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CASE-COMMENTS

JOHNSON V. SOLOMON: A STATE'S DUTY TO DEVELOP COMMUNITY-BASED MENTAL HEALTH TREATMENT

Notwithstanding the controversy surrounding the wisdom of deinstitutionalization from a clinical and social work perspective,¹ this comment focuses on the constitutional rights of approximately 130,000 mentally ill and mentally retarded citizens presently confined in state institutions.² This

1. The deinstitutionalization movement has received many bad reviews. See H. SANTIETSEVAN, *DEINSTITUTIONALIZATION: OUT OF THEIR BEDS AND INTO THE STREETS* (1979); Bachrach, *Is the Least Restrictive Environment Always the Best? Sociological and Semantic Implications*, 31 *HOSP. & COMM. PSYCHOLOGY* 97 (1980). However, a more rigorous analysis of the controversy suggests that deinstitutionalization as a therapeutic model has not failed; rather the implementation in terms of community care has failed, and that "in every instance where a comprehensive system of community care for the chronic mentally ill has been established and evaluated, it [deinstitutionalization] has been successful." *Deinstitutionalization of the Chronically Mentally Ill: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 99th Cong., 1st Sess. 2 (1985) (statement by Leonard I. Stein, M.D.) [hereinafter *Hearing*].

2. *Hearings*, *supra* note 1, at 185 (statement of John A. Talbott, M.D., Director, Institute of Psychiatry and Human Behavior, University of Maryland).

Although at first glance, it could be argued that only involuntarily committed citizens (versus voluntary confinees to state institutions) are protected by the due process clause because of the requirement of state action, the issue triggers a more complex analysis. For example, in *Association for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 484-85 (S.W.N.D. 1982), the court held that the due process clause applied to voluntary confinees as well as those involuntarily committed on three theories: 1) many so-called "voluntary" confinees, such as minors, never actually consented as the particular statute required only the consent of the parents or guardians for a "voluntary" commitment; 2) of those confinees who did consent, the act did not rise to the constitutional level of informed consent because of the nature of severe mental retardation; 3) of those confinees who did voluntarily and knowingly consent in the beginning, they still surrendered some freedom to the state, which although initiated by the individual confinee, was continued by the state thus constituting state action.

Other courts and a commentator have similarly included voluntary confinees, based on one or another of these three theories. *Philipp v. Carey*, 517 F. Supp. 513, 519 (N.D.N.Y. 1981) (due process clause applied to voluntary confinees on the theory that once the state takes charge, state action begins, regardless of who initiates); Rapson, *The Right of the Mentally Ill to Receive Treatment in the Community*, 16 *COLUM. J.L. & SOC. PROBS.* 193, 242 (1980) (arguing for inclusion on the theory of lack of informed consent). At least one court, which held that as a constitutional issue, there was no state action with voluntary commitments, did recognize that the factual issue of voluntariness can itself be complex. *Goodman v. Parwatikar*, 431 F. Supp. 1250, 1253-54 (E.D. Mo. 1977), *vacated and remanded*, 570 F.2d 801 (8th Cir.

comment argues that two distinct substantive due process rights attach to institutionalized citizens: a right to treatment which may involve community-based care if the clinicians involved so advise; and a right to confinement in the least restrictive setting which is suitable and reasonably affordable, which also may involve community placement. In fashioning relief for violations of these due process rights, federal courts may at times order states to develop substantively more community resources or procedurally require states to justify their budgetary priorities.

While the development of a due process right to treatment began historically with a lone writer in 1960,³ Part I of this comment commences discussion of this issue in 1979, utilizing the moderate analysis of *Johnson v. Solomon*⁴ as a continuing thread which renders a cohesive proposition. Thus, Part I of this comment examines the *Johnson* opinion, clarifying it in light of cases upon which it was premised and demonstrating its widespread acceptance in many jurisdictions. Part II explores the impact of the recent Supreme Court case, *Youngberg v. Romeo*,⁵ and concludes that *Johnson* remains good law with an added gloss. Finally, Part III tracks three approaches utilized by federal courts to protect the constitutional rights of the mentally ill and mentally retarded. Current statistics are highlighted which indicate that despite a seventy-five percent decrease in the institutionalized population over the past thirty years, many state mental health agencies still allocate between eighty and ninety percent of their budgets to institutions.⁶ The comment concludes that if the *Johnson* court and its progeny were to revisit a similar class action today in view of current statistics, it would order the development of community resources, or at least require the state to

1978) (inter alia, material issue of fact as to whether patient had been committed voluntarily or involuntarily).

Two commentators have gone even a step further, indeed a step beyond rigorous analysis, to include citizens not presently committed. One of these authors suggests that the constitutional right to treatment for confinees continues after they are released in the form of aftercare. Mort, *Establishing a Right to Shelter for the Homeless*, 50 BROOKLYN L. REV. 939 (1984). The other commentator argues even less soundly that even those mental health patients who have never been confined in institutions possess a due process right to treatment if they become at all involved in the state mental health system, i.e., that even state-controlled halfway houses restrict liberties in subtle ways that are sufficient to constitute state action. Rapson, *supra*, at 243.

Despite the room for debate, however, the thesis of this case-comment rests narrowly on the firm foundation that state action is exercised with involuntary commitments and leaves it to others to consider its application to voluntary commitments.

3. Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960).

4. 484 F. Supp. 278 (D. Md. 1979).

5. 457 U.S. 307 (1982).

6. *Hearings, supra* note 1, at 85 (statistics taken from the testimony of John A. Talbott, M.D.).

shoulder the burden of proving that community programs, as well as the funds to develop them, are unavailable.

I. ANALYSIS OF *JOHNSON V. SOLOMON*

Johnson involved, among other claims,⁷ a section 1983 class suit⁸ against the Maryland State Secretary of Health and Mental Hygiene and other state officials, seeking declaratory and injunctive relief on behalf of juveniles confined to mental institutions, based on the due process clause of the fourteenth amendment. The seventy-six plaintiffs specifically requested a declaration that there was "a constitutional duty on the part of the state officials to explore and provide the least stringent practicable alternatives to confinement of Plaintiff class,"⁹ and an order enjoining "further commitments until defendants present[ed] a plan for the creation or provision of sufficient appropriate less restrictive alternatives to hospital confinement."¹⁰

A. *The Right to Treatment*

Developing its analysis in two steps, the court first held that the due process clause guaranteed the plaintiffs certain minimum standards of treatment, referring to this as a "solid tenet of constitutional law."¹¹ It reasoned that the state's right to exercise its *parens patriae* power over its citizens created a coterminous state obligation to provide treatment, characterizing this exchange as a "check and balance on the State's sovereign power to undertake civil commitments."¹²

As has been suggested,¹³ this widely used *quid pro quo* analysis devolves into three separate theories. Which of these theories governed the *Johnson* decision, however, is not clear. When the court spoke of the "check and balance," it appeared to be utilizing what may be called the *paradigm quid pro quo* theory ("*paradigm theory*"). This theory suggests that irrespective of the three purposes a state pursues through civil commitment (protection of others, protection of the individual, or treatment of the individual), the state must provide treatment in order to compensate the individual for the

7. The other three claims involved allegations of constitutionally vague and inadequate commitment standards, constitutionally impermissible lack of periodic review, and constitutionally impermissible lack of effective legal representation. *Johnson*, 484 F. Supp. at 281.

8. 42 U.S.C. § 1983 (1982).

9. *Id.* at 303 (quoting Plaintiff's reply to post-trial memorandum of Defendant Solomon).

10. *Id.* at 282.

11. *Id.* at 299.

12. *Id.* at 300.

13. Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1, 4-15 (1978).

lack of procedural safeguards that are afforded criminals. However, the *Johnson* court also appeared to be utilizing a more narrowly applied *pseudo quid pro quo* theory (“*pseudo* theory”) when it stated that the right to treatment arose from the necessary “relationship between the justification for civil commitment [in only those situations where the justification is treatment] and the need to guarantee that treatment is actually provided.”¹⁴

Two points suggest that the *Johnson* court relied on the more expansive paradigm theory. First, the two theories are not necessarily mutually exclusive if one views the *pseudo* theory as a subset of the *paradigm* theory. Thus, a court relying on the *paradigm* theory in general could note, with consistency, that the *pseudo* theory adds extra justification for commitment when the state’s purpose is treatment. However, since the *paradigm* theory cannot be viewed as a subset of the *pseudo* theory, the *Johnson* court’s language would be contradictory if the court relied on the more narrow *pseudo* theory. A second reason for construing the *Johnson* opinion in this way is that the court never inquired as to which of the three purposes the defendants had been pursuing; such an inquiry would be essential under the *pseudo* theory. Thus, the *Johnson* holding regarding a substantive due process right to treatment is not limited only to those involuntary confinees whom the state commits for the express purpose of treatment, but applies as well to all involuntary confinees, regardless of the state’s purpose for commitment.

B. The Right to Confinement in the Least Restrictive Setting

In the second part of its analysis, the *Johnson* court held that the confinees enjoyed a due process right to treatment in the least restrictive setting available. Upon finding a constitutional defect in the commitment process, the court then enjoined the defendants from further commitments if adequate services and programs were alternatively available in the community.¹⁵ Three issues require clarification here.

1. Available Intact v. Reasonably Affordable

First, it is unclear how the *Johnson* court intended to construe the word “available” as utilized in the “least restrictive setting available” phraseology. It could have intended either completely to preclude the chance of ever requiring a state to expend any money to develop community resources or merely to impose a condition of financial reasonableness such that even if community programs were not available, the state would be obligated to de-

14. *Johnson*, 484 F. Supp. at 300.

15. *Id.* at 303, 305.

velop these programs if the funds were available or could be ascertained through a creative re-shuffling of budgetary priorities.

Starting with the Supreme Court's pronouncement in *Shelton v. Tucker*,¹⁶ that fundamental personal liberties can be encumbered only by the least drastic means,¹⁷ the *Johnson* court then relied on two cases which correctly applied the *Shelton* obligation to civil commitments with regard to placement in the community as opposed to an institution: *Welsch v. Likens*¹⁸ and *Gary W. v. State of Louisiana*.¹⁹ As the court in both of these key cases found a due process right to confinement in the least restrictive setting which is reasonably affordable, it could be argued that the *Johnson* court intended the same construction. The *Welsch* court defined the constitutional right as requiring the "[s]tate officials to explore and provide the least stringent *practicable* alternatives to confinement of noncriminals."²⁰ Although not articulated quite as clearly, the *Gary W.* court similarly defined the right as requiring the state to consider the "least restrictive alternative," but said the state "will not be required to develop an *entire new system of facilities* to implement the plan."²¹

In addition to the holdings in these cases, some language in the *Johnson* opinion itself precludes a narrow construction of its holding and, implies that the state's obligation in some situations may require some reasonable expenditures for community resource development. After drawing a distinction between the least restrictive "alternative" versus "available" setting, the court stated: "Whereas the former standard would necessitate that the State vastly expand its range of therapeutic services . . . so as to provide a continuum including all medical alternatives, the latter approach would contemplate *fewer* changes since 'availability' presumably *limits* financially the range of services which *must be provided*."²²

Finally, a narrow construction of *Johnson* is inappropriate since it would effectively delegate to state budget administrators the court's responsibility for defining the scope of constitutional rights — a consequence which the *Johnson* court surely did not intend. For example, a budget administrator could define the least restrictive setting available by merely allocating or refusing to allocate funds. Indeed, the court in *Clark v. Cohen*²³ succinctly

16. 364 U.S. 479, 488 (1960).

17. *Johnson*, 484 F. Supp. at 301, 302.

18. 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part*, 525 F.2d 987 (8th Cir. 1975), *vacated and remanded on other grounds*, 550 F.2d 1132 (8th Cir. 1977).

19. 437 F. Supp. 1209 (E.D. La. 1976).

20. *Welsch*, 373 F. Supp. at 502 (emphasis added).

21. *Gary W.*, 437 F. Supp. at 1219 (emphasis added).

22. *Johnson*, 484 F. Supp. at 301 (emphasis added).

23. 613 F. Supp. 684 (E.D. Pa. 1985).

rejected a similarly narrow construction of the due process right to confinement in the least restrictive setting available, stating that:

Defendants argue that this language allows institutional placement whenever there are insufficient funds or resources available to provide for non-residential services. This interpretation would effectively allow defendants to render the standard meaningless. The defendants could simply refuse to allocate funds for any community placements and institutionalize all mentally retarded persons if I were to accept the proffered reading. I decline to do so.²⁴

Whether or not the *Johnson* court intended to construe the term "available" in a narrow fashion may not be as important as its reason for such cautious language. At three different points in its opinion, the court indicated that its cautious language resulted from, and was perhaps conditioned upon, a concern for the state's budget and a firm belief in the state's reasonable, good faith commitment to develop community resources.²⁵ Thus, as will be explored further in Part III, if eight years later the *Johnson* court were faced with the revelation that funds were available to develop community resources, and that the state's commitment to develop community resources no longer existed, the court might reject a narrow construction of its 1979 opinion, and order the development of these resources.²⁶

2. *Shelton's Application to Civil Commitment*

A second point of clarification focuses on *Johnson's* application of the *Shelton* requirement to civil commitment. Although most courts differ only in how broadly or how narrowly they define the right to confinement in the least restrictive setting, at least one court has completely rejected the right, basing its analysis on much-cited dicta in the early Supreme Court case of *Jackson v. Indiana*, in which the Court noted: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."²⁷ In *Garrity v. Gallen*,²⁸ the court argued that this dictum demanded that a court provide only a rational basis review of state action in civil commitment cases, and that the stricter review granted in *Shelton* applies only to the first amendment. The *Garrity* analysis, however, has two flaws.

First, if one is prone to anchoring complex analyses in one-line dicta, then it is essential to closely scrutinize each word: The *Jackson* court said "At

24. *Id.* at 702.

25. *Johnson*, 484 F. Supp. at 301-05, 310, 311.

26. See *infra* notes 125-28 and accompanying text.

27. 406 U.S. 715, 738 (1972).

28. 522 F. Supp. 171, 236-37 (D.N.H. 1981).

the least," and suggested generally that it would go no further than needed in order to strike down the Indiana statute (which allowed criminal defendants to be civilly committed for an indefinite period).²⁹ This dictum in no way precludes a stricter standard of review. Indeed, if anything, it hints that a stricter standard may be required in some circumstances.

Second, and most importantly, the *Garrity* court's insistence that strict judicial scrutiny is unique to the first amendment and not applicable to substantive due process rights exposes a fundamental flaw in its analysis. Although it is true that in some substantive due process cases, for example those involving economic rights, the Supreme Court has applied only a minimum rationality standard of review,³⁰ it is also settled that when the right being curtailed by state action is determined to be "fundamental" in nature, a strict scrutiny analysis is to be applied. Consequently, as in *Roe v. Wade*,³¹ where a woman's fundamental right to privacy was involved, the state could interfere significantly with that right only if the governmental act was *narrowly drawn* to effectuate a *compelling state interest*. Likewise, in other substantive due process cases involving the infringement of "fundamental rights," the Supreme Court has similarly required that the state's means of achieving that interest be *narrowly drawn*.³² As to any argument that *narrowly drawn* is not equivalent to *least drastic means*, the *Shelton* court defined the requirement of "least drastic means" by stating that: "[a legitimate state purpose] cannot be pursued by means that broadly stifle fundamental personal liberties when the *end can be more narrowly achieved*."³³

As applied to involuntarily committed citizens, this analysis examines whether a "fundamental right" is involved, and if so, whether it is significantly curtailed.³⁴ Initially, the right of a citizen to be free from involuntary confinement by the state is manifestly a "fundamental right," satisfying both the Supreme Court's general definition in *Snyder v. Massachusetts*³⁵ which stated that a right is fundamental when it is "so rooted in the tradition and

29. *Jackson*, 406 U.S. at 738.

30. *Williamson v. Lee Optic Co.*, 348 U.S. 483 (1955).

31. 410 U.S. 113, 155 (1973).

32. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (although decision based mostly on substantive equal protection analysis, the Court suggests that a similar test would apply under substantive due process analysis regarding fundamental right to marry); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (right to choose family living arrangements); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right of marital privacy encompassing use of contraceptive devices). It should be noted that in each of these cases, the Supreme Court only required the state's interest to be "important," rather than "compelling" as in *Roe*.

33. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (emphasis added).

34. If the state interferes with a citizen's fundamental right but not in a significant way, then only a rational basis review is triggered. See *Whalen v. Roe*, 429 U.S. 589 (1977).

35. 291 U.S. 97, 105 (1934).

conscience of our people as to be ranked as fundamental," and the more complex test set forth in *Griswold v. Connecticut*³⁶ which noted that a right is fundamental when it is a "penumbral right" of privacy emanating from the specific guarantees in the Bill of Rights.³⁷ Second, as to the level of interference with this fundamental right, the Supreme Court has stated that civil commitment is a "massive curtailment of liberty."³⁸

Thus, when it is found that an individual's fundamental right of liberty or privacy is affected by state action, the strict scrutiny standard mandated by the *Roe-Griswold* framework requires that state action (civil commitment) fails unless it is narrowly tailored to achieve the state's articulated purpose. Accordingly, even though the state's interests in civil commitment are compelling (protection of individual, protection of public, treatment of individual), placement in institutions is "unnecessarily broad" and not "narrowly drawn" when placement in a less restrictive environments could adequately effectuate those state interests.³⁹

If, instead of distinguishing *Shelton* on the basis of first amendment versus substantive due process grounds, the *Garrity* analysis distinguished the stricter review in *Shelton* because it involved legislative action, whereas civil commitment involves executive action, then the analysis suffers a different flaw. Although *Shelton*, *Roe*, and *Griswold* all dealt with legislative action, whereas *Johnson* and *Garrity* addressed executive action, that is precisely the relationship between a constitutional attack on a statute and a section 1983⁴⁰ class suit against state officials. The two levels involve similar analyses because of the court's aversion to allowing a state to commit unconstitutional acts while hiding behind a facially valid statute.⁴¹ Consequently, the strict standard of review in *Shelton*, *Roe*, and *Griswold* regarding legislative action applies in the same manner to the executive act of civil commitment in *Johnson* and *Garrity*.

36. 381 U.S. at 479 (1965).

37. Indeed, involuntary commitments also infringe on the right to privacy which *Roe* and *Griswold* specifically addressed as a fundamental right. See also *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (implying that freedom from reputational injury regarding the stigma of civil commitment may be a fundamental right as is "the right to be free from, and to obtain judicial relief for, unjustifiable intrusions on personal security").

38. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (emphasis added).

39. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold*, 381 U.S. at 484.

40. 42 U.S.C. § 1983.

41. See *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) ("The mere fact that Romeo [the involuntary confinee] has been committed under proper procedures does not deprive him of all substantive liberty interests under the fourteenth amendment.").

3. Two Distinct Constitutional Rights

In the *Johnson* analysis, the court's transition from finding a right to treatment to finding a right to placement in the least restrictive environment is critically confusing: "Having found the existence of a constitutional right to treatment, this court must now face the tougher, more practical problem of defining that right in terms of meaningful therapeutic standards as well as dollars and cents."⁴² This language, along with the reference to the "right to treatment in the least restrictive setting," appears to condition the *Shelton* right to confinement in the least restrictive setting upon finding the *quid pro quo* right to treatment. Not only is this analysis logically inconsistent because the two analyses are significantly different, but in both of the cases on which the *Johnson* court relied, i.e., *Welsch* and *Gary W.*, the courts viewed the right to treatment and the right to confinement in the least restrictive setting as two distinct, independent rights, resulting in two distinct claims.⁴³ Indeed, the *Johnson* court made a semantic slip that indicated its intention to follow the key cases when it quoted a section from *Gary W.* in which the extent of the state's duty to provide a least restrictive setting for a confinee was examined first in light of *Shelton* and then as applied to the *quid pro quo* theory.⁴⁴

This subtle point has five consequences. First, because the two rights are wholly distinct both in analysis and application, a plaintiff may obtain community placement where a claim is based on the right to confinement in the least restrictive setting even when a court determines that relief may not be granted on his right to treatment. Second, those courts which utilize the more narrowly applied *pseudo* theory to find a right to treatment must still inquire as to a plaintiff's right to confinement in the least restrictive setting even where the confinee was committed for reasons other than treatment. Third, even when a court recognizes both rights, the severity of the affliction may give rise to different results. For example, whereas institutional treatment may provide the same degree of minimally adequate care to two confinees with vastly different functioning skills, the confinee with the higher potential for independent living may have a right to community placement since institutional placement is more restrictive for him. Fourth, for whatever reason, if a court finds no violation of a right to treatment or refuses to recognize such a right, then even if the state still must provide com-

42. *Johnson v. Solomon*, 484 F. Supp. 278 (D. Md. 1979).

43. In *Welsch*, the court separated the two rights so as to create two different sections of the discussion. Thus the court discussed the *quid pro quo* right to treatment, 373 F. Supp. at 499, and later addressed the *Shelton* right to confinement in the least restrictive setting. *Id.* at 502. The *Gary W.* court similarly distinguished the two rights. 437 F. Supp. at 1217-18.

44. *Johnson*, 484 F. Supp. at 303.

munity placement under the second right, it theoretically need not provide "treatment" in that placement. Fifth, the *Johnson* court's failure to clearly distinguish between the right to treatment and the right to confinement in the least restrictive setting resulted in an unpersuasive response to one of the state's main arguments in the dispute. Coupling both rights together, the state argued that the due process clause required only that state action bear a reasonable relationship to a legitimate state purpose and that community-based treatment was more than what was reasonably required.⁴⁵ Although struggling to justify the distinction throughout the entire case, the court attempted to summarily dismiss the argument by referring back to the *quid pro quo* right to treatment: "This analysis [the defendants' argument for rational basis review], however, is lacking in light of the conclusions reached above that the State's *parens patriae* power entails certain obligations of the State toward the individual."⁴⁶ Instead of allowing the state to mix and confuse the constitutional interests involved, the court should have focused on the strict scrutiny review unique and crucial to the *Shelton* right to confinement in the least restrictive setting: the cases on which the defendants' argument relied, *Lockner v. New York*,⁴⁷ *West Coast Hotel Co. v. Parrish*,⁴⁸ *Exxon Corp. v. Governor of Maryland*,⁴⁹ all dealt with economic rights, such as the liberty to contract, which are not considered to be fundamental rights under a substantive due process analysis and which therefore trigger only a rational basis review.⁵⁰

C. Similar Holdings in Other Jurisdictions

The *Johnson* opinion is by no means a maverick decision. Indeed, an overwhelming majority of those federal courts which have addressed the issue have either expressly or implicitly recognized a due process right to treatment and confinement in the least restrictive setting. Of at least seventeen federal district courts which have been confronted with the question, fifteen have expressly recognized a constitutional due process right to treatment,⁵¹

45. *Id.* at 302.

46. *Id.* (emphasis added).

47. 198 U.S. 45 (1905).

48. 300 U.S. 379 (1937).

49. 437 U.S. 117 (1978).

50. *Williamson v. Lee Optic Co.*, 348 U.S. 483 (1955).

51. *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985); *Thomas S. v. Morrow*, 601 F. Supp. 1055 (W.D.N.C. 1984), *aff'd in part, remanded in part*, 781 F.2d 367 (4th Cir.), *cert. denied*, 106 S. Ct. 1992 (1986); *Association for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 487 (S.W.N.D. 1982); *Philipp v. Carey*, 517 F. Supp. 513, 517 (N.D.N.Y. 1981); *Flakes v. Percy*, 511 F. Supp. 1325, 1338 (W.D. Wis. 1981); *Eckerhart v. Hensley*, 475 F. Supp. 908, 914 (W.D. Mo. 1979); *Rone v. Fireman*, 473 F. Supp. 92, 119 (N.D. Ohio 1979); *Evans v. Washington*, 459 F. Supp. 483 (D.D.C. 1978); *Lora v. Board of Educ. of New York*,

one has implied such a recognition,⁵² and one has argued that there is no such right in any form.⁵³ Of the seven federal circuit courts which have addressed this same issue, five have expressly found a right to treatment,⁵⁴ one has strongly implied a recognition of the right,⁵⁵ and one has expressly rejected the right.⁵⁶

Of eleven federal district courts which have addressed the right to confinement in the least restrictive setting, eight have expressly recognized such a right,⁵⁷ two have implied such a right,⁵⁸ and only one has expressly rejected such a right.⁵⁹ Although no federal circuit courts have expressly recognized or rejected a due process right to confinement in the least restrictive setting, three have implicitly recognized the right,⁶⁰ and one has implicitly rejected the right.⁶¹

II. IMPACT OF *YOUNGBERG V. ROMEO*

In the recent Supreme Court case of *Youngberg v. Romeo*,⁶² an involuntarily committed citizen, severely afflicted with mental retardation, brought a section 1983 action against state institution officials, seeking damages for

456 F. Supp. 1211, 1275 (E.D.N.Y. 1978), *vacated on other grounds*, 623 F.2d 248 (2d Cir. 1980); Halderman v. Pennhurst State School Hosp., 446 F. Supp. 1295 (E.D. Pa. 1978), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979); Gary W. v. State of Louisiana, 437 F. Supp. 1209, 1216 (E.D. La. 1976); Weidenfeller v. Kidulis, 380 F. Supp. 445, 451 (E.D. Wis. 1974); Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974); Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *aff'd in part, remanded in part sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

52. Davis v. Buckley, 526 F. Supp. 985, 990-91 (E.D. Va. 1981).

53. New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973).

54. Thomas S. v. Morrow, 781 F.2d 367, 374 (4th Cir.), *cert. denied.*, 106 S. Ct. 1992 (1986); Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1246 (2d Cir. 1984); Scott v. Plante, 691 F.2d 634, 638 (3d Cir. 1982); *Wyatt*, 503 F.2d at 1313, 1314; Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1979).

55. Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969).

56. Morales v. Turman, 562 F.2d 993 (D.C. Cir. 1977).

57. Philipp v. Carey, 517 F. Supp. 513 (N.D.N.Y. 1981); *Eckerhart*, 475 F. Supp. at 922; *Rone*, 473 F. Supp. at 125, *Evans*, 459 F. Supp. at 484; *Gary W.*, 437 F. Supp. at 1216; *Eubanks v. Clarke*, 434 F. Supp. 1022, 1028 (E.D. Pa. 1977); *Welsch*, 373 F. Supp. at 502; *Lesard v. Schmidt*, 349 F. Supp. 1078, 1095, 1096 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974). Note that in *Eubanks*, although the Court found this right it left open the issue as to whether there is also a right to treatment, again demonstrating the distinction between the two rights.

58. *Clark*, 613 F. Supp. at 702; *Association for Retarded Citizens of N.D.*, 561 F. Supp. 486.

59. *Garrity v. Whalen*, 522 F. Supp. 171, 237 (D.N.H. 1981).

60. *Scott*, 691 F.2d at 638; *Dilmore v. Stubbs*, 636 F.2d 966, 969-70 (5th Cir. 1981); *Covington*, 419 F.2d at 623.

61. *Society for Good Will to Retarded Children*, 737 F.2d at 1248.

62. 457 U.S. 307 (1982).

alleged violations of his constitutional rights. The Court held that by virtue of the due process clause, Romeo enjoyed constitutionally protected rights to reasonable care and safety, to freedom from unreasonable bodily restraints, and to a sufficient level of training⁶³ necessary to reasonably protect and facilitate those interests.⁶⁴ To determine what is "reasonable," the Court held that deference must be given to the judgment exercised by qualified professionals, whose decisions are presumptively valid.⁶⁵

The *Johnson* holding remains, for the most part, good law following *Youngberg* with only minor variations. Federal courts after *Youngberg* may still order community placement for involuntary confinees, based on violations of either the constitutional right to treatment or the constitutional right to confinement in the least restrictive setting.

A. The Right to Treatment

1. Narrowing the Right

Regarding an individual's right to treatment, *Youngberg* adds two dimensions. First, the Court limits this right to treatment to that which will reasonably protect identifiable liberty interests. This limitation, however, does not preclude a right to community treatment for many committed individuals. Critically, the Court notes: "A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is *reasonable in light of identifiable liberty interests and the circumstances of the case.*"⁶⁶ The rights were limited to that which would enable plaintiff-respondent Romeo to reasonably protect his interests in safety and freedom from bodily restraint because those freedoms were the only two liberty interests at stake. Being severely retarded, Romeo expressly conceded that no amount of training would move him toward release and freedom from state control,⁶⁷ and he did not seek placement in the community.

Thus, it is arguable that under different circumstances, committed individuals who are less severely afflicted and who possess greater potential for independent living would possess additional liberty interests such as freedom

63. "Training" and "treatment" are used interchangeably. See *Youngberg*, 457 U.S. at 311 n.5.

64. *Id.* at 324.

65. The court vacated and remanded the case on the grounds that the lower court had incorrectly instructed the jury to apply an eighth amendment standard of liability. *Id.* at 324-25.

66. *Id.* at 319 n.25 (emphasis added).

67. *Id.* at 317.

from confinement and freedom from all or partial state control of their lives. With *Youngberg* mandating that the right to minimally adequate treatment for confinees requires treatment that would reasonably enable them to achieve any attainable liberty interests, substantive due process under *Youngberg* may guarantee those confined a right to community-based treatment.

2. Defining Professional Judgment

A second dimension which the *Youngberg* decision adds to the *Johnson* analysis is that it requires professional deference in determining what treatment is reasonable. This deference, however, is itself qualified and, arguably, may not occur if the professional bases his decision on administrative (rather than clinical) factors.

In defining the extent to which professional deference is warranted, the *Youngberg* Court offered a working definition of the professional to whom this deference is to be given:

By "professional" decisionmaker [sic], we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded.⁶⁸

The court in *Clark v. Cohen*⁶⁹ rigorously applied this definition to conclude that the professional deference mandated by *Youngberg* is limited to purely clinical decisions. Reasoning that the Supreme Court did not mean "to include decisions motivated out of budgetary constraints in the category of 'professional judgment,'" ⁷⁰ the *Clark* court concluded that a decision requiring deference must be "based on medical or psychological criteria and not on exigency, administrative convenience, or other non-medical criteria."⁷¹ Although the *Youngberg* court specifically stated that budgetary constraints may provide the factual predicate for a defense of good faith immunity from a section 1983 suit for damages,⁷² the *Clark* court correctly recognized that this statement did not mean that such considerations should provide a bar to prospective equitable relief. In reaching this conclusion, the court relied on the Third Circuit case of *Scott v. Plante*.⁷³

68. *Youngberg*, 457 U.S. 307, 323 n.30.

69. 613 F. Supp. 684, 705 (E.D. Pa. 1985).

70. *Id.* at 704 n.13.

71. *Id.* at 704.

72. *Youngberg*, 457 U.S. at 323.

73. 691 F.2d 634, 637 (3d Cir. 1983).

Even in a situation in which professional judgment had not been unanimous, at least one court following *Youngberg* has found a due process right to community-based treatment and demonstrated a willingness to scrutinize the professional judgment to ensure it was not a guise for administrative convenience. In *Thomas S. v. Morrow*,⁷⁴ a federal court granted a motion for summary judgment in favor of a borderline mentally retarded plaintiff who claimed that the state violated his due process right to treatment. Although many of the treating clinicians had recommended community placement, some had recommended that the plaintiff remain in the institution.⁷⁵ Language in the opinion suggests that the court, after discussing *Youngberg*, did not give deference to the recommendations for institutional placement because those judgments had been based on budgetary limitations. The court specifically stated that: "To the extent that any professionally prescribed treatment differed from that set forth above, it differed because the professional's stated judgment was modified to conform to the *available* treatment, rather than to the *appropriate* treatment, for the plaintiff's condition."⁷⁶ The *Thomas* court, quoting *Youngberg* went on to reason that: "To the extent that a professional's judgment of the appropriate treatment is shown to have been modified to fit what is available, that judgment likely has become 'a substantial departure from accepted professional judgment practice, or standards.'"⁷⁷

The judicial check on potential abuse of the *Youngberg* deference is particularly critical to an analysis similar to that of the *Johnson* court which at least semantically distinguished between "available" and "alternative" right to placement in the least restrictive setting. In articulately stating the problem, the *Thomas S.* court noted that under *Youngberg*, "consideration of budgetary constraints is not proper when defining [the] constitutional right," though it is a proper factor in determining relief where damages are sought.⁷⁸

The *Thomas S.* approach offers a way for the *Johnson* court to effectuate its strong desire to consider fiscal feasibility and yet at the same time to honor the *Clark* court's appropriate qualification of the deference mandated

74. 601 F. Supp. 1055 (W.D.N.C. 1984), *aff'd in part, remanded on other grounds*, 781 F.2d 367 (4th Cir. 1986). Despite affirming the case, the Fourth Circuit softened the language somewhat on appeal. It noted that *Youngberg's* absolute defense of lack of funds did not apply to prospective relief and that, although professional judgment may involve some consideration of financial reasonableness, *Youngberg* "did not allow the professionals free rein." *Thomas S.*, 781 F.2d at 375.

75. *Thomas S.*, 601 F. Supp. at 1059.

76. *Id.* (emphasis added).

77. *Id.* at 1060.

78. *Id.* at 1059-60.

by *Youngberg*: the *Johnson* court should limit the definition of the particular plaintiff's *quid pro quo* right to treatment to purely clinical decisions—but could consider fiscal feasibility as the next step when fashioning relief.

3. *Different Holdings in Other Post-Youngberg Cases*

Several federal courts following *Youngberg* have denied plaintiffs' claims to community-based treatment and likewise have concluded that their constitutional (*quid pro quo*) rights to treatment have not been infringed. These cases, however, are reconcilable with those that have found such a constitutional violation based on inherent factual differences. In *Society for Good Will to Retarded Children v. Cuomo*,⁷⁹ the Second Circuit found no constitutional violation because the treating clinicians recommended institutional care. Indeed, the *Clark* court, itself, distinguished its decision from that of *Society for Good Will to Retarded Children* based on factual, rather than legal, differences.⁸⁰

Similarly, the court in *Association for Retarded Citizens of North Dakota v. Olson*,⁸¹ denied relief to a class of institutionalized mentally retarded citizens who sought, *inter alia*, alternative placements. The involved clinicians did not recommend the alternative placements which plaintiffs sought. The court implied, however, that if the professional judgment involved had gone the other way, it would have found a violation.⁸²

B. *The Right to Confinement in the Least Restrictive Setting*

1. *Does The Right Exist After Youngberg?*

The issue of *Youngberg's* impact on the continued validity of a constitutional right to civil confinement in the least restrictive setting focuses on the Court's statement that "[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance the 'liberty of the individual' and 'the demands of an organized society.'"⁸³ Although this issue has not been addressed by either courts or commentators, on the surface this language appears to suggest that a balancing test, rather than the stricter standard enunciated in either *Shelton v. Tucker*⁸⁴ or

79. 737 F.2d 1239, 1249 (2d Cir. 1984).

80. *Clark v. Cohen*, 613 F. Supp. 684, 705 (E.D. Pa. 1985).

81. 561 F. Supp. 473, 486-87 (D.N.D. 1982), *aff'd in part, remanded on other grounds*, 713 F.2d 384 (8th Cir. 1983).

82. *Id.* at 486.

83. 457 U.S. 307, 320 (1982) (quoting *Poe v. Ullman*, 307 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

84. 364 U.S. 479, 488 (1960).

Roe v. Wade,⁸⁵ is the correct standard of review to apply to civil commitments. One could argue that at best, civil confines possess due process rights to confinement in a manner which is not disproportionately restrictive of their liberties, relative to the relevant state interests. To further support this argument, one would attempt to reconcile the analysis with the *Shelton-Griswold-Roe* framework by arguing that judicial review of state executive action is judged by a more relaxed standard than state legislative action because of administrative and economic factors. There is support for this contention in *Youngberg*, such as the following:

At the same time, this standard is lower than the "compelling" or "substantial" necessity tests the Court of Appeals would require a State to meet to justify use of restraints or conditions of less than absolute safety. We think this requirement would place an undue burden on the administration of institutions such as Pennhurst and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents.⁸⁶

Despite the apparent strength of this argument, however, it is flawed. The stronger view is that *Youngberg* does not even implicitly deny the existence of a due process right to civil confinement in the least restrictive setting. This is demonstrated by four points. First, the Court did not even address the right to confinement in the least restrictive setting since it was not raised nor was it relevant; Romeo did not seek community placement nor was he capable of it.⁸⁷

Second, if the *Youngberg* Court is suggesting a new due process standard of review, it is inconsistent in its source. In the same paragraph, the Court supports its use of a "balancing test" with language espousing an even more lenient standard of review. Citing *Bell v. Wolfish*,⁸⁸ the Court explained that "we upheld those restrictions on liberty that were reasonably related to legitimate government objectives and not tantamount to punishment."⁸⁹ This language is even less reconcilable with the substantive due process analyses involving fundamental rights in *Roe* and *Griswold*. Perhaps the way to reconcile these cases and to find consistency in the Court's opinion is to view the balancing test in *Youngberg* not as establishing a new standard of review which initially defines the right to confinement in the least restrictive setting, but as providing a way to determine whether or not the right has been violated. Thus, the Court decided that plaintiff-respondent Romeo possessed

85. 410 U.S. 113, 155 (1973).

86. *Youngberg*, 457 U.S. at 322.

87. *Id.* at 317.

88. 441 U.S. 520 (1979).

89. *Youngberg*, 457 U.S. at 320.

rights to reasonable care and safety, to freedom from unreasonable bodily restraints, and to such training as may be required by those interests. The court *then* balanced those rights against the state's interests to determine whether a violation occurred by deferring to professional judgment. Stated more simply, whereas the *Shelton* and *Roe* standards of review guarantee to the involuntary confinee a substantive due process right to confinement in the least restrictive setting, *Youngberg* may implicitly require that a balancing test be utilized to determine the practicability or reasonableness of the less restrictive alternative sought.

A third response to the argument that *Youngberg* rejects a constitutional right to confinement in the least restrictive setting is to recognize that even if *Youngberg* changes the standard of review for civil commitment from the *Shelton-Roe-Griswold* standard to a balancing test, the consequences remain similar. Whether the constitutional right is to confinement in the least restrictive setting or to confinement in a setting which is not overly restrictive relative to the state interests involved, community placement may be the resulting manifestation of both constructions where the placements, or the funds necessary to develop the placements, are available, or where the funds can be made available by creatively shuffling priorities.

Fourth, and most convincingly, although the *Youngberg* Court did not even address the validity of a confinee's right to confinement in the least restrictive setting, lower courts subsequent to *Youngberg* have addressed this issue. Two such courts have either expressly or implicitly noted that the constitutional right to confinement in the least restrictive setting still exists, while one court seemed to recognize its existence in a modified form. Although not specifically applying *Youngberg* in this part of its opinion, the court in *Clark* based part of its holding on the due process right to confinement in the least restrictive setting.⁹⁰ Similarly, the Third Circuit in *Scott* implicitly recognized the right to confinement in the least restrictive setting when it stated that *Youngberg* required no essential modification of its prior judgment which was in part based on this right.⁹¹ Finally, the court in *Association for Retarded Citizens of North Dakota* noted:

[W]hile the *Youngberg* decision does not directly address this specific right, the Court's analysis indicates that it would reject an absolute right to the least restrictive alternatives. . . . Following this analysis, this court must conclude that a constitutional right to the least restrictive method of care or treatment exists only insofar as professional judgment determines that such alternatives would measurably enhance the resident's enjoyment of basic liberty

90. *Clark v. Cohen*, 613 F. Supp. 684, 702, 703 (E.D. Pa. 1985).

91. *Scott v. Plante*, 691 F.2d 634, 639 (3d Cir. 1983).

interests.⁹²

One could argue that the court in *Association for Retarded Citizens of North Dakota* was, in effect, saying that an involuntary confinee does not possess the *Shelton* right to confinement in the least restrictive setting as a second right, independent from the right to minimally adequate treatment. However, a better reading is that the court was merely suggesting that the *Shelton* right, as with the right to minimally adequate treatment, is limited in its definition by deference to professional judgment.

In other language which may on the surface suggest the extinction of the right to least restrictive confinement, the *Youngberg* Court noted that Romeo possessed a constitutional right to freedom from unreasonable bodily restraints, that reasonableness being determined by balancing the interests of the state against those of the confinee.⁹³ A parallel could be drawn between bodily restraints once within the institution and the overall confinement of being in the institution involuntarily (whether it be a locked facility or one which nonetheless requires that the confinee remain). It could be argued that *Youngberg*, at best, guarantees only a right to a reasonably nonrestrictive placement. Although somewhat appealing, this argument has two flaws.

First, in *Youngberg*, the confinee did not seek community placement and so acquiesced to the state's control in terms of confinement in the institution. In contrast, however, many involuntary confinees who seek community placement contest the initial act of confinement in the institution. The parallel breaks down at this critical point. Whereas a test of reasonableness may be appropriate where a citizen acquiesces and perhaps even desires state control yet at the same time contests one particular part of it, this more liberal test would not be appropriate where a citizen resists the state control in all forms at all times.

Second, even if the parallel stands, since the Supreme Court required a balancing test to determine what is reasonably nonrestrictive, then involuntary confinees after *Youngberg* who possess the potential for community placement possess a right to placement in a setting which is not overly restrictive relative to the state's interests. For many confinees, this setting will involve community placements.⁹⁴

92. *Association for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 486 (S.W.N.D. 1982).

93. *Youngberg*, 457 U.S. at 320-22.

94. In an interesting but unsound reading of *Youngberg*, one commentator has suggested that when a person is committed for the purpose of treatment rather than for protection, *Youngberg* demands the "most effective treatment alternative" and not the least restrictive treatment alternative. Hermann, *Barriers to Providing Effective Treatment: A Critique of Revisions in Procedural, Substantive, and Dispositional Criteria in Involuntary Civil Commitment*, 39 VAND. L. REV. 83, 105 (1986). This argument has two flaws. First, *Youngberg* clearly

2. *Should Courts Defer to Professional Judgment Regarding the Right to Confinement in the Least Restrictive Setting?*

Unlike the *quid pro quo* right to treatment, the *Shelton* right to confinement in the least restrictive setting primarily focuses on the level of state infringement upon personal liberty, not the mode of mental health treatment. Thus, one could argue that although courts have no expertise regarding the mode of treatment, they are adequately equipped to determine the constitutional level of state infringement. Therefore, the *Youngberg* requirement of deference to professional judgment regarding the *quid pro quo* right to treatment need not apply to the *Shelton* right to confinement in the least restrictive setting.

This argument, however, fails for two reasons. First, the *Shelton* right as applied to involuntary confinees will vary widely depending on the ability of the mentally ill or mentally retarded citizen to function. Thus, clinical expertise is necessary to help determine what setting is "least restrictive" for each confinee.

A second reason for applying the *Youngberg* requirement of professional deference to the *Shelton* right is that the *Youngberg* Court's rationale for requiring this deference was based not only on the issue of expertise, but also on concerns for federalism and undesirable "interference by the federal judiciary with the internal operations of these [state] institutions. . . ."⁹⁵ This concern regarding the right to treatment is equally viable regarding the *Shelton* right. Therefore, it would appear that after *Youngberg* a federal court should defer to professional judgment when determining the scope of the confinee's constitutional right to confinement in the least restrictive setting.

III. FASHIONING RELIEF

Having clarified the two constitutional rights espoused by the *Johnson* court and colored by *Youngberg*, the issue of relief for violations of a confinee's rights to treatment and to confinement in the least restrictive setting is now examined. Throughout this section, it is assumed that a violation has been found. That is, a determination has been made based on purely clinical criteria, that as to the *quid pro quo* right to treatment, the involuntary con-

limited the right to treatment to only "minimally adequate treatment," and drew no distinctions with regard to the state's commitment purpose. 457 U.S. at 322. Second, since the confinee's constitutional rights arguably arise because of the government's forced intervention, it is logical that a confinee's right may focus on the freedom from certain forms of control, regardless of the state's purpose for intervention. See, e.g., *Youngberg*, 457 U.S. at 317.

95. *Youngberg*, 457 U.S. at 322-23.

finnee shows potential for living independently of state control and that community-based treatment is reasonably necessary to enable the confinee to regain that liberty interest. As to the *Shelton* right, it is assumed that professional judgment, based on purely clinical criteria, advises that for the individual confinee, community placement is the least restrictive form of state control which adequately accomplishes the state's goals, whether it be treatment of the confinee, protection of the confinee, or protection of the public.

The issue of relief is particularly difficult, as the *Johnson* court articulately explained, because of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own laws."⁹⁶ The court cautioned that "a Federal judge rearranging a State's penal or education system is like a man feeding candy to his grandchild. He derives a great deal of personal satisfaction from it and has no responsibility for the results."⁹⁷ Yet the court finally concluded that:

At the same time, a federal court has an obligation to announce and apply constitutional standards as well as to monitor their implementation. To find otherwise would, in effect, be to write the Supremacy Clause out of the Constitution altogether. Although there are obvious practical limits on the extent to which a federal court can command expenditures from the State treasury, the fact that guaranteeing a constitutional right may call for additional State funding is not a valid defense to a constitutional requirement.⁹⁸

The case law to date suggests three distinct approaches for reaching this delicate balance. The *Johnson* court might apply either of the last two approaches today, with some variation.

A. *Substantive Injunctive Relief*

Regarding substantive injunctive relief, a category which includes two specific approaches, several points require clarification. First, as with constitutionally inadequate prison conditions, the federal court which orders substantive injunctive relief for violations of a confinee's due process rights is not legislating a state's budget; not conclusively requiring it to spend more money on services. Rather, it is forcing the state to choose between exerting its power within constitutional limits or not exerting its power at all.⁹⁹

96. *Johnson v. Solomon*, 484 F. Supp. 278, 297 (D. Md. 1979) (citing *Rizzo v. Goode*, 423 U.S. 362, 378 (1976)).

97. *See id.* (citing *McRedmond v. Wilson*, 553 F.2d 757, 766 (2d Cir. 1976) (Van Graafeiland J., dissenting)).

98. *See id.* at 297-98.

99. *See Association for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 486 (S.W.N.D. 1982).

Second, although dictum in the Supreme Court case of *Dandridge v. Williams*¹⁰⁰ is often cited as prohibiting a federal court from ordering substantive relief which would require additional state expenditures, there is a marked difference between reviewing a state's allocation of gratuitous services among passive recipients and limiting the manner in which a state can physically confine a non-criminal. Ordering extensive improvements in the treatment operations for the confinees/plaintiffs, the Fifth Circuit in *Wyatt v. Aderholt*¹⁰¹ noted:

It goes without saying that state legislatures are ordinarily free to choose among various social services competing for legislative attention and state funds. But that does not mean that a state legislature is free, for budgetary or any other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights.¹⁰²

Having clarified these two points, attention is now given to two distinct ways in which federal courts have fashioned this substantive injunctive relief.

1. *No Express Consideration of Budgetary Constraints*

Although the *Johnson* court did not itself disregard budgetary constraints, it supported its holding¹⁰³ with at least four federal district courts cases, dealing with eighth amendment claims in prisons and juvenile detention centers, which used language effectively precluding the consideration of budgetary constraints even in the fashioning of relief.¹⁰⁴ In these district court cases, the courts ordered substantial, expensive improvements in conditions and operations. As to any argument that eighth amendment violations regarding prison conditions are more deserving of substantive relief than are violations of due process rights of civil confinees, if any difference exists at all, since a state has stronger interests in restraining criminals than it does in confining mentally ill and mentally retarded citizens, logic would suggest that a court would be more likely to order intrusive, substantive relief for the confinees than for the criminals. As the state interest becomes weaker, a court's willingness to focus on the conflicting individual interest should proportionately increase.

At least two pre-*Youngberg* cases which found violations of confinees' sub-

100. 397 U.S. 471, 487 (1970).

101. 503 F.2d 1305 (5th Cir. 1974).

102. *Id.* at 1314-15.

103. *Johnson v. Solomon*, 484 F. Supp. 278, 297, 301 n.28 (D. Md. 1979).

104. *Palmigiana v. Garrahy*, 443 F. Supp. 956, 959 (D.R.I. 1977); *Martarella v. Kelly*, 359 F. Supp. 478, 481 (S.D.N.Y. 1973); *Inmate of the Boys Training School v. Afflick*, 346 F. Supp. 1354, 1374 (D.R.I. 1972); *Jones v. Wittenberg*, 330 F. Supp. 707, 712-13 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972).

stantive due process rights arguably fashioned substantive relief without a consideration of the states' budgetary constraints. As described previously, in ordering expensive improvements in care, based on a violation of the plaintiffs' *quid pro quo* rights to treatment, the Fifth Circuit in *Wyatt* expressly rejected the defendants' argument that fiscal burdens should be considered.¹⁰⁵ Similarly, the district court in *Rone v. Fireman*¹⁰⁶ found violations of substantive due process rights to treatment and to placement in the least restrictive setting; and then, without any discussion of fiscal feasibility, ordered changes involving immense expenditures for staff, transportation, programming, and the physical plant.¹⁰⁷

If construed very broadly, several post-*Youngberg* cases imply a similar approach to fashioning substantive relief. The courts in *Scott*,¹⁰⁸ *Clark*,¹⁰⁹ and *Thomas S.*¹¹⁰ may be construed as suggesting that since the professional judgment requiring judicial deference cannot involve a consideration of budgetary constraints, then a state's fiscal burdens are not to be considered at all when a federal court is defining a constitutional right and determining a violation. Also, since the *Youngberg* consideration of budgetary constraints in fashioning relief is specific to damages, then a federal court may completely ignore fiscal burdens when fashioning prospective relief. However, the better view would be that although *Youngberg* — as construed by the *Clark* and *Thomas S.* courts — probably precludes the professional from considering budgetary constraints when helping the court to define the rights and determine the violations, the *Youngberg* Court's strong concern for federalism¹¹¹ implies that fiscal feasibility should be considered to some degree when fashioning relief.

2. Express or Implied Consideration of Fiscal Feasibility

The most rigorous reading of pre- and post-*Youngberg* decisions suggests that a majority of federal courts have ordered substantive injunctive relief for violations of rights to treatment and to confinement in the least restrictive setting, considering fiscal feasibility when fashioning this relief. During the exploration of these cases, it is important to keep in mind that whenever a court seeks to fashion relief in this manner, a certain factual question regarding the financial reasonableness of developing community placements will

105. *Wyatt*, 503 F.2d at 1314-15.

106. 473 F. Supp. 92 (N.D. Ohio 1979).

107. *Id.* at 133-35.

108. *Scott v. Plante*, 691 F.2d 634, 637 (3d Cir. 1983).

109. *Clark v. Cohen*, 613 F. Supp. 684, 705 (E.D. Pa. 1985).

110. *Thomas S. v. Morrow*, 601 F. Supp. 1055, 1055 (W.D.N.C. 1984).

111. *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982).

inevitably arise and be litigated on a case-by-case basis: while most authorities agree that after an initial period, community-based treatment will cost less than institutional care,¹¹² this view is not universal.¹¹³

In *Welsch*, one of the key cases relied on by the *Johnson* court, the district court expressly considered fiscal reasonableness, and the Eighth Circuit on appeal implied such a consideration.¹¹⁴ Before ordering significant, substantive relief regarding changes in the institutional care and the development of less restrictive alternatives, the district court found violations of the state's constitutional duties to provide "adequate" treatment and "to explore and provide the least stringent practicable alternatives to confinement."¹¹⁵ Thus, a condition of financial reasonableness was part of the analysis.

On appeal, the Eighth Circuit implied the same consideration when, although vacating and remanding on other grounds, it expressly ratified the legal basis of the district court's order.¹¹⁶ Note that to consider fiscal feasibility in fashioning relief does not mean that a court will accept a defense of insufficient funds. Rather, it suggests that a court will either limit the scope of the right with an express condition of financial reasonableness or find a violation but limit substantive injunctive relief to that which is reasonably affordable. Indeed, the Eighth Circuit clearly rejected the state's defense of lack of funds as demonstrated by this statement of the court:

There must be no mistake in the matter. The obligation of the defendants to eliminate existing unconstitutionality does not depend upon what the legislature may do, or upon what the Governor may do, or, indeed upon what the defendants may be able to accomplish with means available to them. As stated, if Minnesota is going to operate institutions like Cambridge, their operation is

112. See *Clark*, 613 F. Supp. at 707; *Rapson*, *supra* note 2, at 200. Finally, in a recent telephone interview, the Assistant Director for Administration for the Maryland Department of Health and Mental Hygiene estimated that the average yearly cost of institutional care per person ranges from \$51,000 to \$72,000, whereas the average yearly cost of community-based care per person is approximately \$35,000.

113. See *Association for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 483 (S.W.N.D. 1982) in which the court held that community placement was not necessarily less expensive despite studies in evidence to the contrary since partial hidden costs were shifted to private citizens and to the local government such as for police protection and hospital care. The problems with this approach are threefold: first, the increases in these local costs are diffused and relatively insignificant; second, the fact that private citizens and local governments may absorb some of the cost should have nothing to do with determining the reasonableness of the cost relative to the defendant state; and third, many community placements successfully help patients return to the work force during treatment, an economic factor not considered by the *Olson* court.

114. *Welsch v. Likens*, 373 F. Supp. 487 (D. Minn. 1974).

115. *Id.* at 499, 502 (emphasis added).

116. *Welsch*, 550 F.2d at 1132.

going to have to be consistent with the Constitution of the United States.¹¹⁷

In similarly strong language, the court warned the soon-to-convene Minnesota legislature that if it did not respond to the district court's requirements, the court would be forced to act harshly.¹¹⁸

Although this strong language may appear to completely preclude a consideration of fiscal feasibility, the context of the court's opinion implies that such a consideration was still potentially influential. This position is supported for example, by the court of appeals' express approval of the district court's decision which limited recognized individual rights with a condition of financial reasonableness. Likewise, this position is supported by the fact that the court of appeals expressed its belief that the necessary funds could be made available through a reasonable re-shuffling of budgetary priorities.¹¹⁹

The decision in *Clark*¹²⁰ is most accurately construed as considering financial reasonableness in fashioning relief, although this was not a factor in the initial definition of constitutional rights or the determination of a violation. Strongly rejecting the defendants' argument of lack of funds, the court ordered the defendants to develop a community placement for the plaintiff. Yet, the court implied that it had considered fiscal feasibility in the fashioning of relief to some degree.¹²¹ First, it noted its understanding that funds were actually available or at least could be made available through a re-shuffling of budgetary priorities. Second, the court commented that the defendants had never requested more funds for community programs. Third, the court stated its belief that the cost of one community placement was relatively nominal and that after the initial investment, community placements in general are less expensive than institutional care.

As explained previously, the court in *Gary W.*, another key case in the *Johnson* opinion, can be construed as suggesting substantive relief in certain cases, which, however, would be limited by a condition of financial reasona-

117. *Id.*

118. *Id.* at 1132-33 ("In any event, we desire to make it clear to the present Governor and the current Legislature that the requirements of the 1974 Order and the requirements of the April 15, 1976 Order that we uphold today are positive, constitutional requirements, and cannot be ignored There is no suggestion that Minnesota lacks the funds necessary to enable the Department of Public Welfare to meet the requirements of the district court. The question is what priority the Legislature, in the face of competing demands for State funds, is willing to accord to its institutions for the mentally retarded.").

119. *Id.*

120. *Clark*, 613 F. Supp. at 705.

121. *Id.* at 706-07 (Only 25% of the budget for the state mental retardation services had been allocated to community programs and some of that portion had been left unused and returned at the end of the fiscal year.).

bleness.¹²² Based on the rights to treatment and to confinement in the least restrictive setting, the court ordered the defendants to prepare treatment plans semi-annually and "to consider the least restrictive alternative for the child, but the State will not be required to develop an *entire new system of facilities* to implement the plan."¹²³ Although one could read *Gary W.* narrowly as requiring only that the state consider the alternatives presently available, the language more accurately implies a very moderate, reasonable amount of substantive direction, such as court-ordered program implementation which although involving some financially reasonable resource development, would still fall far short of creating an entire new system of facilities.

As previously argued, the better reading of *Johnson* similarly suggests that the court did not preclude substantive relief as long as it is financially reasonable. Thus, involuntary confinees possess substantive due process rights to reasonably affordable treatment and to placement in the least restrictive setting which is adequate to serve the state's narrowly-tailored purpose and which is financially reasonable.

Indeed, regardless of what the *Johnson* court intended in 1978, the Fourth Circuit's affirmance of an order for substantive relief in *Thomas S. v. Morrow*¹²⁴ commands the view that a federal district court in Maryland in 1987 should not automatically preclude substantive relief in all circumstances. Even a more narrow construction of *Johnson* suggests that although the court may have precluded substantive relief in that case, this preclusion was conditioned on the state's good faith and reasonable progress in developing community resources which the court referred to at length in different parts of its opinion.¹²⁵ Of particular importance is the court's reliance on defendants' testimony which demonstrated that in the ten years prior to 1978, the Maryland State Mental Hygiene Administration had seen a sixty percent decrease in its institutional population and had increased its expenditures for community services from \$200,000 to \$14,000,000, an increase of seven thousand percent. Apparently, the court felt that the state's good faith progress in that case precluded the necessity of substantively interfering by ordering development that was already taking place as quickly as possible. However, even according to this more narrow reading, the *Johnson* court should have ordered the development of community programs that are financially reasonable in the proper circumstances if the court were faced with statistics which suggested that the state's good faith commitment no longer

122. *Gary W. v. State of Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976).

123. *Id.* at 1219 (emphasis added).

124. 781 F.2d 367 (4th Cir. 1986).

125. *Johnson v. Solomon*, 484 F. Supp. 278, 310-11 (D. Md. 1979).

existed and which implied that even though the community programs were not available intact, the funds necessary to develop them were.

The situation described above would arise if a suit were brought against the Maryland State Department of Health and Mental Hygiene ("DHMH") today by involuntary confinees possessing the potential for independent living and for whom the treating clinicians advised community-based treatment. During the nine years since the 1978 case, despite a forty percent decrease in average daily populations in its mental hospitals, the DHMH has increased its budgetary allocation to community programs from twelve percent in 1978 to only eighteen percent in 1986. The other eighty-two percent was allocated to institutional care.¹²⁶ These grim statistics compare poorly to the seven thousand percent increase in community service expenditures which the *Johnson* court had seen in 1978 with the Mental Hygiene Administration.

Indeed, if the *Johnson* court did not order the reasonable development of community resources in light of these facts, then it would be grossly shirking its self-proclaimed "obligation to announce and apply constitutional standards as well as to monitor their implementation," and would be at odds with its tenet that "although there are obvious practical limits on the extent to which a federal court can command expenditures from the state treasury, the fact that guaranteeing a constitutional right may call for additional state funding is not a valid defense to a constitutional requirement."¹²⁷

B. Procedural Relief

Procedural relief is certainly the least intrusive means of fashioning relief and has some support from the oft-cited case of *Dandridge v. Williams*¹²⁸ in which the Court stated: "The Constitution may impose certain procedural safeguards upon systems of welfare administration But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."¹²⁹

In view of the decision in *Dandridge*, Professor Tribe stated that "the notion of special judicial competence in the area of procedure, as distinguished from that of substance, may derive some support from Justice Stewart's [concluding] statement."¹³⁰

126. Maryland Department of Health & Mental Hygiene, Memorandum of Jan. 9, 1986 (from the Director to Mental Hygiene Administration Executive Council).

127. *Johnson*, 484 F. Supp. at 297-98.

128. 397 U.S. 471 (1970).

129. *Id.* at 487.

130. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 537 (1978).

However, as explained previously, although procedural relief can often be the least intrusive, it may err on the other side, i.e., shirking an obligation to protect adequately the constitutional rights of citizens. The *Clark* court noted that if a court merely enjoins a state from institutionalizing citizens where suitable community programs already exist then "the defendants could simply refuse to allocate funds for any community placements and institutionalize all mentally retarded persons."¹³¹ Also, even assuming a lack of bad faith, the approach offers no incentive for creative budgeting and places the power and duty of defining the scope of citizens' constitutional rights in the hands of state budget administrators.

Despite these obvious limitations it is still possible, though not likely, that one could read *Johnson* and similar cases such as *Gary W.* in the most narrow sense, suggesting that the *Johnson* court's express preference for procedural relief was not conditioned on Maryland's good faith commitment. With this unlikely construction, there is only one readily apparent way in which the *Johnson* court could deal with Maryland's grim statistics of 1986 and yet stay even remotely consistent with its 1978 opinion. Consistent with its preference to attempt first procedural intervention, the court could borrow the relief model in the Supreme Court case of *Hunt v. Washington Apple Advertising Commission*,¹³² and place on the state the burden of demonstrating that community placements, as well as the funds necessary to develop them, are unavailable and cannot be obtained through reasonably prioritized budgeting.¹³³

CONCLUSION

Consistent with many federal courts in the late 1970's,¹³⁴ the court in *Johnson* recognized that involuntary confinees possess substantive due process rights to treatment and to placement in the least restrictive setting.¹³⁵ The two rights differ both in theory and consequence: the former is based on a *quid pro quo* exchange of treatment for confinement with relatively few procedural safeguards; the latter is based on the "least drastic means" standard of review of state deprivation of individual liberty. Constructions of

131. *Clark v. Cohen*, 613 F. Supp. 684, 702 (E.D. Pa. 1985).

132. 432 U.S. 333, 353 (1977) ("When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of local benefits flowing from the statute and the *unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake.*")(emphasis added).

133. For a somewhat similar proposal, see Hoffman & Dunn, *Beyond Rouse and Wyatt: An Administrative-Law Model for Expanding and Implementing the Mental Patient's Right to Treatment*, 61 VA. L. REV. 297, 310-11 (1975).

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

135. *Johnson v. Solomon*, 484 F. Supp. 278 (D. Md. 1979).

the right to least restrictive confinement differ as to whether that setting must be presently available or merely reasonably affordable. A review of relevant cases suggests that the the better view is that the setting must be reasonably affordable.¹³⁶

Subsequent to *Johnson*, the Supreme Court decided *Youngberg* which allowed *Johnson* to remain good law with some variations.¹³⁷ Although the Court did not expressly or implicitly address the right to least restrictive confinement, it did limit the right to treatment to that treatment which is reasonably necessary to achieve recognized liberty interests. Also, it required that great deference be given to professional judgment in the determination of what is reasonable. Federal courts subsequent to *Youngberg* have qualified this precept, giving the required deference only when the judgment is based on purely clinical criteria and does not involve a consideration of budgetary constraints.¹³⁸ The better reading of *Youngberg* would apply the professional deference requirement to the right to least restrictive confinement as well, consequently giving great deference to professional judgment in the determination of what setting is "least restrictive" for the individual confinee.¹³⁹

Finally, most courts, and even the better reading of *Johnson*, suggest that where the clinicians have advised community placement, the court should order the development of financially reasonable programs if they do not exist.¹⁴⁰ Even the most narrow reading of cases such as *Johnson* would recognize that if faced with grim statistics showing that a state is seriously lacking in a reasonable commitment to develop these community programs, these courts would either order the development of community programs where reasonably affordable or at least require the states to demonstrate that the funds necessary to develop them are either unavailable or cannot be obtained through a reasonable re-shuffling of budgetary priorities.

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136. See *supra* notes 16-24 and accompanying text.

137. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

138. See *supra* notes 66-73 and accompanying text.

139. See *supra* note 95 and accompanying text.

140. See *supra* notes 103-127 and accompanying text.