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struck between the individual's right to privacy and the public's interest in regulation. By not opening the gates of all businesses engaged in interstate commerce to government inspectors, but yet applying the more lenient administrative probable cause standard, *Barlow's* will allow the Court to seek that proper balance.

H. BRYAN IVES, III

Constitutional Law—Rights of the Mentally Retarded: *Halderman v. Pennhurst* Closes State Institution and Mandates Community Care

Until the middle of this century the mentally retarded, neglected by the medical profession, were routinely consigned for life to isolated institutions.¹ During the last two decades, however, medical advances regarding the capabilities and treatment of the retarded² have spurred judicial recognition of the rights of that institutionalized population. Recent cases have held, principally on the basis of the eighth and fourteenth amendments, that institutionalized retardates possess a right to habilitation—the education, training, and care required by mentally retarded individuals to reach their maximum development.³

This right to habilitation was first recognized and applied in *Wyatt v. Stickney*⁴ to mandate minimum standards of care and supervision

1. An excellent discussion of the historical treatment of the mentally retarded appears in Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124 (1976).

2. *Id.* at 136-43. A recent paper credits "mid-twentieth century discoveries (or rediscoveries) of the capacities of disabled people, of teaching and learning techniques to evoke those capacities and the more or less wide distribution of knowledge of those techniques among school people and other service agents in our society." T. Gilhool & E. Sturtman, *Integration of Severely Handicapped Students: Toward Criteria for Implementing and Enforcing the Integration Imperative of P.L. 94-142 and Section 504*, at 7 (1978) (unpublished paper for Public Interest Law Center of Philadelphia).

3. Habilitation is defined in *Wyatt v. Stickney*, 344 F. Supp. 387, 395 app. (M.D. Ala. 1972), as

the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to programs of formal, structured education and treatment.

4. 325 F. Supp. 781 (M.D. Ala. 1971); 334 F. Supp. 1341 (M.D. Ala. 1971); 344 F. Supp. 373 (M.D. Ala. 1972) (right to treatment for mentally ill); 344 F. Supp. 387 (M.D. Ala. 1972) (right to

within the institution.⁵ Recently, in *Halderman v. Pennhurst State School & Hospital*,⁶ the United States District Court for the Eastern District of Pennsylvania went one significant step further and found Pennhurst State School and Hospital, a large, isolated state institution for the mentally retarded,⁷ inherently incapable of providing its residents the minimally adequate habilitation that courts in previous cases⁸ had ordered the institutions to provide. Instead of requiring improvements in the institution's staffing, programming, and funding, the court directed that Pennhurst be closed and that suitable facilities in the community⁹ be provided for all its residents.¹⁰

The *Pennhurst* plaintiffs, originally all retarded residents of the institution, brought a class action¹¹ seeking declaratory and injunctive relief, including the closing of Pennhurst, and damages¹² on the ground that they were being denied their right to habilitation. They claimed

habilitation for mentally retarded), *aff'd in part, rev'd in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (*Wyatt* is a series of decisions with the same style).

5. 344 F. Supp. 387, 395-407 app. (M.D. Ala. 1972). For a discussion of the minimum standards in *Wyatt*, see note 53 *infra*.

6. 446 F. Supp. 1295 (E.D. Pa. 1977), *stay denied*, 451 F. Supp. 233 (E.D. Pa. 1978), *appeal docketed*, No. 78-148 (2d Cir. Apr. 25, 1978).

7. Pennhurst, located 30 miles from Philadelphia, was built in 1908, 446 F. Supp. at 1302, at the height of the out-of-sight, out-of-mind philosophy of treatment for the retarded. *Id.* at 1299-300.

8. See, e.g., *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part*, 550 F.2d 1122 (8th Cir. 1977); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972).

9. Alternative community facilities can take many forms, supplying a great variety of residential options and support services that represent a continuum of models from the least restrictive to the highly structured. Among the possible residential options are developmental homes; intensive training residences for children, for adolescents, and for adults; family living residences; adult minimum supervision residences; room and board homes; adult boarding; cluster apartments; independent living with available counseling; five-day residences; behavior-shaping residences; developmental maximization units; crisis assistance units; crisis homes; structured correctional residences; and structured rehabilitation residences. See Glenn, *The Least Restrictive Alternative in Residential Care and the Principle of Normalization*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *THE MENTALLY RETARDED CITIZEN AND THE LAW* 499, 507-12 (1976). All of these facilities afford the mentally retarded some degree of contact with normal community living patterns, primarily because of their location within the community but also because of their smaller size and less rigid structure.

Expert testimony showed that all the retarded at Pennhurst, even the most severely handicapped, were capable of benefiting from community-centered facilities. 446 F. Supp. at 1312.

10. 446 F. Supp. at 1320, 1326.

11. The plaintiff class of retarded persons was defined as "[a]ll persons who as of May 30, 1974, and at any time subsequent, have been or may become residents of Pennhurst State School and Hospital." This included residents, those who were on a waiting list for placement at Pennhurst, and those who, "because of the unavailability of alternate services in the community," might have been placed at Pennhurst. *Id.* at 1300.

12. *Id.* at 1298, 1324.

violations of both state¹³ and federal¹⁴ statutes and the first, eighth, ninth, and fourteenth amendments to the United States Constitution.¹⁵ Defendants—Pennhurst, its supervisor and employees, the Pennsylvania Department of Public Welfare, and various state and county officials¹⁶—denied that conditions at Pennhurst violated its residents' constitutional or statutory rights.¹⁷ They agreed, however, that Pennhurst's staff of 1,500 was extremely inadequate for its patient population of 1,230, seventy-four percent of whom were profoundly retarded,¹⁸ and admitted that they already had plans for a drastic reduction of the population,¹⁹ although their timetable for the eventual closing of the institution was "vague and indefinite."²⁰

Finding that minimally adequate habilitation is properly provided only by living arrangements as much like a normal family living situation as possible,²¹ the court concluded that because of institutional conditions antithetical to this "normalization" principle,²² "minimally adequate habilitation cannot be provided in an institution such as Pennhurst."²³ The court entered judgment for plaintiffs; defendants

13. Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1967) (repealed in part in 1976; application to mentally retarded unaffected).

14. 29 U.S.C. § 794 (1970); 42 U.S.C. §§ 1983, 1986, 6010 (1970).

15. 446 F. Supp. at 1298 nn. 2 & 3.

16. *Id.* at 1301-02 & 1301 n.13.

17. *Id.* at 1313.

18. *Id.* at 1302-03. The institutional population was very similar to that in other institutions for the retarded. Ferleger, *The Future of Institutions for Retarded Citizens: The Promise of the Pennhurst Case*, in MENTAL RETARDATION AND THE LAW: A REPORT ON STATUS OF CURRENT COURT CASES 28, 32 (1978) (compilation prepared for President's Committee on Mental Retardation).

19. 446 F. Supp. at 1306.

20. *Id.* at 1325.

21. See also note 41 and accompanying text *infra*.

22. 446 F. Supp. at 1318. Much of the court's opinion is a catalog of institutional horrors. In 32 days of testimony, *id.* at 1300, and eight pages of the opinion, *id.* at 1303-11, the problems at Pennhurst were set forth. Implicitly measuring Pennhurst against the detailed minimum institutional standards developed by the federal district court in *Wyatt v. Stickney* for Partlow Hospital for the mentally retarded, see note 53 *infra*, Judge Broderick found that "[m]any of the problems at Pennhurst result from overcrowding and understaffing." 446 F. Supp. at 1303. The problems included: lack of privacy and forced conformity to an inflexible institutional schedule; inadequacies in the supervised, directed activities that are termed programming (the average amount of beneficial programming was 15 minutes per day); severe lack of physical therapy and equipment such as wheelchairs and hearing aids; inadequate "exit" and "program" plans (individual reports, regularly updated and central to the habilitative effort, that evaluate the residents' needs and goals, ways to achieve the goals, the residents' progress, and prospects for return to the community); overuse of physical restraints, seclusion, and tranquilizing psychotropic medication; lack of sanitation; deterioration of residents' earlier-acquired skills; and frequent injury to residents through self-abuse, attacks by other inmates, and occasional mistreatment by staff members. *Id.* at 1303-10.

23. *Id.* at 1318; see text accompanying notes 61-68 *infra*.

were permanently enjoined to provide suitable community living arrangements for all members of the plaintiff class, to monitor that provision, and to develop and periodically review individualized program plans for each class member.²⁴ A special master was appointed to develop for submission to the court detailed plans for necessary community facilities, including various types of small-scale, in-community residences and support services, as well as plans for the interim operation of Pennhurst.²⁵ Pennhurst was to be closed as soon as alternative community facilities could be provided for all its residents.

The *Pennhurst* court found the right to habilitation²⁶ to be based on various independent constitutional and statutory grounds. First, the right is grounded in due process. The only permissible justification for institutionalizing retardates is the state's *parens patriae* interest in providing them with care and treatment. If habilitation is not provided, then the nature and duration of the commitment bears no reasonable relation to its purpose and the due process clause is violated.²⁷ Furthermore, because fundamental individual liberties (for example, travel, association, privacy, marriage, and procreation) are compromised by commitment and institutionalization, the institutionalized retarded have a right to enjoy habilitation under the least restrictive

24. 446 F. Supp. at 1326. Defendants were also enjoined from admitting anyone else to Pennhurst and from counseling admission. *Id.* at 1327-28.

25. Pursuant to the interim operation plan, the court enjoined defendants to exert maximum effort in following Department of Public Welfare regulations concerning use of physical and chemical restraints and seclusion. *Id.* at 1328. Defendants were ordered to provide medical services, wheelchairs, and adequate sanitation; they were also prohibited from administering drugs as punishment or for convenience, among other things. *Id.* at 1329.

Defendants have appealed. No. 78-148 (2d Cir. docketed Apr. 25, 1978). The state moved for a stay of judgment pending appeal, 451 F. Supp. 233, 235 (E.D. Pa. 1978); Judge Broderick denied the motion because movant failed to make the four-part showing necessary for success. Judge Broderick's comments in examining the first two parts of the necessary showing are important in assessing the future of the *Pennhurst* decision: (1) Likelihood of success on appeal. Movant characterized the court's decision as "novel and precedent setting, both in the rights enunciated and the scope of relief granted." *Id.* at 235-36. The court disagreed, pointing out that its judgment was based on several legal theories, any one of which was sufficient to sustain it, and most of which have been previously accepted. (2) Irreparable injury to movant. The state claimed that the expenditure required by the order would be enormous. The court, however, pointed out that the state had intended to close Pennhurst before litigation and, in addition, had the benefit of Law of Nov. 27, 1970, no. 256, § 2AX(21), 1970 Pa. Laws 773, which appropriated 21 million dollars for moving Pennhurst residents into new community facilities. Eighteen million dollars of this appropriation was still untouched at the time of suit. Finally, testimony at trial had shown that community facilities are about one-third as costly as institutions and that many retardates in the community could earn substantial incomes, further reducing the cost to the state. 451 F. Supp. 233, 236-37 (E.D. Pa. 1978).

26. See text accompanying notes 70 & 75 *infra*.

27. 446 F. Supp. at 1315-16.

conditions consistent with the purposes of commitment.²⁸ This principle of the "least restrictive alternative" operates to tailor all infringements of personal liberties to conform closely to a legitimate governmental purpose.²⁹

Second, the court found a basis for the right to habilitation in the eighth and fourteenth amendments' implied guarantees of freedom from harm.³⁰ And finally the decision identified an equal protection right to nondiscriminatory habilitation.³¹ The court analogized from the decision in *Pennsylvania Association for Retarded Children v. Pennsylvania*,³² which established the right of retarded children to equal educational opportunity in the public school system in accordance with the mainstreaming (normalization) principle.³³ The court concluded that the segregation of the mentally retarded in isolated institutions produces habilitative facilities that are separate and not equal.³⁴

In addition, the *Pennhurst* court found violations of title 50, section 4201 of the Pennsylvania Statutes³⁵ which provides that the Pennsylvania Department of Public Welfare is empowered "to assure within the State the availability and equitable provision of adequate . . .

28. *Id.* at 1319.

29. In *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), the Court stated:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

30. 446 F. Supp. at 1320. Previous courts have employed the guarantee of due process and the prohibition against cruel and unusual punishment to mandate improvements in harmful institutional conditions. *See id.* at 1316; note 56 *infra*.

31. 446 F. Supp. at 1321-22.

32. 343 F. Supp. 279 (E.D. Pa. 1972).

33. In *Pennsylvania Association for Retarded Children*, a three-judge panel that included Judge Broderick determined that retarded children between the ages of four and twenty-one were entitled under the equal protection clause of the fourteenth amendment to receive at least as much education and training "appropriate to [their] learning capacities" as the state was giving to others. *Id.* at 313. *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), which was not cited by the *Pennhurst* court, established the right to an equal education for children with all types of handicaps. Both cases cite *Brown v. Board of Educ.*, 347 U.S. 483 (1954), for the proposition that education, once the state undertakes "to provide it, is a right which must be made available to all on equal terms." *Id.* at 493; *see* 348 F. Supp. at 875, 343 F. Supp. at 297.

34. 446 F. Supp. at 1322. Judge Broderick's analogy between the *Philadelphia Association for Retarded Children* and *Pennhurst* situations appears to be based on the great similarity between "education and training" and "habilitation." Because it is unable to provide minimally adequate habilitation, *Pennhurst* is unequal to state public school facilities. It is unable to provide minimally adequate habilitation precisely because it is a separate facility. *Id.* at 1321.

35. PA. STAT. ANN. tit. 50, § 4201 (Purdon 1967).

mental retardation services for all who need them . . .³⁶ and of section 504 of the federal Rehabilitation Act of 1973,³⁷ which provides in pertinent part: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."³⁸

Because the reasoning of the *Pennhurst* court is occasionally imprecise and conclusory, examination of the earlier principal cases is necessary to an understanding of the significance of the *Pennhurst* decision in the development of the law regarding the rights of the mentally retarded. The movement to advance the rights of the mentally retarded began in the early 1960's³⁹ with the rediscovery, after almost a century,⁴⁰ of the theory of normalization and the developmental model⁴¹—practical expressions of the medical community's realization that normal living patterns are, for the mentally retarded, both an achievable goal and the means to that goal. With the determination that the retarded can function in normal society came legal recognition of their right to be afforded the training and opportunity to do so. Although medical experts generally endorse the right to habilitation,⁴² case law is not yet unanimous.⁴³

36. *Id.*; see 446 F. Supp. at 1322 (citing *In re Joyce Z.*, No. 2035-69 (C.P. Allegheny County, Pa., filed March 31, 1975)).

37. 29 U.S.C. § 794 (1970).

38. *Id.*; see 446 F. Supp. at 1323. The court found that § 504 codified the constitutional right to equal protection and conferred a private right of action. *Id.*

39. Mason & Menolascino, *supra* note 1, at 136.

40. *Id.* at 130-34. Early successful treatment techniques were forgotten when psychiatrists turned their attention to psychotherapy for the mentally ill. *Id.*

41. Normalization, or mainstreaming, places the retarded individual in an environment that resembles as much as possible an ordinary family situation, maximizing his ability to live in society. See *id.* at 136 n.31. The developmental model is simply an outline of stages in human development, reflecting the realization that mental retardates are capable of growth and change. *Id.* at 137 n.32. Essentially, the mentally retarded are considered developmentally delayed but far from unable to function in society.

42. See, e.g., PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 9.

43. See 446 F. Supp. at 1316-17 & 1316 n.52. The United States Supreme Court has not yet recognized a right to habilitation for either the mentally retarded or the mentally ill. See *Donaldson v. O'Connor*, 422 U.S. 563 (1975) (vacating opinion by Court of Appeals for the Fifth Circuit establishing mental patient's due process right "to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." 493 F.2d 507, 520 (5th Cir. 1974)). The Court awarded *Donaldson* his freedom on much narrower grounds, holding that "a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." 422 U.S. at 576. Cases decided in the Fifth Circuit on the basis of its *Donaldson* opinion and before the Supreme Court decision, in particular *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), are still authoritative, however. See 446 F. Supp. at 1316 n.52.

There are two federal district court decisions that denied the existence of a right to habilita-

Medical theory is important in cases in this area⁴⁴ for two reasons: first, the proposition that the retarded are able to benefit from habilitation is the medical foundation for the existence of the right to habilitation; and second, the evolving medical theories about the capacities of the retarded and what is best for them affect the scope and content of the legal right. *Pennhurst* breaks new ground only on the second point.⁴⁵

Legal recognition of the right of the involuntarily committed mentally ill to treatment long preceded any attention to the plight of the similarly situated mentally retarded.⁴⁶ The first case to deal with the rights of the institutionalized mentally ill, *Rouse v. Cameron*,⁴⁷ was decided on statutory grounds, but the court stated in dictum that involuntary commitment of the mentally ill without treatment might well violate the constitutional provisions against cruel and unusual punishment and deprivation of due process and equal protection of the laws.⁴⁸

tion: *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974) (companion case to *Wyatt v. Aderholt*), *cert. denied*, 422 U.S. 1057 (1975); and *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973). In *New York State Association for Retarded Children*, the court found a constitutional right to freedom from harm that did not rise to the level of a right to treatment. *Id.* at 758, 762. Later, however, in approving a consent decree, the court appeared willing to modify that holding if necessary. *New York State Ass'n. for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715, 719 (E.D.N.Y. 1975).

The trend in the lower federal courts, however, clearly is toward recognition of the right to habilitation. This is a rapidly growing area of the law, characterized by test case litigation. See generally MENTAL RETARDATION AND THE LAW: A REPORT ON STATUS OF CURRENT COURT CASES, *supra* note 18.

44. The *Wyatt* court explicitly recognized the importance of expert medical testimony about "new concepts in the field of mental retardation." 344 F. Supp. 387, 391 n.7 (quoting testimony of Dr. Phillip Roos, Executive Director for the National Association for Retarded Children). In *Pennhurst* Judge Broderick relied heavily on statistics and studies concerning, *inter alia*, the deleterious effect of institutionalization on the retarded, 446 F. Supp. at 1311, and the employability of retardates in the community, *id.* at 1312. Many of the most important cases in this area have been characterized by substantial agreement between plaintiffs and defendants and their respective experts. See, e.g., *Wyatt v. Aderholt*, 503 F.2d 1305, 1314 (5th Cir. 1974); 446 F. Supp. at 1313, 1325. The *Wyatt* litigation was apparently conceived by plaintiffs and defendants together as a way to extract more money from the Alabama legislature for what both sides considered to be essentials of care and treatment. Right-to-habilitation cases often culminate in consent agreements, and the same expert witnesses appear in almost every case.

45. See text accompanying notes 67 & 77 *infra*. Habilitation is commonly defined in the institutional context, see note 3 *supra*, reflecting medical theory upon which the decision in *Wyatt* was based.

46. Legal recognition began with an article asserting a due process right to treatment on behalf of the civilly committed mentally ill. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 449 (1960). The author is a prominent New York City attorney and physician; his work produced an enormous response in the literature.

47. 373 F.2d 451 (D.C. Cir. 1966).

48. *Id.* at 453. This statement contains the basic components of most constitutional arguments for the right to treatment. The court also intimated that the right to treatment might be violated not only by the giving of no treatment but also by the giving of treatment inadequate in

Wyatt v. Stickney, several decisions with the same style concerning three institutions for the mentally ill and mentally retarded in Alabama, applied the due process right-to-treatment principle to the mentally retarded simply by substituting "habilitation" for "treatment." The *Wyatt* cases based the rights to treatment and habilitation on the due process clause, reasoning that civil commitment entails a massive curtailment of liberty⁴⁹ that is prohibited by due process unless justified by a permissible purpose.⁵⁰ For the mentally retarded that purpose is habilitation.⁵¹ The *Wyatt* decisions were directed at improving execrable conditions within Alabama institutions.⁵² To that end, the *Wyatt* court developed specific constitutional minima for both the institutions for the mentally ill and the institutions for the mentally retarded.⁵³ *Wyatt* also emphasized the importance of the normalization principle for the retarded:

Residents shall have a right to the least restrictive conditions necessary to achieve the purposes of habilitation. To this end, the institution shall make every attempt to move residents from (1) more to less structured living; (2) larger to smaller facilities; (3) larger to smaller living units; (4) group to individual residence; (5) segregated from the community to integrated into the community living; (6) dependent to independent living.⁵⁴

In addition to echoing *Wyatt's* due process right to habilitation under the least restrictive alternative, the later case of *Welsch v.*

light of present knowledge. See *id.* at 456-57. This inquiry necessitates the introduction of voluminous expert testimony which accordingly is extremely important in these cases.

49. 325 F. Supp. 781, 785 (M.D. Ala. 1972); *accord*, *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

50. 344 F. Supp. 387, 390 (M.D. Ala. 1972); *accord*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

51. "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." 325 F. Supp. 781, 785 (M.D. Ala. 1972).

52. See note 44 *supra*.

53. 344 F. Supp. 373, 379-86 (M.D. Ala. 1972) (Bryce and Searcy Hospitals for the mentally ill); 344 F. Supp. 387, 395-407 (M.D. Ala. 1972) (Partlow Hospital for the mentally retarded). The guidelines generally included, among many other things, minimum staff size, minimum necessary equipment, and limitations on use of restraints and drugs. They were intended by Judge Johnson to effectuate his three fundamental conditions for adequate and effective treatment at public institutions: (1) a humane psychological and physical environment, (2) qualified staff in sufficient number, and (3) individualized treatment plans. 334 F. Supp. 1341, 1343 (M.D. Ala. 1971). The Partlow guidelines were used by Judge Broderick in his evaluation of *Pennhurst*. 446 F. Supp. at 1303.

54. 344 F. Supp. 387, 396 app. (M.D. Ala. 1972). This invocation of the principle of the least restrictive alternative, *discussed in* note 29 and accompanying text *supra*, represents judicial acceptance of the developmental model for the mentally retarded, by recognizing a potential in the retardate for growth and improvement. *Mason & Menolascino, supra* note 1, at 149. It foreshadows to a large extent the decision in *Pennhurst*.

*Likins*⁵⁵ recognized that the institutionalized mentally retarded have broad eighth amendment rights: the right to be free from cruel and unusual punishment in the form of conditions and practices that shock the conscience,⁵⁶ and the right to "humane and safe living while confined under State authority."⁵⁷

Although these cases were great advances for the interests of the mentally retarded, they rested on the assumption that adequate habilitation could always be achieved within the institutional context.⁵⁸ Some recent cases recognize that for certain individuals, institutions can never provide adequate habilitation. These cases have held that some institutionalized retardates, depending on their individually determined needs, have the right to receive care in settings less restrictive than those offered by large institutions.⁵⁹ But *Pennhurst* is the first decision to find that a particular institution could not adequately serve the

55. 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part*, 550 F.2d 1122 (8th Cir. 1977).

56. *Id.* at 496. Detention for mere status (here, mental retardation), without treatment, is cruel and unusual punishment. This argument derives from *Robinson v. California*, 370 U.S. 660 (1962) (California law making it a crime to be narcotics addict violates eighth amendment).

57. This includes the freedom from harm, *see* *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); note 43 *supra*, and the right to exercise, outdoor activity, and basic hygiene, 373 F. Supp. at 502-03. The decree in *Welsch* was directed solely toward improvement of institutional facilities.

58. Although *Wyatt* and *Welsch* are significant in their recognition of the principles of normalization and the developmental model for the factual foundation of their formulation of the constitutional right to habilitation, their approach can be considered only the rudimentary beginning. The logic of normalization and the developmental model which *Wyatt* and *Welsch* recognize suggests full implementation of habilitation can only be achieved in a noninstitutional setting. Institutions, by their very structure—a closed and segregated society founded on obsolete custodial models—can rarely normalize and habilitate the mentally retarded citizen to the extent of community programs created and modeled upon the normalization and developmental approach components of habilitation. Neither *Wyatt* nor *Welsch* fully implemented the right to habilitation in that they failed to challenge the very existence of the institution. Consequently, the two institutional characteristics most antithetical to the application of the normalization principle remain intact: segregation from the community and the total sheltering of retarded citizens in all spheres of their lives.

Mason & Menolascino, *supra* note 1, at 156.

59. Plaintiff in *Horacek v. Exon*, 357 F. Supp. 71 (D. Neb. 1973), challenged, on equal protection grounds, the placement of some involuntarily committed mental retardates in institutions while others were placed in community-based facilities. *Mason and Menolascino*, *supra* note 1, at 164, contend that "the thrust of the *Horacek* complaint was the continued legitimacy of the institution" and that it was "aimed at dismantling the institution." The suit did not succeed in this aim.

Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975), was a class action brought by inmates of a mental hospital; the case was decided on statutory grounds, although plaintiffs also raised constitutional issues. The court held that the hospital had the duty to provide the least restrictive habilitative settings for its inmates, including noninstitutional community-based facilities. Although this decision was intended to entail a drastic reduction in the institutional population, the hospital itself was not placed in jeopardy. The court held: "[T]hese plaintiffs have a right to the treatment sought in this action where the Hospital has determined that such treatment is appropri-

needs of any of its residents, without regard to the severity of their handicaps. It has succeeded in shifting the focus of the habilitative effort from the institution to the community by declaring "institutions such as Pennhurst" incapable of providing minimally adequate habilitation for any mentally retarded persons.⁶⁰ Although essentially a straightforward endorsement of the principles of the previous cases, *Pennhurst*, by requiring closure of the institution, has, nevertheless, gone far beyond those cases. The opinion will undoubtedly have great impact, precipitating efforts to close other institutions and making possible right-to-habilitation litigation in noninstitutional contexts.

In the effort to close other institutions, future litigants will need to know why Pennhurst was closed and the extent to which the court's reasons are applicable to those other institutions. Judge Broderick simply held: "[O]n the basis of this record we find that minimally adequate habilitation cannot be provided in an institution such as Pennhurst."⁶¹ The reach of the holding, therefore depends upon what "an institution such as Pennhurst" is, an inquiry to which the opinion gives no clear answer.⁶²

It is arguable that the opinion should be read to condemn all public institutions. Certain of the characteristics that induced Judge Broderick to label Pennhurst constitutionally inadequate presumably are typical of most institutions. Indeed, commentators cited in the court's opinion identify certain common institutional characteristics that they believe should be fatal for any institution that possesses them. One article stresses the "segregation from the community and the total sheltering of retarded citizens in all spheres of their lives."⁶³ Another refers to "existing large-scale geographically remote institutions"⁶⁴ as the ones that must close. The *Pennhurst* opinion focuses on similar attributes that are inherent in the institutional setting and antithetical to ha-

ate." *Id.* at 978. The hospital had determined, however, that only 43% of the plaintiff class currently required care and treatment in alternate facilities.

60. 446 F. Supp. at 1318.

61. *Id.*

62. Interview with H. Rutherford Turnbull, Associate Professor, Institute of Government, University of North Carolina at Chapel Hill (September 8, 1978).

63. Mason & Menolascino, *supra* note 1, at 156-57, *quoted in* 446 F. Supp. at 1318.

64. Burt, *Beyond the Right to Habilitation*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 9, at 418, 427, 432 (1976) (footnote omitted), *quoted in* 446 F. Supp. at 1321:

[E]xisting large-scale geographically remote institutions cannot by their nature provide adequate programs to remedy the intellectual and emotional shortcomings and the galling social stigma that led the retarded residents to these institutions. . . . A powerful case can thus be mounted that courts should command states to use extraordinary effort to avoid institutionalizing retarded citizens.

bilitation: lack of privacy, enforced conformity to a rigid schedule, isolation from normal society, confinement, and group living.⁶⁵ None of these, however, is specifically identified as a decisive factor.

The court also devotes much of the opinion to the gross deficiencies in staffing, equipment, and funding at Pennhurst. Although courts in earlier cases, like *Wyatt* and *Welsch*, chose to cure, not close, institutions with similar problems, the presence or absence of such defects should not bear on the closure question.⁶⁶ Clearly these particular defects could have been remedied less drastically than by institutional closure.

Because it appears, therefore, that closure was mandated by characteristics inherent in the institution, *Pennhurst* plainly represents initial judicial recognition of the medical community's realization that application of the normalization principle demands less restrictive settings than can be achieved within the confines of traditional residential institutions.⁶⁷ *Pennhurst* has not, however, made plain what combination of inherent characteristics add up to a defective institution. Therefore, case-by-case adjudication must in the future determine whether a given institution is enough like Pennhurst to invite the Pennhurst remedy. Because of the wide range of institutional and community care models that exists, there is enormous potential for such future litigation; *Pennhurst* may therefore be a long way from "sound[ing] the death knell for institutions for the retarded."⁶⁸

65. See, e.g., 446 F. Supp. at 1303, 1319.

66. There was some testimony at trial that it would be cheaper to close Pennhurst than to cure it, see 446 F. Supp. at 1312, but this is certainly not the rationale for the court's decision. Nor is the argument that plaintiffs would accept nothing less than the closing of the institution, see Ferleger, *supra* note 18, at 29, sufficient, since Judge Broderick was not bound by their demands.

67. Mason & Menolascino, *supra* note 1, at 146.

68. Ferleger, *supra* note 18, at 28 (quoting statement of Judge Broderick made at trial). Frank Laski, an attorney for Pennsylvania Association for Retarded Citizens in the *Pennhurst* litigation, disagrees. Pointing out that a study for the President's Committee on Mental Retardation ranked Pennsylvania one of the top states in efforts to provide better institutional care, he reasons, "While there certainly are some mental retardation facilities that could claim some improvement over Pennhurst, they are not improvements that make a difference, and none can avoid the equal protection implications of the *Pennhurst* decision and order." He names some characteristics, essentially those named by Judge Broderick, that are significantly more prevalent in institutions than in group homes, and concludes:

While there are important implications in the *Pennhurst* opinion and order for all large-scale, segregated institutions housing disabled persons, it is necessary to keep in mind that the decision and order are based on a factual record about a *single mental retardation* institution, and the application of the law of the case depends entirely on the similarity of the institution in question to Pennhurst and the ability to establish the central factual foundation that was established in the *Pennhurst* case, i.e., that no one need be kept there, and that given less restrictive arrangements (community facilities), all could live in the community. On this analysis the direct implication of *Pennhurst* is

As the first decision to close an institution and mandate the creation of community care facilities for all its residents, *Pennhurst* will invariably produce future litigation seeking to secure the right to minimally adequate habilitation for residents, not of institutions, but of community care facilities.⁶⁹ *Pennhurst* does not reach this issue, because it, like all previous cases, is concerned only with an already institutionalized population. Moreover, the court's narrow holding implies limitations on the right to habilitation that, although not inappropriate in the past, could make the right difficult to apply in noninstitutional settings.

The court states its holding as follows: "[W]hen a state involuntarily commits retarded persons it must provide them with such habilitation as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit."⁷⁰ The first problem with applying this holding to the noninstitutional setting is that it is stated in terms of commitment. Since commitment in the earlier cases was always to a *Pennhurst*-like institution, commitment became equated with institutionalization.⁷¹ And because all the institutionalized plaintiffs had been deprived of many fundamental rights by civil commitment, the right to habilitation was always characterized as contingent upon the threat of severe deprivation of liberty.⁷² Thus, placement in a community facility might be construed as not involving commitment with consequent loss of liberty sufficient to give rise to a right to habilitation.⁷³ Realistically, of course, the requirement that the right to habilitation be implemented in community care facilities assumes the existence of the right for persons

clear: it sounds the death knell for *all public mental retardation* institutions in the country.

Laski, *Right to Services in the Community: Implications of the Pennhurst Case*, HEALTH L. PROJECT LIB. BULL., May 1978, at 1, 5-7.

69. "It would be naive to think that community programs will escape the problems that plagued [institutions]." Halpern, *The Right to Habilitation*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 9, at 401 (1976).

70. 446 F. Supp. at 1317-18.

71. Retardates can of course be committed to foster homes and other community care facilities, in addition to the more common institutional commitment. P. FRIEDMAN, *THE RIGHTS OF MENTALLY RETARDED PERSONS: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK* 31 (1976).

72. See notes 49 & 50 and accompanying text *supra*; 446 F. Supp. at 1315.

73. The danger might become particularly acute when no institutions exist as alternatives to community care. Before *Pennhurst* an individual committed to a community facility had the right to habilitation because the mere existence of the institution, to which he could be committed at any time, represented a significant threat to his liberty. After this decision, however, a committed person potentially no longer faces even the threat of institutionalization, since the institution may no longer exist.

in those facilities. Nevertheless, the traditional narrow formulation of the right upon which *Pennhurst* relies is not without potential for "unrealistic" challenges based upon the application of its language to new settings.

The court's holding also refers only to involuntary, as opposed to voluntary, commitment, thereby placing another potential limitation on the applicability of *Pennhurst*. Some courts have held that the freedom to leave an institution at any time (an attribute of voluntary commitment at least in theory) eliminates the need for a right to habilitation by giving the retardate power to restore at will his lost liberty. Ways were therefore devised to equate the voluntarily with the involuntarily committed, in order to secure for the voluntarily committed protection of the right.⁷⁴ These devices have been so consistently used in the past that any distinction between voluntary and involuntary commitment ought for these purposes simply to be eliminated.

In dictum, the *Pennhurst* opinion refers to the right to habilitation in broader terms than used in its holding. This broader statement of the right avoids the potential problem areas in the court's specific formulation of its holding. The court stated, "[W]henever a state accepts retarded individuals into its facilities it cannot create or maintain those facilities in a manner which deprives those individuals of the basic necessities of life."⁷⁵ This formulation, by avoiding the involuntary commitment language, requires that mere acceptance of the retardate into the state's hands triggers the right to habilitation, regardless of the amount of deprivation afforded by different kinds of care and regardless of the involuntary or voluntary cooperation of the retardate. In addition, the right as so stated is applicable to all state facilities, thus making plain that the right to habilitation exists for those in community care even after the closing of the institution has eliminated the

74. One device, used by the court in *Wyatt*, is to assume that all residents are in the institution involuntarily, leaving the burden on defendants to show that some are there voluntarily. 344 F. Supp. 387, 390 n.5 (M.D. Ala. 1972). Another is to establish the right to habilitation for involuntarily committed retardates and then extend the right to voluntarily committed inmates of the same institution on an equal protection basis. Halpern, *supra* note 69, at 396; Mason & Menolascino, *supra* note 1, at 158; Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 153-61 (1972). *Pennhurst* employed two strategies. One was to argue that, practically speaking, there is no such thing as voluntary commitment, because (1) few retardates make the choice themselves—rather, their parents make the choice for them, and (2) even could they themselves choose institutionalization, the absence of alternative placements or community facilities seriously compromises the true voluntariness of such commitments. 446 F. Supp. at 1310-11, 1318. The other strategy was the broad statement of the habilitation right, avoiding the use of the involuntary-voluntary distinction. *Id.* at 1318.

75. 446 F. Supp. at 1318. Judge Broderick emphasized that for the retarded the necessities include minimally adequate habilitation.

threat of institutionalization. And because it does not mention commitment at all, but rather makes the right to habilitation contingent only upon acceptance, the broader formulation provides that the existence of the right is not affected by the exercise of the state's commitment function.⁷⁶ The *Pennhurst* holding was designed for a system of treatment through involuntary commitment, because no more was required under the facts of the case; the broader statement, however, may protect all those in the care of the state, even after future changes in treatment theories, facilities, and practices.⁷⁷

Even if *Pennhurst's* broad statement in dictum of the right to habilitation were taken as authoritative, the decision would not establish the right as constitutionally fundamental. The court states firmly, "No constitutional mandate has been called to our attention which would require a state to provide habilitation for its retarded citizens."⁷⁸ Just as education is not a fundamental right,⁷⁹ and its provision is a duty voluntarily undertaken by the state, so is the provision of facilities for the retarded. Yet the right to habilitation seems no less secure than the right to public education—and as states are not likely to close their schools, neither are they likely to close their community facilities.⁸⁰

The *Pennhurst* decision is likely to be upheld on appeal.⁸¹ The

76. Judge Broderick is opposed to commitment: "[T]his Court entertains serious doubts as to whether retarded individuals should ever be subjected to 'commitment' . . ." *Id.* at 1315.

According to the court's narrow holding, if a state were to discontinue this commitment function, the right of habilitation would no longer exist. This is consistent with the notion that commitment, even to a noninstitutional setting, entails some degree of pervasive and continuing state control over the individual, including power over choice of facility and restriction of the freedom to leave. Acceptance, on the other hand, seems to be offered as a more neutral term, perhaps meaning merely the state's assumption of care.

77. The difficulty of separating medical from legal issues arises because it is the emerging task of science to define the limits of the retardate's humanity for constitutional purposes; people of ordinary intelligence had that done for them long ago, before anyone was worried about scientific implementation of the guarantees of a free society.

78. 446 F. Supp. at 1318. The court relied on *Welsch*, which asserted: "The State is not constitutionally obligated to provide services to its citizens," 373 F. Supp. at 498, and added: "It is not disputed that the State could close its institutions for the mentally retarded without offending the Constitution." *Id.* at 499.

79. "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

80. Murdock, *supra* note 74, at 161, points out that often the state has undertaken to provide for the mentally retarded under its *parens patriae* power because of the recognized inability of the private sector to do so. This is especially true since decisions like *Pennsylvania Association for Retarded Children* and *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), see note 33 *supra*, have highlighted the importance of educational and other opportunities for the retarded.

81. See generally note 25 *supra*. It is not unlikely, however, that its most interesting argument, the equal protection basis for the right to habilitation, will not survive. Essentially, the equal protection argument depends on recognition of mental retardation as at least a semisuspect

practical results of the decision will not, of course, be apparent for some time, given the enormous problems in implementing the complicated orders issued in right-to-habilitation decisions.⁸² *Pennhurst's* importance, however, lies in its potentially broad application in future litigation more than in its results for the particular institution. First, and least controversially, *Pennhurst* is another in a growing number of cases recognizing the institutionalized retardates' right to habilitation. Second, it provides authority for a new means of achieving habilitation—complete closure of the institution and substitution of community care facilities—based upon judicial recognition of changes in medical theory about what constitutes minimally adequate habilitation for the retarded. *Pennhurst* will undoubtedly be a potent and often-used weapon for the institutionalized retarded; however, because it is not a precisely formulated decision, it may not be a weapon easy to wield. And finally, *Pennhurst* at least begins a redefinition of the circumstances giving rise to the right to habilitation. Such a redefinition is necessary to establish the applicability and scope of the right to habilitation in the noninstitutional contexts that will be created by the condemnation of institutions and the consequent widespread establishment of community facilities. Because *Pennhurst* serves not only as a blueprint for future litigation but as a warning about the constitutionality of future provision of facilities for the mentally retarded, its influence ought to be far-reaching.

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Tort Law—*Norton v. United States*: Federal Government's Liability Coterminous with That of Its Agents Under Federal Tort Claims Act Amendment

Prior to the 1970's a United States citizen had no remedy against the United States Government or individual federal law enforcement

classification requiring heightened judicial scrutiny, *see, e.g.*, Mason & Menolascino, *supra* note 1, at 160-64; this intermediate scrutiny in equal protection cases is not yet an established test.

82. *See, e.g.*, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). Most of the important cases are all still struggling with implementation and challenge of their courts' orders. *See generally* MENTAL RETARDATION AND THE LAW: A REPORT ON STATUS OF CURRENT COURT CASES, *supra* note 18; cases cited note 59 *supra*.