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Due Process Protection of the Involuntarily Committed Mental Health Patient

Bradley Nicholas Schulz

DUE PROCESS PROTECTION OF THE INVOLUNTARILY COMMITTED MENTAL HEALTH PATIENT—*Youngberg v. Romeo* — In *Youngberg v. Romeo*,[1] the United States Supreme Court determined that the involuntarily committed mentally retarded patient has a constitutionally protected interest under the Due Process Clause of the fourteenth amendment in reasonably safe conditions of confinement and freedom from bodily restraints. Further, the Court found that such a patient's liberty interest includes the right to obtain minimally adequate training to promote personal safety and freedom from restraint.[2]

In 1974, Nicholas Romeo, a severely mentally retarded individual, was involuntarily committed to the Pennhurst State School and Hospital[3] on the application of his mother, pursuant to the applicable provision of the Pennsylvania Mental Health and Mental Retardation Act.[4] Although he was physically thirty-three years old, Romeo suffered from a chemical imbalance in the brain that limited his mental capacity to approximately that of an eighteen month old child.[5] Romeo's father had died in May of 1974. Shortly thereafter, the mentally retarded boy's mother had applied to the local state court for the admission of her child to a mental health facility. On June 11, 1974, the court committed Romeo to the Pennhurst facility.[6]

While confined at Pennhurst, Romeo was injured on over seventy occasions. Some of the injuries were self-inflicted. Others were the result of attacks by facility residents. Certain of these attacks were made in retaliation for Romeo's aggressive

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1. 457 U.S. 307 (1982).

2. *Id.* at 324.

3. Located in Spring City, Pennsylvania, Pennhurst is a large institution housing approximately 1,200 mentally retarded citizens. About half of the residents were committed there by court order. *See* Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981).

4. Pennsylvania Health & Mental Retardation Act of 1966. PA. STAT. ANN. tit. 50, § 4406 (Purdon 1966). Under the language of this provision, commitment is ordered "for care and treatment." *Id.*

5. 457 U.S. at 309-10. Romeo had an I.Q. between 8 and 10, could not talk, and lacked the most basic self-care skills. *Id.* at 310.

6. *Id.*

behavior.[7] The injuries to Romeo were extensive. They included a broken arm, a fractured finger, human bite marks, and scratches.[8]

Because of inadequate medical attention, some of Romeo's injuries became infected.[9] In some cases, infection resulted from contact with human excrement, not properly disposed of by Pennhurst staff.[10]

Concerned about these injuries, Paula Romeo, Nicholas' mother, filed an action as next friend to her son[11] in the United States District Court for the Eastern District of Pennsylvania alleging that Pennhurst had violated Nicholas Romeo's constitutional rights.[12] It was alleged in the amended complaint[13] that defendants had placed Romeo under physical restraint for prolonged periods of time.[14] Damages[15] were claimed as compensation for defendants' alleged failure to provide Romeo with appropriate "treatment or programs for his mental retardation."[16]

At the ensuing trial, the district court instructed the jury that the cruel and unusual punishment prohibition contained in the eighth amendment was the proper standard by which to de-

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7. *Id.*

8. Other injuries included injuries to the sexual organs, black eyes and various lacerations. The fact of these injuries was not refuted by the medical staff at Pennhurst. Romeo v. Youngberg, 644 F.2d 147, 155 (3rd Cir. 1980).

9. *Id.*

10. *Id.*

11. This action was filed pursuant to 42 U.S.C. § 1983 (1976 & Supp. V 1981), which provides:

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

12. Romeo originally claimed that his rights were violated under the eighth and fourteenth amendments. 457 U.S. at 310.

13. *Id.* at 311. This was filed in December, 1977, over one year after inception of the lawsuit.

14. *Id.* He was restrained for portions of each day, by the use of "soft" restraints.

15. *Id.* The claim was originally for damages and injunctive relief. However the claim for injunctive relief was later dropped because Romeo was a member of a class seeking such relief in another action.

16. The word "treatment" is used synonymously with "habilitation" or "training." *Id.*

termine defendants' liability.[17] A verdict was returned for the defendants.[18]

The Court of Appeals for the Third Circuit reversed and remanded for a new trial, holding that the fourteenth amendment,[19] rather than the eighth, provided the proper constitutional basis for the asserted rights.[20] The court reasoned that the eighth amendment, prohibiting cruel and unusual punishment of those convicted of crimes, is not an appropriate source for determination of the rights of the involuntarily committed in a civil context.[21] Applying the fourteenth amendment, the court found that the involuntarily committed mentally retarded retain a liberty interest in freedom of movement and in personal security.[22] Freedom of movement and personal security were determined to be "fundamental liberties," limitation of which could be properly justified only by an "overriding, non-punitive" state interest.[23] The court found further that the involuntarily committed mentally retarded have a liberty interest in habilitation designed to "treat" their mental retardation.[24]

The Third Circuit concluded that physical restraint in a hospital setting raised a presumption of a punitive sanction and could be justified adequately only by a "compelling necessity" on the part of the state institution.[25] A somewhat different standard was deemed appropriate for the evaluation of an institution's failure to provide for the safety of its residents.[26] The majority found such a failure justifiable upon a showing by the

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17. 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."

18. 457 U.S. at 312.

19. 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 the jurisdiction the equal protection of laws.

Id. § 1.

20. 644 F.2d at 156.

21. *Id.*

22. *Id.* at 164.

23. *Id.* at 158.

24. *Id.* at 164-70.

25. *Id.* at 159-60. The court found that shackling squarely collides with a traditional liberty interest in freedom from bodily restraint. *Id.*

26. *Id.* at 163-64.

state of a "substantial necessity" for the absence of safe conditions.[27] Finally, the Third Circuit majority held that where treatment has been administered by an institution, those responsible for the treatment are liable to the patient only if the treatment is not "acceptable in the light of present medical or other scientific knowledge."[28] In a concurring opinion which would form the basis for the decision of the U.S. Supreme Court on appeal, Third Circuit Chief Judge Seitz argued that the appropriate standard by which all implicated constitutional interests should be judged is that of whether defendants' conduct "was such a substantial departure from accepted professional judgment, practice or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment."[29]

The United States Supreme Court vacated the decision of the court of appeals and remanded the action for further proceedings.[30] The majority held that Romeo had constitutionally protected liberty interests under the Due Process Clause of the fourteenth amendment in reasonably safe conditions of confinement, freedom from bodily restraints, and such minimially adequate training as reasonably might be required by those interests.[31] The Court adopted the reasoning of Third Circuit Chief Judge Seitz' concurrence in regard to the proper weight to be given the interests of the aggrieved mentally retarded patient and the defending state institution.[32] Proper protection would be given patient's constitutional rights in state actions affecting patient's safety, freedom, and treatment if, the Court said, the institution could demonstrate that "professional judgment in fact was exercised" in its decision.[33]

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27. *Id.* The court found that substantial necessity was more appropriate than the compelling necessity standard employed in connection with the shackling claim, "for it enables a court and jury to distinguish between isolated incidents and inadvertent incidents, on the one hand, and persistent disregard of patients' needs on the other." *Id.* at 164.

28. *Id.* at 169.

29. *Id.* at 178 (Seitz, C.J., concurring).

30. 457 U.S. at 325.

31. *Id.* at 324.

32. *Id.* at 321.

33. *Id.* The Justices found this standard lower than the "compelling" or "substantial" necessity tests that the court of appeals would require, reasoning that the Third Circuit's tests would place an "undue burden on the administration of institutions such

Although the Supreme Court found that Romeo was entitled to minimally adequate training,[34] training required by the Constitution was limited to that which is found reasonable in light of the retarded patient's liberty interest in safety and freedom from physical restraints.[35] In determining what is "reasonable" the Supreme Court held, courts must show deference to the judgment exercised by a qualified professional.[36] The decision of a professional in these circumstances, the Court held, would be "presumptively valid."[37]

I. BACKGROUND

The central issue with which courts must deal in any action involving the mentally retarded person committed to an institution for care is the kind of treatment that person is entitled to receive. Treatment of the mentally retarded has changed drastically since the time when institutionalization for such persons meant little more than incarceration.[38] Despite recognition in the medical community during the nineteenth century that the mentally retarded had the ability to learn some skills,[39] the practice of institutional care as late as the 1950's was limited, characteristically, to a kind of "warehousing" designed to segregate the retarded person from society.[40]

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as Pennhurst. . . ." *Id.* at 322.

34. *Id.*

35. *Id.* On the basis of the record, the Court found it uncertain whether Romeo sought training unrelated to safety and freedom from bodily restraints. *Id.* at 318. In his brief to the Supreme Court, respondent disavowed any claim to such treatment as would enable him "to achieve his maximum potential." *Id.* at 318 n.23.

36. *Id.* at 323 n.30. The term "professional," as defined by the Court, refers to a person "competent, whether by education, training or experience, to make the particular decision at issue." *Id.* Chief Justice Burger, in concurrence, argues that this definition would not allow a person to challenge the professional's practice, even if such practice were inconsistent with generally accepted professional practice, due to the fact that it was prescribed by the institution's professional staff. *Id.* at 321 (Burger, C.J., concurring in the judgment).

37. *Id.* at 324. The deference that must be paid to the medical profession was stressed throughout the opinions in this decision. The impact of this presumption will be analyzed later in this comment.

38. I. AMARY, THE RIGHTS OF THE MENTALLY RETARDED—DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION 4-6 (1980).

39. I. AMARY, *supra* note 38, at 5.

40. Herr, *Civil Rights, Uncivil Asylums and the Retarded,* 43 CIN. L. REV. 679 (1974). These conditions have been described as follows: "Regarded as sub-human beings

In the 1960's a full recognition was achieved among professionals in the health field that the retarted have the capacity to develop skills and to use those skills in society.[41] Treatment programs established in the 1960's were curtailed a decade later, however, as funds available for the operation of state care facilities became scarce.[42] Conditions of care deteriorated[43] and the deterioration prompted suits on behalf of institutionalized retarded persons for improved conditions.[44] Courts were confronted with the task of determining the content of the rights of the mentally retarded. Of all such rights asserted, the "right to treatment" has been one of the most difficult to define.

In *Rouse v. Cameron*,[45] a case which one commentator believes initiated the redefinition of the legal rights of the mentally retarded which began in the 1960's,[46] a court of appeals suggested in dictum that a failure to treat the mentally retarded patient involuntarily committed might violate constitutional standards of due process and equal protection and the prohibition of cruel and unusual punishment.[47] In *Wyatt v. Stickney*,[48] a district court decided that mentally retarded persons are entitled to treatment, when committed involuntarily to a state institution, in the "least restrictive" environment.[49] The court established standards for institutional care that would ensure

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they [mentally retarded] were chained in specially designed kennels and cages like wild beasts and thrown into prisons, bridewells, and jails like criminals." *Id.* at 695 (quoting A. DEUTSCH, THE MENTALLY ILL IN AMERICA 53 (2d ed. 1949)).

41. I. AMARY, *supra* note 38, at 8.

42. I. AMARY, *supra* note 38, at 5.

43. *Id.*

44. For a list of representative cases, see Comment, *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*, 58 N.D.L. REV. 119, 123 n.24 (1982).

45. 373 F.2d 451 (D.C. Cir. 1966).

46. Comment, *supra* note 44, at 124. This author felt that *Rouse* was the starting point for the judiciary's redetermination of the rights of the mentally retarded.

47. 373 F.2d at 453.

48. 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), *aff'd in part, remanded in part sub nom.* Wyatt v. Anderbolt, 503 F.2d 1305 (5th Cir. 1974). The *Wyatt* decision was relied upon in Halderman v. Pennhurst State School & Hospital, 446 F. Supp. 1295, 1317-18 (E.D. Pa. 1977), where the court found a constitutional right to minimally adequate habilitation.

49. 325 F. Supp. 781 (M.D. Ala. 1971).

constitutionally adequate treatment and habilitation.[50]

In two subsequent cases decided in the 1970's, *Jackson v. Indiana*[51] and *O'Connor v. Donaldson*,[52] the Supreme Court had open before it the issue of a constitutional right to treatment for persons involuntarily committed to mental institutions. Although the Court did not address the constitutional issue directly in either case, its decisions lent support to the belief that a right to treatment did exist and would be acknowledged by the Court in the future.

In *Jackson*, the Court was faced with an appeal by a twenty-seven year old mentally retarded deaf mute who had been charged with a crime but who the criminal court had determined was incompetent to stand trial.[53] Under pertinent Indiana state law, the trial court had ordered Jackson committed until such time as the state health department could certify petitioner's sanity to the court.[54] Counsel for Jackson argued that his client's commitment to a facility of the Indiana Department of Mental Health amounted to a "life sentence" before conviction, depriving Jackson of his fourteenth amendment rights.[55] Were it not for the criminal charges lodged against Jackson, counsel argued, the state would have had to follow procedures for commitment of the feeble-minded or mentally-ill in order to place Jackson in a state institution. These statutes provided due process protections greater than those in the indefinite confinement statute used against Jackson.[56] Petitioner asserted that indefinite commitment under Indiana law deprived him of consti-

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50. Wyatt v. Stickney, 344 F. Supp. 387, 395-407 (M.D. Ala. 1972). The standards include the following:

> (1) A statement of the least restrictive habilitation conditions necessary to achieve the purpose 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 conditions; and (6) criteria for discharge.

Comment, *supra* note 44, at 125 n.38 (1982).

51. 406 U.S. 715 (1972).

52. 422 U.S. 563 (1975).

53. 406 U.S. at 730.

54. *Id.* at 730.

55. *Id.* at 730, 738.

56. *Id.* at 723.

tutional due process and subjected him to cruel and unusual punishment.[57]

The Supreme Court held that Indiana's indefinite commitment of a criminal defendant solely on the ground of his lack of capacity to stand trial violated guarantees of due process.[58] The Court found that a defendant could not be held for more than the period of time reasonably necessary to determine whether there is a substantial probability that he will attain competency in the future.[59] The Court stated that "at 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."[60]

In *O'Connor v. Donaldson*,[61] the Supreme Court faced the right to treatment question in the context of the case of an involuntarily committed mental patient. Respondent had been confined for almost fifteen years "for care, maintenance, and treatment" as a mental patient in a Florida state hospital. Committed by his father,[62] Donaldson had made repeated attempts to secure release from the hospital.[63] His complaint alleged violations of rights during his years of confinement.[64]

Although the Court declined to decide the question of whether Donaldson had a right to treatment in the Florida institution,[65] it did hold 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 and friends."[66]

The *Jackson* and *O'Connor* cases, without providing for a right to treatment for the involuntarily committed mentally re-

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57. *Id.* at 719.
58. *Id.* at 738.
59. *Id.*
60. *Id.*
61. 422 U.S. 563 (1975).
62. This action, similar to *Youngberg v. Romeo*, was brought pursuant to 42 U.S.C. § 1983. 422 U.S. at 565. Under this section, the plaintiff alleged a deprivation of liberty. The circuit court found that the fourteenth amendment guaranteed a right to treatment for involuntarily committed mental patients. Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975).
63. *Id.* at 573.
64. 422 U.S. at 567.
65. 422 U.S. at 573.
66. *Id.*

tarded, did offer encouragement to those who sought the recognition of such a human right. Both cases established constitutional limits on a state's power in regard to the involuntarily committed patient in a mental institution.

After *Jackson* and *O'Connor,* Courts of Appeal for the Eighth and the Third Circuits addressed the right to treatment issue. In 1978, the Eighth Circuit considered the substantive rights of an involuntarily committed mental patient under the Due Process Clause of the fourteenth amendment in *Goodman v. Parwatikar.* [67] The committed individual in *Goodman* charged that she had received constitutionally inadequate treatment.[68] In giving instructions to the district court for remand proceedings in this § 1983 action, the Eighth Circuit stated that "the Due Process Clause compels minimally adequate treatment be provided for involuntary patients in state institutions."[69]

In March of 1981, the United States Court of Appeals for the Third Circuit faced the right to treatment issue in *Scott v. Plante.*[70] In this case, another § 1983 proceeding, the patient Plante had been confined to a psychiatric hospital since 1955, when a Burlington County, New Jersey jury had determined that he was mentally incompetent to stand trial.[71] Although Plante's action arose in the context of a criminal case, it presented the issue of the right to treatment of an involuntarily committed mental patient. Citing its earlier decision in *Romeo v. Youngberg* which case was then awaiting a grant of certiorari by the United States Supreme Court, the Third Circuit found that involuntarily committed mental patients, whether mentally ill or retarded, have a constitutionally protected right to treatment.[72]

Later in 1981, the right to treatment issue was put squarely before the United States Supreme Court in *Pennhurst State School & Hospital v. Halderman.*[73] The Court, however, chose not to decide the case on constitutional grounds,[74] reaching its determination instead on the basis of the Developmentally Dis-

67. 570 F.2d 801 (8th Cir. 1978).
68. *Id.* at 802.
69. *Id.* at 804.
70. 641 F.2d 117 (3d Cir. 1981).
71. *Id.* at 120.
72. *Id.* at 125.
73. 451 U.S. 1 (1981).
74. *Id.* at 11.

abled Assistance and Bill of Rights Act (DDAA).[75] The Court held that § 6010[76] of the Act does not create in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive" environment.[77]

The *Pennhurst* decision encountered sharp criticism in the legal community.[78] Penelope Boyd, an attorney who represented patient Halderman in the *Pennhurst* case before the Supreme Court, argues persuasively in a post-decision commentary that Congress clearly intended to confer an individually held right to treatment on the mentally retarded patient through the DDAA.[79] She crticizes the Supreme Court for reducing provisions granting such a right under the Act "to mere precatory language."[80]

"Title II [of the Act]," Boyd states, "is designed to assist in the protection of human rights under the Constitution of those mentally retarded and other developmentally disabled individuals who require institutional care or need community facilities and programs."[81] The Court, however, had preferred to emphasize the "assistance" language of the statute over its "rights" language, an act of extraordinary deference to the states.[82] Recognizing that *Pennhurst* was decided narrowly on the basis of §

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75. 42 U.S.C. §§ 6000-6081 (1976 & Supp. V 1981). The Act begins with an exhaustive statement of purposes. 42 U.S.C. § 6000(b)(1). The "specific purposes" of the Act are to "assist" and financially "support" various activities necessary to the provision of comprehensive services to the developmentally disabled.

76. 42 U.S.C. § 6000 (1976 & Supp. V 1981). It is interesting to note that absent from this section is any language suggesting that § 6010 is a "condition" for the receipt of federal funding under the Act.

77. 451 U.S. at 22-23. After a careful study of the language and congressional intent, the Court determined that the lower court had "failed to recognize the well-settled distinction between congressional 'encouragement' of state programs and the imposition of binding obligations on the States." *Id.* at 27. The Court succinctly stated that "when Congress intended to impose conditions on the grant of federal funds . . . it proved capable of doing so in clear terms." *Id.* at 23. "The existence of explicit conditions throughout the Act, and the absence of conditional language in § 6010, manifest the limited meaning of § 6010." *Id.*

78. *See generally* Boyd, *The Aftermath of the DD Act: Is There Life After Pennhurst?*, 4 U. ARK. LITTLE ROCK L.J. 448 (1981) [hereinafter cited as *Aftermath*]. *See also* Note, *Legal Rights of the Mentally Retarded: Pennhurst State School & Hospital v. Halderman*, 35 SW. L.J. 959, 961 (1981-82) [hereinafter cited as *Legal Rights*].

79. *Aftermath, supra* note 78, at 459-60.

80. *Id.* at 466.

81. *Id.* at 459.

82. *Id.*

6010 of the DDAA, critics agreed nevertheless that the decision indicated the Supreme Court was now disinclined to look favorably upon assertions of substantive rights for the mentally retarded.[83]

Against this background, the Supreme Court chose to consider the fourteenth amendment rights of the involuntarily committed mentally retarded patient in *Youngberg v. Romeo*.[84]

II. THE DECISION

Respondent Romeo argued that he had constitutionally protected liberty interests in safety, freedom of movement, and training within the mental health institution[85] and that petitioners had infringed upon these rights by failing to provide the required conditions of confinement.[86] Noting that the parties agreed that respondent had a right to adequate food, shelter, clothing, and medical care while confined,[87] the Court went on to consider the asserted liberty interests of the patient in safety, freedom of movement, and training.[88]

At the outset, the Court stated clearly that patient's asserted liberty interests in safety and freedom from bodily restraint had been established in prior Supreme Court decisions by inference from the recognized rights of convicted criminals.[89] Considering the question of safe conditions, the Court stated that "if it is cruel and unusual punishment to hold convicted criminals[90] in unsafe conditions, it must be unconstitutional to confine the involuntarily committed [mental patient]—who may not be punished at all—in unsafe conditions."[91] Writing for the majority, Justice Powell found that the individual's interest in freedom from bodily restraint has always been recognized as

83. *Id.* at 466.

84. 457 U.S. 307 (1982).

85. *Id.* at 315.

86. *Id.*

87. *Id. See also* Brief for Petitioners at 8, 11, 12 and Brief for Respondents at 15-16, Youngberg v. Romeo, 457 U.S. 307 (1982).

88. 457 U.S. at 315.

89. *Id.* While the Court states that the petitioners do not appear to argue to the contrary, the cited cases dealt with penal confinements.

90. *See id.* at 315-16.

91. *Id.*

"the core of liberty protected by the Due Process Clause."[92] Since this interest, like that of safe conditions, survives criminal conviction and incarceration, the majority reasoned that it must survive civil involuntary commitment.[93] Having acknowledged the established rights to freedom from unsafe conditions and from unnecessary bodily restraint, the Court addressed petitioner's claim that he was entitled to "minimally adequate habilitation."[94]

In their consideration of Romeo's claims, the judges of the Third Circuit had endorsed unanimously the right of the involuntarily committed mentally retarded patient to freedom from physical restraint, to safe conditions, and to treatment.[95] These rights were not found to be absolute, however. They were to be balanced against the interests of the state institution in efficient, economical operation.[96]

The Court of Appeals majority had determined that only a "compelling" state necessity could justify physical restraint of the involuntarily committed mentally retarded patient;[97] only a "substantial necessity" could justify a failure to provide for a patient's safety[98] and, where treatment had been administered, the adequacy of the treatment would offend constitutional standards, "only if treatment is not 'acceptable in the light of present medical or other scientific knowledge.' "[99]

Chief Judge Seitz of the Third Circuit, however, writing in concurrence, determined that the majority had given too little weight to the decisions of institutional personnel in matters of patient restraint, safety, and treatment.[100] These three aspects of patient care, he believed, were essentially inseparable in

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92. *Id.*

93. *Id.*

94. *Id.* In comparison with the other constitutional claims, the Court finds the "right to treatment" claim "more troubling" due to the fact that the context of the term "habilitation" is sharply disputed among members of the medical profession. *Id.* at 316 n.20. Also, the Court refuses to address the question of whether Romeo has a state substantive right to habilitation raising substantive, not procedural protection under the Due Process Clause. *Id.* at 316 n.19.

95. 644 F.2d at 158-59.

96. *Id.* at 159.

97. *Id.* at 160.

98. *Id.* at 164

99. *Id.* at 169.

100. *Id.* at 178.

clinical practice.[101] Judge Seitz opined that in all three areas "the Constitution only requires that professional judgment was exercised,"[102] and that a constitututional breach would occur only if decisions by institution staff in regard to patient safety, freedom from restraint, and training were "such a substantial departure from accepted standards [as to demonstrate] . . . that no professional judgment was in fact used."[103]

Writing for the Supreme Court majority in *Romeo*, Justice Powell adopted the unanimous position of the Third Circuit that the interests of the patient in freedom from restraint, safety, and treatment are not absolute,[104] and must be balanced against the interests of the state institution in determining whether a violation of patient's rights has occurred.[105] Justice Powell found, however, that the weight to be given state decisions on restraint, safety, and treatment had been correctly expressed, not in the Third Circuit majority opinion, but in Judge Seitz' concurrence.[106]

Applying the Seitz position, that professional judgment is entitled to substantial deference from the courts,[107] Justice Powell reduced the level of state justification necessary to overcome the liberty interests of the patient in safety and freedom from restraint, as defined by the Third Circuit majority, from "compelling" and "substantial" to a lower level less burdensome to the mental health institution.[108]

It is in the area of the right to treatment, however, that ap-

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101. *Id.* at 175.

102. *Id.* at 178.

103. *Id.*

104. 457 U.S. at 320. The Supreme Court reasoned that in operating an institution such as Pennhurst "there are occasions in which it is necessary for the State to restrain the movement of residents." *Id.*

105. *Id.* The Court classifies the question in this case as one of substantive due process, which differs from a procedural due process question (similar to *Jackson*), where a higher test would be required. *Id.* at 320 n.27. In this case, the purpose of petitioner's commitment was to provide reasonable care and safety, conditions not available to him outside an institution. *Id.* One author has suggested that the Supreme Court should adopt the strict scrutiny standard, because in his opinion, the mentally retarded form a suspect class. Note, *Parental Rights of the Mentally Retarded: The Advisability and Constitutionality of the Treatment of Retarded Persons in New York State*, 16 COLUM. J.L. & SOC. PROBS. 521 (1981).

106. *Id.* at 321.

107. *Id.*

108. *Id.* at 322.

plication of the Seitz standard by the Supreme Court majority had its most limiting effect. Judge Seitz had argued that the Constitution was satisfied if professional judgment was used in the denial of "minimally adequate care and treatment" to the involuntarily committed mentally retarded patient.[109] The kind of minimal treatment to which Judge Seitz referred in his concurrence, however, was "that education, training, and care required by retarded individuals to reach their maximum development."[110] Justice Powell, for the Supreme Court majority, applies the Seitz standard to a different, sharply restricted definition of "treatment." The Court majority accepts, at the outset, the proposition that once a state adopts the practice of institutionalizing patients,[111] a duty to provide certain services is created.[112] The full extent of those mandated services, however, "treatment per se"[113] is found not to be at issue in *Romeo*. Petitioner Romeo's argument that certain self-care programs were necessary to reduce his aggressive behavior led the Supreme Court majority to conclude that the only treatment at issue was that training "related to safety and freedom from restraint."[114]

Hence, the restrictive standards of Judge Seitz' concurrence in the Third Circuit are applied to a restrictive definition of "treatment" deemed to be at issue by the Supreme Court. The result is a definition of petitioner Romeo's liberty interest in treatment as a requirement that "the State . . . provide minimally adequate or reasonable training to ensure safety and free-

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109. 644 F.2d at 178.

110. *Id.* at 176.

111. 457 U.S. at 317. Citing Harris v. McRae, 448 U.S. 297 (1980) and Maher v. Roe, 432 U.S. 464 (1977), the Court concludes that "[a]s a general matter a State is under no constitutional duty to provide substantive services for those within its border." 457 U.S. at 317.

112. The Court goes on to qualify this duty by stating that "a State necessarily has considerable discretion in determining the nature and scope of its responsibilities." *Id.*

113. Although Justice Powell chose not to consider this issue, Chief Justice Burger, concurring in the judgment, stated that "I would hold flatly that respondent has no constitutional right to training, or 'habilitation,' *per se*." *Id.* at 329 (Burger, C.J., concurring in the judgment).

114. The Court states that "[o]n the basis of the record before us, it is quite uncertain whether respondent seeks any 'habilitation' or training unrelated to safety and freedom from bodily restraints." *Id.* at 318. In the brief to the Supreme Court, and in oral argument, respondent explicitly disavowed any claim that he was constitutionally entitled to such treatment as would enable him to achieve his maximum potential. *Id.* at 318 n.23.

dom from undue restraint."[115] Stating that it intended to curb the exercise of judicial review of state action in this area, the Court held that decisions by medical personnel related to such training would be "presumptively valid: liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[116]

Thus, the *Romeo* decision may be understood as a heightening of protection for mental health decision makers from liability for the provision of extensive patient treatment and from close judicial scrutiny of their actions.

The Supreme Court majority vacated the decision of the Court of Appeals and remanded the action for further proceedings on grounds that the trial jury had been instructed erroneously to determine defendants' liability on the basis of the eighth amendment.[117]

Concurring in the opinion of the majority, Justices Blackmun, Brennan, and O'Connor address two separate questions.[118] First, the Justices question whether the state of Pennsylvania could accept the patient Romeo for "care and treatment" under state statute and then refuse to provide him "treatment" as defined by the statute.[119] The concurring Justices suggest that those circumstances might constitute a violation of patient's due process rights since commitment without any treatment would not bear a reasonable relation to the ostensible purposes for which confinement was effected.[120]

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115. *Id.* at 319.

116. *Id.* at 323.

117. 457 U.S. at 325.

118. *Id.* (Blackmun, J., Brennan, J., and O'Connor, J., concurring).

119. *Id.* This question has been considered by other writers in the field of mental health. As one author points out: "[c]ommitment is usually justifiable only for the purpose of providing treatment." Comment, 16 HARV. C.R.-C.L.L. REV. 205, 210 (1981). Another author points out that the State's legitimizing "reason for allowing commitment of the mentally disordered persons is the belief that they are especially treatable." Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54, 65 (1982). It must be noted that under the Pennsylvania Statute (Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50 § 4406(b) (Purdon 1966)), the justification for commitment is "treatment."

120. 457 U.S. at 326. According to the three concurring Justices, "[i]f a state court orders a mentally retarded person committed for care *and* treatment . . . due process

The second issue addressed by the three concurring Justices concerned whether Romeo had an independent constitutional claim, grounded in the fourteenth amendment, to that training necessary to *preserve* those basic self-care skills[121] he possessed when he entered the Pennhurst mental health institution.[122] The concurrence states that, had the issue been before the Court in *Romeo*, it might have found this type of training to be constitutionally required.[123] The statement of the three Justices is significant as an indication of their willingness to extend the treatment constitutionally required, in certain circumstances, beyond the level of that necessary to ensure patient safety and freedom from undue restraint.[124]

Chief Justice Burger concurred separately in the Court's decision. The Chief Justice states clearly that he "would hold flatly that respondent [Romeo] has no constitutional right to training, or 'habilitation,' *per se*."[125] Chief Justice Burger reasons that although some amount of self-care instruction may be necessary, it is clear that "the Constitution does not otherwise place an affirmative duty on the State to provide any particular kind of training or habilitation—even . . . 'minimally adequate training.' "[126]

CONCLUSION

The *Romeo* decision is, at best, a partial and uncertain vindication of the rights of the involuntarily committed mentally retarded. Although the Court has recognized that liberty interests of involuntarily committed patients do exist, it has declined

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might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of these goals." *Id.* (emphasis in original). According to the majority and concurring Justices, however, this claim under state law was not properly raised in the lower court. *Id.*

121. *Id.* at 327. The Court lists two of these skills as "the ability to dress himself and care for his personal hygiene." *Id.*

122. *Id.*

123. *Id.* at 329. In the view of the concurring Justices "it would be consistent . . . to include . . . such training as is reasonably necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commitment." *Id.* at 327 (emphasis in original).

124. *Id.* at 329.

125. *Id.* at 329 (Burger, C.J., concurring in the judgment). *See supra* note 113 and accompanying text.

126. *Id.* at 330.

to extend those rights to include a "right to treatment"[127] other than that treatment necessary to promote safety and freedom from bodily restraint. Further, the Court's finding that the professional judgment of institution staff is entitled to a presumption of validity[128] may raise significant obstacles to successful prosecution of claims by mentally retarded patients alleging abridgment of their Constitutional rights. As Chief Justice Burger states, it is not inconceivable that even if the involuntarily committed patient were to establish that an institution's training programs were not consistent with prevailing medical practice, that such proof would not provide the patient with a valid cause of action so long as the training program had been prescribed by the institution's medical staff.[129]

Through *Romeo*, the Supreme Court has limited the significance of federal judicial review of the decisions of state institutions in regard the rights of the involuntarily committed mentally retarded. Effective challenges to institution decisions, however, may still be brought in the forum of the state courts.[130] Indeed, in light of the recent decision by the Pennsylvania Supreme Court in *In Re Schmidt*,[131] it is reasonable to anticipate an increase in state court actions related to this area of law. It is inevitable, in turn, that the United States Supreme Court will be called upon to review again the claims of the involuntarily committed mentally retarded to Constitutional protections. More comprehensive claims than those made for Nicholas Romeo will offer the Court opportunities for examination of a full range of patient's rights issues.

For the moment, however, those seeking a definition of the rights of the involuntarily committed mentally retarded must turn to *Romeo*. After the *Pennhurst* decision, one author stated

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127. *See supra* note 113 and accompanying text.

128. This presumption was granted with full knowledge that it would serve to limit judicial review. 457 U.S. at 323. The Court finds that this presumption should also limit interference by the federal judiciary with the internal operations of the institution. *Id.* at 322. Above all, the Supreme Court finds no reason to think that judges or juries are better qualified than appropriate professionals in making such decisions. *Id.*

129. *Id.* at 331.

130. *Id.* at 324 (Blackmun, J., Brennan, J., and O'Connor, J., concurring).

131. *See Legal Rights, supra* note 78, at 971. Just prior to the *Pennhurst* decision, the Pennsylvania Supreme Court recognized a right under state law to habilitation in an individualized fashion in the least restrictive environment. *In Re Joseph Schmidt*, 494 Pa. 86, 429 A.2d 631 (Pa. 1981).

that, for the understanding of the rights of involuntarily committed mentally retarded patient, the Court's opinion "simply muddies the water."[132] The decision in *Romeo* has had, unfortunately, much the same effect.

Bradley Nicholas Schulz

132. 5 MENTAL DISABILITY L. REP. 139 (1981).