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Constitutional Law - Fourteenth Amendment - Right to Treatment - Involuntarily Committed Mental Patients

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Recent Decisions

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — RIGHT TO TREATMENT — INVOLUNTARILY COMMITTED MENTAL PATIENTS — The United States Supreme Court has held that an involuntarily committed mental patient has constitutionally protected liberty interests in personal safety, freedom of movement, and such minimally adequate treatment as might be required by these liberty interests.

Youngberg v. Romeo, 102 S. Ct. 2452 (1982).

In 1974, Nicholas Romeo, a thirty-three year old profoundly retarded man, was involuntarily committed to Pennhurst State School and Hospital, Spring City, Pennsylvania, by the Philadelphia County Court of Common Pleas, at the request of his mother.[1] Romeo could not speak and lacked rudimentary self-care skills.[2] While at Pennhurst, he suffered several injuries that were caused by his own violence, as well as by the reactions of other patients to him.[3] Romeo's mother became concerned about the injuries and, after objecting several times to his treatment, filed suit on November 4, 1976, in the United States District Court for the Eastern District of Pennsylvania, as Romeo's next friend, pursuant

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1. Youngberg v. Romeo, 102 S. Ct. 2452, 2454-55 (1982). Nicholas Romeo had the mental capacity of an eighteen-month old child with an IQ ranging between eight and ten. In 1974, Romeo's mother petitioned the Philadelphia County Court of Common Pleas to admit him to a state hospital on a permanent basis, as she was unable to control his violent behavior following his father's death. The Court of Common Pleas, upon the recommendation of a psychologist and physician, committed Romeo pursuant to the involuntary commitment provision of the Pennsylvania Mental Health and Mental Retardation Act. *Id.* *See* PA. STAT. ANN. tit. 50, § 4406 (Purdon 1969) which provides in pertinent part:

> (a) Whenever a person is believed to be mentally disabled, and in need of care or treatment by reason of such Mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such person cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.

Id.

2. 102 S. Ct. at 2455.

3. *Id.*

to 42 U.S.C. § 1983.[4]

The mother's complaint originally sought damages and injunctive relief from Pennhurst's director and two supervisors, specifically alleging that her son had been injured on numerous occasions.[5] The complaint further asserted that the Pennhurst officials knew or should have known about the injuries Romeo received and that they did not initiate adequate measures to prevent such injuries, resulting in a violation of Romeo's constitutional rights under the eighth and fourteenth amendments.[6] After the complaint was filed, Romeo suffered a broken arm and was confined to the institution's hospital where he was physically restrained to prevent injury to himself and other patients.[7]

In 1977, an amended complaint was filed which dropped all claims for injunctive relief,[8] but added a claim for damages to compensate Romeo for defendants' failure to provide him with adequate treatment for his mental condition.[9] The amended complaint further alleged that defendants were deliberately restraining Romeo for extended periods of time on a regular basis.[10]

In April, 1978, a trial was held in the United States District Court for the Eastern District of Pennsylvania in which the petitioners introduced evidence that Romeo participated in several basic health care programs.[11] Romeo introduced evidence of the inju-

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4. *Id. See* 42 U.S.C. § 1983 (1976) which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

5. 102 S. Ct. at 2455. Paula Romeo sued Duane Youngberg, Superintendent of Pennhurst; Richard Matthews, Director of Resident Life; and Marquerite Conley, Unit Director for Nicholas Romeo. *Id.* n.3.

6. *Id.* at 2455.

7. *Id.* The restraints were ordered by Dr. Gabroy allegedly to protect Romeo and the other patients in the hospital. After his arm healed, Romeo was kept in the infirmary because of his pending lawsuit. *Id.*

8. *Id.* at 2455-56. Claims for injunctive relief were dropped because Romeo was a member of a class seeking such relief in another action. *See* Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) (remanded for further proceedings) (patients at Pennhurst brought a separate class action seeking injunctive relief against the institution).

9. 102 S. Ct. at 2455.

10. *Id.* The restraints generally consisted of soft shackles for the arms. *Id.* n.4.

11. *Id.* at 2456. Prior to Romeo's transfer to Pennhurst's hospital ward, he partici-

ries he sustained and of the conditions in his section of the hospital.[12] The jury was instructed that if the Pennhurst officials knew about Romeo's injuries and neglected to take reasonable steps to prevent them, this failure caused Romeo the loss of his constitutional rights.[13] Additionally, the jury was further instructed that only if defendant officials were "deliberately indifferent"[14] to the medical needs of Romeo, could they find that Romeo's rights under the eighth and fourteenth amendments were violated.[15] The jury rendered judgment for the defendants.[16]

On appeal, the Court of Appeals for the Third Circuit[17] reversed and remanded the case, stating that the eighth amendment was not the proper source for determining the rights of the involuntarily committed mental patient.[18] In applying the fourteenth amendment, the court held that mental patients who have been involuntarily committed retain their liberty interests in freedom of movement and in personal security that can be limited only by an "overriding, non-punitive state interest."[19] The Court of Appeals further concluded that the involuntarily committed have a liberty interest in treatment designed to aid their condition.[20]

The court of appeals did not agree upon the appropriate standard to be applied in determining whether Romeo's rights had indeed been violated.[21] It concluded that physical restraint raised a

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pated in programs dealing with feeding, showering, drying, dressing, self control and toilet training, as well as a program providing interaction with staff members. It was indicated that some programs continued while Romeo was in the hospital, which reduced his aggressive behavior to some extent. *Id.* n.7.

12. *Id.*

13. *Id.* at 2456. *See* Petition for Writ of Certiorari, App. at 110. The jury was further instructed that if defendants restrained Romeo as punishment for initiating the law suit, his constitutional rights under the eighth amendment had been violated. 102 S. Ct. at 2456. *See* Petition for Writ of Certiorari, App. at 73-74.

14. *See* Estelle v. Gamble, 429 U.S. 97 (1976) (prisoners' right to punishment which is not cruel and unusual). The Court found that the district court improperly applied the deliberate indifference standard. 102 S. Ct. at 2456 n.11.

15. 102 S. Ct. at 2456. *See* Petition for Writ of Certiorari, App. at 111-12.

16. 102 S. Ct. at 2456.

17. *Id.* The Court of Appeals for the Third Circuit heard the case en banc. *See* 644 F.2d 147 (3d Cir. 1980), *vacated and remanded,* 102 S. Ct. 2452 (1982).

18. 102 S. Ct. at 2456. The court stated that it was the fourteenth amendment liberty interest which gave rise to the rights sought in the case at hand and not the eighth amendment. *See* 644 F.2d at 156.

19. 102 S. Ct. at 2456. The court stated that the liberty interests of freedom and personal security were fundamental liberties. *See* 644 F.2d at 157-58.

20. 102 S. Ct. at 2456. The court of appeals used the terms habilitation and treatment synonymously. *See* 644 F.2d at 165 n.40.

21. 102 S. Ct. at 2457.

presumption of punishment and could be justified only upon a showing of "compelling necessity."[22] The court chose to employ the different standard of "substantial necessity" in deciding whether the defendants had failed to provide for Romeo's personal safety.[23] Finally, the court held that when treatment is administered, the official will be held liable only if the treatment is not acceptable in conjunction with modern or current medical knowledge.[24] Chief Judge Seitz, in a concurring opinion, stated that the Constitution merely requires the actual exercise of professional judgment and considered the standards proposed by the majority as indistinguishable from those applicable to medical malpractice cases.[25] He proposed that the proper standard to apply was whether defendants' conduct was such a substantial departure from accepted standards in the care and treatment of mental patients as to illustrate that the defendants did not base their actions on professional judgment.[26]

The United States Supreme Court granted certiorari[27] to consider the substantive rights of the involuntarily committed in light of the fourteenth amendment.[28] Speaking for the majority,[29] Justice Powell recognized three separate claims for consideration: the liberty interest in safety,[30] the interest in freedom of movement,[31] and the involuntarily committed person's interest in habilitation or training.[32] The Court first acknowledged that solely because Ro-

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22. *Id. See* 644 F.2d at 159-60.

23. 102 S. Ct. at 2457.

24. *Id. See* 644 F.2d at 166-67, 173. The court divided the right to treatment claim into three categories but only one was discussed in the text of the opinion. The court of appeals also held that if the jury found that no treatment had been administered, it could hold the institution's administrators liable unless they could provide a compelling explanation for the lack of treatment. 102 S. Ct. at 2457 n.14. *See also* 644 F.2d at 165, 173.

25. 102 S. Ct. at 2457. *See* 644 F.2d at 178 (Seitz, C.J., concurring).

26. *Id.*

27. 451 U.S. 982 (1981). The Supreme Court granted certiorari because the issue presented was important to the administration of state institutions for the mentally retarded. 102 S. Ct. at 2457.

28. *Id.* The fourteenth amendment provides in pertinent part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *See* U.S. CONST. amend. XIV, § 1. Romeo no longer relied upon the eighth amendment claim. 102 S. Ct. at 2457 n.16. *See also* Brief for Respondent at 13 n.12, Youngberg v. Romeo, 102 S. Ct. 2452 (1982).

29. Justice Powell filed the majority opinion. Justice Blackmun filed a concurring opinion in which Justices Brennan and O'Connor joined. Chief Justice Burger filed a separate concurring opinion. 102 S. Ct. at 2453.

30. 102 S. Ct. at 2457.

31. *Id.* at 2458.

32. *Id.* at 2457-58. Romeo did not challenge his commitment under Pennsylvania law.

meo had been committed to Pennhurst, he did not relinquish all his substantive rights under the fourteenth amendment.[33] Justice Powell noted that the state conceded that it had a duty to provide Romeo with food, clothing, shelter, and medical care, but that the issue confronting the Court concerned his interests in personal safety, freedom of movement, and a right to treatment.[34]

The first two claims, the interest in safety and freedom of movement, stated Justice Powell, involve liberty interests already recognized by the Court.[35] The Court stated that if it is cruel and unusual punishment to hold criminals in unsafe facilities, it must be unconstitutional to confine the involuntarily committed mental patient in unsafe conditions.[36] The Court also recognized respondent's right to freedom from bodily restraint by concluding that since such a right survives criminal conviction, it must also survive committal to a state mental institution.[37] However, the third claim, the constitutional right to minimally adequate habilitation is much less defined by previous case law.[38] Justice Powell recognized that Romeo was asserting a substantive due process claim under the fourteenth amendment and he suggested that such a right to minimal treatment should be determined on a case-by-case basis in light of present medical knowledge.[39]

Id. at 2457.

33. *Id.* at 2458. *See* Vitek v. Jones, 445 U.S. 480, 491-94 (1980) (action challenging the constitutionality of a Nebraska statute allowing a Director of Correctional Services to transfer a prisoner to a mental hospital if a designated physician or psychologist finds the prisoner suffering from a mental disease).

34. 102 S. Ct. at 2458. If such interests did exist, the Court was further called upon to determine if these rights had been violated. *Id.*

35. *Id.* The claim for a personal security right constitutes an historic liberty interest protected by the due process clause of the fourteenth amendment and is not suspended by confinement. *Id. See* Ingraham v. Wright, 430 U.S. 651 (1977) (school children have a liberty interest in personal safety—historically established liberty interest in personal safety). Secondly, the claim for right to freedom from bodily restraint has always been recognized as the core of the liberty interest protected by the due process clause. *See* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring) (prisoners have a right to freedom from bodily confinement). The Supreme Court noted that this interest survives involuntary commitment. 102 S. Ct. at 2458.

36. 102 S. Ct. at 2458. *See* Hutto v. Finey, 437 U.S. 678 (1978) (Supreme Court held it was cruel and unusual to hold convicted criminals in unsafe conditions). *See also supra* note 35 and accompanying text.

37. 102 S. Ct. at 2458. *See supra* note 35 and accompanying text.

38. 102 S. Ct. at 2458. Justice Powell noted that the remaining claim was more troubling. *Id.*

39. *Id.* at 2458-59. Romeo argued that he was committed for care and treatment under state law, and therefore had a substantive right to treatment. *Id.* at 2458 n.19. *See supra* note 20 and accompanying text for definition of treatment.

The Court began its analysis with the established principle that the state is under no constitutional duty to provide substantial services for those within its confines.[40] The Court conceded however, that when a person is institutionalized, the state does have a duty to provide certain services and care within its discretion.[41] Justice Powell noted that Romeo was not proposing that any amount of treatment would make his release possible.[42] Furthermore, it was noted that Romeo was not alleging that if he had remained at home, the state would have had a duty to provide him with treatment.[43] The Court concluded that on the basis of the record, respondent sought only "habilitation" or training directly related to his liberty interest in safety and freedom of movement.[44] The Court specifically noted that this case did not present the difficult question of whether an involuntarily committed mental patient has some general constitutional right to treatment, even when such treatment would not lead to a release.[45]

The majority proposed that Romeo had adopted the position proposed by Chief Judge Seitz in his concurring opinion below, that Romeo had a constitutional right to minimally adequate care and treatment,[46] noting that Chief Judge Seitz did not expand upon this right to treatment beyond the ideas of personal safety and freedom of movement.[47] Thus the majority did not decide the issue of the general right to treatment. Instead it held that the involuntarily committed have a constitutional right to receive treatment if such treatment is necessary to ensure safety and freedom from undue restraint.[48]

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40. 102 S. Ct. at 2459. *See* Harris v. McRae, 448 U.S. 297 (1980) (state not required to fund abortions). *See also* Maher v. Roe, 432 U.S. 464 (1977) (state not required to provide medical treatment).

41. 102 S. Ct. at 2459. *See* Richard v. Belcher, 404 U.S. 78 (1971) (state does have duty to provide certain services to institutionalized persons). *See also* Dandridge v. Williams, 397 U.S. 471 (1970) (state can regulate monthly limit on welfare payments).

42. 102 S. Ct. at 2459.

43. *Id.*

44. *Id.* Romeo asserted that further self-help programs were needed to reduce his aggressive behavior. *See* Reply Brief for Respondent at 21-22, 50. Youngberg v. Romeo, 102 S. Ct. 2452 (1982). The *Youngberg* Court noted that Romeo repeatedly indicated that if his experts were permitted to testify, they would illustrate that additional training programs were needed to reduce Romeo's aggressive behavior. *See* Petition for Writ of Certiorari, App. at 98-104. Therefore, the Court concluded that Romeo only sought treatment related to his interest in safety and freedom from restraint. 102 S. Ct. at 2459.

45. 102 S. Ct. at 2459.

46. *Id.* at 2459-60.

47. *Id.*

48. *Id.* at 2460.

Having established that Romeo had certain liberty rights under the fourteenth amendment, the Court articulated the proper standards to be used in determining whether his rights had indeed been violated.[49] The Court stated that in ascertaining whether a substantive right has been violated, it becomes necessary to balance the liberty interest of the individual with the demands of society.[50] The majority suggested that the Court in previous cases had weighed the individual's interest against the State's proposed interests in restraining him;[51] therefore, the Court concluded that Romeo's liberty interests must be balanced against the pertinent state interests.[52]

The *Youngberg* Court noted that they had taken a similar approach when deciding procedural due process challenges to civil commitment proceedings.[53] In *Parham v. J.R.*,[54] the Court, in determining that procedural due process did not require an adversarial hearing when a challenge to state procedures for committing a minor was raised, weighed the individual's liberty interest against the state's interests, including fiscal and administrative burdens.[55] The *Youngberg* Court concluded that if there is to be uniformity in protecting liberty interests, this balancing must not be left to the unguided discretion of a judge or jury.[56] Therefore, the Court next considered the proper standard to be applied in determining whether a state has adequately protected the rights of the involuntarily committed.[57]

The Supreme Court adopted the standard proposed by Chief Judge Seitz in his concurring opinion below as being reflective of the proper balance between the legitimate state interests and the involuntarily committed person's right to safety and freedom from

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49. *Id.* The Court noted that in operating an institution such as Pennhurst, it may become necessary on certain occasions to restrain the residents. The majority concluded that the issue was not whether a liberty interest had been infringed upon, but whether the extent of the restraint was such to violate substantive due process. *Id.*

50. *Id. See* Poe v. Ullman, 367 U.S. 497, 522, 542 (1961) (Harlan, J., dissenting) (Harlan suggested individual liberty must be balanced against societal interests).

51. 102 S. Ct. at 2460-61. *See* Bell v. Wolfish, 441 U.S. 520 (1979) (court weighed pretrial detainees' liberty interests against state's reasons for detaining and upheld the restrictions that were reasonably related to legitimate government interest). *See also* Parham v. J.R., 442 U.S. 584 (1979) (court weighed liberty interests against legitimate state interest in determining whether procedural due process required an adversarial hearing).

52. 102 S. Ct. at 2461.

53. *Id.*

54. 442 U.S. 584 (1979).

55. *See* 102 S. Ct. at 2461.

56. *Id.*

57. *Id.*

unreasonable restraint.[58] Chief Judge Seitz asserted that the proper standard for determining whether Romeo's rights had been violated was first to decide if professional judgment was employed;[59] if professional judgment was in fact exercised, Romeo's rights were not violated.[60] The majority further suggested that this standard was a lower one than either the "compelling" or "substantial" necessity tests proposed by the court of appeals.[61]

The Supreme Court further proposed that Romeo was entitled to minimally adequate treatment if such treatment was reasonable in light of his interests in freedom of movement and personal safety.[62] The Court also noted that judicial review should be limited only to the issue of whether professional judgment was in fact exercised;[63] concluding that where a professional's judgment is questioned, there is a presumption of validity.[64] Furthermore, if a professional were sued individually for the exercise of his judgment, he would not be held personally liable if he was unable to uphold average professional standards due to budgetary considerations.[65]

The Supreme Court thus held that mental patients who have been involuntarily committed retain certain liberty interests and these interests must subsequently be weighed against relevant state interests to determine if their interests were indeed violated.[66] The Court emphasized that the state does have a duty to provide adequate food, shelter, medical care, and clothing.[67] Furthermore, the Court asserted that the state may not restrain an individual except to the extent that professional judgment was ex-

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58. *Id.*

59. *Id.* Chief Judge Seitz stated that it was not the role of the court to articulate which professional choice should have been made, but rather only to make sure that professional judgment was indeed exercised. The court defined a professional as a person who is competent, whether by education, training, or experience, to make the decision at issue. *See* 644 F.2d at 178 (Seitz, C.J., concurring).

60. 102 S. Ct. at 2461.

61. *Id.* The Court noted that the standard proposed by the court of appeals would place a harsh burden on the administration of institutions. *Id.*

62. *Id.*

63. *Id.* at 2461-62. Justice Powell noted that there exists no reason to believe that judges and juries are more qualified than professionals in the decision-making process. *Id.*

64. *Id.* at 2462.

65. *Id.* The *Youngberg* Court noted that good faith immunity would bar the official from personal liability. Liability may only be imposed when the decision rendered is a substantial departure from accepted practices. *Id.*

66. *Id. See supra* note 34 and accompanying text.

67. 102 S. Ct. at 2462.

ercised and it was determined that such restraint was necessary.[68] Finally, the majority noted that it may be unreasonable not to provide training when such training could substantially reduce the need for physical restraint and the probability of violence.[69]

The *Youngberg* Court concluded that Romeo enjoyed constitutionally protected interests in personal safety, freedom of movement, and minimally adequate training after commitment to Pennhurst.[70] The Court held that when determining whether a state had fulfilled its obligation to the involuntarily committed, the courts are to look at the decisions of the appropriate professional,[71] noting that the professional's judgment would be afforded a presumption of validity.[72] Justice Powell noted that such a presumption was necessary to enable state institutions to continue to function.[73] The Court recognized that a single professional might be required to make numerous decisions with respect to varying problems in one day.[74] Therefore, the administrators and professional personnel should not be continually threatened with a damage action when making each decision.[75]

The Court concluded that the jury was erroneously instructed on the proper standard of liability, i.e., the eighth amendment.[76] Accordingly, the Supreme Court vacated the decision of the court of appeals and remanded the case for further proceedings.[77]

Justice Blackmun filed a concurring opinion in which he raised two distinct issues.[78] The first concerned whether the state could constitutionally refuse to provide treatment to a mental patient after accepting him for "care and treatment."[79] Justice Blackmun relied upon *Jackson v. Indiana*[80] for the constitutional standard for evaluating the confinement of one civilly committed.[81] The Su-

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68. *Id.*
69. *Id.* at 2462-63.
70. *Id.* at 2463.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 2463 (Blackmun, J., concurring). Justices Brennan and O'Connor joined in the concurrence.
79. *Id.* Justice Blackmun proposed that if that issue were properly raised before the Court, a question would arise as to whether as a matter of due process, the state could refuse to provide treatment. *Id.*
80. 406 U.S. 715 (1972).
81. *Id.*

preme Court in *Jackson* held that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[82] Justice Blackmun noted that under this standard, a state could accept a patient for safekeeping and still constitutionally refuse to provide treatment since commitment without treatment would bear a reasonable relation to the purpose of the confinement.[83] However, if a state court orders a mental patient to be confined for "care and treatment," due process might bind the state to ensure such commitment bears a reasonable relation to these goals.[84]

Justice Blackmun noted that in respondent's case, the majority and principal concurring opinions of the court of appeals agreed that by basing Romeo's deprivation of liberty partially upon the promise of treatment, the state committed the community's resources to provide at least minimal treatment.[85] The concurrence noted, however, that neither opinion clarified whether the term treatment was to be defined under Pennsylvania law.[86] To the extent the majority addressed the issue presented in the evidence on the record, although the evidence was somewhat inconsistent, it found that it suggested not a total failure of treatment so much as an inadequacy of treatment.[87] Therefore, on the Court's reading of the record, the Supreme Court held that respondent's right to "treatment" under Pennsylvania law was not properly raised and, given this uncertainty, Justice Blackmun was in accordance with the Court's decision not to address the constitutionality of the state's failure to provide "treatment" to a mental patient who has been involuntarily committed.[88]

The second question, according to Justice Blackmun, concerned the broad issue of whether Romeo had a separate constitutional right under the fourteenth amendment to treatment to preserve those basic self-care skills which he possessed prior to commitment.[89] Justice Blackmun noted that the majority even held that after a person is committed to a state mental hospital, he is entitled to such training as would be required to prevent unreasonable

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82. *Id.* at 738.
83. 102 S. Ct. at 2463 (Blackmun, J., concurring).
84. *Id.*
85. *Id.* at 2463-64 (Blackmun, J., concurring).
86. *Id.* at 2464 (Blackmun, J., concurring).
87. *Id.*
88. *Id.*
89. *Id.* Justice Blackmun noted such basic self-care skills as the ability to dress oneself and to care for personal hygiene.

losses of additional liberty, i.e., unsafe conditions or unreasonable restraint.[90] Blackmun also suggested that if a patient could demonstrate that he entered the institution with certain basic self-care skills, but lost those skills because of the state's refusal to provide training, then such a patient has been deprived of a liberty interest as serious as the loss of safety or freedom from restraint.[91]

Justice Blackmun asserted that although Romeo asserted a claim of this type, on the basis of the record, it was unclear whether any habilitation unrelated to safety and freedom of movement was sought.[92] Justice Blackmun concluded that if respondent was actually seeking habilitation to reduce aggressive tendencies and to maintain basic self-care skills, he would be free on remand to assert the claim.[93] Also following the majority, Justice Blackmun would defer to the judgment of professionals as to the extent training would preserve any preexisting skills.[94]

In his concurrence, Justice Blackmun concluded that if expert testimony revealed that respondent was so retarded when he entered the institution that he had no self-care skills to preserve, then there would be no additional loss of liberty if training was not provided.[95] However, if testimony established that respondent did possess certain basic skills upon entering the institution, then Justice Blackmun noted that he would be amenable to a constitutional argument even when safety and mobility were not restricted.[96] On the basis of a less-than-fully developed record, the Court found it premature to resolve the constitutional question and Justice Blackmun agreed with the Court's conclusion and thus concurred with the opinion.[97]

In a separate concurring opinion, Chief Justice Burger stated that he would hold that Romeo had no general right to treatment under the Constitution,[98] noting that Romeo could never live outside Pennhurst due to the severity of his retardation and that he did not seek to be discharged from the institution.[99] Therefore, he concluded that since the state had custody of Romeo, it had a

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 2465 (Blackmun, J., concurring).
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* (Burger, C.J., concurring).
99. *Id.*

duty to provide shelter, medical treatment, food, and living conditions as safe as might reasonably be expected.[100] However, Chief Justice Burger noted that the state did not seek custody of respondent but that respondent's family sought state aid.[101]

Chief Justice Burger agreed with the Court that some amount of self-care instruction may be necessary to avoid unreasonable infringment of the patient's interests in safety and freedom from restraint.[102] However, he noted that the Constitution did not otherwise place an affirmative duty upon the state to provide any type of treatment.[103] Since respondent sought a right to minimally adequate treatment, the constitutional issue should not be avoided.[104]

Chief Justice Burger also pointed out that it is largely irrelevant whether respondent's experts were of the opinion that other training programs were needed to reduce Romeo's aggressive tendencies because the training program implemented by petitioners was presumptively valid.[105] Furthermore, liability could be imposed only when the decision was a substantial departure from accepted standards.[106] Therefore, even if respondent could demonstrate that the treatment programs at Pennhurst were not consistent with generally accepted practices, as long as professional judgment was in fact exercised, respondent's claim would not prevail.[107]

Finally, Chief Justice Burger noted that the district court erred in its jury instruction by utilizing the eighth amendment and suggesting that the officials would only be liable if they failed to take reasonable steps to prevent attacks on Romeo.[108]

In *Youngberg*, the Supreme Court was presented with the right of the involuntarily committed person to freedom of movement,[109] to personal safety,[110] and to treatment.[111] The first two rights, per-

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100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 2465-66 (Burger, C.J., concurring).
105. *Id.* at 2466 (Burger, C.J., concurring).
106. *Id.*
107. *Id.*
108. *Id.* Chief Justice Burger noted that the district court's instructions which stated that petitioners would be liable if they "failed to take all reasonable steps to prevent repeated attacks upon" Romeo, were overly generous to respondent. Chief Justice Burger concluded by commenting that if the officials had taken all reasonable steps possible to prevent the attacks on Romeo, they could not have been said to have deprived respondent of either his right to safety or of the training necessary to achieve reasonable safety. *Id.*
109. *Id.* at 2458.
110. *Id.* at 2457.
111. *Id.* at 2458.

sonal safety and freedom of movement, were held to be rights derived from historically protected liberty interests.[112] The third question, the right to treatment, was the central issue of the *Youngberg* decision and the focal point of the majority's decision.[113]

The right to treatment for the involuntarily committed represents a recent development in American constitutional law, which has its roots in the eighth and fourteenth amendments.[114] The right to treatment under the eighth amendment began to develop with the 1962 Supreme Court decision of *Robinson v. California*.[115] The *Robinson* approach to the eighth amendment right to treatment first provided that any punishment of a status is inherently cruel and unusual, and secondly, that being mentally ill and dangerous is a status under the *Robinson* rule.[116] Therefore, since civil commitment not associated with treatment constitutes punishment and is applied because of the status of being mentally ill, it is cruel and unusual and in violation of the eighth amendment.[117]

After the *Robinson* decision, some of the courts of appeals began to recognize an eighth amendment right to treatment, beginning with *Rouse v. Cameron*.[118] In *Rouse*, the court of appeals held that indefinite confinement of one who has not been found criminally responsible may be so inhumane as to be considered cruel and unusual punishment.[119] In 1977, the Court of Appeals for the Fourth Circuit held in *Bowring v. Godwin*,[120] that there was no distinction between the right to medical care for physical illness and its psychological counterpart.[121] Although the courts of appeals have shown a favorable attitude towards recognizing the right to treatment under the eighth amendment,[122] most authorities confine the

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112. *Id. See supra* note 35 and accompanying text.

113. 102 S. Ct. at 2458.

114. *See* Comment, *Right to Treatment for the Civilly Committed: A New Eighth Amendment Basis*, 45 U. CHI. L. REV. 731 (1978). *See also* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (failure of state to provide treatment raised a significant due process question).

115. 370 U.S. 660 (1962) (eighth amendment forbids a state to punish a person for the mere status of being mentally ill).

116. *See* Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1, 19 (1978).

117. *Id.*

118. 373 F.2d 451 (D.C. Cir. 1966).

119. *Id.* at 453.

120. 551 F.2d 44 (4th Cir. 1977).

121. *Id.* at 47.

122. *See supra* notes 118-120 & accompanying text. See also Comment, *supra* note

application of the eighth amendment to the regulation of criminal punishment.[123] But in *Ingraham v. Wright*,[124] the Supreme Court left open the possibility of applying the eighth amendment to non-criminal contexts.[125]

However, the *Youngberg* court chose not to address the eighth amendment basis for the involuntarily committed person's right to treatment.[126] Although Romeo raised such an issue in his complaint, the eighth amendment approach was rejected by the court of appeals[127] and subsequently not considered by the Supreme Court.[128]

The second basis for a constitutional right to treatment for the involuntarily committed lies in the due process clause of the fourteenth amendment. This notion was initially promulgated by Judge Bazelon in *Rouse v. Cameron*,[129] where he proposed that failure to supply treatment to an involuntarily confined mental patient raised a significant due process question.[130] Subsequent to *Rouse*, there developed a growing movement to establish a constitutional right to treatment under the fourteenth amendment, beginning with the 1971 decision of *Wyatt v. Stickney*,[131] in which the District Court for the Middle District of Alabama held that when patients are committed for treatment purposes, they unquestionably have the right to receive individual treatment that will cure or improve their condition.[132] Subsequently, the court of appeals affirmed the district court's decision.[133]

Although a distinction could be made in that the *Wyatt* case dealt with mental patients who were committed for the purpose of treatment, the court of appeals faced a general right to treatment

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114, at 731.

123. Comment, *supra* note 114, at 737.

124. 430 U.S. 651 (1977).

125. *Id.* at 669 n.37.

126. 102 S. Ct. at 2456-57.

127. *Id.* at 2456.

128. *Id.* at 2457. The Court articulated the issue in *Romeo* as the substantive rights of the involuntarily committed under the fourteenth amendment. *Id.*

129. 373 F.2d 451 (D.C. Cir. 1966).

130. *Id.* at 453. In *Rouse*, petitioner had been confined after being found not guilty by reason of insanity. Petitioner argued that his confinement should be conditioned upon the state's provision of treatment; Judge Bazelon proposed that failure of the state to provide treatment raised a significant due process question. *Id.*

131. 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

132. 325 F. Supp. at 784.

133. *See* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), *aff'g*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

issue in *Donaldson v. O'Connor.*[134] In *Donaldson,* the Court of Appeals for the Fifth Circuit developed two rationales for a due process right to treatment,[135] the first of which was based upon the premise that any governmental abridgement of freedom must be justified by some permissible governmental goal.[136] Thus, when a state commits a person for the purpose of caring for him, treatment must be provided, because without treatment, the nature of commitment bears no reasonable relation to its purpose, and due process is therefore violated.[137] The second rationale is based upon a "quid pro quo" theory which proposes that a state cannot confine a person unless it can justify such confinement by providing a quid pro quo in the form of rehabilitation treatment.[138] A fourteenth amendment right to treatment had finally been established under *Donaldson,* but it was soon curtailed when the Supreme Court granted certiorari[139] to hear the *Donaldson* case.[140] The Supreme Court vacated and remanded the court of appeals' decision noting that the appellate court should only consider on remand the issue of monetary liability and not the issue of right to treatment.[141] Thus, the Court avoided the broad issue of a constitutional right to treatment.[142] Furthermore, Chief Justice Burger wrote in his concurring opinion that the Fifth Circuit's analysis regarding a right to treatment had no basis in the decision of the Supreme Court.[143] The Supreme Court's stance in *Donaldson* briefly deterred the courts of appeals from finding a fourteenth amendment right to treatment.[144]

In 1977, however, the eighth circuit once again attempted to establish a constitutional right to treatment by holding in *Welsch v.*

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134. 493 F.2d 507 (5th Cir. 1974), *vacated and remanded,* 422 U.S. 563 (1975). In the *Donaldson* case, a former mental patient who had been involuntarily committed to a state hospital brought an action against state physicians and officials who allegedly deprived him of his constitutional rights to receive treatment or be released from the hospital. The court of appeals held that the patient had a constitutional right to treatment if such treatment would improve his condition. 493 F.2d at 527.

135. *Id.* at 520-25.

136. *Id.* at 520.

137. *Id.*

138. *Id.* at 522.

139. 419 U.S. 894 (1974).

140. 422 U.S. 563 (1975).

141. *Id.* at 577 n.12.

142. *Id.*

143. *Id.* at 587-88 (Burger, C.J., concurring).

144. *See* Scott v. Plante, 532 F.2d 939 (3d Cir. 1976) (court declined to find a due process right to treatment).

Likins[145] that the noncriminal mentally retarded patient who has been committed to a state institution has the constitutional right to at least minimally adequate treatment.[146] Two years later, a district court went even further by adding that the fact that a patient is deemed dangerous does not deprive him of a constitutional right to treatment.[147]

The constitutional right to treatment has been recognized in the past by many commentators and courts.[148] However, although the right has been recognized, there appears to be a great deal of confusion surrounding the proper basis upon which the right should be grounded.[149]

Professor Spece, in his thesis on the right to treatment, has commented that there are six separate theories used to establish a right to treatment: three quid pro quo theories,[150] an eighth amendment/*Robinson v. California* theory,[151] a protection from harm theory,[152] and a least restrictive alternative theory.[153] He proposes that although the right to treatment has been supported by the lower federal courts, there has yet to be articulated a sound conceptual basis for the right.[154]

Of the six theories established by Professor Spece, his least restrictive alternative theory is the only one which he found to be consistent with logic, precedent, and constitutional standards of judicial review.[155] The theory proceeds from a recognition that under the fourteenth amendment concepts of equal protection and due process, deprivations of constitutional rights must be justified by considerations which require intrusions as opposed to other forms

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145. 550 F.2d 1122 (8th Cir. 1977).

146. *Id.* at 1125, 1129.

147. *See* Eckerhart v. Hensley, 475 F. Supp. 908 (W.D. Mo. 1979). In *Eckerhart*, the district court held that due process requires that patients who have been involuntarily committed to state mental hospitals be provided with such treatment as will give them reasonable opportunity for cure or improvement. But the fourteenth amendment does not require the state to provide such treatment to certain untreatable patients. However, the fact that a patient is perceived as dangerous does not deprive him of this constitutional right to treatment. *Id.*

148. *See* Spece, *supra* note 116, at 2. *See also* Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960). *See generally supra* notes 114-47 and accompanying text.

149. *See* Spece, *supra* note 116, at 2.

150. *Id.* at 4-15.

151. 370 U.S. 660 (1962). *See* Spece, *supra* note 116, at 16-28. *See also* notes 115-17 and accompanying text for discussion of *Robinson* decision.

152. *See* Spece, *supra* note 116, at 28-33.

153. *Id.* at 33-46.

154. *Id.* at 47.

155. *Id.* at 33.

of independent compensation.[156] It is based on the notion that commitment impinges on the important right to freedom from confinement and this deprivation must be justified by some overriding state interests which can be obtained only through commitment.[157] In summary, the thesis proposes a less restrictive alternative standard of review which utilizes the compelling state interest test to discern, on an individual basis, whether a patient is entitled to treatment in a state mental hospital.[158] The theory suggests the notion that it is applicable irrespective of the purpose of commitment.[159]

Once again in *Youngberg v. Romeo*,[160] the Supreme Court was afforded the opportunity to discuss a general constitutional right to treatment.[161] The Court declined to address the broad constitutional issue, observing that Romeo sought only treatment related to his interests in personal safety and freedom of movement.[162] Because of the importance of a constitutional right to treatment to the involuntarily committed mental patient,[163] and because of the lower federal courts' favorable policy towards such a right,[164] the Court should have addressed this question.

After *Youngberg* it is unclear how the Supreme Court will respond when squarely faced with a general constitutional right to treatment issue, although the Chief Justice made it evident in his concurrence that he feels there should be no such right and that the majority should have held so in the instant case.[165] However, as Professor Spece stated, the plight of the involuntarily committed deserves the careful attention of legal scholars, for treatment is their sole prospect for cure or improvement.[166]

Kimberly J. Gallagher

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156. *Id.* at 42 n.139.
157. *Id.*
158. *Id.* at 38.
159. *Id.* at 42.
160. 102 S. Ct. 2452 (1982).
161. *Id.*
162. *Id.* at 2459.
163. *See* Birnbaum, *supra* note 148, at 499.
164. *See supra* notes 145-47 and accompanying text.
165. 102 S. Ct. at 2465 (Burger, C.J., concurring).
166. *See* Spece, *supra* note 116, at 1.