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NOTES AND COMMENTS

The Constitutional Right to Free Communication of the Institutionalized Resident

Justified by the generic first amendment protection to unabridged expression and association, a United States citizen cannot be unreasonably denied the right to communicate by mail;[1] by telephone;[2] with legal counsel;[3] with the opposite sex;[4] with others.[5] In most states where such a citizen becomes "mentally ill," the person may be involuntarily civilly committed.[6] Although there is no justification for such a commitment

[1] *See,* Lamont v. Postmaster General, 381 U.S. 301, 306 (1965) (An act which directs administrative officials to inspect and appraise mail is a violation of the first amendment of the United States Constitution); Freedman v. Maryland, 380 U.S. 51 (1964); (Prompt judicial review of mail censorship is constitutionally essential); Hannegan v. Esquire, 327 U.S. 146 (1964) (". . . . grave constitutional questions are immediately raised once it is said that the use of mail censorship is essential); Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 37 (1921, Holmes Dissent) ("The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . .") ; Davis v. Superior Court, 175 Cal. App. 2d 8, 20 (1959) (dictum) (an absolute ban on access to the mails would be unconstitutional); W. HACBTEN, THE SUPREME COURT ON FREEDOM OF THE PRESS 180-91 (1968) ("The use of the mails is now closer to being a basic right belonging to the people rather than a privilege bestowed by government and subject to revocation.")

[2] *Cf.,* Weiss v. United States, 308 U.S. 321 (1939); Red Lion Broadcasting Co. v. F.C.C., 381 F.2d, 908 (D.C. Cir. 1967); Massengale v. United States, 240 F.2d 781 (6th Cir.), *cert. denied,* 354 U.S. 909 (1957).

[3] *See e.g.,* Goldberg v. Kelly, 397 U.S. 254, 70 (1970) (At administrative proceeding to terminate welfare benefits the recipient must be permitted to retain an attorney), Escobedo v. Illinois, 378 U.S. 478 (1964); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (dictum) ("If in any case, civil or criminal, a . . . court were arbitrarily to refuse to hear a party by counsel, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense."); Comment, *Representation By Counsel in Administrative Proceedings,* 58 COLUM. L. REV. 394, 96 (1958) (The right to counsel is found in the United States Constitution amendment VI. All states except Virginia guarantee counsel to the criminal defendant. Nine state constitutions provide for retained counsel in civil actions).

[4] *See,* Eistentadt v. Boird, 405 U.S. 438 (1972); Griswold v. Conn., 381 U.S. 479 (1965).

[5] *See e.g.,* Stanley v. Georgia, 394 U.S. 557 (1969) ("the Constitution protects the right to receive information and ideas . . . regardless of their social worth."); NAACP v. Alabama, 357 U.S. 449 (1958) (dictum) (freedom of speech and of association are inextricably tied. A person has the right to "advocacy of both public and private points of view" and "associate freely with others.").

[6] "Of the forty-three jurisdictions which now provide some form of judicial hos-

beyond the fact that the individual is sick and is in need of care,[7] often the individual's first amendment freedoms are restricted while a resident of a mental institution.[8] This article will focus on the extent to which such restrictions violate the constitutional right of free expression and association, e.g. by mail, by telephone, with legal counsel, with the opposite sex, by general visitation.

The first and fourteenth amendments of the United States Constitution restrict the government's ability to control free communication to the extent that the abridgment serves no reasonable government interest.[9] Therefore, an analysis of the status of a resident's constitutional rights should begin by surveying the premise that, a resident retains all rights of an ordinary citizen except those expressly, or by necessary implication, taken from him[10] pursuant to a legitimate state interest. It has already been noted that the state interest in committing the "mentally ill" is care.[11]

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pitalization, only nine phrase the sole criterion for hospitalization in terms of whether the individual is dangerous to himself or others." "Treatment," "welfare," and "best interests" are the predominant criteria for commitment in the forty-three states. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 36, 72-76 (rev. ed. 1971).

[7] *Id.* at 36.

[8] "Patients in state mental hospitals are deprived of rights not by law, but because they are unaware of their rights or are unable to assert them." Rollins, *Suggested Revisions of North Carolina's Laws on Involuntary Hospitalization for Mental Illness,* NORTH CAROLINA MEDICAL JOURNAL 1019, 20 (Dec. 1972); "Without actual observation of hospital practices, it is impossible to discern what rights patients have in those states which do not have statutory provisions in these rights to free expression areas. Unfortunately, comparable uncertainties exist regarding the actual protection of patients' rights in many of the states which do guarantee these rights by statute." BRAKEL & ROCK, *supra* note 6, at 155; As part of a federal grant (ESEA Title I—P.L. 89-313 eight law students, including the author made a survey on the implementation of the North Carolina Department of Mental Health on Patients' Rights in four North Carolina institutions. The results somewhat substantiate the fears suggested by Brakel and Rock. Buford & Gostin, *Rights of Mental Patients in North Carolina's Mental Health Institutions* (1973).

[9] O'Brien v. United States, 391 U.S. 367, 77 (1968) ("We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest, . . . ;"); *See also,* C. BLACK JR., PERSPECTIVES IN CONSTITUTIONAL LAW 89-93 (1969). Comment, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969).

[10] People v. McCloud, 310 N.Y.S.2d 772 (1970) (mentally incompetent are not, by their misfortune, stripped of constitutional rights). *See,* Coffin v. Reichard, 143 F.2d 443, 45 (6th Cir. 1944), *cert. denied,* 355 U.S. 887 (1945) ("A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.").

[11] *See* note 7 *supra. See also,* P. MARSCHALL, THE MENTALLY ILL AND THE RIGHT TO TREATMENT 40 (Morris ed. 1970).

The legal theory of such a commitment is the *parens patriae* power of the state.[12] *Parens patriae* is a right of sovereignty and imposes a duty on the sovereign to care for persons who, because afflicted with some disability, are unable to act in their own best interests.[13] The constitutional inquiry, therefore, is whether restriction of free expression is related to the care or "best interests" of the individual or any other rational state interest.

A. *Therapeutic Justification for Encouraging Free Exercise of Constitutional Right to Communicate*

In the interests of "care" the concept of "normalization,"[14] would dictate that a resident should not be restricted in the opportunity for free expression and association. To expeditiously return the liberty the state has taken from the resident, the institution must keep intact all of the normal behaviors which are vital to a functioning citizen. This is necessary to prevent the resident from becoming "institutionalized," i.e., overly dependent on the hospital "way of life."[15] The resident should not grow unaccustomed to exercising communicative skills because this is a normal behavior which will help the individual in readjustment to the community. Normal communication with others is a recognized therapeutic

[12] BRAKEL & ROCK, *supra* note 6, at 36.

[13] KY. REV. STAT. ANN. § 202.010 (1954); MO. REV. STAT. § 202.780(5) (1953); NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL, Public Health Service No. 51 § 1 (1952); N.M. STAT. ANN. § 34-2-1(a) (1953); N.D. REV. CODE § 25-01-01(1) (1957 Supp.); UTAH CODE ANN. § 64-7-28(9) (1951); WASH. REV. CODE § 71.02.010 (1959); W. VA. CODE ANN. § 27-1-2 (1955).

[14] Defined as a set of principles derived from the belief that mental health institutions should primarily serve as agents for a resident's rehabilitation to society, i.e., each institution should allow the individual to live as normally as possible. The principle of normalization has been given constitutional sanction in Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), 344 F. Supp. 373 (order and decree, appendix) and statutory sanction in CAL. ANN. CODE WELFARE AND INSTITUTIONS §§ 5001, 5115, 5200 (1969).

[15] Even though the hospital may have "normalized" the resident's precommitment deviant behavior, the individual cannot leave the hospital because he or she has grown accustomed and dependent upon institutional life. *See* Goffman, *Characteristics of Total Institutions*, PREVENTIVE AND SOCIAL PSYCHIATRY 43, 45 ("mass movement" and other "totalistic" features of institutions foster dependence, impair ability to make small independent decisions). *See also* BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 499-503 (3d ed. 1959). (Becoming unaccustomed to exercising communicative skills in prison is a non-normalized behavior which can have adverse consequences when the prisoner is released); *American Handbook of Psychiatry* 1832 (ed. S. Arieti 1959) (the hospital should not make life too simple for the resident because this will impede a proper adjustment to community living).

need of the institutionalized resident.[16] Further, communication "keeps the resident in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by . . . (institutional) life . . . , stimulates his more natural and human impulses and otherwise may make contributions to better mental health."[17] At the same time, the individual is exposed to countervailing ideas[18] and is better able to be informed on such things as government issues (to cast an intelligent vote[19]) and patients' rights (for self-assertion of rights[20]) which are helpful in the resident's habilitation.[21]

B. *Therapeutic Justification for the Restriction of Constitutional Right to Communicate*[22]

Some will argue that restrictions on communication are necessary for the well-being of the resident[23] and therefore are justified under the state's *parens patriae* power.[24] Such restrictions may not be violative of the United States Constitution's first and fourteenth amendments because they are made pursuant to the rational state interest of providing care[25] for the mentally disabled. The hospital might rationally justify restrictions on first amendment freedoms through its medical prerogatives, i.e., the so-

[16] LANGNER & MICHAEL, LIFE STRESS AND MENTAL HEALTH 128 (1963) (". . . social isolation is a symptom of mental disturbance as well as a causal factor"); Arieti, *supra* note 15. "Every psychiatrist is familiar with the fact that when he opens one of his textbooks and runs across the description of a pathological phenomenon—be it hallucination and delusion or resistance and aggression the pathology is described in terms of a patient's communicative behavior," at 855; *Symposium on Preventive and Social Psychiatry Apr. 15-17, Walter Reed Army Institute of Research,* Wash. D.C. (1958); *See,* AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTION STANDARDS 400 (1959); *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong. 1st Sess., Pt. 1 at 45 (1961); Arieti *supra,* note 14, at 909, 17, 24.

[17] BARNES & TEETER, *supra* note 15, at 492.

[18] *See generally,* Comment, *The Right of Expression in Prison,* 40 S. CAL. L. REV. 19 (1967).

[19] N.C. GEN. STAT. § 122-55 (1963) (hospitalization does not automatically divest the right to vote or other civil rights).

[20] Rollins, *supra* note 8 at 1020 ("Patients in state mental hospitals are deprived of rights not by law, but because they are unaware of their rights. . . ").

[21] *See* note 16 *supra* and accompanying text.

[22] The responses that follow are taken partly from Buford & Gostin, *supra* note 8.

[23] BRAKEL & ROCK, *supra* note 6 at 155. (Although modern medico-legal opinion rejects the notion that residents are incapable of exercising their rights, "this is not to say that in modern times mental patients should retain all their personal rights. Effective treatment in many instances necessitates a withdrawal of certain patient rights.")

[24] *See* note 12 *supra* and accompanying text.

[25] *See* note 9 *supra* and accompanying text.

called medical model,[26] which provides for the medical needs of residents, or because of administrative needs of the hospital.[27] The most prevalent use of the medical model to restrict rights to communicate is "milieu" therapy. Here, the hospital manipulates the resident's environment to modify deviant behavior or personality traits.[28] This therapeutic notion can be used to isolate the resident from a "toxic" environment by restricting communication between the resident and his environment.[29] Similarly, the resident's judgment might be so impaired that restrictions on communication might be necessary. The paradigm example would be the manic depressive reactive in a hypomanic stage (increased assertiveness, careless gaiety and boundless energy). The person to some extent betrays his or her normal tendencies and is now irrepressible and often unconventional in speech and manner. The person is narcissistic, childishly proud, glib of tongue, genial of hand, extravagant with money, pawns belongings, full of pranks, imprudent (e.g., spouting obscenity), openly hostile and aggressive.[30]

1. *Mail and Telephone*

During a hypomanic phase the individual "writes numerous letters." "No sooner, perhaps has he posted a letter than he decides that the mail is too slow for his urgent business so he dispatches a telegram to his correspondent."[31] Should the hospital, acting in the resident's best interests, censor his mail or telephone communications in order to prevent the resident from: (a) impairing his integrity and credibility in the community to where he may be released in the future? (b) writing away for a subscription to a magazine he cannot pay for? (c) writing threatening

[26] *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 91st Cong., 1st and 2d Sess. at 413 (1970) ("The medical model essentially is that behavioral variances are analogous to disease in the physical body. The implication of the analogy is that there is a distinct discontinuity in the continuum of behavioral differences which can be objectively discerned, measured and labeled 'pathological.'"

[27] *See,* Henry v. Ciccone, 315 F. Supp. 889 (W.D. Mo. 1970) (Inspection of mail of unconvicted resident of a medical center was justified in order to maintain administrative order). *See also,* S. CA. L. REV., *supra* note 18 at 411 *et seq.* (analysis of the administrative needs of a penal institution).

[28] Note, *Conditions and other Technologies Used to 'Treat?' 'Rehabilitate?' 'Demolish?' Prisoners and Mental Patients,* 45 S. CA. L. REV. 616, 21-22 (1972).

[29] *Cf.,* Arieti, supra note 14, at 1829 ("If, in spite of the best available outpatient care, the patient's suffering continues to increase, removal from his environment may be a necessary step to bring symptomatic relief.")

[30] L. KOLO, MODERN CLINICAL PSYCHIATRY 369-70 (1973).

[31] *Id.* at 370.

letters to a family member or government official? (d) receiving contraband in the mail?

2. *Interaction With the Opposite Sex and Other Associations*

"The hypomanic is often erotic and, if a man, may indulge in sexual excess, while a previously chaste and modest young woman may become sexually promiscuous," often making indecent and obscene proposals.[32] The manic depressive in a hypomanic stage also is overreactive to the extent of violent motor excitement. In the hospital, the resident may tear his or her clothing and destroy objects.[33] Acting in the best interests of the individual, of other residents and of outside visitors, should the hospital allow the resident to: (a) interact with the opposite sex? (b) interact with other residents generally? (c) interact with visitors? (d) make visits outside the hospital (e) interact with legal counsel?

If given the additional psychiatric fact that, on recovery from a manic state the individual perceives his or her past behavior as unpleasant and is sorry for such behavior,[34] should the law uphold hospital restrictions on free expression and association in those instances?[35]

C. *Lowest Common Denominator: A Prior Restraint?*

A hospital administrator may point to a specific resident, e.g., a hypomanic, in a specific instance and give a rational reason for restricting first amendment rights in that particular case. In the constitutional language of free expression, the administrator has isolated a particular danger (to the well-being of the resident or the institution) which is clear and imminent.[36] The administrator then formulates a general policy of first

[32] *Id.* at 370.

[33] *Id.* at 371.

[34] *Id.* at 372.

[35] (*See generally, id.* at 376-7 (case study: m.m. was in and out of a state mental hospital for years. During manic phases she signed leases on strange apartments; bought furniture; went into debt; pawned her rings; wrote checks without finances; purchased fifty-seven hats; instituted divorce proceedings; smoked excessively and swore loudly (contrary to usual habits); made advances to the physician. In the last year m.m. has lost her manic symptomatology and has been making an excellent home and community adjustment as a good housewife and mother. If possible should the hospital have suppressed her actions while she was in a manic phase?)

[36] Whitney v. Cal., 274 U.S. 357, 73 (Brandeis concurring) (1927). The constitutional phrase "clear and present danger" has been frequently used since its formation in Schenck v. United States, 249 U.S. 47, 52 (1919). As Justice Frankfurter has pointed out, "clear and present danger" is easy to oversimplify. One must take account of such things as the relative seriousness of the danger (the danger of mental illness to a single individual is not as great as that of a potential overthrow of the government as in *Dennis*); the value of the speech (see, notes

amendment restriction in that area. One might call this the lowest common denominator theory of mental hospital administration.[37] That is, the hospital will restrict freedoms to the extent necessary for the well-being of its lowest functioning resident in a given area. These restrictions will form a general hospital policy and will apply to all residents even if they are capable of exercising, and can benefit from, greater freedoms. For example, if one resident was harmed by delusional information sent in a letter by the resident's paranoiac mother, the hospital not only reads and censors all future letters sent by his mother; not only reads and censors all future letters sent to him, but reads the censors every letter sent to every resident as a general hospital policy.

In the constitutional language of free expression, the administrator has placed a prior restraint on first amendment rights which is presumptively impermissible.[38] Where the government places a restriction on communication before it has been exercised, it must do so with narrow objectives and definite standards,[39] restricting its scope only to those individuals which the policy must necessarily reach in order to serve its purposes.[40] In deciding cases where first amendment restrictions were at

18 and 19 *supra* and accompanying text); and the availability of more moderate controls (see note 45 *infra* and accompanying text). Dennis v. United States, 341 U.S. 494, 542 (Frankfurter concurring) (1951). Justice Stone suggested that state action involving free speech and association has a higher standard of review, as does state action which impinges on a group with little access to the political processes (e.g. mental patients). United States v. Carolene Prods. Co., 307 U.S. 144, 52 n. 4 (1938).

[37] Defined as a minimum trait or characteristic shared by all members of a group. Placed in the context of mental hospital administration, rules are geared to the lowest level of communicative skill which is common to all residents. Therefore, if one person is hypomanic and as a result cannot have free expression and association, the hospital allows no one to exercise their rights of expression and association. *See,* Muller, Involuntary Hospitalization, 9 *Comprehensive Psychiatry* 192 (1968) (Indignant protests arise when a former mental patient commits a crime. The result is a restrictive custody policy even though it is not strictly necessary for the welfare of the public.).

[38] United States v. Washington Post Co., 403 U.S. 713 (1971); Rowan v. Keefe, 402 U.S. 415 (1971); Near v. Minn., 283 U.S. 697 (1931); Alberti v. Cruise, 383 F.2d 268 (4th Cir. 1967) (In an action for malicious prosecution and defamation of character, the lower court enjoined the plaintiff from speaking or writing to the defendant or members of his family. "We think this . . . order is a prior restraint upon Mrs. Alberti's rights of freedom of speech guaranteed by the First Amendment.").

[39] Shuttlesworth v. Birmingham, 382 U.S. 87 (1965).

[40] *See generally,* Wormuth & Mirkin, *The Doctrine of Reasonable Alternative* 9 UTAH L. REV. 254, 67-93 (1964); comment, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969). *See also,* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives,* 70 MICH. L. REV. 1108 (1972).

issue, the Supreme Court has voided state restrictions because "less drastic means"[41] were available or because of the lack of "precision of regulation"[42] or because the government policy was not "reasonably drawn so that the precise evil (was) exposed."[43] A hospital policy promulgated through the lowest common denominator processes suggested above places a prior restraint on the exercise of free speech and association of every resident in the mental hospital. Such a policy may be constitutionally necessary to combat the "evil" of mental illness for some residents but the restrictions also apply to others for whom the restrictions serve no habilitative purpose (often the restrictions are therapeutically harmful).[44] Moreover, the lowest common denominator policy of hospital administration has a more reasonable alternative. Simple entry into the hospital should not affect first amendment rights. Any restriction necessary because of a *clear and imminent danger to the health of the resident* should be justified, in writing on the individual's hospital record, on an individual basis by the chief medical officer of the hospital unit.[45]

A rule based on the lowest common denominator is constitutionally impermissible. It results in a state policy which is a prior restraint on first amendment rights; which is overbroad in its application; and for which there is a more reasonable alternative. That less restrictive alternative reasonably limits its application to individuals who will clearly and imminently be harmed (or will do harm to others) by the exercise of certain communicative freedoms.

D. *The Few Cases on Point*

Courts have been very stingy in exercising their constitutional prerogatives to assure institutionalized residents the right to communicate. For example, the New York Court of Appeals, in *Phagen v. Miller*,[46] had

[41] E.g., United States v. Robel, 389 U.S. 268 (1967); Shelton v. Tucker, 364 U.S. 479, 88 (1960).

[42] E.g., NAACP v. Button, 371 U.S. 415, 38 (1963).

[43] E.g., Schneider v. Smith, 390 U.S. 17, 24 (1968).

[44] See note 16 *supra*.

[45] This alternative is in some ways similar to the Draft Act. "Right to communications and visitation; . . ." "(a) Subject to the general rules and regulations of the hospital and except to the extent that the head of the hospital determines that it is necessary for the medical welfare of the patient to impose these restrictions, every patient shall be entitled (1) to communicate by sealed mail or otherwise with persons, including official agencies, inside or outside the hospital; (2) to receive visitors. . . . *A Draft Act Governing Hospitalization of the Mentally Ill* § 21, PUBLIC HEALTH PUBLICATION No. 51 (rev. 1952).

[46] 317 N.Y.S.2d 128 (1970).

the opportunity to review a New York statute which limited a patient upon admission to communicating only once with any person within the state. The court saw no violation of the first amendment. In fact, when courts have exercised their constitutional powers to overturn restrictions on free communication, they have used the United States art. I, § 9 (or state constitutional) right to habeas corpus,[47] and not the first amendment right of expression and association.[48] This constitutional treatment of residents' rights is unnecessarily limiting in scope. It protects the resident's right to communicate with his or her attorney (or other officers of the court) but does not protect against restrictions on communication to friends or others.[49] Attorneys in the past have even refrained from asking the court to limit general hospital censoring policies on constitutional grounds, so long as their right to communicate was not abridged.[50]

The mental health system has escaped strict accountability by First Amendment standards. Those persons who are stigmatized by the label "mentally ill" have been exempted from rigorous constitutional protection of their right to freely communicate and associate. Where courts have spoken they have done so broadly[51] and without impact. The extent to which the First Amendment applies to the institutionalized resident needs definition. The judiciary has not yet extended the "less drastic means" test to free speech and association in mental institutions. Further, the courts have never decided whether a uniform policy on free expression and association in mental institutions—the lowest common denominator policy—possesses a prior restraint or restricts rights beyond the extent necessary for rehabilitation or administrative efficiency.

The American attitude that mentally disordered persons should be removed and isolated from the community "for their own good" is an outdated and inhumane notion of therapy. This attitude must be dis-

[47] Hoff v. State, 279 N.Y. 490 (1939); People *ex rel.* Jacobs v. Worthing. 4 N.Y.S.2d 630 (1938); In re Weightman's Estate; 126 Pa. Super. 221 (1937).

[48] *But cf.,* Wyatt v. Stickney *supra* note 14 at appendix (right to communication is part of the *constitutional* right to treatment).

[49] *But see,* Hanson v. Biddle, 84 Kan. 877 (1911) (The court interpreted the Kansas statute to allow communication with friends but forbid communication with attorneys).

[50] Hoff v. State, *supra* note 46. (The hospital had a policy of censoring mail but the attorney failed to challenge its constitutionality.

[51] Covington v. Harris, 419 F.2d 617, 24 (D.C. Cir. 1969) ("additional restrictions beyond those necessarily entailed by the hospitalization are as much in need of justification as any other deprivation of liberty."); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) ("deprivations of liberty solely because of dangers to the [mentally] ill persons themselves should not go beyond what is necessary for their protection."). *See,* In re Jones, 338 F. Supp. 428 (D.D.C. 1972).

carded and replaced with strict enforcement of First Amendment rights in mental health facilities.

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