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John Cahalan
Indiana University School of Law

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Authorities on mental retardation recognize that with proper treatment retarded persons, including the severely retarded, are capable of significant intellectual development.[1] Owing to society's historic misapprehension of the nature of retardation, however, a large number of mentally retarded persons are still isolated in public institutions where they receive purely custodial care.[2] Solutions to this inequity[3] have been sought in the courts and in Congress, but it has proved difficult to arrive at an unassailable means of requiring the public institutional programs to provide treatment that is capable of meeting the developmental needs of the retarded.

During the past decade, a number of federal courts have determined that institutionalized mentally retarded persons have a constitutional right to receive developmental treatment.[4] Although these decisions have been instrumental in improving the quality of care in public programs, they have been limited in scope,[5] and their validity remains in doubt

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[1]Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface,* 10 CREIGHTON L. REV. 124, 137 n.33 (1976).

[2]*See id.* at 130-38. See generally, Herr, *Civil Rights, Uncivil Asylums and the Retarded,* 43 U. CIN. L. REV. 679 (1974). As of 1974, approximately two hundred thousand persons resided in public institutions for the retarded. *Id.* at 683. For a graphic account of the appalling conditions in one of the largest state institutions, see New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 755-56 (E.D.N.Y. 1973).

[3]Given that most nonretarded persons receive public educational and social welfare services that are designed to foster human development, the failure to offer appropriate developmental services to retarded persons amounts to a denial of equal protection. But the efficacy of a constitutional equal protection claim depends on whether state laws and practices that exclude the retarded should be subjected to strict judicial scrutiny. This, in turn, depends on whether the courts will view the retarded as a class that has suffered a history of purposeful discrimination. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). See generally, Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause,* 15 SANTA CLARA LAW. 855, 899-908 (1975).

In the statutory sphere, Section 504 of the Rehabilitation Act of 1973 (codified at 29 U.S.C. § 794 (1976)) prohibits discrimination against otherwise qualified handicapped persons in programs receiving federal funds. Section 504, however, seems of little help to institutionalized retarded persons unless it can be established that they are being denied access to programs in which they are qualified to participate. *But cf.* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1323 (E.D. Pa. 1977) (Section 504 confers statutory right to habilitation in a nondiscriminatory manner) (alternative holding).

[4]*E.g.*, Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part and vacated and remanded in part,* 550 F.2d 1122 (8th Cir. 1977); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part and decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). See generally Schoenfeld, *A Survey of the Constitutional Rights of the Mentally Retarded,* 32 SW. L.J. 605, 619-26 (1978).

[5]See *infra* notes 16-20 and accompanying text.

because the Supreme Court has never addressed the right-to-treatment issue.[6]

While the courts were attempting to fashion a constitutional remedy, Congress responded by enacting a statutory right to treatment: Public Law 94-103, The Developmentally Disabled Assistance and Bill of Rights Act of 1975.[7] Title II of the Act[8] purports to confer special treatment rights on all retarded persons in public institutions,[9] but it fails to indicate how its broad mandates are to be secured, and it is doubtful whether its purposes can be effected unless it is capable of judicial enforcement.[10] This note compares the rights expressed in Title II with the rights recognized in the leading constitutional cases, analyzes the statute in light of the Supreme Court's criteria for implied private rights of action, and argues that Congress intended to permit judicial enforcement of the statute.

THE CONSTITUTIONAL RIGHT TO TREATMENT

The landmark right-to-treatment case was the federal district court decision in *Wyatt v. Stickney,*[11] which held that a person confined by a state on the basis of his mental disabilities has a constitutional right to receive developmental treatment.[12] It has been argued[13] that the Supreme Court undermined the *Wyatt* decision by declining to reach the right-to-treatment issue when it was raised in *O'Connor v. Donaldson.*[14] Nevertheless, the *Wyatt* substantive due process analysis continues to be the basis for right-to-treatment decisions.[15]

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[6]Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1314 (E.D. Pa. 1977). See also *infra* note 14.

[7]Pub. L. No. 94-103, 89 Stat. 486 (codified at 42 U.S.C. §§ 6001-6081 (1976)).

[8]Pub. L. No. 94-103, tit. II, 89 Stat. 486 (codified at 42 U.S.C. §§ 6010-6012 (1976)).

[9]H.R. CONF. REP. NO. 473, 94th Cong., 1st Sess. 42, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 919, 961.

[10]See *infra* note 61 and accompanying text.

[11]344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part and remanded in part and decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (Fifth Circuit affirmed district court's right-to-treatment decision but held that injunctive relief against the State of Alabama had to be assessed by a three judge court).

[12]344 F. Supp. at 390.

[13]See Schoenfeld, *A Survey of the Constitutional Rights of the Mentally Retarded,* 32 SW. L.J. 605, 622-23 (1978).

[14]422 U.S. 563 (1975). *O'Connor* upheld a district court decision which mandated the release of a civilly committed mental patient, but the Court merely held that a state cannot confine "without more" a nondangerous mental patient. *Id.* at 576. This decision vacated the more sweeping Fifth Circuit decision in Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), which had held that the Constitution requires minimally adequate treatment for persons involuntarily committed to state mental hospitals. *Id.* at 521. Shortly before the Supreme Court's decision in *O'Connor,* the Fifth Circuit had entertained the *Wyatt* case on appeal and had relied on its earlier opinion in *Donaldson* in upholding the district court's right-to-treatment analysis. Wyatt v. Aderholt, 503 F.2d 1305, 1312 (5th Cir. 1974).

[15]*See, e.g.,* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1318 (E.D. Pa. 1977); Gary W. v. Louisiana, 437 F. Supp. 1209, 1216 (E.D. La. 1976).

Even if the *Wyatt* analysis remains good law, it is by no means an ideal guarantee of effective treatment. Since it relies on compulsory commitment as the basis for imposing the duty to offer developmental treatment, some courts have refused to hold that the constitutional right to treatment encompasses voluntary residents of state hospitals.[16] In addition, a primary object of the proponents of developmental treatment is to transfer retarded persons out of institutions and into smaller community care centers that can offer more treatment and less restraint.[17] However, the *Wyatt* analysis tacitly accepts the institutional setting, because it stresses that the right to treatment flows from the denial of liberty that accompanies institutionalization.[18] Moreover, in apparent deference to the Supreme Court's admonition against inventing new substantive constitutional rights,[19] the right-to-treatment decisions have mandated only minimally adequate treatment.[20] Given the limitations and uncertainties that are attached to these decisions, there is a clear need for a more forceful means of securing the rights of institutionalized retarded persons.

THE STATUTORY RIGHT TO TREATMENT

Public Law 94-103 is capable of overcoming many of the difficulties inherent in the constitutional theory because it offers a definitive state-

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[16]*E.g.*, Naughton v. Bevilacqua, 458 F. Supp. 610, 617 (D.R.I. 1978) (court abstained from the difficult question whether the constitutional right to treatment encompassed a voluntarily committed resident); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 759-60 (E.D.N.Y. 1973) (voluntary status vitiates basis for constitutional right to treatment). It has been contended that in practice there is little difference between voluntary and involuntary commitment and that there should be equal application of the right to treatment. Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 154-55 (1972).

[17]Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124, 143 (1976).

[18]344 F. Supp. at 390. Civil commitment is a "massive curtailment of liberty," Welsch v. Likins, 373 F. Supp. 487, 491 (D. Minn. 1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977), which invokes the right to treatment, 373 F. Supp. at 499. In the absence of confinement, however, a state is not constitutionally obligated to provide treatment for the retarded. *Id.* at 498. *But cf.* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1319 (E.D. Pa. 1977) (habilitation in other than least restrictive setting is a violation of constitutional rights).

[19]"It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

[20]See Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1318 (E.D. Pa. 1977); Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977). The *Halderman* opinion fails to account for its use of the "minimally adequate treatment" standard, except for a citation to *Welsch*. See 446 F. Supp. at 1318. However, the standard was articulated initially in *Welsch*, and in that decision the court indicated its reluctance to invent new substantive rights. 373 F. Supp. at 498-99, *citing* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

ment of federal statutory rights for persons in public institutions. Title II of this law requires developmental disability[21] programs receiving federal funds to provide treatment that is appropriate to the needs of service recipients.[22] It mandates that treatment programs be designed to maximize developmental potential and be provided in a setting that is least restrictive of personal liberty.[23] Thus, where the courts have called for minimally adequate services, Title II requires maximum development, and by mandating the least restrictive setting, it rejects the traditional custodial mode of services. Finally, since it is addressed to the needs of all institutionalized retarded persons[24] without regard to their commitment status, the statute confers the same treatment rights upon voluntary and involuntary residents.[25]

In view of these potential advantages, it is unfortunate that Congress failed to provide for a private right of action to enforce Title II. This omission need not be fatal, however, because in many instances courts have been able to discern a basis for judicial enforcement of a federal statute even though it makes no mention of private remedies.[26] If Title II is to supersede the constitutional right-to-treatment analysis, it must meet the prevailing standard for implied statutory rights of action.

STANDARDS FOR IMPLIED PRIVATE RIGHTS OF ACTION

The Supreme Court opinion in *Cort v. Ash*[27] established four factors for

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[21]Public Law 94-103 defines "developmental disability" as a disability attributed to mental retardation, cerebral palsy, epilepsy, autism or dyslexia. 42 U.S.C. § 6001(7)(A) (1976).

[22]42 U.S.C. § 6010(1) (1976). For the purposes of this note, it will be assumed that the mandates of Title II apply only to programs that receive federal funds. Such a limitation seems implicit in 42 U.S.C. § 6010(3)(A) (1976), which obligates federal and state officials to assure that public funds are not furnished to programs that fail to provide appropriate treatment. It is questionable whether Congress can require the states to provide developmental services out of state revenues, because Congress is not supposed to "exercise its power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." National League of Cities v. Usery, 426 U.S. 833, 855 (1976). On the other hand, it seems settled that Congress has the authority to impose the right-to-treatment mandate as a condition for the receipt of federal funds. *See* Lau v. Nichols, 414 U.S. 563, 568-69 (1974) (Congress may require equal access to state education programs as a condition for the receipt of federal funds).

[23]42 U.S.C. § 6010(2) (1976).

[24]H.R. CONF. REP. NO. 473, 94th Cong., 1st Sess. 42, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 919, 961.

[25]Much of the Senate subcommittee research into the failings of state institutions was directed at the Willowbrook State School in New York. S. REP. NO. 160, 94th Cong., 1st Sess. 29-30 (1975). A substantial number of Willowbrook's residents had been admitted voluntarily. New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 759 (E.D.N.Y. 1973).

[26]There is a great deal of literature on judicially recognized private remedies to enforce federal statutory rights. See generally, McMahon & Rodos, *Judical Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167 (1976); Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 FORDHAM L. REV. 441 (1974); Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378 (1978).

[27]422 U.S. 66 (1975).

determining whether a private remedy is implicit in a federal statute.[28] Three of these criteria are readily satisfied by the Developmentally Disabled Assistance and Bill of Rights Act: the statute is expressly intended to benefit institutionalized retarded persons;[29] a private right of action to enforce the right to treatment is consistent with the underlying purpose of the statute;[30] and right-to-treatment claims traditionally have been accommodated in the federal courts.[31] The only element of the *Cort* test that is not resolved by the express language of the statute is whether Congress intended to create a private judicial remedy.

It might be argued that the *Cort* test need not be applied in actions against state-operated institutions because Section 1983[32] provides a private right of action to enforce federal statutory and constitutional rights which have been abridged by persons acting under color of state law.[33] Since most of the residential programs that are subject to the mandates of Title II are state institutions, Section 1983 appears to provide an independent basis for enforcing the federal statutory right to treatment. It is doubtful, however, that the effect of Section 1983 is so sweeping that it can be invoked in favor of a particular substantive federal law without first questioning whether Congress intended that law to be subject to private judicial enforcement.[34] As the applicability of Section 1983 remains an unresolved issue, the "legislative intent" aspect of the *Cort* test is relevant even in the context of actions against state institutions.

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[28]*Cort* was a stockholder's derivative action seeking damages for violation of the Federal Election Campaign Act (Act of June 25, 1948, ch. 29, § 610, 62 Stat. 723) (repealed 1976). In the process of holding that no private right of action was available under the Act, the Court set forth four criteria for recognizing implied statutory rights of action: whether the plaintiff is an intended beneficiary of the statute; whether a private right of action is consistent with the underlying purpose of the statute; whether the claim is one traditionally relegated to the state courts; and whether there is evidence of legislative intent, explicit or implicit, to create a private right of action. *Id.* at 78. The Supreme Court continues to rely on the four *Cort* criteria. *E.g.*, Piper v. Chris-Craft Indus., 430 U.S. 1, 37-41 (1977).

[29]*See* 42 U.S.C. §§ 6010(3), (4) (1976).

[30]Title II of Public Law 94-103 is entitled "establishment and protection of the rights of persons with developmental disabilities." Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, tit. II, 89 Stat. 486.

[31]Most right-to-treatment cases have been brought in the federal courts. *See, e.g.*, cases cited *supra* note 4.

[32]42 U.S.C. § 1983 (1976).

[33]*Id.* The defendant in *Cort* was not a state agency, so the role of Section 1983 was not addressed in the *Cort* opinion.

[34]"There may even be some rights created by federal law that may not be the subject of a [Section 1983] federal suit." 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE 496 (1975). Debate over the scope of Section 1983 has focussed on whether 28 U.S.C. § 1343(3) supplies federal jurisdiction. Naughton v. Bevilacqua, 458 F. Supp. 610, 615 n.2 (D.R.I. 1978). This uncertainty arises because Section 1983 enforces "the Constitution and laws" whereas the jurisdictional statute, Section 1343(3), only speaks to rights secured by "the Constitution . . . or by any Act of Congress providing for equal rights . . . ." Of course, the federal jurisdictional restrictions do not apply to Section 1983 actions which are brought in the state courts, but in the state and federal courts alike there remains the overriding question whether Section 1983 secures all of the "laws" of the United States. There is a strong basis for contending that if a federal statute contains indications which

JUDICIAL INTERPRETATION OF TITLE II

The first court to be presented with a private claim under Title II determined that it satisfied each of the *Cort* criteria. *Naughton v. Bevilacqua*[35] was an action instituted on behalf of a twenty-year-old, voluntarily committed resident of a state hospital for the retarded who had suffered a severe reaction to a tranquilizer that had been administered to him by a staff physician. The plaintiff sued the physician, the State Director of Mental Health and the State of Rhode Island for damages, contending that they had violated either his constitutional or his federal statutory right to appropriate treatment.[36] It was his theory that the tranquilizer had been administered solely for the purpose of restraint, without regard to any acceptable habilitative goals.[37] The court held that the Developmentally Disabled Assistance and Bill of Rights Act creates a private right of action, and that the plaintiff had stated facts sufficient to constitute a violation of his statutory right to treatment.[38]

In assessing the intent of Congress, the *Naughton* opinion found significance in the "bill of rights" purposes of Title II. The opinion noted that although the Act had been introduced in the House of Representatives as a conventional federal funding program, it had been amended by the Senate to include the right-to-treatment provisions, and when it emerged from the Conference Committee it was identified as a bill of rights act.[39] Moreover, even though the statute contains express provisions for administrative enforcement, the court determined that they provided no indication that Congress intended to deny recourse to the courts.[40] If this assessment of the intent of Congress is valid, then the legal protections for institutionalized retarded persons are greatly enhanced, for such a reading suggests that all of the Title II treatment standards may be enforced in a private lawsuit. A strict appraisal of the statute will establish that the *Naughton* determination is appropriate:

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weigh against private judicial enforcement, then Section 1983 should not be relied upon as an alternative basis for a private right of action. See the separate opinion of Justice White in Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2795 (1978).

[35]458 F. Supp. 610 (D.R.I. 1978). The *Naughton* opinion indicated that since Title II is essentially a civil rights statute, Section 1983 is a "particularly appropriate vehicle" for enforcing Title II. *Id.* at 616. However, the opinion then went on to assess Title II in light of the *Cort* criteria.

[36]*Id.* at 613.

[37]*Id.* at 613-15.

[38]*Id.* at 615. The court required a showing of deliberate action as a prerequisite to liability under Title II, so the plaintiff was allowed to proceed against the staff physician but the claims were dismissed as to the state director and the state itself. *Id.* at 618-19, *citing* Monell v. Department of Social Services, 436 U.S. 658, 694 (1978). However, the Supreme Court has defined "deliberate action" as including acts representing official policy or practice. *Id.* Thus, any established institutional practice failing to comply with the mandates of Title II would subject the institution to liability under the deliberate-action test.

[39]458 F. Supp. at 616, *citing* H. R. CONF. REP. No. 473, 94th Cong., 1st Sess. 42, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 919, 961.

[40]458 F. Supp. at 616.

however, the statute also contains some contrary indications that merit preliminary consideration.

The first difficulty is raised by a semantic ambiguity which casts doubt on whether Congress really intended to create affirmative rights under Title II. Title II begins with the expression that "Congress makes the following findings respecting the rights of persons with developmental disabilities: . . . ."[41] At first glance, this appears to undermine the succeeding clauses, which contain the crucial right-to-treatment expressions. Ordinarily, Congress does not "find" rights, it creates them. Thus, the "findings" clause, taken alone, could be interpreted to mean that Congress was merely acknowledging the constitutional status quo.

An examination of the statute in its broader context, however, indicates that Congress had something more substantial in mind. The short title of Public Law 94-103 is the Developmentally Disabled Assistance and *Bill of Rights Act*,[42] and Title II is subtitled "establishment and protection of the rights of persons with developmental disabilities."[43] These are clear indications that the legislature intended to create affirmative rights. The ambiguous language of the findings clause should be disregarded, and Title II should be viewed as a source of affirmative rights.

A more formidable question is whether the express enforcement provisions in the Act suggest that Congress did not intend to permit private judicial enforcement of these rights. The *Naughton* opinion failed to consider the role of the detailed administrative enforcement provisions in Title I of the Act, and although the court dealt with, and dismissed, the administrative enforcement provisions in Title II, there is a strong basis for arguing that they were intended to be the exclusive means of enforcing the statutory right to treatment.[44]

In the *Cort* opinion, the Supreme Court noted that the presence of express enforcement provisions, such as criminal sanctions or administrative remedies, may indicate that Congress did not intend to create a parallel judicial remedy.[45] In the aftermath of *Cort*, several lower

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[41]42 U.S.C. § 6010 (1976).

[42]Pub. L. No. 94-103, 89 Stat. 486 (1975) (emphasis added).

[43]Pub. L. No. 94-103, tit. II, 89 Stat. 486 (1975).

[44]For a discussion of the purposes of the administrative remedies in Public Law 94-103, see United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F.2d 1121 (4th Cir. 1977). *Solomon* was an action under Public Law 94-103 instituted by the United States Attorney General to remedy conditions at a state institution for the retarded. The court dismissed the suit on the ground that the Attorney General had no authority to sue to enforce the statute. 419 F. Supp. at 372. Emphasizing the alternative remedy afforded by administrative review, the court maintained that in the Developmentally Disabled Assistance and Bill of Rights Act "Congress has provided a scheme whereby the executive branch of government [*i.e.*, HEW] can accomplish much of what the Attorney General hopes to accomplish in this suit." *Id.* at 369-70.

[45]Cort v. Ash, 422 U.S. 66, 79-80 (1975). For a more sweeping exposition of the view that express enforcement provisions militate against an implied private right of action, see National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

courts have relied upon this view in denying private rights of action under statutes providing for some degree of administrative enforcement.[46] However, a mechanical application of this negative implication view is unjustified. First, the Supreme Court determined that a private right of action was not necessary to effect the purpose of the statute at issue in *Cort*.[47] Therefore, the negative implication view should not be controlling if a statute's express remedies are patently inadequate.[48] In addition, the *Cort* opinion indicated that express remedies in one title of a statute enforcing one set of substantive requirements shed no light on congressional intent as to the appropriate means of enforcing a separate set of requirements in another title of the statute.[49] This means that any express remedies in Public Law 94-103 enforcing standards that are not identical to the right-to-treatment mandates of Title II should not enter into a determination of how Congress intended to secure the right to treatment. Finally, the *Cort* opinion made it clear that the negative implication view is simply a presumption which may be rebutted by evidence that the express enforcement provisions were not intended to operate to the exclusion of other means of enforcement.[50] In light of these considerations, the *Cort* analysis does not necessarily preclude an implied private right of action under Title II.

THE EXPRESS ENFORCEMENT PROVISIONS IN PUBLIC LAW 94-103

An examination and comparison of each of the express enforcement provisions in Public Law 94-103 will demonstrate that the *Cort* analysis does not preclude private judicial enforcement of Title II. There are two principal titles in the Developmentally Disabled Assistance and Bill of Rights Act, and they contain separate substantive standards and separate enforcement provisions. The "bill of rights" aspect is

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"[W]hen legislation expressly provides a particular remedy . . . courts should not expand the coverage of the statute [by creating] other remedies." *Id.* at 458. However, the opinion also noted that this presumption would "yield to clear contrary evidence of legislative intent." *Id.*

[46]*See, e.g.*, Cannon v. University of Chicago, 559 F.2d 1063, 1073-74 (7th Cir. 1976), *aff'd on rehearing*, 559 F.2d 1077 (7th Cir. 1977), *cert. granted*, 98 S.Ct. 3142 (1978); Jones v. Oklahoma Secondary School Activities Ass'n, 453 F. Supp. 150, 153 (W.D. Okla. 1977); People's Hous. Dev. Corp. v. City of Poughkeepsie, 425 F. Supp. 482, 489-94 (S.D.N.Y. 1976); Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378, 1379 (1978).

[47]422 U.S. at 84.

[48]"When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts." Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1286 (7th Cir. 1977). Applying the *Cort* criteria, the *Lloyd* decision recognized a private right of action under Section 504 of the Rehabilitation Act of 1973 (codified at 29 U.S.C. § 794 (1976)), even though the statute provided for administrative enforcement. *Id.* at 1284-86.

[49]422 U.S. at 79-80, 82 n.14, *citing* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), discussed *supra* note 45.

[50]422 U.S. at 82.

manifested in Title II,[51] whereas the "federal assistance" aspect is most evident in the payment provisions of Title I.[52]

The Title I enforcement provision is limited to implementing specific conditions for Title I payments to state programs.[53] This well-defined funding sanction requires the Department of Health, Education and Welfare to review and withhold further payments from noncomplying state programs.[54] Although this review power is governed by established hearing procedures,[55] the Title I enforcement provision does not contemplate complaints from individuals receiving services in the state programs. States which are denied payments may obtain judicial review of the HEW determinations,[56] but there are no provisions enabling other interested parties to obtain such review.[57] Therefore, the Title I payment withholding provision could be dismissed simply because it is an inadequate remedy. It is even more vulnerable to attack, however, on the ground that the Title I program standards do not explicitly address the right to treatment. They do include several requirements that are fundamental components of the right to treatment,[58] but they are not so comprehensive as to be equated with the broader expression in Title II.

The principal enforcement provision in Title II explicitly addressed the right to treatment,[59] but it lacks the elaborate administrative remedies

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[51]*See* Pub. L. No. 94-103, tit. II, 89 Stat. 486 (1975) (codified at 42 U.S.C. §§ 6010-6012 (1976)); H.R. CONF. REP. No. 473, 94th Cong., 1st Sess. 41, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 919, 961.

[52]*See* Pub. L. No. 94-103, tit. I, 89 Stat. 486 (1975). Title I is an amended version of prior legislation which furnished federal funds to state programs for the developmentally disabled.

[53]As a prerequisite to the receipt of Title I payments, states must obtain HEW approval of their developmental disability programs. 42 U.S.C. § 6063(a) (1976). The conditions for approval, in pertinent part, require assurances that Title I funds will be earmarked for developmental disability programs and that these programs will meet certain standards which address the legal rights and treatment needs of institutionalized persons. *See* 42 U.S.C. § 6063(b) (1976).

[54]See 42 U.S.C. § 6065 (1976) (withholding of payments); 42 U.S.C. § 6009 (1976) (evaluation of state programs).

[55]See 42 U.S.C. § 6065 (1976) (hearings); 45 C.F.R. §§ 1386.80-1386.112 (1977) (hearing procedures).

[56]42 U.S.C. § 6068 (1976) (states may appeal to United States Circuit Court of Appeals). It should be pointed out that the HEW regulations permit other interested parties to request to participate in the funding-sanction hearings. See 45 C.F.R § 1386.94 (1977). However, it is the language of the statute that is the key to the intent of Congress, and the statute does not indicate that service recipients are to be represented at these hearings.

[57]If a statute's administrative enforcement provisions are highly elaborate and designed to address individual complaints, this may indicate that Congress intended to deny a private right of action. *See* Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976), *aff'd on rehearing*, 559 F.2d 1077 (7th Cir. 1977), *cert. granted.* 98 S.Ct. 3142 (1978). The *Cannon* decision denied a private right of action under Title IX of the Education Amendments of 1972 on the ground that Congress had intended the administrative remedies to be the sole means of enforcing the rights created by Title IX; but the court stressed that these hearing procedures were designed to investigate and resolve individual complaints. 559 F.2d at 1073.

[58]*See, e.g.*, 42 U.S.C. §§ 6063(b)(20), (22), (24) (1976) (deinstitutionalization, personal advocacy, human rights).

[59]"The Federal Government and the States both have an obligation to assure that public

which support the Title I sanction. The Title II funding sanction merely obligates the federal government and the states to assure that public funds are not provided to programs that fail to offer appropriate treatment.[60] It designates no agency to enforce this obligation and provides no guidelines as to how the federal government is to review the state programs to determine whether they comply with the Title II standards. There is no indication that this sanction was intended to address complaints from service recipients, since this would require provisions for investigations and hearings. Moreover, the Title II provision does not expressly impose state recognition of the right to treatment as a condition for receiving federal payments. The Title II payment withholding sanction is little more than a vague admonition unsupported by any enforcement mechanisms. It is simply too indefinite to constitute the exclusive means of enforcing the statutory right to treatment.[61]

Title II contains an additional enforcement provision requiring states receiving Title I payments to establish agencies to protect the rights of persons with developmental disabilities.[62] These agencies "have the authority to pursue legal, administrative, and other appropriate remedies [to enforce] the rights of such persons."[63] It must be stressed that these agencies are to pursue, rather than to afford, remedies. They have no remedial authority under the statute, and they are not to be impartial quasi-judicial bodies. Rather, they are to be actively supportive of developmentally disabled persons. Their role will be to intervene in other state agencies and in the courts as advocates of the rights of retarded persons.[64]

It is apparent that the express enforcement provisions in the Act were not intended to be the sole avenues for enforcing the right-to-treatment expressions in Title II. The administrative remedy in Title I is a complex enforcement provision, but the conditions it implements do not encompass the right to treatment. The payment withholding provision in Title II theoretically could be used to enforce the right to treatment, but it is not supported by any enforcement mechanisms so it is unlikely that Con-

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funds are not provided to any institutional 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 . . . ." 42 U.S.C. § 6010(3)(A) (1976).

[60]*Id.*

[61]Existing HEW supervision is inadequate to enforce the right to treatment. HEW lacks the resources to review all the public institutions, and the funding sanction is such an unwieldy device that the agency may be reluctant to apply it. *See* Naughton v. Bevilacqua, 458 F. Supp. 610, 616 (D.R.I. 1978). Whether through a private right of action or through more roundabout means, the judiciary is the instrumentality best situated to enforce Title II. See Kentucky Ass'n for Retarded Citizens v. Califano, No. 78-1398 (D.D.C., filed July 31, 1978) (suit to compel Secretary of HEW to obey statutory duty to review the funding of noncomplying state programs), noted in U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 79-21017, MENTAL RETARDATION AND THE LAW 9-10 (Oct. 1978).

[62]42 U.S.C. § 6012(a) (1976).

[63]*Id.*

[64]*See* S. Herr, ADVOCACY UNDER THE DEVELOPMENTAL DISABILITIES ACT 9-10 (1976) (U.S Dep't of HEW, Office of Human Development).

gress intended it to be the sole means of securing the right to treatment. Finally, the local protective and advocacy agencies provided for in Title II are not empowered to afford administrative remedies of their own.

PRIVATE JUDICIAL ENFORCEMENT OF TITLE II: CONGRESSIONAL INTENT

A balanced application of the *Cort* test demonstrates that the express enforcement provisions in the Act do not weigh against a private right of action. However, the *Cort* opinion did not make it clear whether it is only necessary to refute the negative implications, or whether it is also necessary to produce evidence that Congress intended to create a private right of action.[65] If this additional element of proof is required, the "legislative intent" obstacle might appear insurmountable, for if a statute fails to provide expressly for a private remedy, the most plausible explanations are either that the legislators simply failed to consider this possibility, or that they considered it and rejected it.[66] It is not surprising, therefore, that in applying this aspect of the *Cort* test, the courts have found little help in the legislative history of a particular statute.[67]

In the case of Public Law 94-103, however, there is no such difficulty. It was enacted at a time when the federal courts were the principal guardians of the rights of institutionalized mentally retarded persons. Accordingly, it would have been difficult for Congress to have ignored the issue of judicial enforcement. An examination of the language of Title II, its internal structure, and its legislative history yields a great deal of evidence that Congress intended to permit judicial enforcement of the statutory right to treatment.

The language of the statute is the strongest indication of the intent of Congress. The *Cort* opinion stated that where a statute clearly bestows rights upon a class of persons, this obviates the need to establish an intention to create a private right of action.[68] Thus, it is significant that

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[65]*See* Cort v. Ash, 422 U.S. 66 (1975). In National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), discussed *supra* note 45, the Court was not content to rest its decision on the negative implication raised by express enforcement provisions, for the opinion went on to examine the legislative history of the statute at issue there. *Id.* at 458-60.

[66]In National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), the Supreme Court determined that Congress had considered and rejected a provision that would have allowed "any aggrieved party" to sue to enforce the law at issue in that case. *Id.* at 459-60.

[67]*See, e.g.*, Cannon v. University of Chicago, 559 F.2d 1063, 1074 (7th Cir. 1976), *aff'd on rehearing*, 559 F.2d 1077 (7th Cir. 1977), *cert. granted*, 98 S.Ct. 3142 (1978) (no evidence that Congress envisioned individual lawsuits under 20 U.S.C. § 1681 (1976)); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1285 (7th Cir. 1977) (legislative history of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 (1976)) is "bereft of much explanation").

[68]Cort v. Ash, 422 U.S. 66, 82 (1975).

Title II creates a right to treatment in favor of institutionalized mentally retarded persons.[69] The plain and affirmative language in the right-to-treatment subsection should be viewed as manifesting an intent to create judicially enforceable rights.

The *Naughton* opinion found implicit evidence of this intention in the internal structure of Title II.[70] Both the right-to-treatment provision and the payment withholding provision mandate appropriate treatment, services and habilitation.[71] If Congress had intended the right to treatment to be enforced exclusively through a funding sanction, such duplication would have been unnecessary, for the language of the payment withholding provision alone is sufficient to convey such a meaning. By way of comparison, the analogous civil rights statutes express a funding sanction in the same sentence that creates the substantive right,[72] and those that contain more detailed supplementary enforcement provisions state that such provisions are to enforce the provision which creates the substantive right.[73] In Title II, however, the right-to-treatment expression is separate from, and syntactically independent of, the payment withholding provision, and it is not incorporated by reference in that provision. As the *Naughton* opinion noted, this indicates that the denial of funds was not intended to be the only means of enforcing the right to treatment.[74] It is evident that the right-to-treatment provision has a meaning that is not limited by the payment withholding provision.

Contemporaneous usage of the term "right to treatment" sheds light on the meaning Congress attached to it. When Title II was being considered by Congress in 1975, the term already denoted a right that could be enforced in the courts,[75] and it is clear that Congress was cognizant of the meaning of the term in its judicial context.[76] The legislature's adop-

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[69]42 U.S.C. § 6010 (1976).

[70]Naughton v. Bevilacqua, 458 F. Supp. 610, 616 (D.R.I. 1978).

[71]*Compare* 42 U.S.C. § 6010(1) (1976) (right to appropriate treatment, services and habilitation) *with* 42 U.S.C. § 6010(3)(A) (1976) (duty to assure provision of appropriate treatment, services and habilitation).

[72]*See, e.g.*, 42 U.S.C. § 2000d (1976): "No person in the United States shall, on the ground of race, color, or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." *See also,* 20 U.S.C. § 1681 (1976) (sex discrimination); 29 U.S.C. § 794 (1976) (discrimination on the basis of handicap).

[73]*See, e.g.*, 42 U.S.C. § 2000d-1 (1976) (federal departments and agencies directed to enforce the provisions of 42 U.S.C. § 2000d).

[74]Naughton v. Bevilacqua, 458 F. Supp. 610, 616 (D.R.I. 1978).

[75]*E.g.*, Wyatt v. Aderholt, 503 F.2d 1305, 1312 (5th Cir. 1974); Donaldson v. O'Connor, 493 F.2d 507, 521 (5th Cir. 1974), *vacated and remanded sub nom.* O'Connor v. Donaldson, 422 U.S. 563 (1975); Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974), *aff'd in part and vacated and remanded in part,* 550 F.2d 1122 (8th Cir. 1977).

[76]Title II originated in the Senate, and the Senate Report accompanying Public Law 94-103 is replete with references to the contemporaneous court cases. *E.g.*, S. REP. NO. 160, 94th Cong., 1st Sess. 31 (1975), *citing* Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part and remanded in part and decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). After quoting testimony from the *Wyatt* transcript describing the condi-

tion of terminology that is virtually identical to that of the constitutional right-to-treatment decisions[77] indicates that the statutory right to treatment was intended to be subject to private judicial enforcement.

This intention was made explicit in the Conference Committee's interpretation of the meaning of the right-to-treatment provision:

> These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by Congress *and the courts.*[78]

All of the reliable evidence indicates that Congress favored judicial enforcement of Title II. The language of the right-to-treatment subsection is so affirmative as to be practically inconsistent with a contrary reading. Since that subsection is independent of the payment withholding provision, there is no reason to conclude that the right to treatment was intended to be enforced solely through the funding sanction. Finally, the statement in the Conference Committee Report establishes that Congress was aware of the importance of the judicial sanction and intended it to serve as a principal means of enforcing the mandates of Title II.

CONCLUSION

Title II of Public Law 94-103 creates a private right of action to enforce the right to treatment for mentally retarded persons in public institutions. The provision which creates this special right is not a paradigm of clear draftsmanship, but there is ample evidence to support this determination. Although the statute provides for administrative enforcement and makes no mention of alternative remedies, there is no evidence that Congress intended to deny recourse to a judicial forum, and there is a great deal of evidence indicating that Congress assumed, and intended,

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tions at a public institution in Alabama, the report states: "Congress must take action to ensure the humane care, treatment, habilitation, and protection of mentally retarded . . . persons . . . . The Federal Government has the responsibility to provide equal protection under the law to all citizens." S. REP. NO. 160, 94th Cong., 1st Sess. 32 (1975). The use of the term "euqal protection under the law," which tracks the language of the fourteenth amendment, suggests that the statutory right was intended to be enforceable in the courts, just as the equal protection clause of the fourteenth amendment receives judicial enforcement.

[77] *Compare* 42 U.S.C. § 6010(1) (1976) (statutory right to treatment and habilitation) *with* Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972), *aff'd in part and remanded in part and decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (constitutional right to habilitation) *and* Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974), *aff'd in part and vacated and remanded in part,* 550 F.2d 1122 (8th Cir. 1977) (constitutional right to treatment).

[78] H.R. CONF. REP. NO. 473, 94th Cong., 1st Sess. 42, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 919, 961 (emphasis added).

that Title II would be enforced by the courts. In view of the clear and compelling purpose of the statute, enforcement through a private right of action is also justified because the express remedies are incapable of adequately enforcing the right to treatment. The statutory right to treatment offers distinct advantages over the right to treatment generated by the constitutional theory: the statute applies equally to voluntary and involuntary residents of public institutions and it establishes a more positive definition of the substance of the right to treatment.

The spirit and purpose of Title II are best reflected in the subsection which states that treatment for a person with developmental disabilities should be designed to maximize developmental potential.[79] This expression seems to typify Title II as a whole because it is at once vague and affirmative. It is evident, however, that the statute is susceptible to an affirmative interpretation. Future judicial consideration of Title II should lead toward a more comprehensive right to developmental treatment for institutionalized mentally retarded persons.

JOHN CAHALAN

[79]See 42 U.S.C. § 6010(2) (1976).