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# United States - Mental Health - The Bill of Rights of the Developmentally Disabled Assistance and Bill of Rights Act Did Not Create Substantive Rights for the Mentally Retarded to Appropriate Treatment in the Least Restrictive Environment

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## UNITED STATES—MENTAL HEALTH—THE "BILL OF RIGHTS" OF THE DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT DID NOT CREATE SUBSTANTIVE RIGHTS FOR THE MENTALLY RETARDED TO APPROPRIATE TREATMENT IN THE LEAST RESTRICTIVE ENVIRONMENT

Plaintiffs[1] alleged that conditions at the Pennhurst State School and Hospital[2] were unsanitary, inhumane, and dangerous.[3] The residents of Pennhurst contended that they were denied due process and equal protection of the law in violation of the fourteenth amendment;[4] suffered cruel and unusual punishment in violation of the eighth[5] and fourteenth amendments;[6] and were denied rights given by the Developmentally Disabled Assistance

1. Pennhurst State School & Hosp. v. Halderman, 101 S. Ct. 1531 (1981). The present case is a consolidation of five cases. Terri Lee Halderman, a minor retarded resident of Pennhurst, sued on behalf of herself and all other Pennhurst residents. Defendants included Pennhurst, its superintendent, and various Commonwealth of Pennsylvania officials. Intervening plaintiffs included other mentally retarded persons, the United States, and the Pennsylvania Association for Retarded Citizens (PARC). Several surrounding counties were added as defendants by PARC and Halderman, who alleged that the counties were responsible for commitments to Pennhurst and for the lack of community facilities. *Id.* at 1534.

2. *Id.* Pennhurst is an institution for the mentally retarded in Pennsylvania. It has approximately 1,200 residents. Seventy-five percent of the residents have an IQ of less than 35, and are classified as severely or profoundly retarded. Some are also physically handicapped. *Id.*

3. *Id.*

4. U.S. CONST. amend. XIV. This amendment states in part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.* § 1.

5. U.S. CONST. amend. VIII. This amendment states as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

6. U.S. CONST. amend. XIV.

and Bill of Rights Act,[7] the Rehabilitation Act of 1973,[8] and the

7. 42 U.S.C.A. §§ 6001-6081 (West 1977 & Supp. 1981). The Pennhurst residents particularly emphasized section 6010, the "Bill of Rights" provision of the Act. Section 6010 provides:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.
>
> (3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—
>
> (A) does not provide treament, services, and habilitation which is appropriate to the needs of such persons; or
>
> (B) does not meet the following minimum standards:
>
> (i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.
>
> (ii) Provision to such persons of appropriate and sufficient medical and dental services.
>
> (iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.
>
> (iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.
>
> (v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.
>
> (vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.
>
> (4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—
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> (A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary on January 17, 1974 (39 Fed. Reg. pt. II), as appropriate when taking into account the size of the institutions and the service delivery arrangements of the facilities of the programs;
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> (B) in the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and
>
> (C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs. The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons.

*Id.* § 6010 (West Supp. 1981) (amending 42 U.S.C.A. § 6010 (West 1977)).

8. 29 U.S.C.A. §§ 701-796 (West 1975 & Supp. 1981). The Pennhurst residents particularly relied on what is known as section 504 of the Act. At the time of trial, section 504 provided as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

*Id.* § 794 (West 1975) (Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504 87 Stat. 35 ),

Pennsylvania Mental Health and Mental Retardation Act of 1966.[9] The planitiffs sought damages and equitable relief, including the closing of Pennhurst, and the establishment of community living arrangements for its residents.[10] The district court entered a judgment for the plaintiffs,[11] and the Court of Appeals for the Third Circuit substantially affirmed.[12] The United States Supreme Court granted certiorari and *held* that the Developmentally Disabled Assistance and Bill of Rights Act (Act) does not create for the mentally retarded any substantive rights to appropriate treatment in the "least restrictive" environment.[13] *Pennhurst State School & Hospital v. Halderman,* 101 S. Ct. 1531 (1981).

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9. PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969). The Pennhurst residents relied on section 4201 of the Act, which provides in part:

> The department shall have power, and its duty shall be:
> (1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them, regardless of religion, race, color, natural origin, settlement, residence, or economic or social status.

*Id.* § 4201.

10. 101 S. Ct. at 1534. Community living arrangements have been recognized as an important element in the habilitation of the retarded. They are community-based, homelike residences which emphasize a more normal life style for the retarded. Community living arrangements are seen as a preferable alternative to institutionalization in a facility which, by its nature, is large, impersonal, and unable to meet the needs of the individual residents. *Id.* n.1. *See also* Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface,* 10 CREIGHTON L. REV. 124, 139-43 (1976).

11. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977). The district court issued findings of fact which were not disputed on appeal. Pennhurst did not meet minimum standards for the habilitation of its residents. It was overcrowded and understaffed, which led to the excessive use of drugs and physical restraints to control the residents. The environment at Pennhurst was found to have led to the deterioration of skills of the residents, as well as to the physical abuse (both through self-abuse and abuse by the staff) of the residents. *Id.* at 1308. The court concluded that the mentally retarded have constitutional rights to minimally adequate habilitation, to be free from harm, and to nondiscriminatory habilitation. *Id.* at 1314-22. The court believed minimally adequate habilitation included the type of assistance necessary to allow the retarded to acquire as many life skills as their capabilities permitted. The court saw a constitutional mandate to achieve this habilitation in an environment that was the least restrictive, in light of the individual's needs. *Id.* at 1319. The court also concluded that the mentally retarded have statutory rights to minimally adequate habilitation through the Pennsylvania Mental Health and Mental Retardation Act and statutory rights to nondiscriminatory habilitation through the federal Rehabilitation Act of 1973. *Id.* at 1322-24 (construing 29 U.S.C.A. § 794 (West 1975)).

The court ordered that Pennhurst eventually be closed, that community living arrangements be provided for the mentally retarded residents of Pennhurst and those on the waiting list, that individual habilitation plans be developed, and that conditions at Pennhurst be improved. A Special Master was appointed to supervise the implementation or the order. *Id.* at 1302-08, 1314-29.

12. Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979). The Third Circuit chose not to address the constitutional issues. Instead, it based its decision upon an interpretation of the Developmentally Disabled Assistance and Bill of Rights Act. *Id.* at 95 (construing 42 U.S.C.A. §§ 6001-6081 (West 1977 & Supp. 1981)). The court found that the Bill of Rights section of the Act, section 6010, provided the mentally retarded with a right to treatment and habilitation in the least restrictive environment. *Id.* at 97, 107. The court found that this right could be enforced through private action. The court also found that the state statute granted a right to habilitation, and that the plaintiffs could enforce that right in federal court. *Id.* at 103. The court affirmed the relief ordered by the district court, with the exception of the order to close Pennhurst. *Id.* at 116. Instead of closing Pennhurst, the circuit court ordered that individual assessments be made of the needs of each resident, with a presumption made in favor of community living arrangements. *Id.* at 95-100, 103-07.

13. 101 S. Ct. at 1547. The Court found that Congress had not indicated an intent to impose through the Act affirmative funding obligations on the states pursuant to the enforcement provision

The history of the treatment of the mentally retarded[14] reveals changes that have occurred as the philosophy regarding retardation has changed.[15] In colonial times the retarded were frequently incarcerated with the misfits of society: the criminal, the deviant, and the poor.[16] In the early 1800's the mentally retarded began to be seen as persons who could develop skills in a highly structured environment.[17] Early American institutions thus emphasized the development of skills that would enhance the independence of the retarded.[18]

In the late 1800's the eugenics movement[19] developed and the

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of the fourteenth amendment. *Id.* at 1540. Nor had Congress unambiguously conditioned receipt of money under the Act on compliance with the Act's provisions, as required under the spending power clause. *Id.* Thus, the Court found that Congress was merely expressing a preference that the states should provide appropriate treatment in the "least restrictive" environment. *Id.* at 1546-47.

14. Mason & Menolascino, *supra* note 10, at 124 n.1. Mental retardation was defined in 1973 by the American Association on Mental Deficiency: "Mental retardation refers to significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested in the developmental period." *Id.* (quoting H. GROSSMAN, MANUAL OF TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION 5 (1973)).

Intellectual functioning is determined from performance on standardized intelligence tests. The general categorization is as follows:

| *Level of Retardation* | *Stanford-Binet Test Score (IQ)* |
|---|---|
| Mild | 52-67 |
| Moderate | 36-51 |
| Severe | 20-35 |
| Profound | Below 20 |

Mason & Menolascino, *supra* note 10, at 124 n.1.

15. Mason & Menolascino, *supra* note 10, at 130. In a comparison of attitudes toward the retarded in the 19th and 20th centuries, the following has been noted:

> The 19th Century initially witnessed the recognition of mental retardation as a condition in which the intellectual faculties have never developed sufficiently: the introduction and vigorous pursuit of a rational plan for "educating the minds of idiots." . . . As the 20th Century approached, the ascendency of the defect position in professional thinking became associated with waning hopes for the education of the retarded. The previous focus of sheltering the retarded from society was drastically altered to one of protecting society from the retarded.

*Id.* (footnotes omitted).

16. Herr, *Civil Rights, Uncivil Asylums and the Retarded,* 43 CIN. L. REV. 679, 694 (1974). The brutal conditions of the incarceration have been described as follows:

> Regarded as sub-human beings they were chained in specially designed kennels and cages like wild beasts and thrown into prisons, bridewells and jails like criminals. They were incarcerated in workhouse dungeons, or made to slave as able-bodied paupers, unclassified from the rest. They were left to wander about stark naked, driven from place to place like mad dogs, subjected to whippings as vagrants and rogues. Even the well-to-do were not spared confinement in strong rooms and celler [sic] dungeons, while legislation usually concerned itself more with their property than their person.

*Id.* at 695 (quoting A. DEUTSCH, THE MENTALLY ILL IN AMERICA 53 (2d ed. 1949)).

17. Mason & Menolascino, *supra* note 10, at 128. The impetus for the development of a method to increase the skills of the retarded was the result of the work of a French psychiatrist, Jean-Marc Gaspard Itard. Itard worked for five years with a severely retarded adolescent boy and, with a "creative, humanistic, and highly structured approach," achieved improvements in skills such as walking, feeding, dressing, toileting, and language development. *Id.*

18. *Id.* Although the effort was short-lived, a need was seen for the establishment of school-like institutions for the retarded. *See* Herr, *supra* note 16, at 695.

19. Herr, *supra* note 16, at 696. Eugenics is the "scientific" improvement of the human race through the elimination of undesirable traits. The retarded became a particular focus for the eugenics movement after a study by Henry H. Goddard concluded that retardation was a fixed genetic disorder. Mason & Menolascino, *supra* note 10, at 132.

retarded were perceived as a threat to society.[20] "Warehousing" the retarded in institutions as a means of protecting society continued until the 1960's.[21] The retarded were viewed in one of several ways: as subhuman organisms, menaces, objects of pity, eternal children, or diseased organisms.[22] Not until the 1960's, after being urged by specialists to treat the retarded normally, did professionals return to the concept that the mentally retarded could develop skills which would enable them to function as independently as possible in society.[23]

As attitudes toward the mentally retarded began to change, the courts were used to define the rights of the retarded.[24] Support for court redefinition of the rights of the retarded initially came from court decisions regarding the mentally ill.[25] *Rouse v. Cameron*[26]

20. Herr, *supra* note 16, at 696. The retarded were felt to be the cause of many social problems and an effort was made to locate, institutionalize, and sterilize all the retarded so that the "American way of life" could be preserved. Mason & Menolascino, *supra* note 10, at 131 n.17.

In 1927 the North Dakota Legislature enacted a statute which provided that the superintendent of the State Hospital for the Feeble-Minded should report to the state board of medical examiners the names of "all feeble-minded, insane, epileptic, habitual criminals, moral degenerates and sexual perverts, who are potential to produce off-spring, who, because of inheritance of inferior or antisocial traits, would probably become a social menace or wards of the State." 1927 N.D. Sess. Laws ch. 263, § 1. Further, the statute provided as follows:

> [I]f, in the judgment of the entire board, procreation by any such person would produce children with an inherited tendency, to feeble-mindedness, insanity, epilepsy, criminality or degeneracy, and there is no probability that the condition of such person so examined will improve to such an extent as to render procreation by any such person advisable, or if the physical or mental condition of any such person will be substantially improved thereby, then it shall be the duty of said Board after such examination and hearing to make an order requiring such person to be sterilized.

*Id.* § 3 (codified at N.D. REV. CODE § 23-0806 (1943) (repealed 1965)).

21. Mason & Menolascino, *supra* note 10, at 132-33. The emphasis on the need to protect society resulted in the construction of ever larger institutions. *Id.* at 132.

22. PRACTICING LAW INSTITUTE, LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 130-31 (1979). The retarded who were viewed as subhuman organisms were given minimal freedom and managed as animals. The retarded who were viewed as a menace were contained and isolated to protect society. When the retarded were seen as an object of pity, the goal became to keep them content, but there was no recognition of a need to treat them with respect or dignity. The retarded who were viewed as eternal children were kept happy, but were also overprotected and given no opportunity to mature. Those who were viewed as diseased organisms were subjected to indefinite custodial care in an effort to provide the perceived needed treatment and hospitalization. *Id.*

23. Mason & Menolascino, *supra* note 10, at 136. The principle of normalization has become the basis of program strategies that call for the retarded to participate as normally as possible in the community. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 499-514 (1976).

24. *See* Henkin v. South Dakota Dep't of Social Servs., 498 F. Supp. 659 (D.S.D. 1980) (mentally retarded person has a federal statutory right to appropriate treatment and service); Naughton v. Bevilacqua, 458 F. Supp. 610 (D.R.I. 1978), *aff'd,* 605 F.2d 586 (1st Cir. 1979) (mentally retarded person has substantive rights under Developmentally Disabled Assistance and Bill of Rights Act which are privately enforceable); New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975) (consent decree regarding institution for mentally retarded included concept of constitutional right to protection from harm); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated and remanded in part,* 550 F.2d 1122 (8th Cir. 1977) (mentally retarded have constitutional right to minimally adequate treatment in the least restrictive environment); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, reserved in part, sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (mentally retarded have constitutional right to adequate habilitation).

25. *See, e.g.,* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (stating that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends").

26. 373 F.2d 451 (D.C. Cir. 1966).

was the first decision to imply that there may be a constitutional right to treatment in an institution for the mentally ill.[27] The *Rouse* court decided that there was a statutory right to treatment for those involuntarily committed, following an acquittal by reason of insanity.[28] However, the noteworthy portion of the opinion was Judge Bazelon's suggestion in dictum that lack of treatment might violate constitutional standards of due process, equal protection, and the prohibition of cruel and unusual punishment.[29]

In the 1970's the United States Supreme Court decided two cases that lent credence to the idea that a constitutional right to treatment existed.[30] In *Jackson v. Indiana*[31] the Court noted that "due process requires that the nature and duration of a commitment bear some reasonable relation to the purpose for which a person is committed."[32] In *O'Connor v. Donaldson*[33] the Court declined to decide whether involuntarily committed mentally ill persons have a right to treatment.[34] The Court, however, did state that "[i]n short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[35]

The first major case regarding the right of the mentally

27. Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966). Rouse was accused of a misdemeanor and was found not guilty by reason of insanity. He was committed to a hospital for the mentally ill. Although the maximum criminal penalty was a one year sentence, Rouse had been in the mental hospital four years at the time of the circuit court decision. *Id.* at 452.

28. *Id.* at 455.

29. *Id.* at 453. Other states have come to similar conclusions. *See, e.g.,* People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975) (indefinite commitment with inadequate treatment is cruel and unusual punishment).

30. *See* Jackson v. Indiana, 406 U.S. 715 (1972) (due process requires nature and duration of commitment bear reasonable relation to purpose for commitment); O'Connor v. Donaldson, 422 U.S. 563 (1975) (state cannot constitutionally confine nondangerous person capable of surviving safely in freedom).

31. 406 U.S. 715 (1972). The case involved the pretrial commitment of a deaf mute who was found to have the mental ability of a preschool child. After testimony that the defendant would not be able to understand the charges against him, the defendant was ordered committed until he could be certified as sane. The Court upheld the argument that this amounted to a life sentence without a conviction, and was, therefore, a violation of due process and equal protection rights. *Id* at 730, 738.

32. Jackson v. Indiana, 406 U.S. at 738. The *Jackson* Court held that a person "who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Id.*

33. 422 U.S. 563 (1975).

34. O'Connor v. Donaldson, 422 U.S. 563, 573 (1975). Donaldson was civilly committed and confined as a mental patient in Florida. He was kept there for almost 15 years, despite repeated attempts to seek release. Donaldson brought suit against the hospital superintendent and other hospital staff under 42 U.S.C. § 1983, alleging deprivation of liberty. The circuit court found the fourteenth amendment guaranteed a right to treatment for involuntarily civilly committed mental patients. Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974), *vacated and remanded,* 422 U.S. 563 (1975).

35. 422 U.S. at 576. The Court concluded that committment could not be used to ensure a higher standard of living for the person confined. Nor could the state commit a harmless mentally ill person simply to save other citizens from exposure to those who act differently. *Id.* at 575.

retarded to treatment[36] in the "least restrictive" environment was *Wyatt v. Stickney*.[37] In *Wyatt* the district court set standards that would ensure constitutionally acceptable habilitation for the retarded.[38] The *Wyatt* decision was one the district court in *Pennhurst* relied upon when it found a constitutional right to minimally adequate habilitation.[39]

The United States Supreme Court's first opportunity to address the question of whether a constitutional right to minimally adequate habilitation exists came in *Pennhurst State School & Hospital v. Halderman*.[40] The Court, however, chose not to decide the case on a constitutional basis.[41] Instead, the Court focused on the Developmentally Disabled Assistance and Bill of Rights Act.[42]

The residents of *Pennhurst* argued that section 6010 of the Act was enacted as an enforcement provision of the fourteenth amendment of the United States Constitution and that it was, therefore, mandatory on the states.[43] The Court noted that

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36. The terms "treatment" and "habilitation" have been used interchangeably in cases dealing with the retarded. The term "habilitation" is, however, more accurate because the retarded need education and training, not the medical treatment with an eye towards a cure which the mentally ill receive. *See* Halderman v. Pennhurst State School & Hosp. 446 F. Supp. 1295, 1314 (E.D. Pa. 1977).

37. 325 F. Supp. 781 (M.D. Ala. 1971). The *Wyatt* litigation involved disputes over the treatment of both the mentally ill and the mentally retarded in Alabama. *Id.* at 782. Subsequent history of Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced,* 334 F. Supp. 1341 (M.D. Ala. 1971), *supplemented,* 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, reserved in part, sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

38. Wyatt v. Stickney, 344 F. Supp. 387, 395-407 (M.D. Ala. 1972). The court developed detailed standards for the institutions to follow. The standards from *Wyatt* included the following:

> (1) [A] statement of the least restrictive habilitation conditions necessary to achieve the purposes of commitment; (2) a description of intermediate and long-range habilitation goals, with a projected timetable for their attainment; (3) a statement and rationale for the plan of habilitation for achieving these intermediate and long-range goals; (4) a specification of staff responsibility and a description of proposed staff involvement with the patient in order to attain these habilitation goals; (5) criteria for release to less restrictive habilitation conditions; and (6) criteria for discharge.

Mason & Menolascino, *supra* note 10, at 150 (citing Wyatt v. Stickney, 344 F. Supp. 387, 397-99 (M.D. Ala. 1972)).

39. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. at 1317-18. The *Wyatt* court found a violation of the due process rights of the mentally retarded residents of Partlow. "Because the only constitutional justification for civilly committing a mental retardate, therefore, is habilitation, it follows ineluctably that once committed such a person is possessed of an inviolable constitutional right to habilitation." 344 F. Supp. at 390.

40. 101 S. Ct. 1531 (1981).

41. *Id.* at 1536. The Supreme Court followed the lead of the circuit court and based its decision on an interpretation of the Developmentally Disabled Assistance and Bill of Rights Act. Although neither the district court nor the parties had relied on the Act, the circuit court had requested supplemental briefs on the issue and it was fully briefed before the Supreme Court. *Id.* at 1535 n.3.

42. *Id.*; 42 U.S.C.A. §§ 6001-6081 (West 1977 & Supp. 1981).

43. 101 S. Ct. at 1538. The Third Circuit found that section 6010 was enacted as an enforcement of the fourteenth amendment. The court relied on Ingraham v. Wright, 430 U.S. 651, 673 (1977), which found that the fourteenth amendment protected a right to be free from "unjustified intrusions on personal security." The Third Circuit found that section 6010 was enacted to prevent state intrusions into the disabled's personal security. 612 F.2d at 98 & n.5. "Thus, in providing specific guarantees for a particular affected group, Congress' action is consistent with the Supreme Court's recognition of the broad underlying right protected against impairment by the state through the fourteenth amendment." *Id.* at 98.

Congress must expressly state any intent to legislatively enforce the fourteenth amendment.[44] The Court expressed particular concern that an explicit intent be found when the thrust of a legislative action places an affirmative obligation on the states to fund services.[45] The Court was unable to discover any explicit intent in either the language of the Act or the legislative history.[46]

While analyzing the language, structure, and history of the Act, the Court noted that it appeared to be a "mere federal-state funding statute."[47] The Court saw section 6010 as simply an expression of congressional preference, intended only as encouragement for the states to provide better services for the mentally retarded.[48] The Court thus rejected the argument that section 6010 was enacted pursuant to section 5 of the fourteenth amendment (the enforcement provision), and therefore determined that section 6010 did not create substantive rights to appropriate treatment in the least restrictive enviroment.[49]

The Court next addressed the issue of whether section 6010 was enacted pursuant to the spending clause of the United States Constitution.[50] The Court characterized legislation enacted pursuant to the spending power as "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."[51] As with any contract, an offeror must be unambiguous about the terms of the contract so that there can be a knowing acceptance.[52] The Court analyzed

44. 101 S. Ct. at 1539. In other decisions regarding Congress's power to enforce the fourteenth amendment there have been express articulations of legislative intent. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966) (intent stated in the Voting Rights Act of 1965); Oregon v. Mitchell, 400 U.S. 112 (1970) (intent stated in the Voting Rights Act Amendments of 1970); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (intent stated in House and Senate Reports of the 1972 Amendments to the Civil Rights Act of 1964).

45. 101 S. Ct. at 1539. The Court wanted to avoid a finding that Congress acted under the enforcement provision of the fourteenth amendment when such a finding would involve the imposition of "massive financial obligations on the States." *Id.*

46. *Id.* at 1540. The Court rejected the plaintiffs' claim that comments by Senators during debate over the Senate's Bill of Rights provision indicated an intent to enforce the fourteenth amendment. The Senate Bill included "over 400 pages of detailed standards." *Id.* at 1541. The Senate Bill, however, was rejected by the Conference Committee and the "findings" of section 6010 were adopted. *Id.* at 1541-42.

47. *Id.* at 1540. The Court saw no intent on the part of Congress to fund new substantive rights even though section 6010 speaks in terms of rights. The Court chose to determine legislative intent through an overall analysis of the Act instead of focusing on only one section. *Id.*

48. *Id.* at 1540-41. The Court stated, "The closest one can come in giving § 6010 meaning is that it justifies and supports Congress' appropriation of money under the Act and guides the Secretary in his review of state applications for federal funds." *Id.* The dissent also concluded that section 6010 was not enacted pursuant to section 5 of the fourteenth amendment. *Id.* at 1549 (White, Marshall & Brennan, JJ., dissenting).

49. *Id.* at 1540.

50. *Id.* at 1542.

51. *Id.* at 1539.

52. *Id.* at 1539-40. The Court's inquiry was thus directed to whether Congress specifically imposed an obligation on the states as a condition of receiving federal funds, or whether Congress merely advised the states to fund certain rights. *Id.* at 1540.

whether Congress had unambiguously conditioned the states' receipt of the money on compliance with section 6010.

The Court stated that, while other sections of the Act clearly conditioned receipt of money under the program on adherence to specific requirements,[53] section 6010 did not use the same type of conditional language.[54] The Court thus saw section 6010 as having a "limited meaning."[55]

The Court also noted the Secretary of Health and Human Services' interpretation of the Act: " 'No authority was included in [the 1975] Act to allow the Department to withhold funds from States on the basis of failure to meet the findings [of section 6010].' "[56] The Court determined that an inability to terminate funds showed that there was no explicit condition on the states' receipt of funds under the Act.[57]

In *Pennhurst* the Court also analyzed the amount of money that had been allocated to the State of Pennsylvania under the Act.[58]

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53. *Id.* at 1542. The Court compared section 6010 with section 6005 (conditioning funding on employment of the handicapped), section 6009 (conditioning funding on the development of a system to evaluate services), section 6011 (conditioning funding on the state providing the Secretary with assurances that there is a habilitation plan on each disabled person who receives services), section 6012 (conditioning funding on the establishment of a system to protect and advocate the rights of the disabled), section 6063 (conditioning funding on approval of a state plan for the provision of services and facilities), and section 6067 (conditioning funding on the establishment of a state Planning Council). 42 U.S.C.A. § 6005 (West 1977); *id.* §§ 6009, 6011 (West 1977 & Supp. 1981); *id.* §§ 6012, 6063, 6067 (West Supp. 1981).

54. 101 S. Ct. at 1542.

55. *Id.* Both Justice Blackmun in his concurrence and Justices White, Marshall, and Brennan in dissent concluded that section 6010 has greater meaning than that given it by the majority. *Id.* at 1547 (Blackmun, J., concurring); *id.* at 1549 (White, Brennan & Marshall, JJ., dissenting). Justice Blackmun relied on the cross-reference in section 6063 to rights articulated in section 6010. Section 6063 provides in part as follows:

> (5)(C) The plan must contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 of this title (relating to rights of the developmentally disabled).

42 U.S.C.A. § 6063(b)(5)(C) (West Supp. 1981).

Justice Blackmun noted that "[a] perfectly reasonable judicial interpretation of § 6010, which would avoid the odd and perhaps dangerous precedent of ascribing no meaning to a congressional enactment, would observe and give effect to the linkage between § 6010 and § 6063." 101 S. Ct. at 1547.

The dissent concluded that Congress had, pursuant to its spending power, "intended § 6010, although couched in terms of rights, to serve as requirements that the participating States must observe in receiving federal funds under the provisions of the Act." *Id.* at 1549 (White, Brennan & Marshall, JJ., dissenting).

56. 101 S. Ct. at 1543 (quoting 45 Fed. Reg. 31,006 (May 9, 1980)). The Court rejected the Secretary's subsequent comment in the Federal Register that the 1978 amendments to the Act required recipients of funds to provide assurances that they would comply with the provisions of section 6010 and that "[f]ailure to comply with the assurance may result in the loss of Federal Funds." 45 Fed. Reg. 31,006 (May 9, 1980).

In a footnote, the Court indicated that the Secretary's interpretation might be too expansive. The Court also pointed out that the Secretary had not withheld funds from Pennsylvania for noncompliance. 101 S. Ct. at 1543 n.17.

57. *Id.* at 1543. The Court noted that the Conference Committee had rejected the Senate's plan to terminate funding for failure to comply with the Senate's bill of rights. *Id.*

58. *Id.*

The Court termed the 1976 grant of 1.6 million dollars "woefully inadequate to meet the enormous financial burden of providing 'appropriate' treatment in the 'least restrictive' setting."[59] According to the Court this failure to provide adequate funding was an indication that Congress did not impose a "massive obligation on participating states," to provide certain rights to the developmentally disabled.[60]

The *Pennhurst* Court also indicated that the states could not knowingly accept the obligation of providing "appropriate treatment" in the "least restrictive" environment because of the vagueness of the terms of the Act.[61] If such an obligation were enforced by the Court, it would amount to placing a retroactive obligation on the states, something the Court did not believe was encompassed under the spending power.[62]

Finally, the Court commented on the section 6010 "conditions" as compared with other sections of the Act that explicitly imposed conditions.[63] The Court in *Pennhurst* found that the sections that were explicitly conditional would be unnecessary if section 6010 were read as placing affirmative obligations on the states.[64] Thus, the Court concluded that Congress intended to encourage only the development of state programs and did not act to impose affirmative obligations on the states.[65]

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59. *Id.*

60. *Id.* The Court noted, "When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs." *Id.* (citing Harris v. McRae, 100 S. Ct. 2758 (1980)).

61. *Id.* The Secretary's statement that the Act did not provide any authority to withhold funds from the states persuaded the Court that the state's acceptance of the funds would be with the understanding that there were no conditions (with respect to section 6010) on receipt of the funds. *Id.* at 1543.

62. *Id.* at 1544. The Court indicated that although Congress has broad powers under the spending clause, "it does not include surprising participating States with post-acceptance or 'retroactive' conditions." *Id.*

63. *Id.* The Court compared section 6010 with sections 6011, 6063(b) (5) (C), and 6062(a) (4). Section 6011 provides that habilitation plans must be developed on each disabled person. 42 U.S.C.A. § 6011 (West 1977 & Supp. 1981). Section 6063(b) (5) (C) provides that the plan must be consistent with section 6010. *Id.* § 6063(b) (5) (C) (West Supp. 1981). Section 6062(a) (4) provided in the original Act that 30% of the funds received under the Act should be used to deinstitutionalize the developmentally disabled. *Id.* § 6062(a)(4) (West 1977) (repealed 1978).

64. 101 S. Ct. at 1544. The Court noted that section 6011 required habilitation plans only when federal funds from the Act were used in the habilitation of the disabled person, a requirement that would be unnecessary since section 6010 was read as mandating such plans in all cases. *Id.* The Court also noted that section 6063(b) (5) (C) would be superfluous if section 6010 mandated compliance with its provisions. *Id.*

The Court noted differences between section 6010 as interpreted and section 6062(a)(4). Section 6062(a) (4) required that 30% of the funds be used for deinstitutionalization, a sum the Court found inconsistent with a mandate to deinstitutionalize under section 6010. *Id.*

65. *Id.* The Court was persuaded by its earlier decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979). In that case the issue was whether section 504 of the Rehabilitation Act of 1973 forbade a professional school from imposing physical qualifications for admission to a clinical training program. The Court found that there was no congressional intent to impose an affirmative action obligation on all the recipients of the funds. Instead, Congress only encouraged some recipients, while imposing an explicit obligation on others. 442 U.S. at 410.

After deciding that section 6010 was not a mandatory obligation on the states, the Court discussed whether the plaintiffs could bring suit to compel compliance with those sections of the Act that did place conditions on the states.[66] The Court first decided that "[i]n legislation enacted pursuant to the Spending Power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State."[67]

In its analysis of whether the residents of Pennhurst could enforce a private claim the *Pennhurst* Court looked to *Maine v. Thiboutot*.[68] Without deciding whether *Thiboutot* controlled, the Court noted that the plaintiffs in *Thiboutot* and *Pennhurst* might be enforcing different rights,[69] and that there was a question as to whether the remedy in the Act was exclusive.[70] Thus, the case was remanded to the court of appeals for a decision as to whether a private cause of action exists.[71] The Court also remanded the issue of whether Pennhurst qualified as a "program assisted" under section 6063(b) (5) (C) or section 6011[72] since it was the State of Pennsylvania and not Pennhurst that received the funds under the Act.[73]

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66. 101 S. Ct. at 1545. A major concern in this area is whether a private cause of action exists to enforce the statutory provisions that specifically place conditions on the states. The Court concluded that it was unnecessary to determine whether a private cause of action existed under section 6010 or under 42 U.S.C. § 1983 because of its decision that section 6010 provided no substantive rights. *Id.* at 1545 n.21. This was consistent with the decision in *Southeastern Community College v. Davis*, in which the Court found it unnecessary to decide whether a private cause of action existed under section 504 of the Rehabilitation Act of 1973 or 42 U.S.C. § 1983. 442 U.S. 397, 404 n.5.

67. 101 S. Ct. at 1545.

68. 448 U.S. 1 (1980). The *Thiboutot* court held that 42 U.S.C. § 1983 created a private cause of action based solely on statutory violations of federal law. Maine v. Thiboutot, 448 U.S. at 8.

69. 101 S. Ct. at 1545. In *Thiboutot* the plaintiff alleged that Maine's laws deprived him of welfare benefits to which he was entitled. In *Pennhurst*, however, the Court asserted that the plaintiffs could claim only that the state had failed to provide the Secretary with the adequate assurances referred to in section 6063(b) (5) (C). *Id.*

70. *Id.* The Court referred to Justice Powell's dissent in *Thiboutot* which "suggested that § 1983 would not be available where the 'governing statute provides an exclusive remedy for violations of [its terms].' " *Id.* (quoting Maine v. Thiboutot, 448 U.S. 1, 22 n.11 (Powell, J., dissenting)).

71. 101 S. Ct. at 1546. On remand, the court will have to determine whether the assurances required under section 6063(b) (5) (C) are a " 'right secured' . . . within the meaning of § 1983." *Id.* at 1545.

72. *Id.* The dissent concluded that Pennhurst could qualify as a program assisted even though it did not receive funds, because Pennsylvania did receive funds under the Act. *Id.* at 1552 (White, Brennan & Marshall, JJ., dissenting). The dissent stated as follows:

> These funds will necessarily be supporting Pennsylvania's "programs" for providing treatment, services or habilitation within the meaning of § 6063(b) (5) (C); and under the express terms of that section, Pennsylvania is required to respect the § 6010 rights of the developmentally disabled in its state institutions, including Pennhurst, and to give the Secretary adequate assurances in this respect. This is true whether or not Pennhurst itself directly receives any share of the state's allocation.

*Id.*

73. *Id.* at 1546. On remand, the court will have to find that the funds given to Pennsylvania

Next, the Court considered the question of the plaintiffs' possible remedy. The Court noted that in prior decisions regarding federal-state conflicts, relief had been limited to offering the state the alternative of complying with federal statutes or losing federal funds,[74] or enjoining a state from enforcing a provision in conflict with federal law.[75] The Court remanded the issue to the court of appeals,[76] pointing out that there had been no cases in which a state had been required to take on such massive financial obligations as would be required in the *Pennhurst* case.[77]

The Court's final consideration was whether Pennsylvania law imposed an obligation on the state to provide appropriate treatment in the "least restrictive" environment.[78] The Court held that this issue must be remanded because the district court's decision on the state law might "have been colored by its holding with respect to section 6010,"[79] and because the district court held only that there was a state right to treatment and not to treatment in the "least restrictive" environment.[80]

There are several implications of the *Pennhurst* decision. First, the Court left open the issue of a constitutional right to treatment in the "least restrictive" environment.[81] The Third Circuit, which will hear the remand, has recently decided another case, *Romeo v. Youngberg,*[82] in which a limited constitutional right to the least intrusive treatment was found.[83] If the *Romeo v. Youngberg* decision

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have an effect on the habilitation given at Pennhurst before the plaintiffs can claim enforceable violations of the Act. *Id.*

74. *Id.* (citing Rosado v. Wyman, 397 U.S. 397, 420-21 (1970)).

75. 101 S. Ct. at 1546 (citing Carleson v. Remillard, 406 U.S. 598 (1972)).

76. 101 S. Ct. at 1546.

77. *Id.*

78. *Id.* Section 4201 of the Pennsylvania Mental Health and Mental Retardation Act of 1966 provides in part:

> The department shall have power, and its duty shall be:
>
> (1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them, regardless of religion, race, color, natural origin, settlement, residence, or economic or social status.

PA. STAT. ANN. tit. 50, § 4201 (Purdon 1969).

79. 101 S. Ct. at 1546.

80. *Id.* The Court also remanded issues which had not been considered by the circuit court. These issues were plaintiff's federal constitutional claims and the claims under section 504 of the Rehabilitation Act. *Id.* at 1547.

81. *Id.* The Court did not address the constitutional questions because the circuit did not rule on those questions. *Id.*

82. 644 F.2d 147 (3d Cir. 1980), *cert. granted,* 101 S. Ct. 2313 (1981).

83. Romeo v. Youngberg, 644 F.2d 147, 169 (3d. Cir. 1980). The circuit court decided that in the absence of care or when using highly intrusive procedures, the state must show a compelling necessity in order for the procedures to be constitutionally permissible. There is a more flexible standard of judicial review, including suitable deference to medical opinion, when considering a right to adequate treatment. *Id.* at 159.

is affirmed by the Supreme Court, institutions for the mentally retarded in the United States would have to take significant steps to provide community living arrangements for their residents.

The *Pennhurst* decision will probably signal the end of reliance on the Developmentally Disabled Assistance and Bill of Rights Act as a method of deinstitutionalizing the mentally retarded.[84] Advocates of deinstitutionalization, however, may be able to accomplish their goals through reliance on section 504 of the Rehabilitation Act. The potential problem with relying on section 504 is that the Supreme Court has not recognized a private cause of action under section 504, even though it had the opportunity to do so in *Southeastern Community College v. Davis.*[85] In addition, as Justice Blackmun pointed out in his concurring opinion to *Pennhurst,* with respect to a private action, "[t]he court . . . seems to me strongly to intimate that it will not view kindly any future positive holding in that direction."[86]

The *Pennhurst* decision appears to provide advocates of deinstitutionalization grounds for optimism in just one area: protection of rights through state law. The Court remanded for consideration in this area only because the district court's decision may have been "colored" by the holding on section 6010 and because the court did not identify the statute as an independent and adequate ground for the decision.[87] The Court, however, did not add any caveats as to problems with such a course, as they had done in other areas.[88] Thus, for states which have legislated in this area,[89] the door may be open to enforcement of state rights.

A suit seeking habilitation in the least restrictive environment has been filed in North Dakota.[90] The suit relies not only on the Developmentally Disabled Assistance and Bill of Rights Act, but

84. *See* 5 MENTAL DISABILITIES LAW REPORTER 139 (1981). Commentators have noted that section 6010 will no longer be interpreted by states as mandating habilitation in the least restrictive environment. Thus, "the best the plaintiffs can hope for under the DD (Developmentally Disabled) Act is a subsequent interpretation of the remaining provisions, particularly section 6011 and section 6063, that will mandate privately enforceable rights of some kind." *Id.*

85. 442 U.S. 397 (1979).

86. 101 S. Ct. at 1547 (Blackmun, J., concurring). The three dissenting Justices, White, Brennan, and Marshall, concluded that a private cause of action did exist. *Id.* at 1557.

87. *Id.* at 1546.

88. *Id.* at 1546-47. The Court suggested that a recent Pennsylvania Supreme Court decision regarding habilitation rights, *In re* Joseph Schmidt, ____Pa. ____, 425 A.2d 393 (1981), could be considered on remand. *Id.* at 1547 n.24.

89. *See* N.D. CENT. CODE § 25-01.2-02 (1981). North Dakota recently enacted a statute regarding treatment of the developmentally disabled. It states that "[a]ll persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for those disabilities. Treatment, services, and habilitation for developmentally disabled persons shall be provided in the least restrictive appropriate setting." *Id.*

90. Association for Retarded Citizens of North Dakota v. Link, No. A1 80-141 (D.N.D., filed Sept. 26, 1980).

also on constitutional provisions,[91] the Rehabilitation Act of 1973,[92] the Education for All Handicapped Children Act of 1975,[93] and 42 U.S.C. § 1983. To the extent that the suit relies on section 6010, the *Pennhurst* decision would seem to limit the plaintiffs' remedies. However, the *Pennhurst* decision left open the possibility of recovery under the Rehabilitation Act of 42 U.S.C. §1983.[94] Thus, because of the additional basis for the claims in the North Dakota suit, the *Pennhurst* decision may have a minimal effect on the plaintiffs' position.

It has been said of the *Pennhurst* decision that "[i]n many ways, this very limited decision simply muddies the water, providing the states and developmentally disabled people with minimal guidance for making immediate policy recommendations."[95] The Court, however, has indicated that in determining the scope of a statute, no obligation will be enforced unless Congress explicitly requires it. Any rights for the retarded to habilitation in the least restrictive environment, therefore, must be found outside the Developmentally Disabled Assistance and Bill of Rights Act.

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91. Plaintiffs' complaint at 3, Association for Retarded Citizens of North Dakota v. Link, No. A1 80-141 (D.N.D., filed Sept. 26, 1980). The plaintiffs claim violations of the first, fourth, fifth, eighth, ninth, and fourteenth amendments. *Id.*

92. 29 U.S.C.A. § 794 (West 1981).

93. 20 U.S.C.A. §§ 1401-1461 (West 1978 & Supp. 1981).

94. 101 S. Ct. at 1545 n.21, 1547.

95. 5 MENTAL DISABILITY LAW REPORTER 139. The commentator noted that the Court's decision was limited to questions regarding section 6010, and that questions regarding other parts of the Act and other means of attack were left to be answered on remand. *Id.* at 139, 141.