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### JUDGE WILLIAM WAYNE JUSTICE: A LIFE OF HUMAN DIGNITY AND REFRACTORY MULES

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"No one else cared as much, no one else did as much, no one else mattered as much as William Wayne Justice. We are left with no one like him. I fear we will not soon see anyone who even puts us in mind of him."<sup>1</sup>

#### I. THE GENERAL IMPACT OF JUDGE JUSTICE ON TEXAS

Judge William Wayne Justice (1920–2009) had a wide and deep effect on the lives of Texans. During his forty years as a United States District Judge (1968–2009), his decisions permanently improved a wide range of Texas systems, along with the lives of ordinary and extraordinary people. In each case, his opinions and orders drilled deep both to identify and to extirpate the injustices in the underlying institutions and systems. His opinions were unyielding in recognizing and protecting the rights of persons. Of almost equal importance, Judge Justice persevered<sup>2</sup> after an initial

1. U.S. District Judge Keith Ellison, Eulogy at the Memorial Service for the Hon. William Wayne Justice, Celebration of the Life of William Wayne Justice, St. David's Episcopal Church, Austin, Texas (Oct. 19, 2009), available at [http://www.utexas.edu/law/academics/centers/publicinterest/judgejustice/KEllison\\_Eulogy.pdf](http://www.utexas.edu/law/academics/centers/publicinterest/judgejustice/KEllison_Eulogy.pdf).

2. As shown in this Tribute, until near the time of his death, he still had on his docket and was actively hearing cases filed in 1970 (*United States v. Texas*) and 1975 (*United States v. Texas (Bilingual)*).

opinion. If the refractory mule continued to kick, and the attorneys in the case sought further relief, he would re-enter the fray on behalf of the parties.

We are fortunate to have a rich source of information on Judge Justice's personal story,<sup>3</sup> case histories and analyses,<sup>4</sup> and personal reflections by former clerks<sup>5</sup> and colleagues.<sup>6</sup> His record has been sanctified<sup>7</sup> and excoriated;<sup>8</sup> neither seemed to affect him. We are even more fortunate to have "the Judge's" own stories on his cases,<sup>9</sup> and personal reflections on his judicial philosophy and the role of a federal judge.<sup>10</sup> We also have his carefully crafted

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3. FRANK R. KEMERER, *WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY* (1991).

4. *Id.*; Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409 (1983).

5. Lynn E. Blais, *William Wayne Justice: The Life of the Law*, 77 TEX. L. REV. 1 (1998); Richard Warren Mithoff, *A Tribute to Justice*, 77 TEX. L. REV. 9 (1998); Heather K. Way, Eulogy at the Memorial Service for Hon. William Wayne Justice, Celebration of the Life of William Wayne Justice, St. David's Episcopal Church, Austin, Texas (Oct. 19, 2009), available at [http://www.utexas.edu/law/academics/centers/publicinterest/judgejustice/HWay\\_Eulogy.pdf](http://www.utexas.edu/law/academics/centers/publicinterest/judgejustice/HWay_Eulogy.pdf).

6. Henry A. Politz, *Judge Justice*, 77 TEX. L. REV. 13 (1998). At the time he wrote this article, Judge Politz was Chief Judge of the United States Court of Appeals for the Fifth Circuit.

7. See U.S. District Judge Keith Ellison, Eulogy at the Memorial Service for the Hon. William Wayne Justice, Celebration of the Life of William Wayne Justice, St. David's Episcopal Church, Austin, Texas (Oct. 19, 2009), available at [http://www.utexas.edu/law/academics/centers/publicinterest/judgejustice/KEllison\\_Eulogy.pdf](http://www.utexas.edu/law/academics/centers/publicinterest/judgejustice/KEllison_Eulogy.pdf) (reflecting on the life and work of Judge Justice).

8. The Texas House of Representatives passed a bill in 1977 directing that one of the community-based facilities required by the *Morales* litigation be built next to Judge Justice's house in Tyler. FRANK R. KEMERER, *WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY* 169 (1991). In every case summary in his book, Kemerer includes some of the editorial criticism and political criticism of Judge Justice. See generally *id.* (tracing Judge Justice's formative years in the legal profession and exploring many of the high-profile cases over which he presided).

9. See generally William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1 (1992) (describing his role in *Morales* and *Ruiz*); William Wayne Justice, *Putting the Judge Back in Judging*, 63 U. COLO. L. REV. 441 (1992) (describing his opinion and the Supreme Court's opinion in the *Plyler* case); William Wayne Justice, The Herman Phleger Lecture: The Origins of *Ruiz v. Estelle* (Mar. 21, 1990), in 43 STAN. L. REV. 1 (1990) (describing the origins of *Ruiz* and his active role in the trajectory of the litigation).

10. See William Wayne Justice, *The New Awakening: Judicial Activism in a Conservative Age*, 43 SW. L.J. 657, 666 (1989) (describing possible scenarios for the transformation of natural law jurisprudence); William Wayne Justice, Law Day Address at the University of Texas at Austin: The Enlightened Jurisprudence of Justice Thurgood Marshall (Mar. 1, 1993), in 71 TEX. L. REV. 1099, 1100 (1993) (remembering the legacy of Justice Thurgood Marshall, which places him "among the greatest of our nation's advocates and Justices").

criticisms of the Rehnquist Court.<sup>11</sup>

In his richly detailed, well-documented biography of Judge Justice,<sup>12</sup> on which I rely heavily in this short Tribute, Frank Kemerer concludes that “human dignity” is a unifying theme in Judge Justice’s cases.<sup>13</sup> Another equally important theme of Judge Justice’s opinions is one the Judge himself expressed: “*Morales*<sup>14</sup> illustrates an old adage: If you are confronted with a refractory mule, in order to get its attention, you need to hit it—hard—right between the eyes.”<sup>15</sup>

## II. A BRIEF DESCRIPTION OF A SAMPLING OF JUDGE JUSTICE’S DECISIONS<sup>16</sup>

Reflecting on the dual themes of human dignity and refractory mules, I will try to express the effect the Judge’s orders have had and will continue to have on an amazingly wide variety of people. This short summary will follow rough categories of cases involving state systems (education, voting, and health), state institutions (juvenile justice, mental health, and prisons), and other cases involving “protected categories” (single-member districts and public housing). Each of these cases deserves a book to analyze the factual background: the work of the attorneys, parties, and legislators; the actions of the court; and the interplay among these

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11. See William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 13 (1992) (“Those who oppose the Supreme Court’s recent reactionary jurisprudential activism, as well as its unwarranted truncation of the lower courts’ ability to ensure compliance with the Constitution, must do more than invoke the charge of ‘judicial activism.’ They must confront—and somehow refute and surmount—the mean-spirited and callous values that are being identified as constitutionally preeminent, the inadequacy of the reasons given for the selection of them, and the inconsistencies between the judiciary’s words and deeds. It is my hope that some of you in this audience will engage in that exceedingly difficult endeavor, for, right now, the constitutional guarantees of equal justice and human dignity are at stake.”).

12. FRANK R. KEMERER, *WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY* (1991).

13. *Id.* at 401–05.

14. See discussion *infra* Section II.F on *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974), *rev’d*, 535 F.2d 864 (5th Cir. 1976) (describing Judge Justice’s role in the improvement of education for delinquent juveniles sent to reform institutions).

15. William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 9 (1992).

16. I write this section apologizing in advance to the many clients, attorneys, experts, and advocacy organizations that have worked so hard on these cases and will not be acknowledged here. I also apologize to those who expect a “balanced and fair” analysis in what is basically a eulogy.

factors. This Tribute is no more than a tip-of-the-hat to the factual predicate of the decisions, the Judge's role, and the effect of each case on the affected community and the State of Texas.

A. *Education of Undocumented Children, Doe v. Plyler*

Until 1982 in Texas, and in many other states of the United States, undocumented children could not attend public school without paying prohibitive tuition costs. States, in effect, denied these smart, able children any education because of the "sins of their fathers" in seeking and holding low-wage work, often in terrible conditions, in the United States.

Judge Justice held this unconstitutional on both rational basis and federal preemption grounds. But most important to the ultimate protection of these children were the Judge's perceptive and sensitive fact findings that undocumented children are innocent of any wrongdoing and that punishing them is to punish us all. These undocumented students are people who will be long-term workers and participants in our society; the State of Texas (and other states) simply could not defend the denial of education to undocumented children. Judge Justice called this his most important decision and strongly criticized the weak rational basis test used by the minority in the *Doe v. Plyler*<sup>17</sup> Supreme Court decision ("more than deference, it is virtual abdication").<sup>18</sup>

Over the years, countless children have benefited from the *Doe v. Plyler* decision, and as Judge Justice predicted, many of these "undocumented" students have achieved stellar academic success.<sup>19</sup>

B. *Desegregation of Public Schools, United States v. Texas*

Almost all Texas school districts and the State itself ignored the holdings of *Brown v. Board of Education (Brown I)*<sup>20</sup> and *Brown*

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17. *Doe v. Plyler*, 458 F. Supp 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982).

18. William Wayne Justice, *Putting the Judge Back in Judging*, 63 U. COLO. L. REV. 441, 448 (1992).

19. Frank Trejo, *Degree of Opportunity: Texas Bill Would Ease Education Path for Undocumented Migrants*, DALLAS MORNING NEWS, Feb. 17, 2001, at 35A; Edward Hegstrom, *Outpouring of Help Greets Immigrant Scholar*, HOUSTON CHRON., May 13, 2000, at A1; Editorial, *Dream Act Will Help Build a Better Economy*, SAN ANTONIO EXPRESS-NEWS, May 2, 2009, at 8B.

20. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

*v. Board of Education (Brown II)*<sup>21</sup> until forced to pay attention by federal lawyers, officials, and federal judges.<sup>22</sup>

In *United States v. Texas*,<sup>23</sup> Judge Justice first dealt with the “refractory mule” of Texas education. Based on Texas’s record of tricks and devices to avoid integration and clear differences in quality of education between black and white districts, Judge Justice entered a statewide order requiring the Texas Education Agency to identify and remove barriers to desegregation. This case remains on the docket of Judge Justice’s court, though it has been emasculated by opinions of the Fifth Circuit<sup>24</sup> and the lack of action by those given the duty to enforce it.<sup>25</sup>

Nevertheless, after the decision, for the first time in state history, African-Americans and Latinos all over Texas could attend public school without the badge of inferiority created by state support and tacit allowance of segregationist policies in drawing and redrawing districts, allowing discriminatory transfers, discriminating against minority faculty and staff, and ignoring duties to provide an education to non-English speakers. By court order, the Texas Education Agency must now monitor and use its power to terminate state funds to enforce nondiscrimination by Texas school districts.

C. *Rights to Education for Limited English Proficient Students, United States v. Texas (Bilingual)*

Children who are of limited English proficiency (LEP), though bright and energetic as other students, simply did not have equal educational opportunity under the Texas educational system from Texas statehood until at least the 1970s. They were placed into

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21. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

22. I was educated in Galveston I.S.D., a totally segregated Texas school district, from 1954 to 1965. Galveston I.S.D. was a district with de jure separate black and white (with Mexican-American) schools within blocks of each other.

23. *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), *aff’d*, 447 F.2d 441 (5th Cir. 1971).

24. *See generally Samnorwood Indep. Sch. Dist. v. Tex. Educ. Agency (Samnorwood)*, 533 F.3d 258 (5th Cir. 2008) (concluding that a 1970 prophylactic desegregation order is not applicable to two Texas school districts where there was no evidence the districts had engaged in intentional segregation or a constitutional violation when the desegregation order was entered).

25. FRANK R. KEMERER, *WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY* 130 (1991). The author of this Tribute is one of the lawyers who disappointed the judge in this case.

English-only classes with no consideration of their ability to learn the material or culture in a language they did not understand. Other LEP students were tracked into remedial, technical, or special-education classes, regardless of their academic abilities.

Judge Justice's *United States v. Texas*<sup>26</sup> statewide desegregation order included a section requiring the State to explain its practices regarding students whose primary language was something other than English and to recommend curricular offerings for these students.<sup>27</sup> The Latino plaintiff intervenors in the case, the League of United Latin American Citizens (LULAC) and the American GI Forum, filed a motion in 1975 asking Judge Justice to order bilingual education for students whose primary language was not English. Based on a thorough stipulated record of discrimination against Mexican-Americans and a lack of adequate education for students of limited English-speaking ability, Judge Justice held the Texas program for limited-English speakers illegal under federal statutes and he ordered the State to develop a comprehensive plan to provide a legal program.<sup>28</sup> After the parties could not agree on a plan, the court ordered an extensive restructuring of the bilingual education system in Texas, to be phased in over several years and to result in the provision of content instruction in the home language for students throughout their time in Texas public schools.<sup>29</sup> This comprehensive order, though later substantially reversed by the Fifth Circuit, provided the structure and support for a significant and long-lasting change in bilingual education in Texas. The basic structure of the Texas law as passed under the pressure of Judge Justice's order is still in Texas law. That law requires significant offerings in elementary schools of instructional programs in a non-English-speaking student's home language and significant offerings in English as a Second Language and, at district discretion, content instruction in the home language for middle school and high school students. In 2008, Judge Justice again found Texas out of compliance with federal law and the court's orders.<sup>30</sup>

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26. *United States v. Texas (Bilingual)*, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd*, 680 F.2d 356 (5th Cir. 1982).

27. Section "G" of the court's 1970 order was quoted in its 1981 decision on bilingual education. *Bilingual*, 506 F. Supp. at 409.

28. *Id.* at 441–42.

29. *Id.* at 439–42.

30. *United States v. Texas*, 572 F. Supp. 2d 726, 782 (E.D. Tex. 2008).

As a result of Judge Justice's rulings, for the first time, non-English speaking students in Texas would have a chance to understand what was happening in their classes.<sup>31</sup> And as in so many other cases, Judge Justice continued his insistence that state officials meet their obligations.

D. *Voting Rights of African-Americans and Latinos*, *Graves v. Barnes*

Texas had a sordid history in voting rights including the all-white primaries, the most restrictive voting registration process in the nation, the poll tax, and the use of multimember districts in state and local elections in which minority communities' voting power was significantly diluted.<sup>32</sup>

Judge Justice had already issued orders protecting the rights of young voters<sup>33</sup> when he was appointed<sup>34</sup> to the three-judge court that decided *Graves v. Barnes*,<sup>35</sup> the seminal voting rights case, affirmed by the Supreme Court in *White v. Regester*.<sup>36</sup> Later, those decisions had profound and positive effects on state and local governments all over the United States. The holding in *White v. Regester* later became the basis for § 2 of the Voting Rights Act,<sup>37</sup> passed in 1982, the basic "dilution" and "results"

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31. These students have taken advantage of these programs in record numbers and hundreds of thousands of Texas students have been given at least a basic education in Texas schools because of the decision.

32. See *Graves v. Barnes*, 343 F. Supp. 704, 724–34 (W.D. Tex. 1972) (examining the political, legal, and economic restrictions historically suffered by minority populations in Texas, "some of a so-called *de jure* and some of a so-called *de facto* character"), *aff'd in part, rev'd in part sub nom. White v. Regester*, 412 U.S. 755 (1973); see also *Regester*, 412 U.S. at 765–70 (noting the District Court's reference to "official racial discrimination in Texas," which at times significantly interfered with the rights of minorities to participate in democratic processes).

33. *Whatley v. Clark*, No. 5474 (E.D. Tex. Oct. 2, 1972), *aff'd*, 482 F.2d 1230 (5th Cir. 1973); *Ownby v. Dies*, 337 F. Supp. 38 (E.D. Tex. 1971); see also FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 205 (1991) (describing Judge Justice's work in the area of voter discrimination).

34. Kemerer gives an excellent description of the history of this appointment. FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 206–07 (1991).

35. *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972), *aff'd in part, rev'd in part sub nom. White v. Regester*, 412 U.S. 755 (1973).

36. *Regester*, 412 U.S. 755.

37. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b), 96 Stat. 131 (1982) (codified as amended at 42 U.S.C. § 1973(b) (2006)).

statute.<sup>38</sup> Judge Justice also ruled for the minority plaintiffs in the first Texas lawsuit<sup>39</sup> brought under the preclearance provisions of the Voting Rights Act, first applicable to Texas in 1975. Indeed, the record supporting the extension of the Voting Rights Act to Texas was extensively based on the record developed in the *Graves v. Barnes* litigation.<sup>40</sup>

*Graves v. Barnes* and the Voting Rights Act lawsuits have led to a flood of additional minority state and local legislators elected from and responsive to their own communities.<sup>41</sup> These cases gave African-Americans and Latinos a chance to elect candidates of their choice for the first time in Texas history, and immediately had profound effects on the Texas legislature by increasing both the number of minority representatives and the accountability of those representatives to minority communities.

E. *Medical Care for Children of Low-Income Households, Frew v. Gilbert*<sup>42</sup>

Low-income families have always had to fight, usually unsuccessfully, for any medical care for their children. Lack of early medical and dental care caused long-term disabilities to millions of these children throughout the country. Children suffered permanent physical and mental damage because of the lack of sufficient or, in most cases, any health care.

In 1993, a class of indigent children in Texas filed an action against Texas to force the State to meet its obligations under the

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38. See FRANK R. KEMERER, *WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY* 220 (1991) (discussing the national impact of the *Graves* decision, which provided civil rights attorneys “an important weapon against voter discrimination” through its codification as an amendment to the Voting Rights Act of 1965).

39. *Flowers v. Wiley*, No. S-75-103 (E.D. Tex. Nov. 3, 1975); FRANK R. KEMERER, *WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY* 217 (1991).

40. For an excellent summary of the history of voting rights in Texas, see NINA PERALES, LUIS FIGUEROA & CRISELDA G. RIVAS, *VOTING RIGHTS IN TEXAS, 1982–2006, A REPORT OF RENEWTHEVRA.ORG* (2006), <http://maldef.org/resources/publications/TexasVRA.pdf>.

41. The number of Latino state representatives in Texas has risen from ten in 1968 to thirty-one today, and the number of Latino state senators has risen from one in 1968 to five today. Cynthia E. Orozco, Mexican American Legislative Caucus, *The Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/MM/wem4.html> (last visited Dec. 22, 2009).

42. *Frew v. Gilbert*, 109 F. Supp. 2d 579 (E.D. Tex. 2000), *vacated sub nom. Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), *rev'd in part sub nom. Frew v. Hawkins*, 540 U.S. 431 (2004).

federal Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program.<sup>43</sup> The statute was designed to ensure decent health care for low-income children, both to diagnose existing health issues and to prevent worse conditions that can develop from undiagnosed heart murmurs, diabetes, and dental and sight problems.<sup>44</sup> After a strong agreed judgment was approved by Judge Justice in 1996, the State did not meet its obligations and the court ordered further relief in 2000.<sup>45</sup> After U.S. Supreme Court affirmation that Judge Justice had the constitutional power to order the state to abide by the consent decree,<sup>46</sup> the judge's order forced the State to greatly increase services to poor children,<sup>47</sup> including migrant children.

Thus, for the first time, hundreds of thousands of children would receive decent medical care under a law specifically passed for their benefit, but not enforced without the power of Judge Justice. Another attempt by Texas to escape from the requirements of federal law and its own agreement was rebuffed by Judge Justice in 2005.<sup>48</sup>

F. *Rights of "Delinquent" Juveniles in State Custody, Morales v. Turman*

The Texas Youth Council, the state's system of "reform schools," was used by parents and local officials as punishment for crimes ranging from bad attitude to murder. The schools were charged with educating and improving the lives of the children sent there. But the facilities were actually prisons that did little

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43. See *Frew*, 540 U.S. at 433 (discussing the lawsuit brought under 42 U.S.C. § 1396a(a)(43), 1396d(r), a federally mandated Medicaid program designed to provide early diagnostic and treatment services to indigent children).

44. *Cf. id.* at 433–34 (outlining the EPSDT Medicaid plan).

45. *Frew*, 109 F. Supp. 2d at 588.

46. *Frew*, 540 U.S. at 442.

47. See *Alberton v. Hawkins*, No. 6:99-cv-00459-LED-HWM (E.D. Tex. May 19, 2005), available at [http://www.hhsc.state.tx.us/medicaid/SettlementAgreement\\_072105.pdf](http://www.hhsc.state.tx.us/medicaid/SettlementAgreement_072105.pdf) (last visited Dec. 26, 2009) (establishing a partial settlement agreement in 2005 to facilitate compliance with the EPSDT program); see also Statement of Tex. Sen. Eliot Shapleigh, *Frew Settlement Will Improve Health Care Access for El Paso's Children* (Apr. 10, 2007), <http://shapleigh.org/news/1113-frew-settlement-will-improve-health-care-access-for-el-paso-s-children> (praising an attorney for the *Frew* plaintiffs for a settlement "result[ing] in a \$700 million investment" in the low-income children of Texas).

48. *Frew v. Hawkins*, 401 F. Supp. 2d 619 (E.D. Tex. 2005), *aff'd sub nom. Frazer v. Ladd*, 457 F.3d 432 (5th Cir. 2006).

more than warehouse and squeeze the life out of the Texas Youth Council's charges. Education and rehabilitation were virtually nonexistent in these prisons.<sup>49</sup>

Judge Justice required Texas to give young people rights to basic due process before they could be sent to "reform school."<sup>50</sup> In a detailed and, indeed, almost emotional decision, the Judge required the State both not to torture the young people in the system and to give detained youths decent education, conditions and medical care when they were in custody.<sup>51</sup> This was the first of Judge Justice's cases involving Texas institutions in the criminal justice and mental health areas. He learned a great deal that he applied in future cases.<sup>52</sup>

The decisions have led to substantial improvement in conditions and programs in the institutions and a move toward community-based and smaller institutions. Though the students still do not have adequate education or therapy, they are generally safe from torture by either guards or other "inmates."<sup>53</sup>

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49. See *Morales v. Turman (Morales I)*, 364 F. Supp. 166, 172 (E.D. Tex. 1973) (describing the conditions of the prisons and pointing out that inmates received "little or no educational instruction during the period of their confinement").

50. See *Morales v. Turman (Morales II)* 383 F. Supp. 53, 68 & n.11 (E.D. Tex. 1974) (setting forth findings of fact concerning the allegation that juveniles were denied procedural due process: the plaintiffs "had never appeared in court or before a judge nor had they been represented by or consulted with an attorney in connection with [their] adjudication as a delinquent child"), *rev'd*, 535 F.2d 864 (5th Cir. 1976).

51. See *id.* at 73 (discussing regular occurrences of staff brutality toward the juvenile inmates and the frequent denial of adequate health care).

52. Cf. William Wayne Justice, The Herman Phleger Lecture: The Origins of *Ruiz v. Estelle* (Mar. 21, 1990), in 43 STAN. L. REV. 1, 1 (1990) (addressing his role in the *Ruiz* litigation and advancing a "broader means of understanding" the case and the importance of providing "meaningful access to legal institutions for the most disadvantaged members of our society").

53. The Texas Youth Council (TYC) summarizes the effect of the *Morales* litigation as follows:

[The *Morales* case] established the first national standards for juvenile justice and corrections. In Texas, it prompted a number of changes, including the prohibition of corporal punishment, extended periods of isolation, and all forms of inhumane treatment. The case also required the establishment of an effective youth grievance and mistreatment investigation system; minimum staff qualification and training requirements; individualized, specialized and community-based treatment programs; TYC-operated halfway house programs; and a county assistance program to help reduce commitments to TYC by providing state funds for probation services for youth in their local communities.

Tex. Youth Comm'n, A Brief History of the Texas Youth Commission: From the Roots of Texas Juvenile Justice Through the Present, <http://www.tyc.state.tx.us/about/history.html>

G. *Rights of Persons with Mental Disabilities*, *Lelsz v. Kavanaugh*

Mental hospitals in Texas, as in most states, were warehouses for persons who could not be controlled locally or had family members who wanted them removed for the good of the patient or the family. Intolerably cruel physical abuse and lack of any meaningful treatment were rampant in the hospitals, a result of lack of funding, lack of supervision, and often a lack of caring.<sup>54</sup>

In the difficult litigation involving the rights of persons with mental disabilities in institutions of the Texas Department of Mental Health and Mental Retardation, Judge Justice's main role in the case was to pressure a settlement, which was eventually entered in 1983.<sup>55</sup> The case was transferred to another judge, and the consent decree was reversed in significant respects by the Fifth Circuit.<sup>56</sup> Nevertheless, the case markedly improved conditions in what Judge Justice described as "the most depressing case I have ever been associated with."<sup>57</sup>

In addition to improved physical conditions, the consent decree substantially improved the physical conditions in the institutions and the rights of patients to individual treatment plans, prohibition of medications as punishment, and real care and therapy, with accountability for failure to provide it.<sup>58</sup>

H. *Rights of Prisoners*, *Ruiz v. Estelle*

Even as compared to the Texas youth prisons and mental health facilities, the Texas prison system imposed cruel and unusual punishment on its inmates. Prisoners were packed up to five in a

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(last visited Dec. 22, 2009).

54. See FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 316-19 (1991) (describing the conditions of the institutions and noting an attorney's remark to reporters that the state schools were worse than warehouses because "[a]t least in warehouses, things are kept neat and clean and safe").

55. *Lelsz v. Kavanaugh*, No. S-74-CA-95 (E.D. Tex. Nov. 27, 1974), noted in 98 F.R.D. 11 (E.D. Tex. 1982), appeal dismissed, 710 F.2d 1040 (5th Cir. 1983); see also FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 316-25 (1991) (giving a detailed description of the start-and-stop nature of the *Lelsz* litigation).

56. *Lelsz*, 807 F.2d 1243 (5th Cir. 1987), reh'g denied, 815 F.2d 1034 (5th Cir. 1987). Seven judges dissented from the denial of rehearing en banc. *Lelsz*, 815 F.2d at 1235-36.

57. FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 320 (1991).

58. See generally SARAH C. SITTON, LIFE AT THE TEXAS STATE LUNATIC ASYLUM 1857-1997 (1999) (discussing the reform movement in Texas, and noting the impact of cases such as *Lelsz* on improved conditions in Texas hospitals and institutions).

cell built for one and received no training for life after prison, except training by fellow inmates in cruelty and criminal enterprise.<sup>59</sup>

The Texas prison case is another example of Judge Justice's active involvement in the development and shaping of a case and its remedies. We are fortunate to have the Judge's own recollections of the history of the case, which he summarized as a duty:

The right to be heard, whether one's conditions be exalted or lowly, is a right the courts have a duty to vindicate. It was to vindicate that right, and to get at the truth about the conditions of some of the lowliest offscourings of our society, that I helped bring *Ruiz v. Estelle* to birth.<sup>60</sup>

After a six-month trial, Judge Justice found that the Texas prison system was "cruel and unusual punishment" and violated prisoners' rights to equal protection and to protection afforded by a number of state statutes. After the initial flurry of decisions and appeals, most of the action in the case was through the appointed master, Vincent Nathan, and a series of agreed settlements of various issues. But the backdrop to this progress, indeed the power behind the talk, was Judge Justice. The Judge finally dismissed the case in 2002, thirty years after he had first received letters of complaint from prisoners in the Texas system.<sup>61</sup>

Though *Ruiz* went through a series of procedural loops, rehearings, and partial reversals,<sup>62</sup> there is no doubt that the

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59. See generally *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir.), *vacated in part and amended by* 688 F.2d 266 (5th Cir. 1982) (describing, among other problems, the overcrowded conditions, lack of security, and acts of official brutality against inmates in the Texas prisons).

60. William Wayne Justice, The Herman Phleger Lecture: The Origins of *Ruiz v. Estelle* (Mar. 21, 1990), in 43 STAN. L. REV. 1, 12 (1990). For a detailed and balanced description of the case from the point of view of some of the State's attorneys and experts, see STEVE J. MARTIN & SHELDON EKLAND-OLSON, TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN (1987). Professor Kemerer's section on the litigation is especially detailed and informative. FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 356-400 (1991).

61. See generally Carl Reynolds, *The Final Chapters of Ruiz v. Estelle*, CORRECTIONS TODAY, June 2002, at 108 (describing Judge Justice's final orders in *Ruiz*, which included a proposal for remediation and set a target expiration of the court's jurisdiction over the matter for July 2002).

62. See generally *Ruiz*, 503 F. Supp. 1265 (refusing to allow modification of the consent decree between the Texas Department of Corrections and the Plaintiff class of inmates). On July 15, 1985, TDC's attempt to seek modification of the amended decree

opinion and the judge behind it certainly significantly improved the lives of prisoners. The prisons are less crowded; the use of inmate tenders (inmates who are trusted as supervisors and given administrative control over other prisoners) has been curtailed, if not eliminated; medical care and psychiatric care is much more available, both at the prisons and in a special unit in Galveston; additional due process protections are available before prisoners can be sent to solitary confinement; the general culture of violence and intimidation in the prison has decreased; and the state has slowly moved to using smaller facilities.<sup>63</sup>

### I. *Desegregation of Public Housing, Young v. Pierce*

African-Americans in East Texas had long been segregated in separate and unequal public housing by local housing authorities, with no intervention and benign neglect by the United States Department of Housing and Urban Development (HUD).<sup>64</sup>

Based on several examples of blatant discrimination against African-American applicants for housing in Clarksville, Texas, Judge Justice heard a claim that the Clarksville discrimination was just an example of an areawide (indeed, state and nationwide) discrimination allowed by HUD.<sup>65</sup> Judge Justice found the local housing authority and HUD liable for discrimination in the Clarksville area and ordered integration of the units.<sup>66</sup> The resulting uproar over the case led to a series of articles in the *Dallas Morning News* in 1985 documenting blatant segregation in public housing nationwide.<sup>67</sup> The case and the articles led to

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was denied by the district court, whose decision was later affirmed by the Fifth Circuit. *Ruiz v. Lynaugh*, 811 F.2d 856, 857 (5th Cir. 1987) (per curiam).

63. See generally James W. Marquart & Ben M. Crouch, *Judicial Reform and Prisoner Control: The Impact of Ruiz v. Estelle on a Texas Penitentiary*, 19 LAW & SOC'Y REV. 557 (1985) (tracing the "due process revolution" in Texas and the conditions of the Texas prison system before, during, and following the sweeping reform measures established throughout the *Ruiz* litigation).

64. See *Young v. Pierce*, 628 F. Supp. 1037, 1045-51 (E.D. Tex. 1985) (exploring the historic underpinnings of de jure segregation and, despite a national policy established in 1962 to end discrimination, HUD's "undisputed" involvement in "a system of segregation" throughout East Texas).

65. *Id.*

66. *Id.* at 1060; FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 343 (1991).

67. FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 347 (1991) (referring to Craig Flournoy & George Rodriguez, *Separate but Unequal: Illegal Segregation Pervades Nation's Subsidized Housing*, DALLAS MORNING NEWS, Feb. 11-17,

congressional hearings. Finally, the case led directly to an order requiring HUD to desegregate public housing in a thirty-six-county area in East Texas.<sup>68</sup>

After at least a century of segregated housing and decades of segregation in public housing, African-Americans would finally have a right to apply for and live in a public housing unit without discrimination. And minority public-housing applicants around the country won a powerful new weapon to prevent such discrimination in the future.

### III. JUDGE JUSTICE AS A GREAT LAWYER AND AN EVEN BETTER PERSON

As a superb lawyer, Judge Justice knew that his decisions had to be extremely well-documented and, in the words of the recent Supreme Court confirmation hearings, have fidelity to the law. He also understood that to preserve and protect human dignity he would have to hit the refractory mule of state politicians and bureaucrats with a tough, clear order to get them to move on their own.

He loved a good cross-examination as a wine connoisseur loves a complex wine. The Judge told me several times about the best cross-examination he ever saw, the plaintiff's attorney's cross examination of the main defendant Estelle in the *Ruiz v. Estelle* litigation. He criticized lawyers on all sides of a controversy who provided "little bitty records" (holding up his thumb and forefinger about a half inch apart). He demanded decorum by all attorneys in his court and would frankly call out attorneys who made stupid objections<sup>69</sup> or prevaricated before the court.

In my opinion, Judge Justice was consistently the smartest and toughest person in the room and in the case, even when some of the "best" attorneys in the United States were before him. He

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1985, which was awarded the Pulitzer Prize in 1986); see *The Pulitzer Prizes, 1986 Winners and Finalists*, <http://www.pulitzer.org/awards/1986> (last visited Dec. 22, 2009) (honoring the writers "[f]or their investigation into subsidized housing in East Texas, which uncovered patterns of racial discrimination and segregation in public housing across the United States and led to significant reforms").

68. *Young v. Pierce*, 685 F. Supp. 986 (E.D. Tex. 1988).

69. When I requested Judge Justice to order a particularly smart and recalcitrant witness to answer a question, the Judge gave me a little smile and said, "Mr. Kauffman, I can't order him to answer a question when he says he doesn't know the answer. Why don't you ask him a question he can answer? Now move on."

would demand justice for the clients even if the clients' attorneys were tired or weakened or political or venal. Judge Justice's jurisprudence will certainly be further explored, analyzed, extolled, and eviscerated. But I have no doubt that millions of people have rights because of his work that they would not have had without "the Judge."

When Judge Justice was ending his article on the career of Justice Thurgood Marshall, praising Marshall's "use of concrete, observable truths to produce enlightened jurisprudence,"<sup>70</sup> he quoted Euripides, from 420 B.C. Certainly, this is a good summary of the work of Judge Justice as well:

Justice requires no subtle sophistries;  
It in itself hath fitness; but injustice,  
Being rotten at the heart, needs cunning treatment.<sup>71</sup>

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70. William Wayne Justice, Law Day Address at the University of Texas at Austin: The Enlightened Jurisprudence of Justice Thurgood Marshall (Mar. 1, 1993), in 71 TEX. L. REV. 1099, 1114 (1993).

71. Euripides, *Phoenissae*, in THE MACMILLAN BOOK OF PROVERBS, MAXIMS AND FAMOUS PHRASES 1290 (Burton Stevenson ed., 1948), quoted in William Wayne Justice, Law Day Address at the University of Texas at Austin: The Enlightened Jurisprudence of Justice Thurgood Marshall (Mar. 1, 1993), in 71 TEX. L. REV. 1099, 1114 (1993).