa Belkin, *Retarded Woman at Center of Furor Has Baby*, N.Y. TIMES, Jan. 3, 1991; Denise Gamino, *Brother-in-Law Arrested in Rape of Retarded Woman*, AUSTIN AM. STATESMAN, Jan. 18, 1991, A1, A6; Denise Gamino, *Rape Victim at School Bears Son*, AUSTIN AM. STATESMAN, Jan. 2, 1991, at A1, A5. Mr. Wooten's trial was transferred to Houston, where he ultimately pleaded no contest to rape and was sentenced to fifteen years of incarceration. Cindy Rugeley, *Man Guilty in Attack on Sister-in-Law, No Contest Plea in Rape of Retarded Woman*, 34, HOUSTON CHRON., Apr. 24, 1992, at A29.

76. The good achieved was real, but eventually MHMR (now DADS) fell off the wagon, and treatment of the mentally retarded in the state schools deteriorated to inhumane and unconstitutional levels. In December 2008, the United States Department of Justice released a report about the Texas State Schools and found that they failed to:

- (1) provide adequate health care (including nursing services, psychiatric services, general medical care, and physical therapy, and physical and nutritional management); (2) protect residents from harm; (3) provide adequate behavioral services; provide freedom from unnecessary or inappropriate restraints, and habilitation; and (4) provide services to qualified individuals with disabilities in the most integrated setting appropriate to their needs.

Findings Letter from Grace Chung Becker, Acting Assistant Attorney Gen., Civil Rights Division, U.S. Dep't of Justice to Rick Perry, Governor, State of Texas (Dec. 1, 2008), available at http://www.usdoj.gov/crt/split/documents/TexasStateSchools_findlet_12-1-08.pdf. To avoid litigation by the Justice Department to (again) vindicate the rights of the schools' residents, in early 2009 a bill was submitted to the Texas legislature that would shut down more state schools and move an estimated 3,000 residents to group homes and independent living facilities. See Emily Ramshaw, *Legislature Face-Off at Hand Over Texas' Schools for Disabled*, DALLAS MORNING NEWS, Feb. 23, 2009. That is, the legisla-

ture is considering drastically expanding the remedy that ended the *Lelsz* case. Should the bill become law, it would be an additional, if belated, encomium to Judge Sanders' handling of *Lelsz*.

Tributes

