

# THE RIGHT TO VOLUNTARY, COMPENSATED, THERAPEUTIC WORK AS PART OF THE RIGHT TO TREATMENT: A NEW THEORY IN THE AFTERMATH OF SOUDER

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*It is for the clothing, and for the food, and for the shelter, by these to sustain their lives, that they work. Into this work and need, their minds, their spirits, and their strength are so steadily and intensely drawn that during such time as they are not at work, life exists for them scarcely more clearly or in more variance and seizure and appetite than it does for the more simply organized among the animals, and for the plants.*

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## INTRODUCTION

In recent years, the attention of lawyers, psychologists, and psychiatrists has been turned to the plight of residents in institutions for the mentally handicapped who have been required to perform productive labor for the benefit of the institution without adequate compensation.<sup>2</sup> As it has become apparent that a significant number of institutional residents<sup>3</sup> have spent an appreciable amount of their time performing such labor,<sup>4</sup> and as the potentiality for abuse has become manifest,<sup>5</sup> the contention has been made that compulsory,

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<sup>1</sup> J. AGEЕ & W. EVANS, LET US NOW PRAISE FAMOUS MEN 289 (Ballantine Books ed. 1966).

<sup>2</sup> For a general overview of this problem see Friedman, *The Mentally Handicapped Citizen and Institutional Labor*, 87 HARV. L. REV. 567 (1974) [hereinafter cited as Friedman I]; Friedman, *Thirteenth Amendment and Statutory Rights Concerning Work in Mental Institutions*, in 2 MENTAL HEALTH LAW PROJECT, PRACTISING LAW INSTITUTE, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 637 (B. Ennis & P. Friedman eds. 1973) [hereinafter cited as Friedman II]. See also A. STONE, MENTAL HEALTH AND LAW: SYSTEM IN TRANSITION 109-17 (1975).

<sup>3</sup> Unless otherwise specified, the term "resident" will include both patients at institutions for the mentally ill and residents at institutions or "state schools" for the mentally retarded.

<sup>4</sup> Various studies show work force percentages ranging between approximately 16 and 25 percent of the resident population. See Friedman I, *supra* note 2, at 568.

<sup>5</sup> See generally Bartlett, *Institutional Peonage: Our Exploitation of Mental Patients*, 214 ATLANTIC MONTHLY, July 1964, at 116; Friedman I, *supra* note 2, at 567-68. For

noncompensated work programs—labeled “institutional peonage”<sup>6</sup>—may be prohibited by the thirteenth amendment,<sup>7</sup> a patient’s constitutional right to treatment,<sup>8</sup> and the minimum-wage provisions of the Fair Labor Standards Act (FLSA).<sup>9</sup>

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individual accounts of abuse see *Jobson v. Henne*, 355 F.2d 129, 132 (2d Cir. 1966) (resident of a state school for mental defectives alleged that he had been “forced to work in the . . . [s]chool’s boiler house eight hours a night, six nights a week, while working eight hours a day at assigned jobs”); *B. ENNIS, PRISONERS OF PSYCHIATRY* 109–27 (1972) (nature and effects of an institution’s systematic exploitation of a patient over a 16-year period are recounted).

<sup>6</sup> See Bartlett, *supra* note 5; Friedman II, *supra* note 2, at 639.

<sup>7</sup> See, e.g., *Jobson v. Henne*, 355 F.2d 129, 132 & n.3 (2d Cir. 1966) (forcing residents to perform nontherapeutic work not related to personal needs solely to defray institutional costs may violate the thirteenth amendment even if compensation is paid); *Downs v. Department of Pub. Welfare*, 368 F. Supp. 454, 465 (E.D. Pa. 1973) (thirteenth amendment is applicable in mental institution context); *Johnston v. Ciccone*, 260 F. Supp. 553, 556 (W.D. Mo. 1966) (forced work would violate petitioner’s constitutional rights); *Tyler v. Harris*, 226 F. Supp. 852, 855 (W.D. Mo. 1964) (cause of action under the thirteenth amendment stated where federal prisoner-patient claimed he was required to perform “‘a non-essential clerical function’”); cf. *Parks v. Ciccone*, 281 F. Supp. 805, 811 (W.D. Mo. 1968) (nonconvicted prisoner-patient has right to be informed “he has the right not to work”). See generally Ferleger, *Loosing the Chains: In-Hospital Civil Liberties of Mental Patients*, 13 SANTA CLARA LAW. 447, 479–83 (1973). For an analysis of the practicalities of thirteenth amendment litigation see Friedman I, *supra* note 2, at 579–84; Friedman II, *supra* note 2, at 648–49.

<sup>8</sup> See *Weidenfeller v. Kidulis*, 380 F. Supp. 445 (E.D. Wis. 1974); *Wyatt v. Stickney*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *enforcing* 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), *aff’d sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). The *Weidenfeller* court found plaintiffs’ allegation that they were forced to perform nontherapeutic tasks for the institution equivalent to a claim that they were being denied their constitutional right to treatment, which was “a viable theory upon which relief might be granted.” 380 F. Supp. at 451. The court in *Wyatt* found “nontherapeutic, uncompensated work assignments . . . dehumanizing,” 344 F. Supp. at 375, and, in ordering implementation of standards necessary to sustain a minimum level of treatment, included the stricture that all work of an institutional nature be voluntary, therapeutic, and compensated. *Id.* at 381, 402.

For a discussion of how institution-maintaining labor may be attacked as undermining the right to treatment see Friedman I, *supra* note 2, at 584–86.

<sup>9</sup> The Fair Labor Standards Act of 1938 was amended in 1966 to expand coverage to workers involved in “the operation of . . . an institution . . . engaged in the care of . . . the mentally ill or defective.” Act of Sept. 23, 1966, Pub. L. No. 89–601, § 201, 80 Stat. 833 (codified at 29 U.S.C. §§ 203(r)(1), (s)(4) (Supp. IV, 1975)). The Act was held applicable to patient-workers in *Souder v. Brennan*, 367 F. Supp. 808, 812 (D.D.C. 1973). For a discussion of *Souder* see notes 10–12 & 100–02 *infra* and accompanying text.

Prior to *Souder*, the court in *Wyatt v. Stickney* ordered hospital administrators to comply with FLSA minimum wage requirements. 344 F. Supp. 373, 381, 344 F. Supp. 387, 402 (M.D. Ala. 1972), *enforcing* 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), *aff’d sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). This was done presumably because uncompensated work was “dehumanizing” and violative of the patient’s right to treatment. See 344 F. Supp. at 375; note 8 *supra*.

For an analysis of the practicalities of FLSA litigation see Friedman I, *supra* note 2, at 571–79; Friedman II, *supra* note 2, at 647–48, 649.

In *Souder v. Brennan*,<sup>10</sup> a federal district court, in a class action, held that patient-workers in state psychiatric hospitals and institutions for the retarded are deemed to be "employees" within the coverage of the FLSA, *even if* the work they do is therapeutic, "[s]o long as the institution derives any consequential economic benefit."<sup>11</sup> The court ordered the defendant Secretary of Labor "to implement reasonable enforcement efforts" to apply the FLSA minimum and overtime wage provisions to residents at all state institutions for the mentally ill and mentally retarded.<sup>12</sup> Subsequently, the Secretary promulgated regulations<sup>13</sup> requiring, in part, that patient-workers whose capacities are not impaired "be paid at least the statutory minimum wage" and others be paid wages commensurate with their productive capacities.<sup>14</sup>

State responses to the *Souder* decision and to the subsequent regulations have ranged from acquiescence and payment of wages to abolition of all work programs.<sup>15</sup> This article is directed toward those

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<sup>10</sup> 367 F. Supp. 808 (D.D.C. 1973).

<sup>11</sup> *Id.* at 812-13. The class in *Souder* included "[a]ll patient-workers in non-Federal institutions for the residential care of the mentally ill and mentally retarded who meet the statutory definition of employee [within the FLSA]." *Id.* at 814.

<sup>12</sup> *Id.* at 809-10.

<sup>13</sup> 29 C.F.R. § 529.1 *et seq.* (1975).

<sup>14</sup> *Id.* § 529.4. The regulations provide that subminimum wages can be paid when authorized by certificates issued by the Wage and Hour Division of the Department of Labor. See note 103 *infra*.

<sup>15</sup> For a survey of approaches to the *Souder* decision and subsequent regulations nationwide see *From Peonage To Pay* (pts. I-V), 5 BEHAVIOR TODAY 331, 337, 344 (1974) & 6 BEHAVIOR TODAY 351, 364 (1975); *Peonage—One More Time*, 6 BEHAVIOR TODAY 372 (1975). See 26 HOSP. & COMMUNITY PSYCHIATRY 190-91 (1975); *cf.* Moore, *The Wages of Peonage*, PSYCHOLOGY TODAY, March, 1975, at 17, 79.

The *Behavior Today* survey revealed that some states, such as New York and Alabama, had already reduced or eliminated patient labor as a result of prior anti-peonage programs or decisions. See 5 BEHAVIOR TODAY at 339, 346. But for the most part each individual state has been forced to weigh the benefits to be derived from patient labor against the financial realities of deflated budgets and a lack of available resources.

In a few states, such as Massachusetts, Connecticut, North Carolina, Idaho, South Dakota, Rhode Island, Alaska, and Kansas, the *Souder* decision has resulted in the simple expedient of providing the requisite pay for resident workers. *Id.* at 332, 338, 344-45; 6 BEHAVIOR TODAY at 353, 366. Typical of this encouraging approach are the comments of Robert Tacey of the Connecticut mental health department, who stated "that 'work is therapeutic and payment is good for self-concept.'" 5 BEHAVIOR TODAY at 338.

Other states, such as Virginia, Michigan, Georgia, Illinois, Kentucky, Indiana, Vermont, and North Dakota, have followed suit with New Jersey and have chosen to virtually eliminate all resident-performed jobs which would require compensation. *Id.* at 332, 338, 339, 345; 6 BEHAVIOR TODAY at 351-52, 366. In most instances, the decision to eliminate patient labor was based solely upon the lack of adequate finances.

A third group of states is attempting to align therapeutic work programs with the

states, particularly New Jersey, which have chosen to terminate all work programs in state mental institutions.<sup>16</sup> It is urged that such a response violates the resident's right to treatment,<sup>17</sup> right to the least restrictive treatment setting,<sup>18</sup> right to freedom from harm,<sup>19</sup> and right to earn a livelihood.<sup>20</sup> Although some of these arguments traditionally have been used to attack the subjection of patients to labor assignments,<sup>21</sup> they properly may be employed to support the proposition that the right to participate in voluntary, compensated, therapeutic work programs is constitutionally protected. Furthermore, the rationale given for terminating work programs—lack of funds—will not withstand scrutiny under either the due process or equal protection clause.<sup>22</sup>

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availability of financial resources by employing various criteria to determine which patient-held jobs should be continued. Pennsylvania has decided to employ only those patients engaged in "necessary" work, while Maryland intends to limit employment to those services which are deemed "essential." 5 BEHAVIOR TODAY at 332. Washington plans to certify patients for labor programs "on the basis of productivity and whether or not treatment personnel prescribe work" for any particular individual. *Id.* Both Tennessee and Massachusetts will continue resident work, but plan to reduce the number of work hours. This goal will be accomplished through use of "a stepladder program, in which patients progress in the number of hours they may work according to their needs and competence." Moore, *supra* at 17.

Several states have yet to formulate any policy and are merely keeping records of all resident work hours while one, California, may challenge the *Souder* decision on the ground that patient labor is not within the scope of the FLSA. See 5 BEHAVIOR TODAY at 339.

<sup>16</sup> New Jersey abolished all work programs as of December 1, 1974, because of the state's inability to pay patient workers. See Letter from Dr. Michail Rotov, Acting Director, Division of Mental Health and Hospitals, Department of Institutions and Agencies of N.J., to author, October 31, 1974, on file at *Seton Hall Law Review*. The letter states in pertinent part:

The Department of Institutions and Agencies apparently was not successful in obtaining additional funds to compensate patients for their work at the public mental hospitals. Additionally, the total fiscal situation of the state is such that all departments have been required to exercise maximum prudence and restraint. The level of expenditures on salaries is to be kept at the September 13, 1974 level. Under these circumstances no remuneration of patients for work can be expected. All patient work will have to be discontinued by December 1, 1974.

<sup>17</sup> See text accompanying notes 23-83 *infra*.

<sup>18</sup> See text accompanying notes 130-50 *infra*.

<sup>19</sup> See text accompanying notes 151-64 *infra*.

<sup>20</sup> See text accompanying notes 165-70 *infra*; note 169 *infra*.

<sup>21</sup> See note 8 *supra*. See generally Friedman I, *supra* note 2, at 584-86. It has been suggested that nontherapeutic work programs might also violate the cruel and unusual punishment clause of the eighth amendment, implicitly a partial basis of the constitutional right to freedom from harm. See *Jortberg v. United States Dept. of Labor*, Civil No. 13-113, at 10 (D. Me., April 10, 1974) (citing, *inter alia*, *Furman v. Georgia*, 408 U.S. 238, 271-79 (1972) (Brennan, J., concurring)).

<sup>22</sup> See text accompanying notes 172-75 *infra*.

### WORK PROGRAMS AND THE RIGHT TO TREATMENT

The most crucial right infringed by the stoppage of work programs is the institutionalized mental patient's constitutional right to treatment, of which the voluntary, therapeutic work program is an indispensable element. The development of the constitutional right to treatment has been heavily documented, and it is not the purpose of this article to retrace ground thoroughly covered in prior literature.<sup>23</sup> However, it is still necessary to review the current state of the law in this context and to demonstrate that the existence of this right is today virtually beyond question, having been recognized almost without exception by federal courts confronting the issue<sup>24</sup> and implied in analogous Supreme Court decisions.<sup>25</sup>

<sup>23</sup> For a survey of recent literature regarding the right to treatment see Schwitzgebel, *Implementing a Right to Effective Treatment*, 1975 LAW & PSYCHOLOGY REV. 117, 117 n.1; Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1339 n.5 (1975).

<sup>24</sup> Virtually every lower federal court confronting the issue has held that a constitutional right to treatment exists for those detained by the state under nonpenal statutes. See, e.g., *Wyatt v. Aderholt*, 503 F.2d 1305, 1312-15 (5th Cir. 1974) (mentally ill and mentally retarded); *Donaldson v. O'Connor*, 493 F.2d 507, 521-22 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975) (mentally ill); *Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (juveniles); *Davis v. Watkins*, 384 F. Supp. 1196, 1197 (N.D. Ohio 1974) (mentally ill and mentally retarded); *Welsch v. Likins*, 373 F. Supp. 487, 499 (D. Minn. 1974) (mentally retarded); *Stachulak v. Coughlin*, 364 F. Supp. 686, 687 (N.D. Ill. 1973), *rev'd on other grounds*, 17 CRIM. L. REP. 2462 (7th Cir. Aug. 6, 1975), *cert. denied*, 44 U.S.L.W. 3489 (U.S. Mar. 2, 1976) (No. 75-608) (dangerous sexual offenders); *Morales v. Turman*, 364 F. Supp. 166, 175 (E.D. Tex. 1973) (juvenile delinquents); *Martarella v. Kelley*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972) (juveniles in need of supervision); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1372 (D.R.I. 1972) (juvenile offenders). For cases which implicitly recognize a right to treatment see sections (a)-(d) of note 55 *infra*.

Only two district courts have denied a right to treatment. See *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973); *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335, 1340 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975). Not only has *Burnham* been reversed, but the same judge who had declined to find a right to treatment in *Rockefeller*, *supra*, and who had premised his decision instead on the existence of a right to freedom from harm, has appeared to withdraw from his earlier position:

Somewhat different legal rubrics have been employed in these [institutional class action] cases—"protection from harm" in this case and "right to treatment" and "need for care" in others. It appears that there is no bright line separating these standards.

*New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715, 719 (E.D.N.Y. 1975).

<sup>25</sup> Although the Supreme Court has not ruled on the precise question, its decisions dealing with the rights of mentally handicapped persons suggest that the right to treatment is of constitutional dimension, mandated by both the due process clause and the eighth amendment prohibition against cruel and unusual punishment.

In *Robinson v. California*, 370 U.S. 660 (1962), the Court stated that while a state

The right to treatment was first articulated by Dr. Morton Birnbaum in a 1960 article in the *American Bar Association Journal*.<sup>26</sup> Birnbaum, drawing upon his experience as both a doctor and a lawyer, argued that when the state commits a person under its *parens patriae* power, it must legally, morally, and ethically give that person treatment.<sup>27</sup> Although this was hardly a radical idea, it was not judicially recognized until 1966 in *Rouse v. Cameron*,<sup>28</sup> a habeas corpus action brought by an inmate, confined following acquittal on grounds of insanity, who maintained that the absence of treatment rendered his confinement unconstitutional.<sup>29</sup> Judge Bazelon, writing for the District of Columbia Circuit, found a statutory right to treatment,<sup>30</sup> but more significantly, he noted that confinement without treatment would raise "considerable constitutional problems" under the due process and equal protection clauses of the fourteenth amendment and the cruel and unusual punishment clause of the eighth amendment.<sup>31</sup> *Rouse* was the springboard used by subsequent courts which found the right to treatment constitutionally mandated,<sup>32</sup> most notably, *Wyatt v. Stickney*,<sup>33</sup> a landmark series of decisions involving

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may confine involuntarily a narcotics addict for purposes of treatment, imprisoning him for his illness "inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment." *Id.* at 665, 667. Mental illness clearly falls within the ambit of *Robinson*. See *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 251 (1972); cf. *Jackson v. Indiana*, 406 U.S. 715, 737 n.23 (1972). Subsequently, the Court indicated that a state must justify confinement of an involuntarily committed mentally handicapped person by therapeutic progress. See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (continued commitment of mental incompetent must be justified by progress toward competency); *Humphrey v. Cady*, 405 U.S. 504, 514 (1972) (allegation by indefinitely committed sex offender that he was not receiving treatment may have raised a "substantial constitutional claim"). Hence, under the rationale of *Robinson*, confinement grounded on mental illness must be accompanied by treatment, and under the rationale of *Jackson*, the treatment rendered must further the state's therapeutic goal. A fortiori, involuntary confinement of the mentally ill must be accompanied by treatment calculated to improve the patient's condition or the confinement violates the fourteenth amendment.

Although the Court recently avoided reaching the specific issue in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), its decision in that case neither undermines the Fifth Circuit holding, see note 64 *infra* and accompanying text, nor contradicts the rationale expressed in the cases discussed above, see notes 57-58 *infra*.

<sup>26</sup> Birnbaum, *The Right To Treatment*, 46 A.B.A.J. 499 (1960).

<sup>27</sup> *Id.*

<sup>28</sup> 373 F.2d 451 (D.C. Cir. 1966).

<sup>29</sup> *Id.* at 452.

<sup>30</sup> *Id.* at 453-55.

<sup>31</sup> *Id.* at 453. *Rouse* is the seminal statutory right-to-treatment case. For an analysis of the *Rouse* approach see Stone, *The Right to Treatment and the Medical Establishment*, 2 BULL. AM. ACAD. PSYCHIATRY & LAW 159, 161 (1974).

<sup>32</sup> *Welsch v. Likins*, 373 F. Supp. 487, 492-93 (D. Minn. 1974).

<sup>33</sup> 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp.

residents in Alabama institutions for the mentally ill and the mentally retarded.<sup>34</sup>

In the initial *Wyatt* decision, Judge Johnson held that civil patients possess

a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.<sup>35</sup>

Subsequently, he held that the mentally retarded have a similar "constitutional right to habilitation."<sup>36</sup> Judge Johnson found that the Alabama state system failed to provide adequate treatment and habilitation and that this failure deprived patients of their constitutional rights.<sup>37</sup> He specified three conditions which must be met to satisfy constitutionally "adequate" treatment or habilitation: "(1) a humane psychological and physical environment, (2) qualified staff in numbers sufficient to administer adequate treatment and (3) individualized treatment plans."<sup>38</sup> The influence of *Wyatt* was so great that, even before the case reached the Fifth Circuit, the opinion was relied on by federal courts as persuasive authority for the proposition that the right to treatment was of constitutional dimension.<sup>39</sup>

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373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

<sup>34</sup> The impact of *Wyatt* cannot be overstated. It was the first class action of its kind in the mental health field, initiated by the preeminent Mental Health Law Project of Washington, D.C., filed against all Alabama institutions, backed by many prestigious amici, and brought before the prominent activist federal district judge, Frank Johnson. For a recent article highlighting the distinguished career of Judge Johnson see Brill, *The Real Governor of Alabama*, NEW YORK, April 26, 1976, at 37.

<sup>35</sup> 325 F. Supp. at 784.

<sup>36</sup> 344 F. Supp. at 390 (footnote omitted). After the original *Wyatt* ruling, plaintiffs had amended their complaint to expand the class to include residents of institutions for the mentally retarded. Judge Johnson ruled that "no viable distinction can be made between the mentally ill and the mentally retarded," and concluded that since "the only constitutional justification for . . . committing a mental retardate . . . is habilitation, . . . once committed, such a person is possessed of an inviolable constitutional right to habilitation." *Id.* (footnote omitted).

<sup>37</sup> 325 F. Supp. at 784. The court gave the defendants six months to raise the standard of care at state mental institutions. *Id.* at 785. At the subsequent hearing, the court found that the defendants had failed to implement constitutionally minimal standards and ordered an additional hearing for the purpose of establishing appropriate standards. 334 F. Supp. at 1343-44.

<sup>38</sup> 334 F. Supp. at 1343. At a subsequent hearing, the court adopted and ordered implementation of standards to assure that these requirements were met. 344 F. Supp. at 378-79 (covering state institutions for the mentally ill); *id.* at 394-95 (covering state institutions for the mentally retarded).

<sup>39</sup> See *Davis v. Watkins*, 384 F. Supp. 1196, 1197 (N.D. Ohio 1974); *Welsch v. Likins*, 373 F. Supp. 487, 495-96 (D. Minn. 1974); *Stachulak v. Coughlin*, 364 F. Supp. 686, 687 (N.D. Ill. 1973), *rev'd on other grounds*, 17 CRIM. L. REP. 2462 (7th Cir. Aug.

*Wyatt* was joined for oral argument on appeal<sup>40</sup> with *Burnham v. Department of Public Health*,<sup>41</sup> a decision denying the existence of a constitutional right to treatment.<sup>42</sup> The Fifth Circuit proceeded to affirm *Wyatt*<sup>43</sup> and reverse *Burnham*,<sup>44</sup> holding that there is a constitutional right to treatment,<sup>45</sup> that adequacy of treatment is an appropriate subject for judicial review,<sup>46</sup> and that a class action seeking remedial relief is warranted.<sup>47</sup>

The Fifth Circuit based its right-to-treatment holding on *Donaldson v. O'Connor*,<sup>48</sup> which it had decided a few months earlier. In *Donaldson*, the court held that due process guarantees a right to treatment and affirmed the award of damages against officials of a Florida state mental institution.<sup>49</sup> The court based its holding on "a two-part theory." The first part invoked the traditional due process

6, 1975), *cert. denied*, 44 U.S.L.W. 3489 (U.S. Mar. 2, 1976) (No. 75-608); *Morales v. Turman*, 364 F. Supp. 166, 175 (E.D. Tex. 1973); *Martarella v. Kelley*, 349 F. Supp. 575, 600 (S.D.N.Y. 1972).

<sup>40</sup> 503 F.2d at 1314.

<sup>41</sup> 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975).

<sup>42</sup> 349 F. Supp. at 1340-41. The court also held that the issue of treatment was nonjusticiable and that injunctive relief was precluded by the existence of an adequate remedy at law through individual suits. *Id.* at 1342-43.

<sup>43</sup> 503 F.2d 1305 (5th Cir. 1974).

<sup>44</sup> 503 F.2d 1319 (5th Cir. 1974). The court reversed in a brief per curiam opinion, citing its decisions in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), and *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

<sup>45</sup> 503 F.2d at 1313-14. Finding the right to treatment constitutionally mandated, the court dispensed with appellees' arguments that no jurisdiction existed under 28 U.S.C. § 1343(3) (1970), *see* 503 F.2d at 1312 & n.7, and that the suit was barred by the eleventh amendment, *id.* at 1314.

<sup>46</sup> 503 F.2d at 1314. The court stated that implementation of the right to treatment could be accomplished through judicially manageable standards, and that court-enforced implementation did not impermissibly invade a legislative function, since a state legislature may not "for budgetary or any other reasons . . . provide a social service in a manner which will result in the denial of individuals' constitutional rights." *Id.* at 1314-15.

Lack of justiciability was also argued on appeal in *O'Connor v. Donaldson*, 422 U.S. 563 (1975). The Supreme Court rejected the contention that adequacy of treatment was nonjusticiable, stating that

[w]here "treatment" is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present.

*Id.* at 574 n.10.

<sup>47</sup> 503 F.2d at 1316. Individual suits at common law were deemed inadequate due to the particular situation of mental patients and the need for preventive relief. *Id.*

<sup>48</sup> 493 F.2d 507 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975).

<sup>49</sup> 493 F.2d at 510. Patient *Donaldson* brought his action for damages pursuant to 42 U.S.C. § 1983 (1970). 493 F.2d at 510.

requirement that any abridgment of freedom must be justified by a legitimate state purpose.<sup>50</sup> Applying this concept to the commitment of mental patients,<sup>51</sup> the court found a constitutional right to treatment supported, if not mandated, by the Supreme Court's holding in *Jackson v. Indiana*,<sup>52</sup> that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."<sup>53</sup> Thus, when the state confines an individual under the *parens patriae* rationale, treatment must in fact be provided.<sup>54</sup>

The second part of the theory employed by the Fifth Circuit in *Donaldson* resulted in the determination that treatment must be provided as "the *quid pro quo*" required by due process to justify any deprivation of liberty which lacks the traditional limitations and procedural safeguards normally accorded to one who is incarcerated by the state.<sup>55</sup> Hence, even when confinement is based on a "dangerous to

<sup>50</sup> 493 F.2d at 520.

<sup>51</sup> *Id.* at 521.

<sup>52</sup> 406 U.S. 715 (1972).

<sup>53</sup> *Id.* at 738.

<sup>54</sup> 493 F.2d at 521.

<sup>55</sup> *Id.* at 521-22. The court noted that the government's power to detain an individual is subject to three limitations:

that detention be in retribution for a specific offense; that it be limited to a fixed term; and that it be permitted after a proceeding where fundamental procedural safeguards are observed . . . .

*Id.* at 522.

The court surveyed five procedural contexts in which attacks on the nature of nonpenal confinement had arisen and found that, in almost every situation, there must be a *quid pro quo* for confinement "in circumstances where the conventional limitations of the criminal process are inapplicable." *Id.* at 522-25. Treatment was found or implied as the *quid pro quo* in:

(a) "habeas corpus petitions brought by citizens held under . . . 'nonpenal' confinement . . . in correctional facilities for prisoners convicted of crimes," *see, e.g.*, *Benton v. Reid*, 231 F.2d 780, 782 (D.C. Cir. 1956) (confinement of those endangering public health in prison hospital would violate fifth and sixth amendments); *In re Maddox*, 351 Mich. 358, 370-72, 88 N.W.2d 470, 476-77 (1958) (incarceration of sexual psychopath in prison is not treatment and violates constitutional rights to trial and due process); *cf. Miller v. Overholser*, 206 F.2d 415, 418-19 (D.C. Cir. 1953) (confinement of sexual psychopath in institution for the "hopeless insane" rather than in institution for the mentally ill who are not insane is not treatment and therefore is not authorized by statute);

(b) holdings that persons under nonpenal confinement "must be held in places where the conditions are *actually* therapeutic," *see, e.g.*, *Darnell v. Cameron*, 348 F.2d 64, 67-68 (D.C. Cir. 1965) (confinement based on need for treatment requires that treatment be afforded); *Commonwealth v. Page*, 339 Mass. 313, 317, 159 N.E.2d 82, 85 (1959) (when sexually dangerous person confined in prison state must show therapeutic aspect of confinement);

(c) decisions holding "that the constitutionality of the statute is conditioned upon the *realization* of the statutory promise of rehabilitative treatment," *see, e.g.*, *Sas v.*

others"—“protection of the public” rationale, treatment is constitutionally mandated.<sup>56</sup>

In its subsequent review of *Donaldson*, the Supreme Court found it unnecessary to rule on the existence of a constitutional right to treatment,<sup>57</sup> holding instead that involuntary custodial confinement without treatment of a mental patient not dangerous to himself or

Maryland, 334 F.2d 506, 509 (4th Cir. 1964), *cert. dismissed as improvidently granted sub nom.* Murel v. Baltimore City Crim. Ct., 407 U.S. 355 (1972) (constitutionality under sixth, eighth, and fourteenth amendments of act confining “defective delinquents” to be conditioned on treatment actually provided); Davy v. Sullivan, 354 F. Supp. 1320, 1328–29 (M.D. Ala. 1973) (statute which permits transfer of sexual psychopaths to prison cannot be constitutionally justified as remedial measure);

(d) habeas corpus petitions challenging nonpenal confinement on several grounds including lack of treatment, *see, e.g.*, Humphrey v. Cady, 405 U.S. 504, 514 (1972) (allegations of lack of treatment for one indefinitely confined pursuant to state sex crimes act may present “substantial constitutional claims”); Stachulak v. Coughlin, 364 F. Supp. 686, 687 (N.D. Ill. 1973), *rev'd on other grounds*, 17 CRIM. L. REP. 2462 (7th Cir. Aug. 6, 1975), *cert. denied*, 44 U.S.L.W. 3489 (U.S. Mar. 2, 1976) (No. 75–608) (failure to provide treatment to one confined as a “sexually dangerous person” states cause of action);

(e) federal class actions “seeking broad forms of injunctive and declaratory relief requiring that adequate treatment be provided in state-run facilities,” *see, e.g.*, Wyatt v. Aderholt, 503 F.2d 1305, 1312–15 (5th Cir. 1974) (those confined in mental institutions have constitutional right to treatment requiring certain minimal standards be met); Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir.) *cert. denied*, 417 U.S. 976 (1974) (juveniles committed to state correctional institution have constitutional right to rehabilitative treatment); Martarella v. Kelley, 349 F. Supp. 575, 585 (S.D.N.Y. 1972) (juveniles subject to long-term confinement as “persons in need of supervision” have constitutional right to treatment); Inmates of Boys’ Training School v. Affleck, 346 F. Supp. 1354, 1367 (D.R.I. 1972) (“antirehabilitative” conditions of confinement of juvenile delinquents found to violate due process and equal protection).

<sup>56</sup> 493 F.2d at 521. In *Wyatt v. Aderholt*, the Fifth Circuit described its decision in *Donaldson* as holding that where confinement is justified on the basis of danger to others

treatment had to be provided as the *quid pro quo* society had to pay as the price of the extra safety it derived from the denial of individuals’ liberty.

503 F.2d at 1312.

<sup>57</sup> O’Connor v. Donaldson, 422 U.S. 563, 573 (1975). The Court reasoned that since the jury had found that no “treatment,” as defined by the trial court, had been provided, there was

no occasion . . . to decide whether the provision of treatment, standing alone, can ever constitutionally justify involuntary confinement or, if it can, how much or what kind of treatment would suffice for that purpose.

*Id.* at 574 n.10. The trial court had instructed the jury

“that a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such treatment as will give him a realistic opportunity to be cured or to improve his mental condition.”

*Id.* at 570 n.6 (emphasis by the Court). Since the trial court’s instructions announcing and defining the right to treatment pertained only to those confined on the basis of need for treatment, the issue of whether one confined on the basis of dangerousness to self or others has a constitutional right to treatment was not presented. *Id.* at 570–71 n.6.

others violated that patient's constitutional right to liberty.<sup>58</sup> In light of its intervening decision in *Wood v. Strickland*,<sup>59</sup> altering the scope of official immunity in civil rights cases,<sup>60</sup> the Court vacated the judgment and remanded the case for reconsideration of the question of damages.<sup>61</sup> In doing so, the Court noted that its vacation of judgment deprived the Fifth Circuit's opinion of "precedential effect,"<sup>62</sup> citing *United States v. Munsingwear, Inc.*<sup>63</sup> This caveat, however, does not erode the constitutional basis of the Fifth Circuit's opinion: A close reading of *Munsingwear* indicates that the *Donaldson* Court's intent was to rob the circuit court opinion of precedential effect only as it related to further proceedings on remand with respect to damages in the *Donaldson* litigation itself.<sup>64</sup> Hence, the constitutional basis of the

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<sup>58</sup> *Id.* at 575-76. The Court made clear that indefinite, involuntary custodial confinement cannot be justified solely on the basis of a determination of mental illness. *Id.* at 575. Although this could be interpreted as implying that a "definite" period of confinement or "treatment" above and beyond the level of custodial care may justify commitment, the Court indicated that even these elements will be insufficient when such persons "are dangerous to no one and can live safely in freedom." *Id.*

<sup>59</sup> 420 U.S. 308 (1975).

<sup>60</sup> In an action for damages under section 1983 brought by high school students against school board members, the *Wood* Court, in a five-to-four majority opinion, held that official immunity would not extend to acts done maliciously (a subjective good-faith test) or to acts which the official "knew or reasonably should have known . . . would violate the constitutional rights of [others]" (an objective good-faith test). 420 U.S. at 321-22. Justice Powell, speaking for the minority, dissented from this part of the opinion and termed the majority decision a departure from prior standards which would "significantly enhance the possibility of personal liability." *Id.* at 331.

<sup>61</sup> 422 U.S. at 577 & n.12. The Court determined that the trial court in effect had found that O'Connor deprived Donaldson of his constitutional right to liberty, and therefore the only question to be decided by the Fifth Circuit on remand was whether, in light of *Wood v. Strickland*, the trial court's failure to instruct the jury of the effect of O'Connor's alleged reliance on state law rendered the instruction inadequate. On remand, the Fifth Circuit determined that in light of *Wood v. Strickland* the trial court's instruction was inadequate "in defining the scope of the qualified immunity possessed by state officials," and it remanded the case for a reconsideration of that issue. *Donaldson v. O'Connor*, 519 F.2d 59, 60 (5th Cir. 1975).

<sup>62</sup> 422 U.S. at 577-78 n.12. The Court stated:

Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case. See *United States v. Munsingwear*, 340 U.S. 36.

*Id.*

<sup>63</sup> 340 U.S. 36 (1950).

<sup>64</sup> The issue in *Munsingwear* was whether a judgment on one count of a complaint, which was precluded from review on grounds of mootness, barred litigation of the second count because of the doctrine of res judicata. *Id.* at 37. Justice Douglas, writing for a unanimous Court, held that it did, but pointed out that the res judicata effect could have been avoided by a motion to vacate judgment which, if granted, would have "clear[ed] the path for future relitigation of the issues *between the parties*." *Id.* at 39-40 (emphasis added).

Fifth Circuit's decision in *Donaldson*, reiterated in *Wyatt* and relied on in *Burnham*, has not been undermined. Subsequently, the Supreme Court declined an opportunity to review the Fifth Circuit's reversal of *Burnham*, where, relying on *Donaldson* and *Wyatt*, the circuit court had overturned the only federal decision which had held that no such right to treatment existed.<sup>65</sup>

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*Munsingwear* has generally been cited by the federal circuit courts as authority for vacating judgments rendered nonreviewable by mootness and remanding to the district courts with directions to dismiss as moot. See, e.g., *New Left Educ. Project v. Board of Regents*, 472 F.2d 218, 220-21 (5th Cir. 1973). The purpose of the vacation is to avoid unfairness to the parties which might result "from the prejudicial effect of an unreviewed judgment." *Id.* at 221. See also Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77, 83, 93 (1955).

Since *Munsingwear* deals solely with mootness, it is unclear exactly what the *Donaldson* Court intended by its reference to the case. However, the most reasonable inference which may be drawn is that since *Munsingwear* held that a res judicata effect would attach in the absence of a vacation, the Court was compelled to vacate the judgment to clear the way for relitigation of certain factual issues relating to the narrow consideration of official immunity and reliance on state law. See note 61 *supra*.

Although some circuits have interpreted a vacation of judgment on grounds of mootness to rob the lower court opinion of stare decisis as well as res judicata effect, see *Boston Community Media Comm., Minority Caucus v. FCC*, 509 F.2d 516, 517 (D.C. Cir. 1975); *Cabuco-Flores v. Immigration & Naturalization Serv.*, 477 F.2d 108, 112 (9th Cir. 1973), others, even in the mootness context, have interpreted the disposition to go no further than precluding claims of res judicata, see *In re Hearings by the Committee on Banking and Currency of the United States Senate*, 245 F.2d 667, 670 (7th Cir. 1957); *Granville-Smith v. Granville-Smith*, 214 F.2d 820, 820 (3d Cir. 1954). The *Granville-Smith* court stated explicitly that it was governed by a prior decision even though the judgment in that case had been vacated on grounds of mootness by the Supreme Court. *Id.* As one author has noted:

If the opinion below is officially reported, it will always remain in the volume; even if the decision is vacated, the force of the reasoning remains.

Comment, *supra* at 93 (footnote omitted).

The language in *Donaldson* appears consistent with the approach of those circuits which consider vacation of a judgment in the mootness context to deprive a lower court opinion of precedential value only in the res judicata, and not the stare decisis, sense. The Court made clear that it was not deciding whether there is a constitutional right to treatment. 422 U.S. at 573. Furthermore, the Court stated that the purpose of vacating the judgment was solely for reconsideration of damages in light of a new immunity standard, *id.* at 577-78 & n.12, and emphasized that its opinion is "the sole law of the case," *id.* at 578 n.12 (emphasis added). These statements appear to support the view that the Fifth Circuit opinion is robbed of precedential effect only as to those portions of the opinion which might otherwise inhibit relitigation of damages because of the res judicata effect which would attach in the absence of a vacation of judgment. Although Chief Justice Burger, in his single concurring opinion, read the majority statement to mean that the entire Fifth Circuit opinion is no longer precedent for the district courts in that circuit, *id.* at 580, this wide-ranging result appears unwarranted, particularly in light of the distinction between a judgment which will never be reviewed due to mootness and a judgment which, in effect, is affirmed "on other grounds" and remanded for relitigation of damages on a narrow, unrelated point of law.

<sup>65</sup> *Burnham v. Department of Pub. Health*, 503 F.2d 1319 (5th Cir. 1974), *rev'g* 349

In addition to the due process basis espoused by the Fifth Circuit, the constitutional right to treatment may also be seen as resting on the cruel and unusual punishment clause, found specifically applicable to mental hospitals in *Rozecki v. Gaughan*,<sup>66</sup> and developed in the context of suits challenging jail and prison conditions.<sup>67</sup> The right to treatment may also be based on the equal protection clause on the theory that, because involuntary civil commitment involves fundamental rights,<sup>68</sup> equal protection requires that the classification of the group being civilly committed must be subject to the rigid scrutiny of the "compelling state interest" test.<sup>69</sup> Thus, to justify the classification and fulfill the rationale for confinement, the state must provide suitable treatment.<sup>70</sup>

Apart from the constitutional arguments, there exists in some states—New Jersey for example—an independent statutory right to treatment. In *In re D. D.*,<sup>71</sup> a habeas corpus action brought by a juvenile confined in the state's maximum-security psychiatric facility, the New Jersey appellate division recognized a statutory right based

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F. Supp. 1335 (N.D. Ga. 1972), *cert. denied*, 422 U.S. 1057 (1975). See also note 24 *supra*.

<sup>66</sup> 459 F.2d 6 (1st Cir. 1972). The plaintiffs in *Rozecki* were patients confined to a state correctional institution either pursuant to civil commitment or for observation. They complained that by failing to provide heat in the institution, defendant administrators subjected them to cruel and unusual punishment in violation of the eighth amendment. *Id.* at 7. The defendants contended that since "plaintiffs were patients rather than 'inmates' . . . the question of punishment was not involved." *Id.* The court rejected this contention, indicating that, if any distinction were to be made, cruelty would be more cognizable in a civil as opposed to criminal setting. *Id.* at 8. See also *Robinson v. California*, 370 U.S. 660 (1962); note 25 *supra*.

<sup>67</sup> See, e.g., *Rhem v. Malcolm*, 371 F. Supp. 594, 627 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974) (lack of "tolerable living environment" violates detainees' rights under eighth amendment); *Hamilton v. Love*, 328 F. Supp. 1182, 1193 (E.D. Ark. 1971) (if conditions of pretrial detention are punitive in any way, eighth amendment will be violated); *Holt v. Sarver*, 309 F. Supp. 362, 372-73 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) ("confinement itself . . . may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is . . . shocking to the conscience").

<sup>68</sup> See notes 135-40 *infra* and accompanying text.

<sup>69</sup> Cf. *Dunn v. Blumstein*, 405 U.S. 330 (1972). In *Dunn*, the Court held that since durational residence requirements infringe fundamental rights to travel and to vote, these requirements must be subject to "a strict equal protection test" and may be justified only by a compelling state interest. *Id.* at 342.

<sup>70</sup> See generally Friedman & Halpern, *The Right to Treatment*, in 1 MENTAL HEALTH LAW PROJECT, PRACTISING LAW INSTITUTE, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 273, 282 (B. Ennis & P. Friedman eds. 1973) (confinement without treatment renders classification of civilly committed mental patients irrational). See also notes 165-68 *infra* and accompanying text.

<sup>71</sup> 118 N.J. Super. 1, 285 A.2d 283 (App. Div. 1971).

on two provisions:<sup>72</sup> N.J. STAT. ANN. § 30:4-7.1 which mandates that the state "make maximum provision for the health, safety and welfare" of mental patients<sup>73</sup> and N.J. STAT. ANN. § 30:4-24.1 which, prior to 1975, provided that the mentally ill "shall be entitled to humane care and treatment."<sup>74</sup> The court warned that custodial care alone was insufficient to fulfill this mandate, adding that legislative failure to implement required treatment would compel action by courts "to protect the rights of persons committed to [state] public mental institutions,"<sup>75</sup> and indicating that indefinite confinement without treatment might violate the eighth and fourteenth amendments.<sup>76</sup>

In *State v. Carter*,<sup>77</sup> the New Jersey supreme court subsequently incorporated the entire *In re D. D.* right-to-treatment discussion,<sup>78</sup> holding that a patient committed after dismissal of charges on grounds of insanity could be granted a conditional release under New Jersey law.<sup>79</sup> While noting that it was not "faced with delineating the scope of the right to treatment," the *Carter* court termed the right "an affirmative obligation on behalf of the State" and noted that its existence "bears on the availability of conditional release."<sup>80</sup>

After *Carter*, the legislature revised the "humane care and treatment" provision to read: "Every individual who is mentally ill shall be entitled to fundamental civil rights."<sup>81</sup> This provision, which

<sup>72</sup> *Id.* at 7, 285 A.2d at 286-87.

<sup>73</sup> N.J. STAT. ANN. § 30:4-7.1 (Supp. 1975-76).

<sup>74</sup> *Id.* § 30:4-24.1 (Supp. 1975-76), as amended, N.J. STAT. ANN. § 30:4-24.1 (Supp. 1976-77). The new law greatly expanded the rights of residents in state mental institutions. See note 81 *infra*.

<sup>75</sup> 118 N.J. Super. at 6, 285 A.2d at 286. The court added that "failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities." *Id.* (quoting from *Rouse v. Cameron*, 373 F.2d 451, 457 (D.C. Cir. 1966). *Rouse* is the seminal statutory right-to-treatment decision. See text accompanying notes 28-32 *supra*.

<sup>76</sup> 118 N.J. Super. at 6, 285 A.2d at 286.

<sup>77</sup> 64 N.J. 382, 316 A.2d 449 (1974). See generally Note, *Conditional Release From Mental Institutions Made Available to Persons Confined Under Criminal Statutes*, 6 SETON HALL L. REV. 128 (1974).

<sup>78</sup> 64 N.J. at 393-94, 316 A.2d at 455-56.

<sup>79</sup> *Id.* at 389, 316 A.2d at 453.

<sup>80</sup> *Id.* at 393, 316 A.2d at 455.

<sup>81</sup> Law of May 7, 1975, ch. 85, § 1, [1975] N.J. SESS. L. SERV. 140, amending N.J. STAT. ANN. § 30:4-24.1 (Supp. 1975-76) (codified at N.J. STAT. ANN. § 30:4-24.1 (Supp. 1976-77)).

This new provision is clearly intended to remove some of the stigma borne by the mentally ill and to accord them, as nearly as possible, the same fundamental civil rights enjoyed by the rest of the population. The powers of the directors and staffs of mental health facilities under prior law have been sharply curtailed. Under the former law, for example, mechanical restraints could be applied to a patient if "required by his medical needs." N.J. STAT. ANN. § 30:4-24.1 (Supp. 1975-76). The statute now provides that

is part of a comprehensive new "Bill of Rights" for the mentally ill, implicitly recognizes the constitutional implications of confinement, including the state's obligation to provide treatment reasonably calculated to improve or cure the patient's mental condition. The statutory revision has not yet been considered by the New Jersey supreme court; however, in *State v. Krol*,<sup>82</sup> a subsequent case concerning commitment standards for those acquitted on grounds of insanity,<sup>83</sup> the court noted that any restraint imposed by a commitment order "must . . . always be coupled with a corresponding opportunity for care and treatment" and cited *In re D. D.* along with a number of federal cases holding that the right to treatment is constitutionally mandated.<sup>84</sup>

### *Constitutionally "Adequate" Treatment*

The "treatment" deemed constitutionally required has been defined by the Fifth Circuit and New Jersey courts as that "adequate" to give institutionalized patients "a reasonable opportunity to be cured or to improve [their] mental condition."<sup>85</sup> However, the dimensions of "adequate" treatment have only begun to be drawn. In a "first things first" context, courts confronting the massive denial of

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every patient has the right "[t]o be free from physical restraint and isolation," and lists procedures which must be followed in those instances when restraints are absolutely necessary. *Id.* § 30:4-24.2(d)(3) (Supp. 1976-77), amending *id.* § 30:4-24.2 (Supp. 1975-76). Now, for the first time, the use of excessive medication as punishment or as a substitute for treatment is strictly forbidden, and patients have the judicially enforceable right to refuse shock treatment, experimental research programs, sterilization and psychosurgery. *Id.* §§ 30:4-24.2(d)(1), (2) (Supp. 1976-77).

Before the amendment, patients' rights could be denied if the director of the facility felt it was medically necessary. *Id.* § 30:4-24.2 (Supp. 1975-76). Under the new law, no right may be denied for more than 30 days and then only when imperative and for good cause, and the patient, his attorney, and his guardian have been notified. *Id.* §§ 30:4-24.2(g)(1)-(3) (Supp. 1976-77).

<sup>82</sup> 68 N.J. 236, 344 A.2d 289 (1975). See generally Note, *Standard for Commitment Following Acquittal by Reason of Insanity Made Uniform with That for Civil Commitment*, 7 SETON HALL L. REV. 412 (1976).

<sup>83</sup> 68 N.J. at 243, 344 A.2d at 293-94. The plaintiff challenged the constitutionality of N.J. STAT. ANN. § 2A:163-3 (1971), which provided that a jury—after acquitting a defendant on grounds of insanity—make a separate determination as to the defendant's current sanity. If his insanity was found to continue, he was to be committed to the state psychiatric hospital.

<sup>84</sup> 68 N.J. at 262, 344 A.2d at 303 (citing, *inter alia*, *In re D. D.*, 118 N.J. Super. 1, 6, 285 A.2d 283, 286 (App. Div. 1971); *Wyatt v. Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), enforced, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974)).

<sup>85</sup> *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975). See also *State v. Carter*, 64 N.J. 382, 393, 316 A.2d 449, 455 (1974) (citing *In re D. D.*, 118 N.J. Super. 1, 6, 285 A.2d 283, 286 (App. Div. 1971)).

rights prevalent in many of those mental institutions which have been the objects of class action litigation necessarily have focused on setting standards to govern living conditions, supervision of patients, and basic treatment and institutional procedures.<sup>86</sup> However, neither courts nor legislatures have yet determined the implications of "adequate" treatment as it relates to the availability of particular therapeutic programs.<sup>87</sup> At the least, however, it would appear that constitutionally "adequate" treatment would require the availability of those particular therapeutic programs deemed generally essential to patients' improvement.<sup>88</sup> Otherwise, therapeutic effort would be crippled to the extent that confinement would fail to satisfy the Supreme Court mandate "that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."<sup>89</sup> The opportunity to participate in work programs is such an integral and essential component of therapy that abrogation of

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<sup>86</sup> See, e.g., *Davis v. Watkins*, 384 F. Supp. 1196, 1198-1212 (N.D. Ohio 1974); *Wyatt v. Stickney*, 344 F. Supp. 373, 379-86, 344 F. Supp. 387, 395-407 (M.D. Ala. 1972), *enforcing* 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

For two views on what constitutes adequate treatment see Birnbaum, *A Rationale for the Right*, 57 GEO. L.J. 752, 753 (1969) (adequacy of treatment "should be objectively based upon a consideration of the institution as a whole and not subjectively premised upon the individual therapy received"); Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 792 (1969) (adequacy of treatment must be determined by "an inquiry into the adequacy of the individual's treatment"). See also *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1333-44 (1974) (judicial standards for both institutional and individual treatment programs).

For a discussion of how both court-imposed "quantitative" requirements (regarding environment and staff) and court-imposed "qualitative" standards (regarding individual patient rights) fail to provide "adequate" treatment see Hoffman & Dunn, *Beyond Rouse and Wyatt: An Administrative-Law Model for Expanding and Implementing the Mental Patient's Right to Treatment*, 61 VA. L. REV. 297, 303-10 (1975). The authors state that effective implementation of a patient's right to treatment can best be accomplished through an administrative model composed of (1) a rule-making board; (2) legal aid service to both inform, counsel, and represent patients in all adjudicatory proceedings; (3) treatment evaluators to conduct hearings following patient complaints; and (4) mental-health judges who would have jurisdiction over commitments and appeals from decisions made by the treatment evaluators. *Id.* at 315-18.

<sup>87</sup> The need for "comparative studies of alternative therapies" has been often noted. Wexler, *Token and Taboo: Behavior Modification, Token Economies, and the Law*, 61 CALIF. L. REV. 81, 109 & n.152 (1973). According to Professor Wexler, unless such studies "are performed soon, the law will be unable to incorporate the results in developing a sensible package of patient rights." *Id.* at 109 (footnote omitted).

<sup>88</sup> See Schwitzgebel, *Right to Treatment for the Mentally Disabled: The Need for Realistic Standards and Objective Criteria*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 513 (1973). The author "suggests that a reasonable standard of treatment is effectiveness." Thus, treatment is adequate if "it accomplishes its purpose." *Id.* at 520.

<sup>89</sup> *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

all such programs results in treatment inadequate to achieve the major purposes of confinement—improvement of one's mental condition and, when possible, reintegration into the community.

Before documenting the therapeutic importance of work programs, it should be emphasized that while the affirmative right to these programs has yet to be ruled upon,<sup>90</sup> the issue of work within mental institutions has been the subject of extensive comment, litigation, and, more recently, government regulation. As a result, if and when work is made available to mental patients, that work must be voluntary,<sup>91</sup> therapeutic,<sup>92</sup> and compensated when "the institution

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<sup>90</sup> A class action for injunctive and declaratory relief filed in the United States District Court for the District of Maine alleges that termination of patient employment at Pineland Center, an institution for the mentally retarded, violates plaintiffs' constitutional right to habilitation. First Amended Complaint at 14, *Wuori v. Rosse*, Civil No. 75-80 (D. Me., filed Oct. 1, 1975). The plaintiff class is defined as

residents who want to work, are able to work, and who are not otherwise involved in a full-time program calculated to meet their needs for habilitation or whose habilitation needs can best be met by working.

*Id.*

<sup>91</sup> Voluntariness is required by the thirteenth amendment prohibition against involuntary servitude and by the patient's constitutional right to treatment. *See* notes 97-99 *infra* and accompanying text. It can also be argued that voluntariness is required by the right to refuse treatment, which has been found to rise to constitutional dimensions in cases involving subjection of patients to drugs. *See Knecht v. Gillman*, 488 F.2d 1136, 1139-40 (8th Cir. 1973) (nonconsensual subjection of patients to vomit-inducing drug as part of an "aversive" conditioning program violates eighth amendment); *Mackey v. Proconier*, 477 F.2d 877, 878 (9th Cir. 1973) (nonconsensual use of drug causing temporary paralysis raises "serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes").

In an analogous setting, a federal district court has held that segregated confinement of prisoners for sixteen months in response to their refusal to participate in prison work constituted cruel and unusual punishment. *Adams v. Carlson*, 368 F. Supp. 1050, 1053 (E.D. Ill. 1973).

It seems apparent that the right to refuse treatment can extend to the right to refuse to participate in an involuntary work program. *See generally* Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39 (1975) (right to treatment encompasses right to refuse treatment since the former is limited by the right to privacy, the eighth amendment, and the due process clause); Schwartz, *In the Name of Treatment: Autonomy, Civil Commitment, and the Right to Refuse Treatment*, 50 NOTRE DAME LAW. 808 (1975) (forced treatment of nonconsensual patient violates the right to privacy, the due process clause, and the first, fourth, and eighth amendments); Wexler, *Behavior Modification and Other Behavior Change Procedures: The Emerging Law and the Proposed Florida Guidelines*, 11 CRIM. L. BULL. 600 (1975) (right to treatment limited by personal autonomy, necessitating informed consent, competence, and least restrictive treatment).

<sup>92</sup> The requirement that work be therapeutic is demanded both by case law, *see* note 8 *supra*, and by the realities of institutional life. As one British hospital superintendent has bluntly stated:

The economy of a mental hospital is based on "patient-labour". Patients as patients are not thought of when this term is used (that would make the speaker

derives any consequential economic benefit."<sup>93</sup> These requirements are to some extent directed at ending the abuse termed "institutional peonage," *i.e.*, compelling hospital inmates to perform tasks without compensation solely for the benefit of the institution.

Cases have proceeded on grounds that such labor violates the thirteenth amendment,<sup>94</sup> the patient's right to treatment,<sup>95</sup> and the

uncomfortable), but only the commodity they provide—labour. That patients should do a little domestic work, to foster a feeling of community and to teach them how to care for their homes, is reasonable. What is unreasonable is the extent to which the hospital is dependent on their work. In fact, *without it* the hospital could not run and *the mental-hospital service would collapse*.

Bickford, *Economic Value of the Psychiatric Inpatient*, THE LANCET, March 30, 1963, at 714 (emphasis added).

The necessity for distinguishing between therapeutic and nontherapeutic labor has been recognized in AMERICAN PSYCHIATRIC ASS'N, STANDARDS FOR PSYCHIATRIC FACILITIES, Standard 32 (1969) ("a clear distinction between therapeutic and non-therapeutic work assignments is essential") and by other mental health authorities. *See, e.g.*, Safier & Barnum, *Patient Rehabilitation Through Hospital Work Under Fair Labor Standards*, 26 HOSP. & COMMUNITY PSYCHIATRY 299, 302 (1975) (noting the continuing importance of developing programs "to make work therapy or paid hospital-work assignments available as a rehabilitative, rather than an institutionalizing, medium"); Oudenne, *Resident Labor: A Practical Solution in New Jersey State Institutions*, 12 MENTAL RETARDATION, Oct. 1974, at 17 (examining the therapeutic, practical, and potentially deleterious effects of institutional labor).

It has been suggested by Paul Friedman, a leading patients' rights advocate, that for a work program to be characterized as "therapeutic," nine standards should apply:

- (1) Work assignments should be made after a careful prior physical and mental examination and diagnosis;
- (2) The work assignment should be dictated by the resident's personal habilitation or training needs and not the institution's maintenance needs;
- (3) The actual work assignment should be made only by a physician or other qualified professionals;
- (4) Work assignments should be part of and related to a larger integrated treatment program;
- (5) The resident's work assignment must be entered into the resident's record;
- (6) The resident's work assignment should be carefully supervised by a qualified staff member who is aware of the way in which the specific work assignment fits into the larger treatment plan;
- (7) The resident's alleged work therapy program should be regularly reviewed so that appropriate adjustments can be made;
- (8) The resident should perform his work voluntarily and with appropriate understanding of its purposes; and
- (9) The resident should be fairly compensated for his labor.

Friedman II, *supra* note 2, at 652. Unless the standards suggested by Friedman are present, and unless the distinction urged by the American Psychiatric Association is maintained, it is likely that the programs will remain predominately little more than what the British superintendent aptly described as the economic underpinning of the hospital system. *See* Bickford, *supra*, at 714.

<sup>93</sup> Souder v. Brennan, 367 F. Supp. 808, 813 (D.D.C. 1973).

<sup>94</sup> *See* note 7 *supra*.

<sup>95</sup> *See* note 8 *supra*.

terms of the Fair Labor Standards Act.<sup>96</sup> It has been held, for example, that the thirteenth amendment will be violated when even a compensated patient is compelled to perform nontherapeutic labor,<sup>97</sup> thus implying that that amendment requires that work performed be either therapeutic or voluntary.<sup>98</sup> Considerations compelled by a patient's right to treatment have resulted in the further requirement that all work of an institutional nature be both therapeutic and voluntary.<sup>99</sup> Finally, as a result of *Souder v. Brennan*, patients must be compensated to the extent that their labor economically benefits the institution, regardless of whether such labor is therapeutic.<sup>100</sup> The *Souder* court stated that "[t]o hold otherwise would be to make therapy the sole justification for thousands of positions as dishwashers, kitchen helpers, messengers, and the like."<sup>101</sup> The court ordered the Secretary of Labor to implement and enforce the application of FLSA minimum-wage and overtime compensation provisions "to patient-workers at non-Federal institutions for the residential care of the mentally ill and/or mentally retarded."<sup>102</sup> In compliance with the order, the Secretary promulgated regulations requiring that non-impaired patient workers "be paid at least the statutory minimum wage," and others be paid wages commensurate with their productive

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<sup>96</sup> See note 9 *supra*.

<sup>97</sup> *Jobson v. Henne*, 355 F.2d 129, 132 n.3 (2d Cir. 1966).

<sup>98</sup> *Id.* at 131. The Second Circuit in *Jobson* assumed that the thirteenth amendment did not preclude states "from requiring that a lawfully committed inmate perform without compensation certain chores . . . if the chores are reasonably related to a therapeutic program." *Id.*

The court's conclusion presumes that the state's interest in treatment is sufficient to outweigh the thirteenth amendment prohibition against involuntary servitude. See *id.* at 131-32 & n.3. However, this assumption is subject to further considerations. First, it may be argued that the state's interest in treatment does not override the thirteenth amendment. See Friedman I, *supra* note 2, at 582 n.91; *Right to Compensation for Institution-Maintaining Labor Under the Thirteenth Amendment: Excerpts from Claimant's Brief in Dale v. State of New York*, in 2 MENTAL HEALTH LAW PROJECT, PRACTISING LAW INSTITUTE, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 695 (B. Ennis & P. Friedman eds. 1973). Second, and even more important, it may be argued that forced institutional work programs cannot be sufficiently therapeutic to qualify as treatment because (1) the conflict between institutional maintenance needs and individual treatment needs will inevitably impinge upon the therapeutic value of work to the patient, see, e.g., Friedman I, *supra* note 2, at 569-70; and (2) involuntary institutional work is, in and of itself, often anti-therapeutic, see, e.g., Haller, *Legal Challenges to Peonage in Juvenile Institutions*, 9 CLEARINGHOUSE REV. 453, 461 (1975).

<sup>99</sup> *Wyatt v. Stickney*, 344 F. Supp. 373, 381, 344 F. Supp. 387, 402 (M.D. Ala. 1972), enforcing 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). See note 8 *supra*.

<sup>100</sup> 367 F. Supp. at 813.

<sup>101</sup> *Id.* (footnote omitted).

<sup>102</sup> *Id.* at 809-10.

capacities pursuant to certificates issued by the Wage and Hour Division.<sup>103</sup>

While many institutions have developed work programs in conjunction with the guidelines set forth in the regulations, others have abolished all such programs.<sup>104</sup> Ironically, then, the victory in the battle to eliminate some of the major sources of patient-labor abuse has resulted—through no fault of its proponents—in a total elimination of work programs in many institutions. However, if such work programs are an essential component of such treatment as will give patients “a realistic opportunity to be cured or to improve [their] mental condition,”<sup>105</sup> then these programs are constitutionally mandated, as long as they are compensated and voluntary.

### *The Therapeutic Value of Work*

It is generally agreed that therapeutic work “enhances [the patient’s] self esteem as a member of a work-oriented society” since the patient “knows that what he is doing has value.”<sup>106</sup> This is espe-

<sup>103</sup> 29 C.F.R. § 529.1 *et seq.* (1975). Certificates covering “evaluation and training,” “individual exception,” and “work activities center,” may require no minimum wage but do require pay commensurate with productivity. *Id.* §§ 529.4(c), (e), (f). A fourth “group minimum wage” certificate requires that workers be paid not less than fifty percent of the federal minimum wage. *Id.* § 529.4(d). The power to approve subminimum wages derives from section 14(c) of the Fair Labor Standards Act which authorizes the granting of such certificates “to prevent curtailment of opportunities for employment” of handicapped persons. 29 U.S.C. § 214 (Supp. IV, 1975).

Generally, the regulations require an institution to compensate a worker whenever an employment relationship exists. 29 C.F.R. § 529.2(d). While the existence of an employment relationship is a factual determination based on all the circumstances, the relationship “generally arises” whenever patients work, except when the work is solely personal housekeeping or related to crafts. The major criterion “is whether the work performed is of any consequential economic benefit to the institution,” *i.e.*, of a type noninstitutionalized workers normally perform within and outside of the institution. The patient’s performance capability and the therapeutic value of the work are irrelevant to a determination of the existence of the employment relationship. *Id.*

<sup>104</sup> For a survey of various state responses to the *Souder* decision see note 15 *supra*.

<sup>105</sup> *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff’d sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

<sup>106</sup> D. CLARK, *SOCIAL THERAPY IN PSYCHIATRY* 80–81 (1974).

The psychoanalytic roots of the work drive are deep. Freud saw “the compulsion to work”—along with “the power of love”—as part of the “two-fold foundation” of the “communal life of human beings.” S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 48 (1st Am. ed. J. Strachey 1962). Erikson has posited that a person’s attitude toward work is formulated during the latency period (after early childhood but before adolescence), during which time he “learns to win recognition by producing things.” E. ERIKSON, *CHILDHOOD AND SOCIETY* 259 (2d ed. 1963). Hendrick has suggested that a “work principle” governs those “functions which enable the individual to control or alter his environment,” operative via an “instinct to master” which leads the individual to derive pleasure from successful work. Hendrick, *Work and the Pleasure Principle*, 12

cially so in a society such as ours in which, as the noted social theorist Sebastian de Grazia has pointed out, "the American without work . . . is a damned soul."<sup>107</sup> It also has been noted that, "[w]ithout work, one loses one's condition of being an adult."<sup>108</sup> Conversely, "[p]rolonged unemployment typically leads to a deterioration of personality: passivity, apathy, anomie, listlessness, dissociation, lack of interest and of caring."<sup>109</sup>

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PSYCHOANALYTIC Q. 311, 311, 314-15 (1943). See also Hendrick, *The Discussion of the "Instinct to Master,"* 12 PSYCHOANALYTIC Q. 561 (1943).

Lantos has theorized that for an "adult the principle of working is the primary motive for any activity," and that "[a]n adult who is deprived of his work . . . loses the essential condition of being an adult." This is so because work motivation grows out "of the instinct of self-preservation" and because "[t]he feeling of freedom, independence and security depends on the ability to guarantee one's existence by one's own achievements." Therefore, it is a "relief from fear," insecurity and dependence that is felt by the productive adult. Lantos, *Work and the Instincts*, 24 INT'L J. PSYCHO-ANALYSIS 114, 118-19 (1943). In a later article, Dr. Lantos concluded that "pleasure is not the ultimate motive of work. The powerful motive is self-preservation." Lantos, *Metapsychological Considerations on the Concept of Work*, 33 INT'L J. PSYCHO-ANALYSIS 439, 442 (1952). For a broad analysis of various work motivation theories see Neff, *Psychoanalytic Conceptions of the Meaning of Work*, 28 PSYCHIATRY 324 (1965). For a comprehensive discussion of both the biological and historical origins of work see M. ARGYLE, *THE SOCIAL PSYCHOLOGY OF WORK* 7-30 (1974) [hereinafter cited as ARGYLE].

<sup>107</sup> S. DE GRAZIA, *OF TIME, WORK, AND LEISURE* 41 (1962).

<sup>108</sup> Olshansky & Unterberger, *The Meaning of Work and Its Implications for the Ex-Mental Hospital Patient*, 47 MENTAL HYGIENE 139, 141 (1963) (emphasis in original). The authors analogize the ex-mental patient's reentry into society to "the adolescent and the minority group person, who is uncertain about his identity." *Id.* at 148. They contend that "[j]ob satisfaction . . . is based . . . on the financial and emotional rewards implicit in being able to function in an *approved adult role*." *Id.* (emphasis in original). Since society fails to facilitate the necessary role transition, the patient must fend for himself, and "[w]ork . . . constitutes a major bulwark against the tendency to regression." *Id.*

The importance of work has been noted by others. Social psychologist Michael Argyle states that "[work] can be the cause of mental health or mental ill health." ARGYLE, *supra* note 106, at 245. In another context, famed economist Gunnar Myrdal termed work "the basis for self-respect and a dignified life." G. MYRDAL, *CHALLENGE TO AFFLUENCE* 41 (1963). Similarly, Menninger has stated that approximately 75 per cent "of the patients who come to psychiatrists are suffering from an incapacitating impairment of their satisfaction in work or their ability to work," and that in many cases "it is their chief complaint." Menninger, *Work as a Sublimation*, 6 BULL. MENNINGER CLINIC 170, 177 (1942). See generally Oberndorf, *Psychopathology of Work*, 15 BULL. MENNINGER CLINIC 77 (1951). See also ARGYLE, *supra* note 106, at 246, 247 ("low job status leads to low self-esteem which, in turn, produces low mental health") (citing Kasl & French, *The Effects of Occupational Status on Physical and Mental Health*, 18 J. SOCIAL ISSUES 67 (1962)).

Recently, a group of social psychologists labeled unemployment "America's major mental health problem." Philadelphia Inquirer, Sept. 6, 1975, at 8-A, col. 1. According to Dr. Hannah Levin:

"People who lose jobs and can't find work tend to feel like non-persons. They are depressed, apathetic, disoriented and withdrawn. They feel dispossessed, helpless and often irrational. In this society, they have lost a primary source of a sense of identity, self-esteem, status, meaning and autonomy.

Institutionalization itself can have a depressing effect on self-esteem by its tendency to minimize an individual's unique characteristics and to emphasize his role as "patient" and "sick person."<sup>110</sup> Providing patients with meaningful work roles can be a potent tool in avoiding the debilitating effects of institutionalization: For recently admitted individuals, a meaningful work role "modifies the tendency for a 'person' to erode into a 'patient'"; for the long-term or chronically ill, "it can serve as a pivotal force in rehabilitation."<sup>111</sup>

In addition, in-hospital work can often be seen as the first step on the path toward meaningful out-patient vocational rehabilitation and as an "integral part of the therapy program."<sup>112</sup> It is a mechanism by which a "realistic evaluation of work potential" may be made,<sup>113</sup> and it serves as "the most culturally accepted and reality-based prov-

"In short, people who are unemployed usually suffer a loss of self and a collapse of personality."

*Id.* cols. 1-2. See also Ochberg & Kopolow, *Spin-off From a Downward Swing*, MENTAL HEALTH, Summer 1975, at 21.

<sup>109</sup> W. WINICK, *INDUSTRY IN THE HOSPITAL: MENTAL REHABILITATION THROUGH WORK* 13 (1967) (quoting from B. BERELSON & G. STEINER, *HUMAN BEHAVIOR* 403 (1964)).

<sup>110</sup> Schwartz, *Expanding a Sheltered Workshop to Replace Nonpaying Patient Jobs*, 27 *HOSP. & COMMUNITY PSYCHIATRY* 98, 99 (1976).

<sup>111</sup> *Id.* at 99-100. A study of 109 patients engaged in paid (as a consequence of Souder) institutional tasks at four Pennsylvania institutions revealed

that 94.5 per cent of the patients enjoyed working; that 85.3 per cent felt more respected by others when they worked; that 88.1 per cent felt a greater sense of self-respect when they worked; and that 87.6 per cent considered work a form of therapy. Also, 85.8 per cent endorsed the statement "I wish they had paid patients to work before now." And 89.8 per cent endorsed the statement "Being paid to work while I am still in the hospital is the best opportunity I've had in a long time."

*Work: The Patients' View*, 27 *HOSP. & COMMUNITY PSYCHIATRY* 102 (1976).

<sup>112</sup> AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 166 (2d ed. S. Brakel & R. Rock 1971). See also L. LINN, *A HANDBOOK OF HOSPITAL PSYCHIATRY* 86 (1955) [hereinafter cited as LINN]. For the traditional attitude towards "work therapy" see S. DAVIES, *SOCIAL CONTROL OF THE MENTALLY DEFICIENT* 229-32 (1930); J. GILLIN, *POVERTY AND DEPENDENCY* 283-84 (1921). For historical development of various attitudes towards the treatment of the mentally ill see N. DAIN, *CONCEPTS OF INSANITY IN THE UNITED STATES, 1789-1865* (1964). Dain stated that by the 1860's,

[m]anual labor still proved to be "the most effective of the 'moral means,' for the promotion of a cure in the curable," and for making the incurables "more comfortable and contented."

*Id.* at 118 (quoting from FRIENDS' ASYLUM FOR THE INSANE, 25th ANN. REP., 1842, at 20; 28th ANN. REP., 1845, at 18; 32d ANN. REP., 1849, at 17-18). See also Reid, *Ergo-therapy in the Treatment of Mental Disorders*, 171 *BOSTON MED. & SURG. J.* 300 (1914).

<sup>113</sup> Adlestein & Jolly, *Rights of Mental Patients to Treatment and Remuneration for Institutional Work: Comments by the Office of Mental Health*, 39 *PA. B. ASS'N Q.* 548, 549 (1968).

ing ground for testing [the patient's] new insights in interpersonal relationships," his motivation being "greatly strengthened" where work is "realistically tied in with his vocational objective after release."<sup>114</sup> The value of meaningful work programs has been underscored by forensic psychiatrist Jonas Robitscher, who has contrasted the remarkable success of Russian work-therapy programs which are "designed to provide meaningful work and to serve as a transition between the hospital and the working world" with the lack of success of traditional "occupational therapy" programs in this country which are not so designed.<sup>115</sup>

Compensation itself is seen by institutional superintendents and administrators "both as a therapeutic tool and also as a protection for the resident against exploitation," in that money—the universally accepted "reward"—serves to encourage responsible working habits, eliminate the burdens of financial dependency, and reduce "the economic incentive for institutions to exploit" patients by maintaining them "longer than necessary."<sup>116</sup> Conversely, the worker, without compensation, suffers direct income loss, loss of work-related social-

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<sup>114</sup> Richman & Zinn, *Work as a Central Focus in Therapy*, 13 MENTAL HOSPITALS 603 (1962).

Most revealingly, in an article written more than twelve years ago, New Jersey's director of the Division of Mental Retardation praised New Jersey's then-existing wage programs for the mentally retarded, noting that such a

program provides an opportunity for gradually diminishing custodial control and correspondingly increased freedom for selected residents. It presents selected residents with new opportunities to experience formal employee-supervisor relationships in familiar circumstances. It offers expanded opportunities to attempt community adjustment and handling of their own earned funds.

Kott, *Wage Programs for Mentally Retarded Residents of Public Institutions*, 1 MENTAL RETARDATION 161, 163 (1963). Cf. Berry & Lukens, *Integrating Occupational Therapy Into Other Activities in a Day Treatment Program*, 26 HOSP. & COMMUNITY PSYCHIATRY 569 (1975).

<sup>115</sup> J. ROBITSCHER, PURSUIT OF AGREEMENT: PSYCHIATRY & THE LAW 148 (1966). According to Robitscher, the Russian programs are based on the writings of Pavlov and Korsakoff added that

"[s]ystematic, meaningful occupations have a beneficial influence not only on and physical work. Help is possible if physical work corresponding to the individuals' potentialities [are] correctly applied."

Korakoff added that

"[s]ystematic, meaningful occupations have a beneficial influence not only on those chronically ill with persistent and progressive mental debility but also on acute patients, giving an outlet for energies that otherwise would be manifested in destruction and anxiety."

*Id.* at 147 (quoting from MEDICAL WORLD NEWS, Oct. 15, 1965, at 135) (footnote omitted).

<sup>116</sup> Friedman II, *supra* note 2, at 641. See also Morris, *Institutionalizing the Rights of Mental Patients: Committing the Legislature*, 62 CALIF. L. REV. 957, 1014 (1974).

legislation benefits, and the loss of "a basic sense of self respect or dignity."<sup>117</sup>

Not surprisingly, "[p]atients in mental hospitals are found not to differ in this regard from their 'normal' fellows in the outside community."<sup>118</sup> A study of patients in an occupational crafts group in a day-care center revealed:

The matter of payment is taken quite seriously because no single factor is more important in the total picture of rehabilitation than to discover that one is being paid for ability rather than disability. Nothing appears to be a greater stimulus to engage in activities that reflect health instead of illness than to be paid for the product of those activities.<sup>119</sup>

Also, when New York hospital patients who had been involved in an occupational therapy program were promised compensated employment upon successful completion, the knowledge that they would receive compensation "was electrifying" to them: Work which had taken "two weeks was now completed in three days"; patients "began to take noticeable pride in their appearance and performance"; and, finally, instead of being viewed "as 'old-timers' doomed to" lifelong confinement, they were seen "as worthwhile rehabilitation prospects."<sup>120</sup> Finally, in a closely monitored study of chronic schizophrenic patients who were involved in a remunerated work program, it was found that, while the workshop was open, 13 of the 14 working patients showed a decrease in "idiosyncratic behavior pattern[s]," while 7 of the 8 nonworking patients showed an increase in such behavior. The researchers thus concluded "that, given an optimal medication pro-

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The operation of a patient loan fund at one state psychiatric institute has been seen as a "therapeutic tool" and as an "invaluable . . . practical unlocking device for reaching some patients who might otherwise be inaccessible to more traditional therapeutic approaches." Williams, *Money and the Therapeutic Process*, 18 CANADA'S MENTAL HEALTH 20, 21, 23 (1970).

<sup>117</sup> Friedman II, *supra* note 2, at 642.

<sup>118</sup> LINN, *supra* note 112, at 85.

<sup>119</sup> Scoles & Fine, *Aftercare and Rehabilitation in a Community Mental Health Center*, SOCIAL WORK, July 1971, at 75, 78. Friedman has noted that [f]orced employment without compensation may engender feelings of enslavement, exploitation, or persecution, undermining constructive attitudes and the sense of human dignity essential to therapeutic progress. Appropriate compensation for work performed by patients serves as a meaningful "reward" which can motivate such patients to develop responsible work habits and behavior patterns vital to their eventual reintegration into the community.

Friedman I, *supra* note 2, at 569 (footnotes omitted).

<sup>120</sup> Richman & Zinn, *supra* note 114, at 607. See also Safier & Barnum, *supra* note 92, at 302.

gram and a suitable type of work, exposure of the individual to a sheltered workshop is therapeutically valuable."<sup>121</sup>

Unquestionably, compensated, voluntary work programs may be equated with "such individual treatment as will give [patients] a realistic opportunity to be cured or to improve [their] mental condition,"<sup>122</sup> and may be seen as a necessary element of due process requiring "that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."<sup>123</sup> Thus, the right to treatment should be read to include the right to such therapy.

It is suggested that the right to participate in voluntary, compensated work programs is applicable to all residents of state institutions for the mentally ill and mentally retarded, whether the state has confined them under its *parens patriae* power (need for treatment) or its police power (need to protect the public). The Fifth Circuit's opinions in *Wyatt* and *Donaldson* make clear that a constitutional right to treatment exists regardless of the basis for confinement.<sup>124</sup> Similarly, the right to therapeutic work programs must be made available not only to those committed for treatment, but also to those committed for society's protection as part of the "*quid pro quo*" owed to those whom the state confines indefinitely without the normal procedural safeguards accorded those incarcerated under criminal statutes.<sup>125</sup> The right must also be made available to the mentally retarded as part of their constitutional right to habilitation to "enable [the resident] to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency."<sup>126</sup>

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<sup>121</sup> Esser, *Behavioral Changes in Working Chronic Schizophrenic Patients*, 28 DISEASES OF THE NERVOUS SYSTEM 441, 445, 447 (1967).

<sup>122</sup> *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

<sup>123</sup> *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). It has been pointed out that ineffective treatment which does not increase the likelihood of a civilly-committed patient's returning to participation in the community is not reasonably related to the ultimate goal of his commitment for treatment and violates due process requirements.

Schwitzgebel, *supra* note 23, at 120-21.

<sup>124</sup> *Wyatt v. Aderholt*, 503 F.2d 1305, 1312-15 (5th Cir. 1974); *Donaldson v. O'Connor*, 493 F.2d 507, 520-22 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975).

<sup>125</sup> See note 55 *supra* and accompanying text.

<sup>126</sup> *Wyatt v. Stickney*, 344 F. Supp. 387, 395 (M.D. Ala. 1972), *enforcing* 334 F. Supp. 1341 (M.D. Ala. 1971), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

Finally, the right to voluntary, compensated, therapeutic work must also apply to so-called "voluntary" residents.<sup>127</sup> Voluntariness as a status has been accurately labeled as "illusory" by at least one respected commentator,<sup>128</sup> and the legal distinction between voluntary and involuntary has been recognized as inadequate for purposes of determining whether a patient is truly "willing" or "unwilling" to be institutionalized.<sup>129</sup> The distinction is equally meaningless for the purpose of classifying those patients to whom the right to work attaches. This conclusion is inescapable whether one uses a due process approach or whether one looks to the realities of institutional life.

#### WORK PROGRAMS AND TREATMENT IN THE LEAST RESTRICTIVE SETTING

Elimination of work programs infringes not only a patient's constitutional right to treatment but also his right to be treated in the least restrictive setting.<sup>130</sup> Work programs constitute an important

<sup>127</sup> Voluntary residents are those persons who apply for admission to a mental institution without presentation to the courts for adjudication of the need for commitment. In New Jersey, a person 18 or older may file an application for admission to a mental institution. An adult family member or guardian may file an application on behalf of a minor under 21 years of age. N.J. STAT. ANN. § 30:4-46 (Supp. 1975-76). However, no minor may be permanently committed without a court hearing and a judicial determination that commitment is necessary. See N.J.R. 4:74-7(j).

<sup>128</sup> Herr, *Civil Rights, Uncivil Asylums, and the Retarded*, 43 U. CIN. L. REV. 679, 722 (1974). The author notes further that "the 'voluntary' resident may have even fewer opportunities for discharge than those involuntarily committed." *Id.* at 723.

<sup>129</sup> E. GOFFMAN, *ASYLUMS* 131-33 & n.9 (1961). See also *Bartley v. Kremens*, 402 F. Supp. 1039, 1046-47 (E.D. Pa. 1975), *prob. juris. noted*, 44 U.S.L.W. 3531 (U.S. Mar. 23, 1976) (No. 75-1064) (children facing commitment are entitled to due process protections); *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973) (noted that voluntarily admitted patients are treated no differently than involuntarily committed patients); *Horacek v. Exon*, 357 F. Supp. 71, 73 (D. Neb. 1973) (plaintiffs' claim that their voluntarily committed children were being denied constitutional right to treatment stated a cause of action under section 1983).

<sup>130</sup> A resident's right to the least restrictive treatment setting is not only required by statute and case law, see notes 141-48 *infra* and accompanying text, but is supported by the overwhelming weight of medical authority for therapeutic, emotional, financial, and practical reasons, see Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1194 n.385 (1972) [hereinafter cited as Chambers I]. See also Chambers, *Right to the Least Restrictive Alternative Setting for Treatment*, in 2 MENTAL HEALTH LAW PROJECT, *PRACTISING LAW INSTITUTE, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED* 991 (B. Ennis & P. Friedman eds. 1973) [hereinafter cited as Chambers II].

For general analysis of the effectiveness of different types of treatment settings see R. BARTON, *INSTITUTIONAL NEUROSIS* (1959); D. CLARK, *SOCIAL THERAPY IN PSYCHIATRY* (1974); E. GOFFMAN, *ASYLUMS* (1961); JOINT INFORMATION SERVICE OF THE AMERICAN PSYCHIATRIC ASS'N & THE NAT'L ASS'N FOR MENTAL HEALTH, *REHABILITATING THE MENTALLY ILL IN THE COMMUNITY* (1971); N. KITTRIE, *THE*

means by which patients can achieve and demonstrate entitlement to increased responsibility, less supervision, and, ultimately, release from the institution. By foreclosing this opportunity to achieve and demonstrate competence, the state has eliminated a major avenue by which a patient may progress from more restricted to less restricted environments.<sup>131</sup>

The right to treatment in the least restrictive setting is based upon the principle that although a government may be acting in furtherance of a valid goal, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."<sup>132</sup> This doctrine, known as the "least restrictive alternative,"<sup>133</sup> requires that a court "ensure that the state imposes no greater constriction of freedom than necessary to serve [its] objectives."<sup>134</sup>

At the very least, commitment to a psychiatric facility represents a loss of freedoms which are customarily enjoyed by other citizens. Thus, when a person is committed to a psychiatric hospital, his constitutionally protected rights to travel and to freely associate with

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RIGHT TO BE DIFFERENT 95-101 (1971); LINN, *supra* note 112, at 463-92; A. STANTON & M. SCHWARTZ, *THE MENTAL HOSPITAL* (1954).

<sup>131</sup> It may even be implied that in some cases, therapeutic work programs represent the only means whereby a patient may secure eventual release from the institution. *Cf.* Richman & Zinn, *supra* note 114, at 607.

<sup>132</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (footnote omitted).

<sup>133</sup> The doctrine is also known "as the principle of 'less drastic means'" and "as the principle of 'reasonable alternatives.'" Chambers I, *supra* note 130, at 1111 n.9.

<sup>134</sup> *Id.* at 1111. The doctrine of the least restrictive alternative has been given a liberal application, reaching areas of economic and commerce clause regulation as well as personal rights and freedoms. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1246 (1974). However, the nature of the right invaded will dictate the degree to which a court will require that the challenged governmental action be the least restrictive alternative necessary to achieve its purpose. Where, for example, a question of overreaching was framed in the context of state welfare regulation, the Supreme Court was quick to distinguish between measures taken "in the social and economic field" and those which might infringe upon first amendment rights or other basic freedoms guaranteed in the Bill of Rights, noting that stricter standards would be applicable in the latter cases. *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970). *See also* *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 32-37 (1973) (greater scrutiny required where regulation concerns a specific constitutional guarantee); *Jefferson v. Hackney*, 406 U.S. 535, 546-47 (1972) (measures in furtherance of social welfare held only to standard of rationality); *Moreno v. United States Dep't of Agriculture*, 345 F. Supp. 310, 313-14 (D.D.C. 192), *aff'd*, 413 U.S. 528 (1973) (effect of statute determines degree of scrutiny).

When presented squarely in the setting of a civil commitment, due process requires an affirmative showing "that the proposed commitment is to the least restrictive environment consistent with the needs of the person to be committed." *Lynch v. Baxley*, 386 F. Supp. 378, 392 (M.D. Ala. 1974) (footnote omitted).

others<sup>135</sup> are curtailed, and his rights to peacefully assemble,<sup>136</sup> communicate,<sup>137</sup> practice religion,<sup>138</sup> and enjoy sexual privacy<sup>139</sup> are similarly constricted. And, of course, he is in danger of losing "the most basic and fundamental right [which] is the right to be free from unwanted restraint."<sup>140</sup>

In view of this "massive curtailment of liberty,"<sup>141</sup> federal courts have not hesitated to test state commitment procedures against the doctrine of "the least restrictive alternative," and in several cases have required affirmative proof that no less restrictive alternative exists prior to authorizing commitment to a psychiatric institution.<sup>142</sup> Thus, it is generally accepted that "committing courts and agencies must refrain from ordering hospitalization whenever a less restrictive alternative will serve as well or better the state's purposes."<sup>143</sup> This principle also applies within the institutional context. In a recent decision it was held that confinement of a person in a psychiatric facility may entail only

<sup>135</sup> See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500, 507, 517 (1964) (right to travel closely associated with first amendment right of association); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (right to travel protected by due process).

<sup>136</sup> See, e.g., *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937) (criminal syndicalism statute declared unconstitutional insofar as it infringed the right to peaceful assembly); *United States v. Cruikshank*, 92 U.S. 542, 551 (1875) (the right to peacefully assemble is "one of the attributes of citizenship under a free government").

<sup>137</sup> See, e.g., *Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1965) (regulation requiring seizure of "communist" literature by postal officials held violative of first amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943) (right of communication extends to symbolic gestures).

<sup>138</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404, 410 (1963) (state infringement of freedom of religion improper even where indirect means are used); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (license to solicit held unconstitutional when effect is to inhibit practice of religion).

<sup>139</sup> See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (right to sexual privacy individual in nature); *DeGregory v. Attorney General*, 383 U.S. 825, 829 (1966) (right to privacy secured against intrusion by state); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (state ban on use of contraceptive devices held an unconstitutional invasion of right to privacy).

<sup>140</sup> *Lessard v. Schmidt*, 349 F. Supp. 1078, 1095-96 (E.D. Wis. 1972), *vacated on other grounds and remanded*, 414 U.S. 473, *modified on other grounds and reinstated*, 379 F. Supp. 1376 (1974), *vacated on other grounds and remanded*, 421 U.S. 957 (1975) ("full-time involuntary hospitalization only as a last resort").

<sup>141</sup> *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (footnote omitted).

<sup>142</sup> See, e.g., *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966); *Negron v. Preiser*, 382 F. Supp. 535, 542 (S.D.N.Y. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1095-96 (E.D. Wis. 1972), *vacated on other grounds and remanded*, 414 U.S. 473, *modified on other grounds and reinstated*, 379 F. Supp. 1376 (1974), *vacated on other grounds and remanded*, 421 U.S. 957 (1975); *In re Jones*, 338 F. Supp. 428, 429 (D.D.C. 1972).

<sup>143</sup> *Chambers I*, *supra* note 130, at 1145.

the minimum limitation of movement or activity of a patient or resident necessary to provide reasonable assurance that his dangerousness would not constitute a significant risk to others and in which treatment or habilitation continues to the fullest extent possible.<sup>144</sup>

In New Jersey, both the courts and the legislature have recognized this limitation on the state in light of the patient's right not to have his liberty curtailed more than is necessary. In *State v. Krol*, the New Jersey supreme court stated that commitment orders, while providing for the safety of the community, "should be molded . . . in a fashion that reasonably minimizes infringements upon [a patient's] liberty and autonomy."<sup>145</sup> Furthermore, the revised New Jersey court rules tacitly support the proposition that treatment be afforded in the least restrictive setting by allowing "commitment to an *appropriate* institution"<sup>146</sup> and allowing release to "a non-residential mental health facility or other form of supervision."<sup>147</sup> Finally, in the 1975 revision of mental patients' rights, the New Jersey legislature explicitly included a patient's right "[t]o the least restrictive conditions necessary to achieve the purposes of treatment."<sup>148</sup>

When work programs are stopped, patients and residents lose one of the major avenues for self-improvement and preparation for eventual reentry into the community. Not only are they denied practical employment experience, but in addition, are deprived of income and funds which would otherwise enable them to participate in various activities outside the institution.<sup>149</sup> The curtailment of therapeutic work programs also eliminates one of the principal ways in which patients can demonstrate to the hospital staff that they are capable of adjusting to life outside the institution. The director of New Jersey's Division of Mental Retardation has specifically noted

<sup>144</sup> *Davis v. Watkins*, 384 F. Supp. 1196, 1203 (N.D. Ohio 1974).

<sup>145</sup> 68 N.J. 236, 257, 344 A.2d 289, 300-01 (1975).

<sup>146</sup> N.J.R. 4:74-7(f) (emphasis added).

<sup>147</sup> N.J.R. 4:74-7(g).

<sup>148</sup> N.J. STAT. ANN. § 30:4-24.2(e)(2) (Supp. 1976-77), amending N.J. STAT. ANN. § 30:4-24.2 (Supp. 1975-76).

<sup>149</sup> *Programs for Patient-Workers: Approaches, Problems in Four Institutions*, 27 HOSP. & COMMUNITY PSYCHIATRY 93, 97 (1976). For example, at one institution in which the *Souder* decision led to paid vocational training, the salaries earned by patients

has made it possible to broaden their environment tremendously . . . . Some patients paid their own way to a YMCA summer camp, and some have made trips to the Grand Old Opry in Nashville, to Six Flags Over Georgia in Atlanta, and to the mountains and the shore. Some have bought three-wheeled bikes that have greatly increased their mobility around the campus.

*Id.* at 95.

that wage programs, while improving the morale of participants, are particularly significant in that they give the mildly retarded "an additional opportunity to secure release from the facility."<sup>150</sup>

In the final analysis, elimination of work programs deprives patients of a meaningful opportunity to gain increased freedom and responsibility and to ultimately secure release from the institution. To the extent that a patient's progress toward less restrictive environments or ultimate release is thereby diminished, the abrogation of therapeutic work programs violates a patient's right to treatment in the least restrictive setting.

#### WORK PROGRAMS AND THE RIGHT TO FREEDOM FROM HARM

The termination of work programs in mental institutions poses a genuine threat to the safety and well-being of resident inmates. In addition to deterioration of physical conditions of hospital premises through the loss of resident labor,<sup>151</sup> the elimination of work programs produces an adverse psychological and emotional effect upon the patients themselves. A senior clinical psychologist in an institution for the mentally retarded has observed that, as a consequence of work stoppage, many patients "have become more jittery, fighting to continue 'working,' and having tantrums that included defecating, assaulting, and self-mutilating."<sup>152</sup> To the extent that termination of work programs results in a dangerous and unhealthy atmosphere—both physically and mentally—such termination violates the patients' constitutional right to freedom from harm.

When a person is committed to either a penal or psychiatric institution, the state assumes a responsibility to protect such person from harm.<sup>153</sup> Those charged with the management of such facilities

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<sup>150</sup> Kott, *supra* note 114, at 188. See also Richman & Zinn, *supra* note 114, at 607. An analysis of a formerly operative sheltered work program illustrates the significant effect of therapeutic work programs, and reveals that 52 percent of the 441 participating residents subsequently attained release from the institutions involved. Oudenne, *supra* note 92, at 18.

<sup>151</sup> See Bickford, *supra* note 92, at 714. Resident labor can include work in the laundries, kitchens, and dining rooms, or on farms and dairies, as well as routine maintenance and clean-up chores. Friedman I, *supra* note 2, at 568.

<sup>152</sup> C. Cameron, Effects of the No Work Ruling on Hunterdon State School, Nov. 1, 1974 (unpublished memorandum on file at *Seton Hall Law Review*).

<sup>153</sup> New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973). The court explained that the constitutional right to freedom from harm could be founded upon either the eighth amendment concept of cruel and unusual punishment, or the due process clause or the equal protection clause of the fourteenth amendment. *Id.* See generally Herr, *supra* note 128, at 750-54. For a general

have a duty "to preserve [an inmate's] life, health, and safety—a duty which is in addition to the duty of safekeeping owed to the public generally."<sup>154</sup> Custodial institutions must specifically protect inmates from assaults,<sup>155</sup> provide them with medical care,<sup>156</sup> allow them to exercise and to have outdoor recreation,<sup>157</sup> provide sufficient heat for their living quarters, and make available "the necessary elements of basic hygiene."<sup>158</sup> In short, state authorities must provide an environment which meets "basic standards of human decency."<sup>159</sup>

Whereas the standard applied in a penal setting has been described as "a tolerable living environment,"<sup>160</sup> it is obvious that a higher standard should be applied wherever an inmate's commitment is nonpenal in nature.<sup>161</sup> Clearly, a patient's confinement "must be therapeutic, not punitive."<sup>162</sup> Significantly, it has been noted that the duty owed to a patient in a hospital specializing in the treatment of mental disorders is greater than the duty owed to a patient in a general hospital.<sup>163</sup>

In addition to prohibitions on certain physical intrusions, *psychological* oppression and acts causing mental distress are similarly within the proscription of the eighth amendment. The Second Circuit recently noted:

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discussion of the factual context of prison litigation in this area see J. MITFORD, *KIND AND USUAL PUNISHMENT* 271-94 (Vintage Books ed. 1974).

<sup>154</sup> *Roberts v. State*, 307 N.E.2d 501, 505 (Ind. Ct. App. 1974).

<sup>155</sup> *Gates v. Collier*, 349 F. Supp. 881, 894 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974). See *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971); *Holt v. Sarver*, 309 F. Supp. 362, 384 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

<sup>156</sup> See *Corby v. Conboy*, 457 F.2d 251, 254 (2d Cir. 1972); *Martinez v. Mancusi*, 443 F.2d 921, 924-25 (2d Cir. 1970).

<sup>157</sup> *Cf. Brenneman v. Madigan*, 343 F. Supp. 128, 133 (N.D. Cal. 1972).

<sup>158</sup> *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 765 (E.D.N.Y. 1973). See also *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973); *cf. Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972).

<sup>159</sup> *Brenneman v. Madigan*, 343 F. Supp. 128, 133 (N.D. Cal. 1972).

<sup>160</sup> Kaufman, *Book Review*, 86 HARV. L. REV. 637, 639 (1973).

<sup>161</sup> *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 764 (E.D.N.Y. 1973). See *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972) (cruelty more cognizable in civil than in criminal setting); *cf. Anderson v. Nossner*, 438 F.2d 183, 190 (5th Cir. 1971) (presumption of innocence prohibits punitive measures prior to conviction for criminal offense); *Lollis v. New York State Dept. of Social Servs.*, 328 F. Supp. 1115, 1118 (S.D.N.Y. 1971), *modifying* 322 F. Supp. 473 (S.D.N.Y. 1970) (isolation of juvenile not convicted of crime is cruel and unusual punishment); note 67 *supra*.

<sup>162</sup> *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 165, 305 N.E.2d 903, 905, 350 N.Y.S.2d 889, 892 (1973).

<sup>163</sup> See *Fernandez v. Baruch*, 96 N.J. Super. 125, 137, 232 A.2d 661, 667 (App. Div. 1967), *rev'd on other grounds*, 52 N.J. 127, 244 A.2d 109 (1968).

Psychological oppression is as much to be condemned as physical abuse, and . . . acts causing mental suffering can—even absent attendant bodily pain—violate the Eighth Amendment.<sup>164</sup>

Certainly, the harm that has befallen institutional residents including, for example, lack of sensory motivation, lack of contact with the outside world, and inability to develop aspects of self-sufficiency, may similarly come within this protection against *psychological* harm.

As a result of the discontinuance of work programs, residents are placed in a living environment in which they are subject to precisely the type of harm forbidden by case law. If patients are not allowed to resume participation, the constitutional violations will continue.

#### WORK PROGRAMS AND LIBERTY AND PROPERTY CONCEPTS: FOURTEENTH AMENDMENT CONSIDERATIONS

Among the constitutional attacks that may be levied against the termination of voluntary, compensated, therapeutic work programs is that such termination violates the equal protection clause of the fourteenth amendment. Essentially, the equal protection clause mandates that before a state may limit or abrogate the rights of a class of individuals, the state's interest must be legitimate, and the classification as well as the limitation must be rationally related to the legitimate state interest.<sup>165</sup> From two initial perspectives, it is clear that the

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<sup>164</sup> United States *ex rel.* Schuster v. Vincent, 524 F.2d 153, 160 (2d Cir. 1975). See also LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973) (indecent conditions in strip cell "seriously threatened [plaintiff's] physical and mental soundness"). For a full analytical discussion of the psychological harm which can befall long-term prisoners see S. COHEN & L. TAYLOR, *PSYCHOLOGICAL SURVIVAL* (Vintage Books ed. 1974).

<sup>165</sup> Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972). In F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), the Court formulated an equal protection test:

[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Id.* at 415.

Generally, the Court, in employing this rational basis test, has given wide deference to the rationality of the state action in question. For example, in McGowan v. Maryland, 366 U.S. 420 (1961), the Court upheld the constitutionality of "Sunday Blue Laws" against a challenge to the rationality of the classification of items forbidden to be sold on Sunday. *Id.* at 425-28. The Court concluded that the classifications were rational, stating that "[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* at 425.

Gradually, the Court developed a second "tier" of scrutiny to be applied when fundamental rights such as voting, see *Dunn v. Blumstein*, 405 U.S. 330 (1972), have been infringed or when the classification of individuals, such as by race, is deemed

abrogation of work programs violates equal protection. First, while the state has a legitimate interest in confining one who needs institutional treatment and who poses a threat to himself or others,<sup>166</sup> it is clear that the justification for confinement is treatment calculated to improve his condition.<sup>167</sup> When termination of work programs renders the therapeutic value of confinement ineffective, the concept of treatment as justification becomes illusory, and the state's detention of the class violates equal protection.<sup>168</sup> Second, for the institutional resident, therapeutic work programs afford the only opportunities to work, to earn income, and to receive work-related benefits such as social security. Whether the right to work is termed fundamental<sup>169</sup>

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suspect, *see* *Loving v. Virginia*, 388 U.S. 1 (1967). To pass constitutional muster the state must show that (1) the statute, regulation, or practice is required, (2) the statute, regulation, or practice advances a compelling interest, and (3) the state interest is legitimate. *See generally* *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments—Equal Protection*]; Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria*, 27 VAND. L. REV. 971, 995–1011 (1974).

<sup>166</sup> *See* *Jackson v. Indiana*, 406 U.S. 715, 736–38 (1972).

<sup>167</sup> *See* notes 26–56 *supra* and accompanying text.

<sup>168</sup> This would hold true under a rational basis or strict scrutiny analysis because the state's interests in and justifications for confinement are not furthered when treatment is ineffective. *See, e.g.,* *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172–76 (1972) (state statute disabling illegitimate children from suing for workmen's compensation for death of father held violative of equal protection because a denial of benefits to such children is unrelated to state interest in legitimate family relationships); *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 412–13, 416–17 (1920) (state's taxation of domestic corporations on out-of-state profits while not imposing such tax on domestic corporations not doing business in state held to violate equal protection because taxing scheme unrelated to state purpose).

<sup>169</sup> "Fundamental" interests are those deemed by the Court to warrant a higher degree of constitutional protection with the result that a strict scrutiny—compelling state interest approach generally will be employed in judging the constitutionality of the state's infringement. Rights which have been deemed fundamental include the right to travel, *see* *Shapiro v. Thompson*, 394 U.S. 618 (1969); the right to vote, *see* *Dunn v. Blumstein*, 405 U.S. 330 (1972); the right to run for office, *see* *Bullock v. Carter*, 405 U.S. 134 (1972); the right to procreate, *see* *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and the right to appellate review in criminal proceedings, *see* *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring).

The Constitution does not expressly denominate rights as fundamental; rather, the Court labels rights fundamental "upon a belief that they are simply more important than others." *Developments—Equal Protection*, *supra* note 165, at 1128 (footnote omitted). *See also* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 & n.32 (1972). *But see* *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973).

The right to pursue a livelihood has traditionally been accorded a heightened status although it has not yet been denominated as "fundamental" in the special constitutional sense of the two-tiered equal protection test. For example, in *Dent v. West Virginia*, 129 U.S. 114 (1889), the Supreme Court upheld a state statute requiring certification of qualifications to practice medicine. Although the Court upheld the statute in the face of a

or simply "important," a state may not limit or terminate work programs without demonstrating a compelling or, at a minimum, a

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due process challenge, it did so on the basis that the state interest in regulating the practice of medicine was important and that the certification procedures were reasonably related to the state's purposes. *Id.* at 124-25, 128. The Court clearly indicated the preferred status of the right to pursue a livelihood, stating that there exists

the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. . . . [T]he right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them . . . .

*Id.* at 121.

Similarly, in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), the Court confronted an ordinance which required the licensing of "the manufacture, sale and distribution of ice [as] a public business." To obtain a license, the potential businessman had to demonstrate a community need for the product or service beyond that which could be supplied by already existing businesses. *Id.* at 271-72. Finding no state interest supporting the statute, the Court affirmed a denial of an injunction against the unlicensed ice manufacturer. *Id.* at 279-80. The Court had concluded that no regulation which unreasonably abrogated or limited the right to engage in a lawful business pursuit could survive fourteenth amendment scrutiny, stating that

nothing is more clearly settled than that it is beyond the power of a state, "under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

*Id.* at 278 (quoting from *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924)) (emphasis added). See also *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111-12 (1928) ("The police power may be exerted . . . only when such legislation bears a real and substantial relation to . . . some . . . phase of the general welfare"); *Yick Wo v. Hopkins*, 118 U.S. 356, 357-59, 373-74 (1886) (San Francisco regulations impairing or totally eliminating operation of laundries violated equal protection when enforced only against Chinese nationals); *Corey v. City of Dallas*, 352 F. Supp. 977, 980-81 (N.D. Tex. 1972) (ban on administration of massages to persons of opposite sex violates fourteenth amendment right to earn a livelihood, the infringement of which requires justification by a compelling state interest). For additional cases holding that the right to earn a livelihood or to engage in a business of one's choice is protected by both federal and state constitutions see *Smith v. Texas*, 233 U.S. 630, 636 (1914); *United States v. Briggs*, 514 F.2d 794, 798 (5th Cir. 1975); *Van Zandt v. McKee*, 202 F.2d 490, 491 (5th Cir. 1953); *Bautista v. Jones*, 25 Cal. 2d 746, 749, 155 P.2d 343, 345 (1944); *Lane Distribs. v. Tilton*, 7 N.J. 349, 362, 81 A.2d 786, 792 (1951); *Cameron v. Theatrical Stage Employes Local 384*, 118 N.J. Eq. 11, 21-23, 176 A. 692, 697-98 (Ct. Err. & App. 1935); *Carroll v. Local 269, IBEW*, 133 N.J. Eq. 144, 146, 31 A.2d 223, 224-25 (Ch. 1943). Cf. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (conviction for teaching German violated plaintiff's right to teach).

Residents of institutions do not lose rights merely because they are confined. In *Romero v. Schauer*, 386 F. Supp. 851, 855 (D. Colo. 1974), the court stated:

Just as the inmates of a prison do not forfeit all constitutional rights upon commitment, neither do the patients at the Colorado State Hospital, although those rights retained may be somewhat restricted by the nature of the institutional environment.

See also *Davis v. Watkins*, 384 F. Supp. 1196, 1206 (N.D. Ohio 1974) (enumerating certain basic rights which residents retain while institutionalized, including the rights "to manage [personal] affairs, to contract, [and] to hold professional and occupational or

substantial state interest.<sup>170</sup>

Regardless of the scrutiny a court may employ in evaluating the constitutionality of terminating therapeutic work programs, equal protection is nevertheless violated, because, by banning all work programs, the state has infringed more rights than necessary. The doctrine of the least restrictive alternative, applicable within an equal protection analysis, mandates that infringement of individual interests and liberties go no further than that which is absolutely necessary for

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vehicle operators licenses"). By recognizing a resident's continuing right to hold occupational or professional licenses, the *Davis* court implicitly acknowledged that, despite commitment, the right to earn a livelihood remains protected. In 1975, the New Jersey legislature enacted a provision stating specifically that

no patient shall be deprived of any civil right solely by reason of his receiving treatment . . . nor shall such treatment modify or vary any legal or civil right of any such patient including . . . rights relating to the granting, forfeiture, or denial of a license, permit, privilege, or benefit pursuant to any law.

Law of May 7, 1975, ch. 85, § 2, [1975] N.J. SESS. L. SERV. 141.

Even in the context of prisons, courts have traditionally recognized that inmates do not forfeit their basic constitutional rights when imprisoned. As stated by the court in *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944): "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him." *Accord*, *Negron v. Preiser*, 382 F. Supp. 535, 541 (S.D.N.Y. 1974); *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966). Clearly, the rights of mental patients warrant at least as much constitutional protection as is afforded to convicted criminals.

<sup>170</sup> A number of commentators have suggested that several Supreme Court Justices are dissatisfied with the definitional strictures of the two-tiered equal protection analysis because the constitutional result is dependent upon the classification of the right or interest as fundamental or nonfundamental. More specifically, under the two-tiered approach, the Court, when faced with a serious infringement of an important interest, is forced to either expand the category of fundamental rights and perhaps establish an unsatisfactory precedent or classify the right as nonfundamental and thereby relegate an important interest to a rational basis analysis which is essentially insensitive to its seriousness. See Gunther, *supra* note 169, at 8-20; Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 808-09 (1973); Note, *supra* note 165, at 1006-07.

Several commentators who have noted the erosion of the two-tier equal protection analysis propose alternative approaches. Professor Gunther suggests that the Court is moving towards a "means-focused" model of equal protection scrutiny in which a court would require that "the legislative means must substantially further legislative ends" which "have substantial basis in actuality, not merely in conjecture." Gunther, *supra* note 169, at 20-21. Further, where suspect classifications or fundamental interests are involved, Professor Gunther would preserve the strict scrutiny approach. *Id.* at 21-24.

The author of a recent University of Chicago Comment to some extent agrees with Professor Gunther's analysis of the direction of the Court. Comment, *supra* at 817-19. However, the author argues for a fundamental rights approach, implying an expansion of the category of fundamental rights for purposes of a balancing test. Here, the state's goals in effecting the legislation would be balanced against the right which is being infringed or abrogated. *Id.* at 827-31. Unlike Professor Gunther's proposal, the focus of this approach would be directed to ends, not means.

A third approach is suggested by Professor Nowak, who indicates that the Court has not moved in the direction forecast by Professor Gunther. The Nowak model advances

the achievement of the state's interest.<sup>171</sup> Since the state's interest in confinement is treatment coupled with security, the right to work, especially in light of the demonstrated viability and success of therapeutic work programs, must be preserved.

The justification offered for blanket termination of work programs is lack of funds.<sup>172</sup> Although financial considerations may be a legitimate state interest, reliance on this "justification" for abridgment of work programs is insufficient, whether these programs are deemed

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an analysis focusing on the concept of "neutral classifications":

A classification is "neutral" whenever it treats persons in a dissimilar manner on the basis of some inherent human characteristic or status (other than racial heritage), or limits the exercise of a fundamental right by a class of persons. Whenever legislation involves a neutral classification, the Court will validate it only if it has a factually demonstrable rational relationship to a legitimate state end. . . . [T]he Court should validate a statute only if the means used bear a factually demonstrable relationship to a state interest capable of withstanding analysis. The Court will scrutinize the factual support for the legislation to determine whether its ends are capable of withstanding analysis and whether its means are rationally related to that end.

Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1093-94 (1974).

Thus, under the first two approaches, the state may not irrationally interfere with the right to work regardless of whether or not it is termed a fundamental right. Under the Nowak model, if the right to work were considered fundamental, arbitrary interference would similarly be held violative of equal protection. However, it is unclear whether Professor Nowak would approve of the Court's inclusion of the right to treatment or the right to work into that very small group of rights now denominated as fundamental.

Recent cases which suggest a movement away from the two-tiered approach are *Sugarman v. Dougall*, 413 U.S. 634, 641-46 (1973); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533-38 (1973); *Frontiero v. Richardson*, 411 U.S. 677, 684, 691-92 (1973); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971). *But see* *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258-59, 269 (1974) (compelling state interest required where fundamental right to travel is infringed); *Dunn v. Blumstein*, 405 U.S. 330, 339 (1972) (compelling state interest required where right to vote is infringed).

Commentators have also argued that the mentally handicapped should be regarded as a suspect class and that any infringements on their rights should be viewed as a violation of equal protection unless there is a compelling state interest furthered by the classification. For example, in Case Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282, 1293-94 (1973), the author stated:

Since civil commitment trenches upon fundamental liberties and has invidious effects upon the class of mentally ill, strict judicial review is appropriate and a compelling state purpose should therefore be necessary to sustain the classifications.

(Footnotes omitted.) Chambers has suggested that "all regulation of the mentally handicapped as a class should . . . be regarded as constitutionally suspect and subjected to close review." Chambers II, *supra* note 130, at 997-98.

<sup>171</sup> See notes 130-34 *supra* and accompanying text.

<sup>172</sup> See notes 15 & 16 *supra*.

constitutionally mandated as an integral part of treatment, or whether they are viewed as protectable under "property" and "liberty" concepts.<sup>173</sup> Courts have consistently held that lack of funds is no excuse for a state's failure to provide adequate treatment in state mental and rehabilitative institutions<sup>174</sup> or to provide tolerable living environments in pretrial detention facilities or prisons.<sup>175</sup> The "lack of funds" rationale is similarly inadequate to justify deprivation of therapeutic work programs which are generally essential to a healthful physical and psychological environment and to successful treatment and return to the community.

Termination of work programs thus violates equal protection because the erosion of the value of treatment caused by the elimination of an essential treatment modality substantially diminishes the state's justification for confinement. Absent justification, confinement is an impermissible infringement of personal liberty. From a right-to-work perspective, unjustified termination of work programs is similarly invalid.

### *Procedural Due Process*

Procedural due process requires a state to accord an individual the right to notice and hearing before depriving him of a liberty or

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<sup>173</sup> See note 176 *infra*.

<sup>174</sup> *Wyatt v. Aderholt*, 503 F.2d 1305, 1314-15 (5th Cir. 1974); *Welsch v. Likins*, 373 F. Supp. 487, 499 (D. Minn. 1974). Despite the anticipation that heavy state expenditures would be involved, the *Wyatt* court held that the state could not fail to provide adequate treatment in Alabama institutions for the mentally ill and mentally retarded "for budgetary reasons alone," since without treatment there would be no justification for confinement. 503 F.2d at 1315. In *Welsch*, the court went one step further, stating that evidence of "substantial progress" and anticipation of continued improvement were insufficient defenses if the level of treatment fell short of constitutional adequacy. 373 F. Supp. at 497-98. The court acknowledged the difficulties of entering "what is essentially a question of conflicting legislative priorities," but noted that "courts have on occasion forced additional expenditures on State agencies to remedy constitutional violations." *Id.* at 498, 499. See also *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972) (lack of heat in state correction and treatment center not justified by lack of funds).

<sup>175</sup> See, e.g., *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (lack of funding for alternate regulatory procedures does not justify "strapping" of prisoners since "[h]umane considerations and constitutional requirements are not . . . to be measured or limited by dollar considerations"); *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (obligation of state board of corrections to eliminate unconstitutional conditions in prison not dependent on legislative action). For cases involving pretrial detainees see *Rhem v. Malcolm*, 507 F.2d 333, 340-41 & n.19 (2d Cir. 1974) (institution ordered closed, but where this is not possible, a court may be compelled "to order an expensive, burdensome or administratively inconvenient remedy" to rectify unconstitutional conditions of confinement); *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971) (lack of resources cannot justify lack of space, recreation, plumbing facilities, and ventilation in facilities housing persons awaiting trial and release will be mandated if necessary expenditures are not forthcoming).

property right protected by the fourteenth amendment. When determining whether due process is required, courts employ a two-step analysis: First, it is determined whether the right or interest at stake is embraced within the meaning of the "liberty" or "property" language of the fourteenth amendment;<sup>176</sup> second, if the right is deemed protected, the court balances the individual's "interest in avoiding [a] loss" against "the governmental interest in summary adjudication" in order to determine the degree of notice and hearing that is required.<sup>177</sup>

Initially, it is apparent that due process protects therapeutic work programs because such programs embody both property and liberty interests. They constitute a property interest in that they are the sole means by which an institutional resident may earn a livelihood, and a liberty interest in that they are vital to a resident's psychological progress and to his development of marketable skills, and thus are instrumental in returning him to society.

In addition, due process is applicable on the basis of the nexus between therapeutic work programs and the right to treatment. Constitutionally mandated treatment also embodies fourteenth amendment liberty interests because it is usually the only road out of the institution. As any erosion of the quality of treatment prolongs confinement, it follows that a substantial diminution of treatment affects

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<sup>176</sup> Board of Regents v. Roth, 408 U.S. 564, 569-71 (1972). A number of interests have been held to come within the meaning of fourteenth amendment "liberty." See, e.g., Wolff v. McDonnell, 418 U.S. 539, 555-58 (1974) (unjust physical restraint); Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972) (unjust physical restraint); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) ("reputation, honor, or integrity"). The Court has in recent years adhered to an earlier Court's definition of fourteenth amendment "liberty" as

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). See, e.g., Board of Regents v. Roth, *supra* at 572.

Fourteenth amendment "property" interests include personal property, see Fuentes v. Shevin, 407 U.S. 67, 96 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969), as well as a variety of state-created benefits such as education, see Goss v. Lopez, 419 U.S. 565, 572-76 (1975), drivers licenses, see Bell v. Burson, 402 U.S. 535, 539 (1971), and welfare, see Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970). For a discussion of mental patients' right to procedural due process protection of their property interests see 43 FORDHAM L. REV. 624 (1975). See also Veccione v. Wohlgemuth, 377 F. Supp. 1361 (E.D. Pa. 1974) (statute permitting state seizure of mental patients' assets without hearing or notice, to pay for care and maintenance held violative of due process and equal protection clauses).

<sup>177</sup> Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

fourteenth amendment liberty interests and thus may not be implemented without notice and hearing.<sup>178</sup> Since work therapy is inextricably bound to effective treatment, it is, in effect, a right adhering within the broader right to treatment and imbued with the same constitutional due process protections.<sup>179</sup>

Once it is established that these programs may not be terminated without notice and hearing, it becomes necessary to balance the competing state and individual interests to determine what form of hearing is required. Here, the loss suffered by residents is substantial. Termination effects a major change in the conditions of confinement, eliminates a major form of therapy, delays release from the institution, and deprives residents of income and other work-related benefits. In short, the individual interests at stake are overwhelming. On the other hand, the state interest in summary adjudication—a desire not to spend money or to complicate institutional administrative processes—cannot outweigh the individual interests at stake.

Balancing these interests, it is apparent that the following procedures are required. First, prior to any determination regarding work programs, the agency should hold public evidentiary hearings at which all interested parties have the opportunity to testify and submit data on the impact of work program termination.<sup>180</sup> Second, prior to

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<sup>178</sup> Courts have not been presented with issues involving institutionalized residents' rights to notice and hearing prior to termination of treatment programs, primarily because (1) litigation has focused on forcing states to provide treatment in the first place, *see generally* text accompanying notes 86–87 *supra*, and (2) virtually no patients have had general access to counsel subsequent to commitment to state psychiatric institutions. *But see* N.J. STAT. ANN. § 30:4–24.2(g) (Supp. 1976–77); *id.* § 52:27E–21 *et seq.* (Supp. 1975–76). However, at the very least, the liberty concept embodied in treatment would warrant the same due process considerations given to a person's interest in parole or probation.

<sup>179</sup> *See* *Bullock v. Carter*, 405 U.S. 134 (1972). *Bullock* concerned an equal protection challenge to a Texas filing fee requirement for candidates entering a state primary. *Id.* at 135, 141. The Court noted that many potential candidates who had neither personal wealth nor wealthy supporters were, in effect, foreclosed from running for office, and perceived a significant effect on voters resulting from a reduction in the number of potential candidates, particularly those candidates who might represent the interests of poorer communities. *Id.* at 143–44. Emphasizing the nexus between the right to vote and "the resources of the voters supporting a particular candidate," the fee requirements were subjected to a strict scrutiny, *id.* at 144, and found violative of equal protection, *id.* at 149.

This case suggests that where the state seeks to eliminate an interest (therapeutic work), which is essential to the integrity of a constitutional right (treatment), the due process protections adhering to the right to treatment are, of necessity, applicable, and subject to strict scrutiny, even if the interest in work may be termed nonfundamental.

<sup>180</sup> Both the federal and the New Jersey Administrative Procedure Acts require notice and hearing prior to agency rulemaking. *See* 5 U.S.C. § 553 (1970); N.J. STAT. ANN. § 52:14B–4(a) (Supp. 1975–76). It seems clear that the act terminating all work

any actual termination, each resident must be given individual notice and a hearing.<sup>181</sup> If a resident has been declared judicially incompetent or a bona fide doubt exists as to his competence, an independent guardian ad litem should be appointed.<sup>182</sup> In view of the importance of these programs to residents, the subsequent hearing must be an adversary proceeding, accompanied by the full panoply of procedural due process rights, including the right to counsel, to cross-examination, to presentation of witnesses, and to a neutral hearing body.<sup>183</sup> Doubtless, such procedures may appear to be time-

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programs in state mental institutions is "rulemaking" within the meaning of the acts since it is "an agency statement of general . . . applicability." 5 U.S.C. § 551(4) (1970). See also N.J. STAT. ANN. § 52:14B-2(e) (Supp. 1975-76). Both statutes describe the hearing required as the opportunity to present "data, views, or arguments" with or without oral argument. 5 U.S.C. § 553(c) (1970); N.J. STAT. ANN. § 52:14B-4(a) (Supp. 1975-76). In considering the type of hearing required, commentators generally agree that trial-type hearings are appropriate where the agency action involves questions of legislative and adjudicatory facts and issues of law. See K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.05, at 165 (3d ed. 1972); Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 85; Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1335 (1972). In light of the importance of work programs to the institutional environment and to individual treatment programs, evidentiary hearings must be held prior to agency action which would alter or abolish such programs. At these hearings, all interested parties—patients, their guardians, their legal representatives, doctors, and hospital administrators—would have the opportunity to present all relevant data and testimony, to cross-examine witnesses, and, if necessary, to present expert testimony. Such hearings are essential to provide the information from which a reasoned decision regarding work programs can be made, to provide an adequate record for judicial review, and to ensure that those affected by the regulation will be afforded the necessary degree of due process.

<sup>181</sup> One court, relying on *Goldberg v. Kelly*, 397 U.S. 254 (1970), has determined that a hearing, with a neutral hearing officer, and the opportunity to cross-examine witnesses when appropriate, be afforded a patient in a mental institution before being transferred. *Jones v. Robinson*, 440 F.2d 249, 250-52 (D.C. Cir. 1971). In language which is appropriate to the question of termination of work programs as well, the court noted that "due process is required in order to make as certain as the hospital authorities reasonably can the correctness of their decision." *Id.* at 251 (footnote omitted). See also Broderick, *A One-Legged Ombudsman in a Mental Hospital: An Over-the-Shoulder Glance at an Experimental Project*, 22 CATH. U.L. REV. 517, 541-42 (1973).

<sup>182</sup> See *Dale v. Hahn*, 440 F.2d 633, 638 (2d Cir. 1971). See also N.J. STAT. ANN. § 30:4-24.2 (Supp. 1976-77).

<sup>183</sup> The thrust of recent case law indicates that hearing procedures must be more complex and adversary in character when the loss threatened is serious. For example, in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the state's interests in terminating parole where conditions of parole had been violated or where subsequent crimes had been committed was balanced against the parolee's interest in retaining his liberty. The state's interests being great, the Court permitted the state to place the parolee in custody without a prior hearing. *Id.* at 483, 485. However, the Court also found the parolee's interest to be substantial, mandating that a hearing be held shortly after arrest to determine probable cause and that another hearing be held prior to final revocation

consuming and costly. Nonetheless, they must be implemented because the rights at stake are so crucial and so clearly among the lib-

of parole. *Id.* at 482, 484-89.

Since the first hearing was summary in nature, the Court only required that, in addition to notice of the alleged parole violations, a parolee be allowed to appear in his own behalf, and to have a conditional right of confrontation, an independent decision-maker, and a written report of the proceeding. *Id.* at 485-87.

Since the second hearing resulted in a final decision, the Court required that the parolee be accorded far more extensive rights:

- (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

*Id.* at 489. One of the points implicit in *Morrissey* was the difference between parole revocation and denial. *See id.* at 482 & n.8. Since the *potential* loss of already-existing liberty (albeit conditional) involved such a "grievous loss," due process required, at a minimum, a full adjudicatory-type hearing prior to revocation. *Id.* at 482, 489. The *Morrissey* result may be compared with the situation in *Beckworth v. New Jersey State Parole Bd.*, 62 N.J. 348, 301 A.2d 727 (1973), where the court distinguished *Morrissey* and found that the full panoply of due process rights did not attach to a parole release hearing, in part due to the distinction between the deprivation of an already-existing benefit and the denial of a potential future benefit. *Id.* at 362-66, 301 A.2d at 734-36. Clearly, the termination of heretofore-existing work programs falls within the scope of *Morrissey*, with the result that revocation of work programs must be accompanied by the same procedural safeguards as those mandated for revocation of parole.

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Court held the *Morrissey* procedures applicable to a revocation of probation. *Id.* at 786, 791. *See also* *Avant v. Clifford*, 67 N.J. 496, 525-32, 341 A.2d 629, 645-49 (1975) (*Gagnon* and *Morrissey* principles applied to prison disciplinary procedures). The *Gagnon* Court declined to mandate a right to counsel because "[i]n most cases, the probationer or parolee has been convicted of committing another crime or has admitted the charges against him." 411 U.S. at 787 (footnote omitted). However, the Court adopted a case-by-case approach to gauge when "fundamental fairness" would require the presence of counsel. *Id.* at 790.

Numerous courts have held that in proceedings where the liberty rights of mentally ill or allegedly mentally ill individuals are jeopardized by commitment, there is a right to counsel. *See In re Barnard*, 455 F.2d 1370, 1375-76 (D.C. Cir. 1971); *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1097-98 (E.D. Wis. 1972), *vacated on other grounds and remanded*, 414 U.S. 473, *modified on other grounds and reinstated*, 379 F. Supp. 1376 (1974), *vacated on other grounds and remanded*, 421 U.S. 957 (1975); *Dixon v. Attorney General*, 325 F. Supp. 966, 974-75 (M.D. Pa. 1971); *In re Fisher*, 39 Ohio St. 2d 71, 313 N.E.2d 851, 858 (1974).

Recently, a New Jersey county court vacated an order which would have attached all income over \$25 of all patients at a county hospital for their care and maintenance, and ordered that individual hearings be held to determine the financial ability of each of 350 patients to contribute to their maintenance. Patients are to be represented by counsel and given an opportunity to present evidence. Order Vacating Judgment & Defendants' Brief in Support of Motion, *Board of Chosen Freeholders v. Connell*, No. 83870 (Hudson County Ct., Dec. 2, 1975).

erty and property interests which the fourteenth amendment was meant to protect.

#### CONCLUSION

The outrages of "institutional peonage" led to the welcomed and needed reforms highlighted by the *Wyatt* and *Souder* cases. Responses such as the one in New Jersey, however, may have succeeded in merely replacing one undesirable situation with another, a result clearly not foreseen by the mental health law reform movement at the time the question of litigation in this area first arose.

Because the question of the necessity for payment for work done is now beyond dispute, attention can be turned to the affirmative need for such programs, from both the therapeutic and constitutional points of view. The action taken by those states which have abolished all programs is clearly unconstitutional and may be ultimately seen as a bad situation made worse. It is urged that a reinstatement of therapeutic programs—solely on a paid, voluntary basis—would ameliorate conditions and offer residents a meaningful opportunity to receive treatment designed to give each committed person "a realistic opportunity to be cured."<sup>184</sup>

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<sup>184</sup> *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).