NOT FOR PUBLICATION
WITHOUT WRITER'S CONSENT

INSTITUTE OF CURRENT WORLD AFFAIRS

JLS-23 In the Matter of Alberta Lessard -- II
(the second part of an eight-part series)

29 West 17th Street
New York, New York 10011
March 20, 1976

Mr. Richard H. Nolte
Institute of Current World Affairs
535 Fifth Avenue
New York, New York 10017

Dear Mr. Nolte:

The day after he received her call, Bob Blondis visited Alberta Lessard at North Division. It was his first visit to a mental hospital, and he remembers his sense of shock. "The place is horrendous, ugly, antiquated--barred windows, locked wards. You know, an institution changes people within a couple of days. When I'd seen Alberta before at the Legal Services office, she'd been quite pleasant-looking--short gray hair, trim, dainty, sure of movement, speaking carefully and deliberately like a school teacher. Now it was a little hard to recognize her, shuffling around in those God-awful hospital robes and those little slippers they give people. But she was rational, and we didn't have any trouble communicating with each other. I didn't have any problem explaining the legalities involved. Her questions were clear and intelligent, and it was hard to see that anything was wrong with her. Of course, she was very upset.

Jeffrey Steingarten is an Institute Fellow interested in the relationship among psychoanalysis, psychiatry, and law.

Miss Lessard told Blondis about the informal interview Judge Seraphim had conducted at her bedside without a moment's preparation to order her thoughts and without the assistance of counsel, and about the medication the staff had put her on even before a judge had reviewed her case. (She was lucky that the drugs had made her lethargic and only caused her difficulty in speaking). She also mentioned the appointment of a "lawyer" who had not yet spoken with her. And she was confused about whether legal proceedings had been initiated against her and what their nature was.

She told Blondis that she had not been trying to commit suicide when the manager of the West Allis Trading Post saw her hanging from the ledge. After all, there was a snowmobile within six inches or so of her feet. That afternoon there had been a persistent knocking at her apartment door, she had become frightened, and climbed through the window to make an escape. She also told Blondis about her call to the police at 3 A.M. that same day.

Some months earlier in 1971, Alberta Lessard had walked into the Southside neighborhood office of Milwaukee Legal Services, where Blondis was assigned to "intake"--interviewing new clients who, too poor to afford private lawyers, seek free legal advice in their disputes with creditors, landlords, welfare offices, and, perhaps most commonly, their spouses. Miss Lessard's problem, though, was quite a bit more involved than the routine run of cases Blondis had handled, and he spoke with her for over an hour.

A school teacher for twenty-one years, Miss Lessard was fired in 1967 from her job at a West Allis elementary school in a dispute with the administration over the introduction of a technique for teaching reading that she and a local parents' group opposed. Shortly afterwards she was also fired from her

teaching job in Marquette University's reading skills program for college students in the elementary education department, and was informed that although she had amassed all the credits for a doctorate in education short of her dissertation, she would not be permitted to complete the requirements for her degree. She had sought vindication by filing suits against the West Allis school board and Marquette University for firing her without a fair hearing, and she repeatedly telephoned Marquette for an appointment with an administrator in the doctoral program. She finally desposited herself outside his office and refused to budge until he heard her out. Marquette called the police and a psychiatrist, threatened her with commitment to a mental hospital, and filed charges for disorderly conduct and for abusing the telephone system. (Marquette had arranged for the phone company to put a pen-recorder on Miss Lessard's line to count the number of calls she placed to the University.) By the time she came to the Southside office for advice, Alberta Lessard had been sent three times to Milwaukee mental hospitals and two times to Milwaukee jails, remaining there anywhere from a few hours to two days, and she had employed the services of two or three respectable private attorneys. On one occasion, after Judge Christ T. Seraphim sent her to a mental hospital for observation, an appeals court immediately released her, calling the judge's action outrageous. The local newspapers had several times reported on Miss Lessard's activities, picturing her as a crank or a nuisance or worse.

When she first sought Bob Blondis' help, Miss Lessard had been unemployed for three or four years, lived alone on a teacher's pension, and had become entirely preoccupied with vindicating herself against the West Allis school system and Marquette University. She believed that they had acted in concert to deprive her of her livelihood.

Blondis was unaware of Miss Lessard's notoriety, and when he spoke with her, she struck him as a highly intelligent woman with a reasonable story. When he looked into the matter, he grew convinced that there was not much he could do for her as a lawyer. Even if her claims had been persuasive three or four years before, the issues had since then gotten so muddled in the clash of personalities, the lawsuits and visits to the mental hospital, that Blondis thought it best to let the matter drop. Miss Lessard seemed so concerned with complete vindication that she was unlikely to compromise in order possibly to achieve some of her practical objectives.

After Blondis returned from his visit with Alberta Lessard at North Division, he and Tom Dixon spent the rest of the day and much of the night doing research. Early the following morning they made a provisional decision to go to federal court, where they would challenge the Wisconsin commitment law as infringing rights guaranteed by the 14th Amendment to the Constitution, which reads in part:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

They had identified four provisions in Chapter 51 that they felt worked a deprivation of due process: the general vagueness of the commitment criteria, the lack of adversary counsel and mandatory notice to the patient of his rights and the nature of the charges against him, and the length of time, up to 145 days, before a full hearing might be held. They began to draft a complaint against Wilbur Schmidt, director of the state department of Health and Social Services; Leonard Ganser, director of the state Division of Mental Hygiene; Drs. Currier and Kennedy of North Division; Officers Mejchar and Schneider of the West Allis police force; and Judge Christ T. Seraphim. They would apply for a temporary restraining order against enforcement of Chapter 51 to get

Alberta Lessard released immediately, and request that a three-judge federal district court be convened for a full hearing on the constitutionality of the statute. (Three judges are required to issue an injunction against the operation of a state law--serious business in a federal system--and their decision is immediately appealable to the U.S. Supreme Court, bypassing the normal review by a Court of Appeals. The district judge to whom the application is made will determine whether a substantial constitutional claim is made out in the complaint, and if he thinks there is, he convenes the special three-judge panel.) They would also ask for monetary damages against the police officers for enforcing an unconstitutional law against Alberta Lessard. And they would sue not only in her name but "on behalf of all persons similarly situated"--everyone in the state of Wisconsin eighteen years or older who was being held against his will, temporarily or permanently, under Chapter 51. They would bring this class action into federal court under the authority of an Act of Congress passed in 1871, during Reconstruction:

> Sec. 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

"It was the beautiful, typical legal services 1983 class action extravaganza," Blondis recently reminisced. "With the five or six years of experience I have now, I'm not sure I would make the same decision. I was a lot more idealistic then, a lot more naive. And," he added with a laugh, "a lot more hard-working." Blondis recalls that in the late 'sixties and early 'seventies, bringing a 1983 civil rights action had become a badge of honor for young poverty lawyers; the opportunity to create sweeping federal

precedents and affect fundamental changes in the legal system had attracted many of them to the field in the first place--certainly it was not the low salaries, unglamorous working conditions, or the intellectual nourishment of handling four routine divorce cases in a week or persuading the local electric company to continue service to a client whose welfare check had gone astray. When they would meet at parties or regional conferences, the young lawyers talked about little else than their 1983 class actions.

Section 1983 had been enacted in the post-Civil War years against a background of massive and systematic terrorism directed by the Ku Klux Klan against blacks and Republicans in the South. The 14th Amendment, along with its provisions retributive to the Confederacy and its office holders, had granted state and national citizenship to former slaves and extended the guarantee of federal constitutional rights to all citizens. But state courts and law enforcement officials in the South were understandably daunted by the Klan's power, and the Act of 1871 was designed to give the lower federal courts jurisdiction over claims under the 14th Amendment. Federal marshals, relying on the Union army of occupation, would overwhelm the Klan with superior power, whereupon, as one Congressman expressed it, "the trembling and tottering States will spring up and resume the long neglected administration of law in their own courts, giving, as they ought themselves, equal protection to all." With the formation of the Legal Services Program in 1965 as part of President Lyndon B. Johnson's war on poverty and its growth by 1971 into a seventy-million dollar effort employing 2,200 full-time attorneys nationwide, section 1983 came to be used, often as a first resort and often successfully, to challenge state practices and statutes affecting welfare disbursement, prisoners' and juvenile rights, housing discrimination, and even the summary repossession procedures of finance companies. In the view of the young poverty lawyers, the Klan had been replaced by customary and

systematic discrimination against the poor to keep the tottering States from springing up and giving equal protection to all.

But by 1971, the law reform activities of the legal services program had come under attack from both the right and the left, on the grounds that its proper mission was to undo the day-to-day legal tangles of its clients and not to attack structural defects in the law. On the right, California's U.S. Senator George Murphy's "Murphy amendment" would have tacked a condition onto a legal services appropriations bill prohibiting suits against state and Federal agencies, and if the Murphy amendment had not been defeated in 1967 and again in 1969 under pressure from the organized bar, it would have foreclosed the lawsuit that Blondis and Dixon were planning to bring. Another leader of the fight against law reform was Governor Ronald Reagan, who in 1971 used his statutory veto against California Rural Legal Assistance (Senator Murphy's immediate target and perhaps the most activist program in the nation). (Reagan was overridden by the Nixon Administration, which for most of its tenure protected the legal services program; the blow to Reagan was softened with a $2,500,000 grant to explore alternate ways of providing lawyers for the poor.) And there was growing criticism from the left: several organized poverty groups had begun to feel that young, activist attorneys were so preoccupied with the glory and headlines of dramatic test cases that they had lost sight of the more mundane problems of their clients.

Neither Blondis nor Dixon had ever initiated a 1983 class action, a complex piece of litigation for two young and inexperienced poverty lawyers to embark upon, and the senior attorneys at Milwaukee Legal Services warned them that they might be wasting their time. The U.S. Supreme Court had just decided the case of Younger v. Harris, which severely restricted access to the federal courts. The decision was expressly

limited to precluding most federal injunctions against pending criminal prosecutions. Under principles of federalism, the Supreme Court had held, the national government is obliged to protect federal rights with a minimum of interference with legitimate state activities. And under principles of "comity," the federal courts owe a duty of respect to the state courts, which, they are bound to assume, will protect every right secured by the federal constitution. As a result of Younger, a state defendant could no longer turn to federal court as soon as prosecution was brought against him under a state law he considered unjust; he would now have to fight out the issues at his trial and through the state appeals system and then, if he were not vindicated, turn to the national judiciary. Although Younger was limited to criminal cases, these senior associates of Blondis and Dixon predicted that under the reasoning behind that case, the Burger Court would soon be extending its non-interference doctrine to civil cases like the civil commitment of Alberta Lessard.

But Dixon and Blondis argued that working under a prediction about what the Burger court might some day decide would always insure a conservative strategy, and that even if Younger were extended to state civil proceedings, the commitment action against Miss Lessard could hardly be called a "proceedings" because it lacked even the routine regularities observed in civil cases. Besides, they were pessimistic about the chances of any other strategy.

They would, of course, represent Miss Lessard as best they knew how in Judge Seraphim's court, whenever a hearing might be scheduled. But they had discovered, after telephoning around to other lawyers with some civil commitment experience, that Seraphim's hearing were short, perfunctory, and conducted with massive deference to medical judgment--pretty much the case in most of the nation. Seraphim was, and still is, an enormously popular law-and-order judge. Criminal lawyers do

consider him to be a fair sentencer, but he conducts his courtroom like a theater, often playing to the press as much as to Blind Justice, carefully collecting newspaper clippings about his activities between clear plastic sheets. (Some years after he was elevated to the felony bench by an enthusiastic Milwaukee County electorate, the judge had a young, disabled Vietnam veteran before him on a drug charge. According to newspaper reports, Seraphim became angry at some point in the hearing, stepped down from the bench and tore the patches from the helpless defendant's uniform.) Blondis and Dixon were not optimistic that Seraphim would listen to their constitutional arguments, and they were familiar with the reluctance of most lower-court judges to release patients against medical advice when there is even a possibility that they might hurt themselves or others on the outside (an inversion of the ancient legal maxim applied to criminal defendants: better that ten guilty men go free than that one innocent man be jailed unjustly).

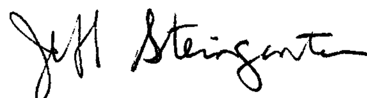
Dixon puts some of the blame on the press. "Newspapers don't print--don't know how to print--a headline that says, ex-mental patient becomes director of such-and-such a program or receives an award for civil achievement. But they sure as hell do when the headline is, ex-mental patient kills somebody or commits suicide, or is picked up under bizarre circumstances. They never deal with that incredibly large number of former patients that have never been picked up by the police and never will be. And the climate really affects public figures, psychiatrists, lawyers, and judges, whose names are going to be plastered all over the front page."

If they failed to persuade Judge Seraphim, Blondis and Dixon could have planned an appeal of Miss Lessard's commitment to a higher state court, but for one small problem: Chapter 51 has no provision for appeal, and a 1938 decision of the

Wisconsin Supreme Court had held that there is no appeal from civil commitment orders.

The two young lawyers worked around the clock, and on the afternoon of November 12, four days after Alberta Lessard had telephoned Blondis from North Division, they went back there to get her signature on the federal complaint. As the judges and clerks and secretaries in the Federal Building in Milwaukee were getting ready to go home for the weekend, they filed their papers with the district court clerk, who assigned docket number 71-C-602 and set a hearing for the following Tuesday.

The case of Lessard v. Schmidt would raise issues that had rarely been aired in an American court of law. It would spark as furious a debate among lawyers, judges, and psychiatrists as had ever been heard in the history of civil commitment. But on the day they drove over to federal court with the papers for their "beautiful, typical legal services 1983 class action extravaganza," neither Blondis nor Dixon was aware of its full significance. As Dixon recalled recently, "We merely thought that it was the most outrageous law we had ever seen, and one of our clients and God knows how many other people were being held under it illegally, and that it ought to go. It never occurred to us that we were about to turn everything around."



Received in New York on April 12, 1976.