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# Mental Health - Mentally Retarded Have a Right to Habilitation in the Least Restrictive Environment Possible

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## MENTAL HEALTH—MENTALLY RETARDED HAVE A RIGHT TO HABILITATION IN THE LEAST RESTRICTIVE ENVIRONMENT POSSIBLE.

*Halderman v. Pennhurst State School & Hospital* (1979)

On May 30, 1974, Terri Lee Halderman, a retarded resident of Pennhurst State School and Hospital (Pennhurst)[1] initiated a class action[2] on behalf of herself and other Pennhurst residents against Pennhurst, its superintendent, and various Pennsylvania state and county officials who were responsible for supervising the Commonwealth's and the counties' retarda-

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1. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1300 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *cert. granted*, 100 S. Ct. 2984 (1980). Now known as Pennhurst Center, Pennhurst is an institution owned and operated by the Commonwealth of Pennsylvania for the education, training, and care of the Commonwealth's mentally retarded residents. 446 F. Supp. at 1298. Located in Spring City, Pennsylvania, Pennhurst housed 1,230 mentally retarded persons at the time of trial. *Id.* at 1302. The district court found that, since its founding in 1908, Pennhurst "has been overcrowded and understaffed." *Id.* Moreover, defendants admitted at trial that, even though Pennhurst had undergone "tremendous improvement" in recent decades, it still did not "meet minimum standards for the habilitation of its residents." *Id.* The district court further found that

> [a]t its best, Pennhurst is typical of large residential state institutions for the retarded. These institutions are the most isolated and restrictive settings in which to treat the retarded. Pennhurst is almost totally impersonal. Its residents have no privacy—they sleep in large, overcrowded wards, spend their waking hours together in large day rooms and eat in a large group setting. They must conform to the schedule of the institution which allows for no individual flexibility.

*Id.* at 1303 (footnote and citations omitted). According to the trial court,

> [m]ental retardation, by definition, is an impairment in learning capacity and adaptive behavior. Retardation is wholly distinct from mental illness. Retarded individuals, just as other members of society, may suffer from mental illness. Mental retardation is primarily an educational problem and not a disease which can be cured through drugs or treatment. However, with proper habilitation, the level of functioning of every retarded person may be improved.

*Id.* at 1298 (footnotes and citations omitted). The district court also stated that " '[h]abilitation' is the term of art used to refer to that education, training and care required by retarded individuals to reach their maximum development." *Id.* *See* note 20 and accompanying text *infra*.

2. 446 F. Supp. at 1298. The certified plaintiff class included all retarded persons who, as of May 30, 1974, either have been, are, or may become residents of Pennhurst and all persons residing in the five southeastern Pennsylvania counties who either are on waiting lists for placement at Pennhurst, or, "because of the unavailability of alternate services in the community, may be placed at Pennhurst . . . ." *Id.* at 1300. *See* note 94 and accompanying text *infra*.

The complaint charged that the conditions to which the residents were subjected at Pennhurst violated the class members' rights to habilitation under both state, *see* PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969), and federal, *see* 42 U.S.C. § 794 (1976); 42 U.S.C. §§ 1983, 1986, 6010 (1976), statutes as well as their rights under the first, eighth, ninth, and fourteenth amendments to the United States Constitution. 446 F. Supp. at 1300. *See* notes 9-10 and accompanying text *infra*. The plaintiffs sought "both damages and broad equitable relief including the closing of Pennhurst, and mandating that the defendants provide them with education, training and care in their respective communities." 446 F. Supp. at 1300. For a discussion of the conditions at Pennhurst and the injuries suffered by the plaintiffs, *see* notes 4-8 and accompanying text *infra*.

The United States, the Pennsylvania Association for Retarded Citizens, the Parents and Family Association of Pennhurst, and several mentally retarded residents of Pennhurst subsequently moved to intervene. 446 F. Supp. at 1301.

tion programs.[3] The complaint alleged that the Pennhurst residents lived in inhumane and dangerous conditions[4] and were subjected to unnecessary physical restraints[5] and dangerous medication.[6] The complaint further alleged that Pennhurst residents suffered numerous physical injuries resulting from a lack of adequate supervision.[7] Moreover, the plaintiffs asserted that inadequate habilitative programs condemned the Pennhurst residents to

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3. 446 F. Supp. at 1301-02. The plaintiffs sought relief against five counties in southeastern Pennsylvania which, pursuant to the Pennsylvania Mental Health and Mental Retardation Act, operate Base Service Units (BSU's) which arrange for the admission of the counties' mentally retarded citizens to Pennhurst and are responsible for evaluating the needs of the retarded individuals and determining the appropriate habilitative services. *Id.* at 1313. Admission to Pennhurst is arranged through these BSU's on the basis of either a commitment order from a state court or a voluntary admission initiated by a parent or guardian. *Id.* at 1310, 1313.

In their complaint, the plaintiffs sought access to local facilities within each county, called Community Living Arrangements (CLA's), which they claimed the county defendants had denied them. *See* note 2 *supra*; note 68 *infra*. The district court found that the counties had "a financial incentive to send their retarded to Pennhurst rather than provide them with habilitation within the community" since the Commonwealth paid 100% of the costs incurred in the habilitation of an individual placed in Pennhurst, whereas each county had to pay 10% of the costs if the individuals received services within that community. 446 F. Supp. at 1312. The court also found that the five county defendants were not in compliance with the Commonwealth's CLA policy that "at least 50% of the residents for these living facilities must be drawn from institutions" such as Pennhurst. *Id.* at 1313. The district court further noted that, "[a]lthough the Pennsylvania Department of Public Welfare, Pennhurst staff and county officials are in complete agreement that the residents of Pennhurst should be transferred as soon as practicable to appropriate community facilities, apparently no one has taken the initiative to accomplish this objective." *Id.* (citation omitted).

4. 612 F.2d at 88. The district court found

> [t]he physical environment at Pennhurst [to be] hazardous to the residents, both physically and psychologically. There [was] often excrement and urine on the ward floors, and the living areas [did] not meet minimal professional standards for cleanliness. Outbreaks of pinworms and infectious disease [were] common. . . .
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> Moreover, most toilet areas [did] not have towels, soap or toilet paper, and the bathroom facilities [were] often filthy and in a state of disrepair. Obnoxious odors and excessive noise permeate[d] the atmosphere at Pennhurst. . . . Moreover, the noise level in the day rooms [was] often so high that many residents simply stop[ped] speaking.
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> . . . .
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> Injuries to residents by other residents, and through self-abuse, [ were] common. . . . In January, 1977 alone, there were 833 minor and 25 major injuries reported.

446 F. Supp. at 1308-09 (citations and footnotes omitted). The court also found evidence that serious injuries inflicted by staff members, including sexual assaults, had occurred. *Id.* at 1309.

5. 612 F.2d at 88. The district court found that "[p]hysical restraints are potentially physically harmful and can create conditions in which physical injuries are more likely to occur, and prevent residents from learning or exercising self-care skills." 446 F. Supp. at 1307 (citations and footnote omitted). However, the court also found that "[a]t Pennhurst, restraints . . . [were] used as control measures in lieu of adequate staffing." *Id.* at 1306 (footnote and citations omitted). Moreover, the court determined that seclusion in solitary confinement had been used to punish "aggressive behavior" which might not have occurred had a proper regimen of training been available. *Id.*

6. 612 F.2d at 88. At trial, the court found that dangerous psychotropic drugs had been used for behavior control and not for treatment. 446 F. Supp. at 1307. Moreover, one witness testified "that the drug practice at Pennhurst . . . [did] not meet minimally professional standards and . . . [was] physically hazardous to the residents." *Id.* at 1308 (citation omitted).

7. 612 F.2d at 89. *See* notes 4-6 and accompanying text *supra*. *See also* note 8 and accompanying text *infra*.

lives of idleness, causing them to regress emotionally, intellectually, and physically.[8]

The district court found that the defendants had violated the plaintiffs' federal and state statutory rights to minimally adequate and nondiscriminatory habilitation[9] as well as their federal constitutional right to such habilitation under the least restrictive means possible.[10] In its decree, the court ordered that Pennhurst must eventually be closed and directed that, in the interim, the Commonwealth defendants must sanitize it and take steps to prevent the recurrence of some of the more egregious abuses of the residents.[11] The court further ordered a special master to supervise the individualized removal of the Pennhurst residents to appropriate community-based mental retardation programs.[12]

On appeal, the United States Court of Appeals for the Third Circuit, sitting en banc,[13] affirmed the district court's finding that the plaintiffs' rights had been violated[14] but modified the district court's decree in part,[15] *holding* that the residents of Pennhurst have a right to habilitation under both federal[16] and state[17] statutes as well as a federal statutory right to live

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8. 612 F.2d at 88-89. According to the trial court, the defendants "admitted that the inadequacies in programming at Pennhurst . . . [were] directly attributable to staff shortages." 446 F. Supp. at 1304. For a discussion of physical deterioration and intellectual and behavioral regression in regard in individual cases, *see id.* at 1309-10.

9. 446 F. Supp. at 1322-25. The court found that the rights of the retarded at Pennhurst under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), and under the Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969), had been and were being violated. 446 F. Supp. at 1322-25. *See* note 2 *supra*. However, the court did not reach the question of the defendants' possible liability under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (1976). *Id. But see* notes 51-54 and accompanying text *infra*.

10. 446 F. Supp. at 1319. *See* notes 36-50 and accompanying text *infra*. The court also found that the plaintiffs' constitutional right to be free from harm had been violated and that they were being denied equal protection of the law as guaranteed by the fourteenth amendment. 446 F. Supp. at 1320-22. *See* note 2 *supra*.

11. 446 F. Supp. at 1326, 1328-29. The court issued its decree after it had been informed by the parties that they had not been able to agree among themselves on an order. *See* 612 F.2d at 90.

12. 446 F. Supp. at 1326-28. The court's order required the special master to prepare "[a] plan specifying the quantity and type of community living arrangements and other community services necessary for the habilitation of all plaintiffs in the least separate, most integrated, least restrictive community setting." *Id.* at 1326-27. *See also* notes 92-95 and accompanying text *infra*; note 98 *infra*. The order also enjoined the county defendants from recommending future commitments of mentally retarded persons to Pennhurst and forbade the Commonwealth defendants from placing additional persons there. 446 F. Supp. at 1327-28.

13. The Third Circuit heard arguments en banc after the panel, which had originally heard the arguments, could not produce a single opinion which commanded majority support. 612 F.2d at 90. Judge Gibbons wrote the majority opinion. Chief Judge Seitz, joined by Judges Aldisert and Hunter, dissented.

14. *Id.* at 116. The district court had entered judgment in favor of the defendants on the plaintiffs' claim for money damages and no appeal was taken from that determination. *Id.* at 90 n.4.

15. *Id.* at 116. *See* note 65 *infra*.

16. 612 F.2d at 100.

17. *Id.* at 103.

in the least restrictive environment possible.[18] The court remanded the case for individual determinations by the district court or the special master regarding those residents for whom institutionalization at an improved Pennhurst might be appropriate.[19] *Halderman v. Pennhurst State School & Hospital,* 612 F.2d 84 (3d Cir. 1979) (en banc), *cert. granted,* 100 S. Ct. 1984 (1980).

The United States Supreme Court has not specifically decided whether mentally ill or mentally retarded persons have a constitutional right to treatment or habilitation.[20] The overwhelming weight of legal authority, however, indicates that, at least insofar as involuntarily confined mental patients are concerned, there exists on some basis[21] a "constitutional right to receive such treatment as will give them a reasonable opportunity to be cured or to improve [their] mental condition." [22]

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18. *Id.* at 107. *See* notes 51-54 & 60-61 and accompanying text *infra*; note 87 *infra*. *See also* notes 9-10 and accompanying text *supra*.

19. 612 F.2d at 114.

20. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975). The *Donaldson* Court held that a state "cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of [others]." *Id.* at 576. The Court found it unnecessary to decide "the difficult issues of constitutional law . . . whether mentally ill persons dangerous to themselves or others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment." *Id.* at 573.

The petitioner in *Donaldson* was not retarded but was allegedly suffering from "paranoid schizophrenia." *Id.* at 565. When dealing with the mentally *retarded*, the concern is for "habilitation," whereas the concern is for "treatment" when dealing with the mentally *ill*. *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. at 1314. It is important to note that

> [t]he use of the concept "habilitation" instead of "treatment" in the context of mental retardation reflects an awareness that "mental illness" is not synonymous with "mental retardation." Mental illness concerns an inability to cope with one's environment regardless of intellectual level. Mental illness can occur at any stage of life while mental retardation is considered to be a developmental disability beginning in the early years.

Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124, 147 n.72 (1976). Although the concepts of "habilitation" and "treatment" are separate and distinct, in dealing with the question of the right of the retarded to adequate habilitation, the district court in *Pennhurst* noted that those cases which deal with the right to treatment of the mentally ill should be considered to the extent to which they are applicable. 446 F. Supp. at 1314. One court has noted that "[i]n the context of the right to appropriate care for people civilly confined to public mental institutions, no viable distinction can be made between the mentally ill and the mentally retarded." Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972), *aff'd in part, rev'd in part, and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

21. *See* notes 23-31 & 36-41 and accompanying text *infra*.

22. Wyatt v. Stickney, 325 F. Supp. 781, 784, *enforced*, 334 F. Supp. 1341 (M.D. Ala. 1971), *supplemented*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part, and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (federal constitution guarantees persons civilly committed to state mental institutions a right to treatment which can be implemented through judicially manageable standards). *See also* Parham v. J.R., 442 U.S. 584 (1979) (due process of law requires neutral factfinder to determine whether statutory requirements for admission of child to state mental facility are satisfied); O'Connor v. Donaldson, 422 U.S. 563 (1975) (state violates respondent's constitutional right to liberty where it confines, without more, nondangerous respondent capable of surviving safely in freedom by himself or with help of others); Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977)

A mentally ill person's right to treatment was first recognized in *Rouse v. Cameron*.[23] In finding that the petitioner, who had been involuntarily and summarily committed, had a federal statutory "right to treatment,"[24] the *Rouse* court, through Judge Bazelon, identified four constitutional arguments to support such a right.[25] The first two arguments suggest that treatment ought to be made available in order to compensate the petitioner—as a "quid pro quo"—for the lack of procedural due process,[26] and equal protection of the laws,[27] attendant with summary commitment. With respect to the third argument, Judge Bazelon noted that indefinite confinement without treatment for a person who has not been convicted of a crime "may be so inhumane as to be 'cruel and unusual punishment' " in violation of the eighth amendment.[28] Finally, focusing upon the fact that the petitioner's confinement was to continue only as long as his need for treatment persisted, Judge Bazelon reasoned that, by failing to supply the petitioner with treatment, the hospital authorities were prolonging his confinement for a period which was already longer than he would have been

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(mentally retarded involuntarily committed to state institutions have federal constitutional right to treatment); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) (en banc) (mentally ill petitioner has federal constitutional right to treatment in least restrictive environment possible); Evans v. Washington, 459 F. Supp. 483 (D.D.C. 1978) (mentally retarded have federal constitutional right to be free from harm); Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976) (mentally retarded have constitutional right to treatment).

23. 373 F.2d 451 (D.C. Cir. 1966). *Rouse* involved a habeas corpus proceeding in which the petitioner attacked his confinement to a mental hospital where he had been involuntarily and summarily committed under a District of Columbia statutory provision. *Id.* at 452. The petitioner had been automatically committed to the mental hospital after he had been found not guilty of carrying a dangerous weapon by reason of insanity. *Id. See generally*, Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960).

24. 373 F.2d at 453. The court based this right to treatment upon the Hospitalization of the Mentally Ill Act of 1964. *Id. See* D.C. CODE ANN. § 21-562 (1973).

25. 373 F.2d at 453.

26. *Id.* The *Rouse* court stated:

> Lack of improvement raises a question of procedural due process where the commitment is under D. C. Code section 24-301 rather than under the civil commitment statute, for under 24-301 commitment is summary, in contrast with civil commitment safeguards. It does not rest on any finding of present insanity and dangerousness but, on the contrary, on a jury's reasonable doubt that the defendant was sane when he committed the act charged. Commitment on this [summary] basis is permissible because of its humane therapeutic goals.

*Id.* However, on examination of the quid pro quo theory in a subsequent case, Chief Justice Burger could not discern a "basis for equating an involuntarily committed mental patient's unquestioned constitutional right not to be confined without due process of law with a constitutional right to *treatment*." O'Connor v. Donaldson, 422 U.S. 563, 587-88 (1975) (Burger, C.J., concurring) (emphasis in original). Chief Justice Burger seemed to suggest that "strict standards of proof or periodic redetermination of a patient's condition" in cases of civil confinement would be sufficient to protect the patient's rights. *Id.* at 587 (Burger, C.J., concurring).

27. 373 F.2d at 453. Judge Bazelon noted the suggestion "that a failure to supply treatment may violate the equal protection clause." *Id.*

28. *Id. See* U.S. CONST. amend. VIII. The United States Supreme Court has held that the fourteenth amendment makes the eighth amendment applicable to the states, and that punishment for nonviolent *status* offenses is a violation of the eighth amendment, thus expressly mandating civil commitment and treatment, rather than criminal confinement, for such offenses. *See* Robinson v. California, 370 U.S. 660 (1962) (narcotics addict entitled to treatment).

confined had he been convicted and served a prison sentence, thereby depriving him of substantive due process.[29]

Federal courts have drawn on the substantive due process argument in holding that involuntary confinement must be justified by a legitimate state purpose.[30] Accordingly, if the purported purpose of confinement is the need for treatment or, by analogy, habilitation, then the state has an obligation to treat or habilitate confined persons.[31]

The need for treatment, however, has not been the sole ground for civil commitment: historically, danger to oneself and danger to others have also served to justify commitment.[32] Given the notion that the nature of the

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29. 373 F.2d at 453.

30. *See, e.g.*, Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds and remanded*, 422 U.S. 563 (1975) (civil commitment involves deprivation of liberty which must be justified in terms of permissible governmental goal in order to comport with substantive due process); Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976) (involuntary institutional confinement is a massive deprivation of liberty which must be justified by permissible governmental interest). *See also* note 31 and accompanying text *infra*.

In his seminal work on the subject, Dr. Morton Birnbaum proposed

> that the courts under their traditional powers to protect the constitutional rights of our citizens begin to consider the problem of whether or not a person who has been institutionalized solely because he is sufficiently mentally ill to require institutionalization for care and treatment actually does receive adequate medical treatment so that he may regain his health, and therefore his liberty, as soon as possible, that the courts do this by means of recognizing and enforcing the right to treatment, and that the courts do this independent of any action by any legislature, as a necessary and overdue development of our present concept of due process of law.

Birnbaum, *supra* note 23, at 503.

31. *See* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (treatment and habilitation); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds and remanded sub nom.* O'Connor v. Donaldson, 422 U.S. 563 (1975) (treatment); Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (treatment), Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976) (habilitation); Woe v. Matthews, 408 F. Supp. 419 (E.D.N.Y. 1976), *remanded in part and dismissed in part sub nom.* Woe v. Weinberger, 556 F.2d 563 (2d Cir. 1977) (treatment); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974) (treatment); Saville v. Treadway, 404 F. Supp. 430 (M.D. Tenn. 1974) (habilitation); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part, and remanded in part*, 550 F.2d 1122 (8th Cir. 1977) (habilitation). *But see* Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975).

*See also* Wyatt v. Stickney, 344 F. Supp. 387, 391 (M.D. Ala. 1972), *aff'd in part, rev'd in part, and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *Wyatt* was the first case to apply the right to treatment rationale to the mentally retarded. Having determined in its earlier consideration of the case that persons involuntarily committed to mental institutions have a right to treatment, the *Wyatt* court felt compelled to extend an analogous right to the mentally retarded. 344 F. Supp. at 390. *See* Wyatt v. Stickney, 325 F. Supp. 781, *enforced*, 334 F. Supp. 1341 (M.D. Ala. 1971), *supplemented*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part, and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). Since 1972, a number of courts have followed *Wyatt* and have held that mentally retarded persons confined in state-run institutions have a constitutional right to habilitation. *See, e.g.*, Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976); Saville v. Treadway, 404 F. Supp. 430 (M.D. Tenn. 1974); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part, and remanded in part*, 550 F.2d 1122 (8th Cir. 1977). In each of these cases, the court either concluded or assumed that the state could provide the necessary habilitation in an institutional setting. *See, e.g.*, Gary W. v. Louisiana, 437 F. Supp. at 1217-19.

32. Jackson v. Indiana, 406 U.S. 715, 737 (1972) (criminal defendant, confined under more lenient commitment standard and subject to more stringent standard of release than generally applicable, deprived of equal protection).

confinement of mental patients ought to bear some reasonable relationship to its purpose,[33] the substantive due process argument has been criticized as being an improper rationale for the rights to treatment and habilitation[34] since it cannot accommodate an indefinite confinement which is justified by these two latter, purely protective, grounds for commitment.[35]

The least restrictive alternative theory supports "a right to superior, individual treatment for virtually all committees."[36] This theory was first expressed, again by Judge Bazelon, in *Lake v. Cameron*,[37] in which a sixty-year-old woman had been institutionalized after being deemed unable to care for herself.[38] In appealing her commitment, the petitioner did not contest the legality of the decision to impose treatment; rather, she argued that more appropriate treatment was available in a setting which was less restrictive than the "confinement" of the mental hospital.[39] Remanding the case for consideration of alternative courses of treatment,[40] Judge Bazelon

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33. *See id.* at 738. *See also* note 35 *infra*.

34. *See* Spece, *Preserving The Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1, 12-15 (1978). Although each of the constitutional arguments for a right to treatment or habilitation have, in one form or another, been successfully employed, there is some dispute as to whether these theories really present a logical and precedentially sound basis for the right. *Id.* For those cases in which a constitutional right to treatment or habilitation has been recognized, *see* note 31 *supra*.

35. *See* Spece, *supra* note 34, at 15. At least one court, in a jurisdiction which recognizes a right to treatment, has avoided the problem of having to justify the deprivation of due process which results from purely protective confinement by reasoning that treatment is the only valid purpose for which a person may be confined. Wyatt v. Stickney, 325 F. Supp. 781, 784-85, *enforced*, 334 F. Supp. 1341 (M.D. Ala. 1971), *supplemented*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part, and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

36. Spece, *supra* note 34, at 47. *See also*, Hoffman & Foust, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses*, 14 SAN DIEGO L. REV. 1100 (1977).

37. 364 F.2d 657 (D.C. Cir. 1966) (en banc).

38. *Id.* at 658. The petitioner in *Lake* suffered from a chronic brain syndrome. *Id.*

39. *Id.* at 659.

40. *Id.* at 661. Judicial inquiry into such alternatives has prompted considerable debate as to whether the courts are "equipped to carry out the broad . . . inquiry proposed or to resolve the social and economic issues involved." *Id.* at 663 (Burger, J., dissenting). *Accord*, Department of Health & Rehab. Serv. v. Owens, 305 So. 2d 314 (Fla. Dist. Ct. App. 1974). *See also* State v. Sanchez, 80 N.M. 438, 457 P.2d 370 (1969), *appeal dismissed*, 396 U.S. 276 (1970) (quoting dissent in *Lake*). Similarly, a district court has suggested that the judiciary is not sufficiently knowledgeable to choose a less restrictive alternative from among various treatment options and that, therefore, the decision should be left to the professional judgment of clinicians. J.R. v. Parham, 412 F. Supp. 112, 139 (M.D. Ga. 1976), *rev'd and remanded on other grounds*, Parham v. J.R., 442 U.S. 584 (1979). Moreover, it is also questionable whether the courts are able to strike a proper balance between the clinical expertise and therapeutic interests on the one hand, and judicial expertise and individual liberties on the other. *Compare* United States v. Ecker, 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977) (court conducted de novo review in light of expert testimony) *with* Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part, and remanded in part*, 550 F.2d 1122 (8th Cir. 1977) (state need only make good faith attempt to place person in appropriate setting).

Having struck such a balance and having found that a less restrictive environment is appropriate for a mental patient, courts are frequently thwarted in the enforcement of their orders

held that "[d]eprivations of liberty solely because of dangers to ill persons themselves should not go beyond what is necessary for their protection."[41]

A number of states have enacted statutes which provide a right to treatment for the residents of their state mental institutions.[42] In Pennsylvania, the Mental Health and Mental Retardation Act of 1966 (MH/MR Act)[43] established that the Department of Public Welfare must "assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all people who need them."[44] The MH/MR Act provides for a division of responsibility between the Commonwealth and the counties for the care of the state's mentally retarded.[45] Those few courts which have considered the MH/MR Act have gleaned from it a right to treatment for the mentally handicapped.[46]

The United States Congress has also recognized the need of mentally handicapped citizens for protection and has enacted the Developmentally Disabled Assistance and Bill of Rights Act (DDA/BR Act).[47] This legislation establishes that "[p]ersons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities."[48]

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for the patient's treatment by a lack of available alternative facilities. *See* Lake v. Cameron, 267 F. Supp. 155, 158-59 (D.D.C. 1967) (on remand). *But cf.* Dixon v. Weinberger, 405 F. Supp. 974, 980 (D.D.C. 1975) (federal government and District of Columbia have joint duty to develop alternative facilities). To overcome this obstacle, courts have often had to embroil themselves in the arduous task of administering the creation of alternatives. *See, e.g.*, J.R. v. Parham, 412 F. Supp. at 139; Dixon v. Weinberger, 405 F. Supp. at 980; Morales V. Turman, 383 F. Supp. 53, 125-26 (E.D. Tex. 1974).

41. 364 F.2d at 660.

42. *See, e.g.*, FLA. STAT. ANN. §§ 394.459 (1)-(2), (4)(a) (West 1978); N.J. STAT. ANN. § 30:6D-9 (West 1979); WISC. STAT. ANN. §§ 51.61 (e)-(f) (West 1979). For a discussion of the relevant Pennsylvania statute, *see* notes 43-46 and accompanying text *infra*.

43. PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969).

44. *Id.* § 4201(2). A state's involvement in the fields of mental health and mental retardation is based upon its sovereign duty to provide for the general health and welfare of its citizens, and its chosen method of discharging this responsibility is generally respected in the absence of a "clear collision" with a federal constitutional or statutory mandate. *See* Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932 (1978), *overruled in part on other grounds sub nom.* Mattos v. Thompson, ___ Pa. ___, 421 A.2d 190 (1980). *See also* notes 80-82 and accompanying text *infra*.

45. *See* PA. STAT. ANN. tit. 50, §§ 4102, 4202(a), 4301(d), 4507(a)(1). The Commonwealth is responsible for large residential institutions, such as Pennhurst, while the counties operate smaller and less isolated programs, referred to as Community Living Arrangements. *Id. See* note 68 *infra*.

46. *See* Eubanks v. Clarke, 434 F. Supp. 1022 (E.D. Pa. 1977) (involuntarily committed schizophrenic has state right to treatment); Hoolick v. Retreat State Hosp., 24 Pa. Commw. Ct. 218, 354 A.2d 609 (1976), *aff'd*, 476 Pa. 317, 382 A.2d 739 (1978) (MH/MR Act described as comprehensive program for care, treatment, and rehabilitation of mentally retarded persons); *In re* Joyce Z., 123 PITT. L.J. 181 (1975) (mentally retarded child had right to treatment).

47. 42 U.S.C. §§ 6001-6081 (1976).

48. *Id.* § 6010(1). The so-called "Bill of Rights" section provides:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

Both the federal government and the states are obligated to ensure that only those institutions which "provide treatment, services, and habilitation which is appropriate to the needs" of the mentally retarded receive public funds.[49] The DDA/BR Act further requires that those publicly financed habilitation programs "be provided in the setting that is least restrictive of the person's personal liberty."[50]

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(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institution or other residential program for persons with developmental disabilities that—

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) does not meet the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—

(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary on January 17, 1974 (39 Fed. Reg. pt. II), as appropriate when taking into account the size of the institutions and the service delivery arrangements of the facilities of the programs;

(B) in the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons being served by the programs.

*Id.* § 6010.

49. *Id.* § 6010(3)(A). *See* note 48 *supra*.

50. *Id.* § 6010(2). *See* note 48 *supra*. Section 504 of the Rehabilitation Act of 1973 is, like section 6010 of the DDA/BR Act, a civil rights act for the handicapped providing that

> [n]o otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794 (1976).

Having noted the preference of the federal courts to resolve claims on statutory grounds before adjudicating constitutional issues,[51] the *Pennhurst* court found, in light of the legislative history,[52] that the express language of the DDA/BR Act[53] was intended to provide the mentally retarded residents of Pennhurst with a privately enforceable federal statutory right to habilitation.[54]

The *Pennhurst* court found that the MH/MR Act also grants plaintiffs a privately enforceable state statutory right to habilitation.[55] In so finding, the majority rejected the Commonwealth's assertion that, because the state Act predicates services to the mentally retarded on the availability of funds, the MH/MR Act never contemplated granting an unconditional right to habilitation.[56] The court stated that the Commonwealth must provide adequate habilitative services to the mentally retarded "to the extent" that it maintains facilities for the mentally handicapped.[57] Rejecting the county defendants' contention that their responsibilities toward the mentally retarded are limited to those specifically enumerated in the Act,[58] the court pointed out that the MH/MR Act contemplates "a joint venture" between the Commonwealth and the counties to provide care for the state's mentally retarded.[59]

Having concluded that the Pennhurst residents have a right to treatment, the majority, in examining the DDA/BR Act, detected "a clear congressional preference for deinstitutionalization."[60] The majority concluded,

51. Halderman v. Pennhurst State School & Hosp., 612 F.2d at 94. Moreover, the court noted that the preferred order is to interpret federal statutory issues first and then to consider state statutory grounds. *Id* .

52. *Id.* at 96-97. The court noted that the conference report for the DDA/BR Act stated that "the developmentally disabled have a right to appropriate treatment, services and habilitation." *Id.* at 96.

53. *See* notes 48-50 and accompanying text *supra*.

54. 612 F.2d at 100. Only one other court has considered whether private litigants may enforce the rights granted under the federal Act. *See* Naughton v. Bevilacqua, 458 F. Supp. 610 (D.R.I. 1978), *aff'd*, 605 F.2d 586 (1st Cir. 1979) (mentally retarded schizophrenic has private right of action).

55. 612 F.2d at 103. *Accord*, Eubanks v. Clarke, 434 F. Supp. 1022 (E.D. Pa. 1977) (involuntarily committed schizophrenic has a right to treatment or release). In making its determination, the Third Circuit relied upon both the language and legislative history of the state Act. 612 F.2d at 100-01.

56. 612 F.2d at 102.

57. *Id.*

58. *Id.* at 103. The county defendants also argued that any duty to provide treatment rested solely upon the Commonwealth. *Id.*

59. *Id.* at 102. The majority found that, although the MH/MR Act specified certain facilities for which the counties would be principally responsible, the Act as a whole contemplates participation by the counties "in all facets of the state's provision of services." *Id.* at 103. Moreover, in practice, since the counties had been responsible for arranging the admission of persons to Pennhurst through their local service operations, "the Counties have joined inextricably in the state's provision—or lack of provision—of treatment . . . [and] cannot at this late date escape" responsibility. *Id.*

60. *Id.* at 104. The plaintiffs contended that the Commonwealth was obligated to provide habilitation in an environment which infringed least on the personal liberties of the mentally retarded. *Id.* at 103-04. The majority stated that its affirmance of the plaintiffs' principal claim to a right to habilitation on statutory grounds obviated the need for a consideration of the constitutional merits of the issue. *Id.* at 104.

therefore, that the federal Act established a right of the mentally retarded to be habilitated in the least restrictive environment possible.[61]

The Third Circuit noted, however, that while the intent of Congress may have been in favor of the "establishment of community programs as alternatives to institutionalization"[62] in an effort to eliminate the "inappropriate placement" of the mentally handicapped in institutions,[63] the DDA/BR Act does not prohibit *all* institutions.[64] For some "comparatively rare" individual cases, the majority recognized that "adequate habilitation could not be accomplished in any setting less restrictive than an institution."[65] Emphasizing "the discrete needs of individual patients,"[66] the Third Circuit

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61. *Id.* at 107. The court cited the Act itself and its legislative history at great length. *Id.* at 104-06. *See* notes 53-54 and accompanying text *supra*. *But cf.* notes 69-77 and accompanying text *infra*. The Commonwealth defendants, however, argued that, "because the Act, until 1978, required states to spend a specific minimum amount for deinstitutionalization, the states were free to use institutions as much as they chose so long as they spent the specified amounts on alternative facilities." 612 F.2d at 107. In rejecting this argument, the majority stated that the minimum expenditure requirement "was clearly intended to encourage the development of alternative facilities . . . [and] must not be confused with a maximum duty on the States' part; to do so would substantially undermine the rights articulated . . . and the insistence on specific deinstitutionalization plans." *Id.*

Having satisfied itself that the plaintiffs had an enforceable statutory claim under the DDA/BR Act, the majority declined to consider whether § 504 of the Rehabilitation Act of 1973 provided an alternative basis for enforcing the right to treatment or habilitation in the least restrictive environment. *Id.* at 107-08. For the text of § 504, *see* note 50 *supra*.

62. 42 U.S.C. § 6063(b)(23) (1976).

63. *See id.* § 6063(b)(20).

64. 612 F.2d at 106-07.

65. *Id.* at 107. While the Third Circuit agreed with the district court's finding that "for the retarded class members as a whole, Pennhurst cannot be an appropriate setting in which to provide habilitation," the majority disagreed with the lower court's determination that "Pennhurst could *never* provide adequate habilitation because of its very status as a large institution." *Id.* at 113-14 (emphasis in original). Moreover, the Third Circuit noted that "for some patients, institutionalization might be 'appropriate.' In those individual cases, . . . the need for . . . [adequate] habilitation could thereby justify institutionalization." *Id.* at 107. For these reasons, the Third Circuit disagreed with the order of the district court that Pennhurst be closed completely. *Id.* at 113.

Nevertheless, the court stated emphatically that this disagreement in no way intimated any disapproval of the interim measures ordered by the district court for the improvement of Pennhurst:

> Quite the reverse: state and federal laws plainly require that if Pennhurst is to remain open for at least some patients, it must be dramatically improved so as to provide adequate habilitation. Neither should our willingness to permit retention of Pennhurst as an institution available for those who cannot be treated in any less restrictive environment be construed as an invitation to the appellants to desist from opening up alternative community facilities. As we have said, institutionalization is a disfavored approach to habilitation. Only where the court or the Master finds that an improved Pennhurst is the only appropriate place for individual patients should it be used. For all other patients, [Community Living Arrangements] must be provided.

*Id.* at 116 (footnote omitted). *See* note 68 and accompanying text *infra*.

The Third Circuit's premise that institutions can be justified if "needed" echoes the constitutional substantive due process rationale that confinement based upon the "need" for treatment or habilitation creates an obligation on the part of the state to treat or habilitate. *See* notes 30-31 and accompanying text *supra*.

66. 612 F.2d at 114. The court observed that some patients might find a transfer from Pennhurst to a community "too unsettling" and that some patients might lack the "minimum skills" needed for community living so as to make habilitation outside the institution "a practical impossibility." *Id.*

directed the trial court to employ a case-by-case analysis in determining "the appropriateness of an improved Pennhurst."[67] For those for whom Pennhurst is deemed "inappropriate," the court ordered the Commonwealth to provide accommodations in the county-operated Community Living Arrangements (CLA's).[68]

Chief Judge Seitz, writing for the dissent, assumed for purposes of his argument that the Pennhurst patients possess a statutory right to "treatment" under both the DDA/BR Act and the MH/MR Act.[69] Although such a right requires that the substandard conditions at Pennhurst be corrected,[70] it does not, according to the dissent, compel treatment in the least restrictive environment possible.[71] Neither the statutory language[72] nor a con-

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67. *Id.* In order to facilitate its determination of the "appropriate" setting for each patient's habilitation, the district court may, according to the Third Circuit, "permit particular organizations to intervene at the relief stage or create subclasses." *Id.* at 116. The court emphasized, however, that "[n]o matter how it is accomplished, . . . an assessment of *each* class member's needs must be carried out." *Id.* (emphasis added).

68. *Id.* at 116. *See* note 45 *supra*; note 90 *infra*. In evaluating each patient's needs, the district court or special master was directed to begin with the rebuttable "presumption that individuals should be placed in CLAs." 612 F.2d at 115. The majority cautioned, however, that, before ordering the transfer of patients to CLA's, both the district court and the master

> must have assurances that the sanitary, staffings, and program deficiencies which were found at Pennhurst are not duplicated on a smaller scale in the CLAs. If staffing and programs are inadequate at the CLAs, then the goals of deinstitutionalization will not be met. Mere changes in the size of buildings and their location are not enough to meet the statutory requirements.

*Id.* at 116.

Established in the home counties of the Pennhurst residents, CLA's are operated by local private companies which contract with the county and are financed by the Commonwealth. Philadelphia Inquirer, Sept. 14, 1980, § M, at 4, col. 4-5. It has been noted that

> [t]he companies provide homes, programs and staff to care for the residents and teach them to dress themselves, do their laundry and help with the cooking or grocery shopping, depending on their level of retardation.
>
> The state also requires that everyone in a CLA go out on weekdays for some learning activity—public school for people under 21, some sort of workshop, ranging from prevocational to toilet training, for the adults.
>
> Additional services—doctors, psychologists, speech therapists and the like—are provided on a consulting basis. Each county is supposed to have a team of special education experts and psychologists on call for crises.

*Id.*, col. 5.

69. 612 F.2d at 117, 122 (Seitz, C.J., dissenting). Chief Judge Seitz explicitly rejected the plaintiffs' claim under § 504 of the Rehabilitation Act of 1973, however, stating that the "carefully tailored system of programs and grants in the legislation as a whole belies any congressional intention to impose an absolute duty to provide the least restrictive treatment." *Id.* at 120-21 (Seitz, C.J., dissenting). The majority had simply declined to consider the plaintiffs' section 504 claim. *See* note 61 *supra*. For the relevant text of § 504, *see* note 50 *supra*.

70. 612 F.2d at 117 (Seitz, C.J., dissenting).

71. *Id.* at 122 (Seitz, C.J., dissenting).

72. *See id.* at 118-19, 122 (Seitz, C.J., dissenting). Concerning the federal DDA/BR Act, Chief Judge Seitz maintained that Congress had merely intended the Act and the concomitant federal funds as an incentive for the states to deinstitutionalize their programs for the mentally handicapped. *Id.* at 118-19 (Seitz, C.J., dissenting). According to the dissent,

> [t]he Act nowhere places such a duty of least restrictive treatment on those states accepting federal funding. The Act is extremely explicit as to the duties of those states that

stitutional analysis,[73] argued Chief Judge Seitz, imposes a duty upon the states to habilitate by some "less drastic means" than institutionalization.[74]

The dissent maintained that the state's purpose in responding to the mentally retardeds' need for care and supervision supported institutional confinement[75] and that any attendant restraints on the residents' personal liberties need only be rationally related to the purpose of the confinement.[76] Chief Judge Seitz criticized the constitutional "less drastic means" analysis as being unworkable—a single, better alternative to institutionalization being too difficult to ascertain in light of the need for individual and continual medical evaluation of the patients' needs.[77]

The portion of the *Pennhurst* court's holding which found that the plaintiffs have a right to habilitation is consistent with prior interpretations of the DDA/BR Act[78] and the trend of constitutionally-based decisions in this area.[79] The court's instruction that habilitation be provided in the least restrictive setting possible, however, appears to confict with well-settled prin-

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receive such funds. The heart of the states' duty under the Act is section 6063. . . .Prior to the 1978 amendments, section 6063 (b)(20) required that . . . [before a state can receive federal funds, it must submit to the Secretary of Health, Education, and Welfare (HEW)]

> a plan designed (A) to eliminate inappropriate placement in institutions of persons with developmental disabilities, and (B) to improve the quality of care and the state of surroundings of persons for whom institutional care is appropriate.

Moreover, the state must maintain individual habilitation plans and an advocacy system to ensure that the general plan approved by HEW is properly implemented.

*Id.* at 118, *quoting* 42 U.S.C. § 6063(b) (20) (Seitz, C.J., dissenting) (footnote and citation omitted).

Similarly, the dissent remarked that, whereas Pennsylvania's MH/MR Act "sets out the duties of the state . . ., nowhere does it mention a duty to provide the least restrictive treatment regardless of fiscal concerns." *Id.* at 122 (Seitz, C.J., dissenting).

73. *See id.* at 123-30 (Seitz, C.J., dissenting).

74. *See id.* at 126-29 (Seitz, C.J., dissenting). *See also* notes 75-77 and accompanying text *infra*.

75. 612 F.2d at 126 (Seitz, C.J., dissenting). Having noted the findings of the district court, the dissent stated that the

> defendants are doing far more than relieving otherwise willing and able relatives of the burden of caring for the residents; they are acting as the residents' only source of food, shelter, supervision, and medical care. Far from being "trivial," these services are a matter of life or death to the residents.

*Id.* at 125-26 (Seitz, C.J., dissenting) (citations omitted).

76. *Id.* at 129 (Seitz, C.J., dissenting).

77. *Id.* at 128-29 (Seitz, C.J., dissenting). The dissent considered the majority's ruling to have gone

> far beyond the proposition that federal courts should require the state to eliminate the deplorable conditions at Pennhurst. The effect of the rule is to require the state to create new facilities regardless of the feasibility or practicality of such a course of action. Moreover, because persons develop over time, the federal courts will become embroiled in almost continual supervision to ensure that each individual at any particular moment is in the least restrictive environment.

*Id.* at 117 (Seitz, C.J., dissenting). Chief Judge Seitz concluded that institutionalization at Pennhurst was not in itself a "constitutionally unreasonable means" of providing for the care and supervision of the mentally retarded and that a properly run Pennhurst would not unreasonably restrict its residents' personal liberty. *Id.* at 129 (Seitz, C.J., dissenting).

78. *See* notes 52-54 and accompanying text *supra*.

79. *See* notes 21-22 and accompanying text *supra*.

ciples of state sovereignty.[80] It is submitted that the state's police power to provide for the general health and welfare of its citizens must be considered and accommodated in any analysis of the manner in which state-sponsored habilitative services should be rendered to the mentally retarded[81] and, absent some "collision" with federal law, the state law must be respected.[82]

In an exercise of its police power, the Pennsylvania legislature enacted the MH/MR Act in which it utilizes institutionalization as a major component of the state's comprehensive habilitative program.[83] Although the *Pennhurst* majority may have correctly found that the congressional intent behind the DDA/BR Act was deinstitutionalization and that the federal Act required those states which accepted federal funds "to *support* the establishment of community programs as alternatives to institutionalization,"[84] it seems clear that the federal DDA/BR Act imposes no *mandate* with which the MH/MR Act "collides."[85] Therefore, unless the court were to find a federal *constitutional* right with which the state Act conflicts,[86] it is submitted that the Commonwealth's policy regarding the care of its mentally retarded citizens—formulated as part of its sovereign duty—should be respected.[87]

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80. The United States Supreme Court has long held that among a state's sovereign duties is the duty to provide for the general welfare of its citizens. *See* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 138 (1837). The Court has further stated that this police power, "especially when exerted for the protection of life and limb, . . . should be respected unless there is a clear collision with a national law which has the right of way under the Supremacy Clause of Article VI." Kesler v. Department of Pub. Safety, 369 U.S. 153, 172 (1962).

81. The state's sovereign duty to provide for its citizens' general welfare includes the authority to enact legislation "which it may deem to be conducive to these ends . . . where the power over the particular subject, or the *manner* of its exercise is not surrendered or restrained" by the Federal Constitution. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 138 (1837) (emphasis added).

82. Parker v. Children's Hosp., 483 Pa. 106, 116, 394 A.2d 932, 937 (1978), *overruled in part on other grounds sub nom.* Mattos v. Thompson, ___ Pa. ___, 421 A.2d 190 (1980). The *Parker* Court noted:

> [I]t must be remembered that a legislative enactment enjoys a presumption in favor of its constitutionality and will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution. All doubts are to be resolved in favor of a finding of constitutionality. . . .The legislature must be respected in its attempt to exercise the State's police power and the power of judicial review must not be used as a means by which the courts might substitute its [*sic*] judgement as to public policy for that of the legislature.

*Id.* (citations omitted).

83. *See* notes 43-46 and accompanying text *supra*.

84. 42 U.S.C. § 6063 (b)(23) (1976) (emphasis added). *See* notes 60-64 and accompanying text *supra*.

85. 612 F.2d at 119 (Seitz, C.J., dissenting). *See* note 82 and accompanying text *supra*.

86. The *Pennhurst* majority specifically declined to consider the constitutional merits of the plaintiffs' claim, having satisfied itself that the statutory basis was sufficient. *See* note 60 *supra*.

87. It should be noted that the *Pennhurst* court did not inquire into or base its least-restrictive standard upon the state statute. *See* 612 F.2d at 103-08. Without a specific analysis and construction of the MH/MR Act, the Pennsylvania legislature's intent can only be inferred from the Commonwealth's practices in implementing the statute. Neither the *Pennhurst* court's analysis nor such state implementation of the statute, it is submitted, suggest that the mentally retarded patients at Pennhurst have a *state* right to habilitation in the least restrictive setting possible.

It is further submitted that, in striking an improper balance between clinical and judicial expertise,[88] the *Pennhurst* court has achieved that which it cautioned against: duplicating the deficiencies of Pennhurst on a smaller scale in the CLA's.[89] In executing his mandate to resettle in CLA's those

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88. For a brief critical discussion of the appropriateness of judicially mandated medical treatment, *see* note 40 *supra*. *Accord*, 612 F.2d at 128 (Seitz, C.J., dissenting). For the dissent's view on this point, *see* note 77 and accompanying text *supra*.

89. *See* note 68 *supra*; notes 90-91 & 94 and accompanying text *infra*. On October 11, 1980, this author interviewed a Provider of Services for a Base Service Unit (BSU) within Philadelphia County who prefers to remain anonymous at this time [hereinafter cited as *Provider Interview*]. This Provider, who administers the operation of a CLA, suspects that drugs continue to be used as a means toward behavioral control in some CLA's. *Provider Interview*. Although when he became a Provider in July, 1979, the Philadelphia County Provider's Manual discouraged the use of medication for behavioral control, this Provider correctly suspected that his new clients were nevertheless taking medication for that purpose and unilaterally directed that they be reevaluated by the consulting psychiatrist in order to determine the necessity of the medication. *Id.* Moreover, although only one of the five residents in his CLA is a member of the *Pennhurst* plaintiff class, this Provider has never received a directive from either the special master or the Philadelphia County mental health/mental retardation administrators notifying him of their compliance with that portion of the district court's original order, with regard to the plaintiff class, enjoining the Commonwealth defendants from:

> (a) Administering excessive or unnecessary medications to class members;
>
> (b) Using medication as punishment, for the convenience of the staff, as a substitute for programming, or in quantities that interfere with a Pennhurst resident's functioning;
>
> (c) Failing to ensure that only appropriately trained staff are allowed to administer drugs to residents;
>
> (d) Failing to provide training programs to staff who administer drugs to residents. The nature of such training programs, and the qualifications to be required of staff members who administer drugs to residents shall be established in the plan;
>
> (e) Administering drugs to residents on [an "as needed"] basis. Written policies and procedures governing the safe administration and handling of medications shall be established pursuant to guidelines developed in the plan;
>
> (f) Failing to monitor and to provide for at least monthly reviews by a physician of each resident's medications.

Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. at 1329. *See* notes 91-92 & 94 and accompanying text *infra*. Moreover, this Provider noted that there have been cases in which either he or a member of his staff has requested of the consulting psychiatrist that a client be prescribed specific medication for legitimate reasons, but, except for those relating to members of the *Pennhurst* plaintiff class, these requests are routinely granted without the psychiatrist ever having seen the client. *Provider Interview, supra*. *See also* note 94 *infra*. It is also noteworthy that only members of the plaintiff class have their medication closely monitored by periodic blood tests. *Id.* *See* note 94 and accompanying text *infra*.

As a result of insufficient funding, the county cannot offer competitive salaries to attract the high-quality personnel needed to administer CLA's and daytime habilitation programs. *Provider Interview, supra*. In one daytime program, for example, the entire staff, except for the director, resigned and the program was then administered by the patients themselves. *Id.* Nor can the county finance adequate habilitation programs which are required in order to "help the client to achieve his or her individual potential by making available to him or her the opportunities which are available to the normal person—such as vocational habilitation (job-training for the high-functioning clients) so that they can become productive members of society." *Id.*

Similarly, at the CLA, budgetary constraints prohibit the hiring of the most qualified staff: "The 'A' people just get up and leave and we're stuck with the 'C' people." *Id.* As a result, an already overworked staff must train new staff members, a task which diverts their attention from patient-related matters. *See* note 90 *infra*. Moreover, staff shortages result in the inadequacy of such community services as dental care (because of the time required to transport patients long distances to a dentist who will treat the mentally retarded) and recreation. *Provider Interview, supra*.

plaintiff-patients for whom an improved Pennhurst was "inappropriate," the special master has apparently failed to canvass adequately "the discrete needs of *individual* patients."[90] Moreover, due to inadequate funding, the members of the plaintiff class, although benefiting from the unstructured environment of the CLA's, are deprived of the full range of habilitative programs and services which should otherwise be available to them in accordance with the *Pennhurst* majority's interpretation of their federal and state statutory rights.[91]

The ramifications of the *Pennhurst* decision are broad and incisive. Fundamentally, the court held that mentally handicapped persons— *i.e.*, the mentally ill, as well as the mentally retarded, who do not require institutionalization for adequate treatment/habilitation—have a federal statutory right to treatment/habilitation in the least restrictive environment possible.[92] For the mentally handicapped, this means a mandatory transfer to community habilitation programs.[93] Nevertheless, since county administrators of local mental retardation programs now give such preferential treatment as periodic reevaluation of individual habilitative programs (IHP's) to members of the *Pennhurst* plaintiff class, thereby reducing the resources available to non-class members, not all of the community's mentally retarded will share in the benefits of the Third Circuit's decision.[94]

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90. *See* 612 F.2d at 114 (emphasis in original). In criticizing the district court's "wholesale judgment" that, for the retarded class members as a whole, Pennhurst could not be an appropriate setting in which to provide habilitation, the *Pennhurst* court stated that

> the trial court did not adequately canvass the discrete needs of *individual* patients. For some patients a transfer from Pennhurst might be too unsettling a move. Longterm patients, for example, may have suffered such degeneration in the minimum skills needed for community living that habilitation outside an institution is a practical impossibility.

*Id. See* notes 65-68 and accompanying text *supra*. The court further stated that "[o]nly where the court or the Master finds that an improved Pennhurst is the only appropriate place for individual patients should it be used. *For all other patients, CLAs must be provided.*" 612 F.2d at 116 (footnote omitted) (emphasis added). *See* notes 62-68 and accompanying text *supra*.

Despite the Third Circuit's directive, in at least one case, a patient with severe behavioral problems, who requires a restrictive environment, was transferred from Pennhurst to a CLA. *Provider Interview*, *supra* note 89. Although a procedure is established whereby a former Pennhurst patient may, in theory, be readmitted to Pennhurst, such readmission is, in practice, a virtual impossibility in light of the court's order and the fact that inadequate staffing prohibits the taking of the time required to gather the necessary documentation to prove a case for readmission. *Id.* As a consequence, Philadelphia County has agreed to secure an apartment for the patient in order to provide her with a more restrictive setting, and to hire two full-time and one part-time staff members to care for her. *Id.* This expenditure of scarce financial resources should, it is submitted, be compared to the situation of an individual CLA housing five patients, in which there are two full-time and three part-time staff members. *Id. See* text accompanying note 91 *infra*.

91. *See* notes 89 & 90 *supra*.

92. 612 F.2d at 107. *See* note 61 and accompanying text *supra*.

93. *See* note 68 and accompanying text *supra*; note 90 *supra*.

94. Although, in addition to Pennhurst, there are two other institutions—Woodhaven Center and Embreeville Center—for the mentally retarded in southeastern Pennsylvania, the residents being transferred from the latter two institutions to CLA's are not within the plaintiff class and, therefore, are not protected by the order of the district court. Similarly, former residents of Pennhurst who had been transferred to CLA's before plaintiff Halderman com-

Moreover, the shifting of emphasis to CLA's and away from institutionalization will mean the partial, if not total, closing of residential

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menced her class action are also not protected. For a discussion of the makeup of the plaintiff class, *see* note 2 *supra*. In its order, the district court required the special master to prepare all of the following:

> A report specifying resources, procedures, and a schedule for individual evaluations and the formulation of individual exit and community program plans required for the habilitation of each member of plaintiff class and for their periodic review.
>
> . . . A plan for the recruitement, hiring and training of a sufficient number of qualified community staff to be detailed to each Base Service Unit to manage the preparation of individual exit and community program plans for each member of plaintiff class and upon completion of such plans to assist in the execution of the responsibility to create, develop, maintain, and monitor the community living arrangements and other services required.
>
> . . . A plan for the creation, development and maintenance of mechanisms to monitor a system of community services to assure that community living arrangements and other community services of the necessary quality and quantity are continously provided to retarded persons in the least separate, most integrated, least restrictive community setting, which plan shall include but shall not be limited to the provision of friend-advocates to assist in the protection of the rights of each member of plaintiff class.
>
> . . . A plan to provide retarded people, members of the class, with continuing information concerning the effect and the implementation of the Court's decision, concerning the plans to provide all necessary community living arrangements and other community services to them and any other general or specific information regarding the conditions necessary to habilitation of retarded persons and to provide for consultation with them.
>
> . . . A plan to provide parents and family of the members of the class with continuing information concerning the effect and the implementation of the Court's decision, concerning the plans to provide all necessary community living arrangements and other community services to their relative and any other general or specific information regarding the conditions necessary to habilitation of retarded persons and to provide for consultation with them.

446 F. Supp. at 1327.

As the order has been implemented, in addition to having IHP's reviewed every six months and updated by "all personnel and interested parties [*e.g.*, family members] who are involved in any and every aspect of the patient's habilitation," transitional individual habilitative programs have also been developed for members of the plaintiff class to prepare them for life outside of the institution. *Provider Interview, supra* note 89. One effect of not affording the protective provisions of the court's order to the non-class members has been to increase the weight of the burden now being shouldered by inadequate staffs at CLA's as a result of having to receive into CLA's non-class members who are generally unprepared for community living, having spent so much time institutionalized. *Id.*

On the BSU-level, the members of the plaintiff class have been assigned to special case managers who are situated in the county administration headquarters where they have access to the special master as well as state and local officials. *Id.* Ordinarily, case managers are located in the BSU's where they have charge of not only the mentally retarded within the geographical area serviced by the BSU, but also the mentally ill. *Id.* For a large part of 1980, however, the caseload of a single case manager at one BSU in Philadelphia County had hovered around 320 clients. *Id.* Thus, although an effort is being made to provide the plaintiff class with plans for habilitation programs and other community services designed to be in accord with their federal statutory rights, far less can be done practically to assist the non-class mentally retarded in attaining the benefits of their right to an equally adequate habilitation program. Moreover, in light of the fact that, within the CLA's, there is no differentiation according to class/non-class members or level of mental development, the practical impact of releasing the non-Pennhurst patients from the respective institutions without affording them the habilitative advantages which the former Pennhurst residents receive is to divert staff attention away from the plaintiff class so that no one is receiving the habilitative opportunities which both the district court and the Third Circuit in *Pennhurst* had intended. *Id.* *See* note 89 *supra*.

mental institutions and, possibly, some mental hospitals.[95] As a result, state budgetary policies will perforce undergo extensive review in order to reformulate the structures and procedures by which states have heretofore cared for the mentally handicapped.[96]

Probably the most significant impact of the *Pennhurst* decision will be upon the communities in which the mentally handicapped are placed.[97] There is no clear reason why the mentally impaired should be segregated from the rest of society for there are undoubtedly many contributions which they are able to make toward the good of the whole. But whether the presence of the mentally handicapped in the general society will present such a burden that society itself will be shown to be in need of "habilitation," will, it is submitted, determine in the end just what is the most "appropriate" environment for the mentally impaired.

*Frederick C. Bader*

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95. *See* notes 60-68 and accompanying text *supra*. Such closings, of course, will depend upon the number of people who, "because of advanced age, profound degree of retardation, special needs or for some other reason, will not be able to adjust to life outside of an institution." 612 F.2d at 114.

96. In this regard, the Third Circuit in *Pennhurst* noted a finding of the district court that the "per patient cost in CLAs is less than at Pennhurst." *Id.* at 116 n.39. It is unclear, however, whether the court's finding refers to the cost of maintaining an established CLA, or to the cost of CLA's initial development in addition to its maintenance costs. For a brief discussion of the sources of funding for CLA's, *see* notes 56-57 and accompanying text *supra*.

97. Some communities in southeastern Pennsylvania have resisted the establishment of CLA's. Philadelphia Inquirer, Sept. 14, 1980, § M, at 4, col. 5. Although members of those communities accept the deinstitutionalization process in theory as being beneficial for the mentally handicapped, they "have fears about the retarded, and they are very suspicious of government. They feel that if the government puts retarded people in this year, next year they might get drug addicts." *Id. See* Boyd, *Strategies in Zoning and Community Living Arrangements for Retarded Citizens*: Parens Patriae *Meets Police Power*, 25 VILL. L. REV. 273, 277 (1980). To combat the influx of the mentally retarded, such communities have resorted to the use of local zoning ordinances of which there are several major types:

> Some explicitly exclude such [group] homes from single-family areas, classifying group homes as a business or medical rather than as a residential use. More commonly, a city defines a family as a number of persons related by blood, marriage or adoption living together, and limits the number of unrelated persons who can live in a single dwelling. A third type of ordinance allows group homes in certain districts only if they first comply with specified conditions and obtain special permits from the city government.

MENTAL HEALTH LAW PROJECT, COMBATTING EXCLUSIONARY ZONING: THE RIGHT OF HANDICAPPED PEOPLE TO LIVE IN THE COMMUNITY 1. However, a number of courts throughout the country have "interpreted the term 'family' in local zoning ordinances to include group homes for developmentally disabled persons." *Id.* at 2. For a discussion of the relevant cases, *see id.* at 1-25. While a few courts have considered whether a state policy to care for the handicapped preempts local ordinances which exclude group homes, other courts have required an explicit state statute preempting local zoning restrictions before permitting group homes to be established. *Id.* For a general discussion of community resistance to CLA's in Pennsylvania through the use of zoning, *see* Boyd, *supra*.