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EX-MENTAL PATIENTS HAVE RIGHTS TOO*

I. INTRODUCTION

Our nation's mentally ill population, at one time warehoused under deplorable conditions in state and privately run institutions,¹ is no longer "out of sight, out of mind."² In the past two decades, compassionate civil rights attorneys and mental health advocacy groups have won long-over-due recognition of legal rights for this once ill regarded populace.³ Treatment in mental institutions has

* The author wishes to express his gratitude to Professor Michael L. Perlin for his helpful suggestions and criticisms.

1. See A. DEUTSCH, *THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES* (2d ed. 1949); A. DEUTSCH, *THE SHAME OF THE STATES* (1973) (comparing the conditions in American state mental hospitals with the horrors of Nazi concentration camps). See also S. BRAKEL, J. PARRY & B. WEINER, *THE MENTALLY DISABLED AND THE LAW* (3d ed. 1985); A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* (1974) (for an excellent list of articles which explore the prevalent conditions in mental hospitals during the 1960s and early '70s); S. SHEEHAN, *IS THERE NO PLACE ON EARTH FOR ME?* (1983) (detailing the conditions at the Creedmoor Psychiatric Center through a thorough examination of the treatment of a paranoid schizophrenic named Sylvia Frumkin); Lehmann, Possidente, & Hawken, *The Quality of Life of Chronic Patients in a State Hospital and in Community Residences*, 37 HOSP. & COMMUNITY PSYCHIATRY 901 (1986).

2. Kanter, *Homeless Mentally Ill People: No Longer Out of Sight and Out of Mind*, 3 N.Y.L. SCH. HUM. RTS. ANN. 331 (1986) (with so many of the mentally ill receiving care and treatment in the community instead of in institutions, the nation can no longer ignore the existence of a mentally ill population). See Rapson, *The Right of the Mentally Ill to Receive Treatment in the Community*, 16 COLUM. J.L. & SOC. PROBS. 193, 194 (1980), who points to the big turn-around from hospital to outpatient treatment during the heyday of deinstitutionalization. See Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness and Libertarian Theory*, 31 EMORY L.J. 375 (1982), for a thorough discussion of the effects of the deinstitutionalization movement. Deinstitutionalization was a policy instituted by state governments to reduce the vast numbers of mentally ill patients living in psychiatric facilities. See *infra* note 9 for further discussion of deinstitutionalization.

3. Perlin, *Rights of Ex-Patients in the Community: The Next Frontier?*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 33, 34 (1980) [hereinafter *The Next Frontier*]. Professor Perlin suggests a "logical progression" of recognizing legal rights for the poor, minorities, and those traditionally isolated from mainstream society. This progression began with *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and advanced to *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *O'Connor v. Donaldson*, 422 U.S. 563 (1975). Professor Perlin asserts that mental patients and ex-patients are just one class in a series of downtrodden groups now finding redress for civil rights grievances through use of the legal system. *The Next Frontier*, *supra* at 34-35. See also Perlin, *Economic Rights of the Institutionalized Mentally Disabled*, 10 INT'L J.L. & PSYCHIATRY 187 (1987); Perlin, *Ten Years After Evolving Mental Health Advocacy and Judicial Trends*, 15

improved,⁴ and numbers of mentally ill patients are being assimilated back into society through the use of community mental health facilities and hospital outpatient treatment programs.⁵ Despite the advances, however, new problems have been engendered.⁶

Great civil rights battles have been won, bringing about lesser restraints on mental patients' liberty interests.⁷ However, despite this

FORDHAM URB. L.J. 335 (1986-87) [hereinafter *Ten Years After*]; See *infra* note 7.

4. Nonetheless, some cases are still being litigated on the issue of institutional conditions. See, e.g., *Doe v. Klein*, 143 N.J. Super. 134, 362 A.2d 1204 (App. Div. 1976).

5. Appelbaum, *Outpatient Commitment: The Problems and the Promise*, 143 AM. J. PSYCHIATRY 1270 (Oct. 1986) (identifying the problems inherent in state statutory provisions permitting outpatient treatment: 1) provisions infrequently employed because the criteria for outpatient care are often identical to those for inpatient commitment, and, 2) statutes generally fail to provide enforcement mechanisms for patients who violate the conditions of outpatient treatment).

Although mandatory outpatient treatment does not demonstrably reduce readmissions, it may improve the quality of life of patients while living outside the hospital, reducing the time spent in the hospital. See Bursten, *Posthospital Mandatory Outpatient Treatment*, 143 AM. J. PSYCHIATRY 1255 (Oct. 1986). See also Coye, *Rights of Recipients in Community Residences*, 8 MENTAL & PHYSICAL DISABILITY L. REP. 491 (Sept.-Oct. 1984), for detailed excerpts from the Michigan Department of Mental Health guidelines for dependent living settings for mentally ill and developmentally disabled persons.

6. Early advocates of deinstitutionalization were overly optimistic about the ability of released patients to survive, unaided in society, therefore they focused too heavily on obtaining liberty for patients instead of seeking services for them. Rhoden, *supra* note 2, at 377. The ranks of the homeless, many ex-mental patients, have increased dramatically. See generally *Homelessness in America II: Hearings Before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. 1 (1984) (for various testimony of Congressional witnesses).

7. See *Mills v. Rogers*, 457 U.S. 291 (1982) (case remanded to the court of appeals to decide the issue of the right to refuse treatment with psychotropic medication. On remand, the First Circuit recognized a due process right to refuse psychotropic medication under Massachusetts law. *Mills*, 457 U.S. 291, remanded *sub nom.* *Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (mentally retarded person, who was involuntarily committed, has a constitutional right to: a) reasonably safe conditions of confinement, b) freedom from unreasonable bodily restraints, and c) minimum adequate training to reasonably assure security and freedom from undue bodily restraints); *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983) (involuntarily committed mental patients have a constitutional right to refuse medication and antipsychotic drugs which may only be constitutionally administered when, in the exercise of professional judgment, such action is deemed necessary to prevent the patient from endangering himself or others); *Project Release v. Prevost*, 722 F.2d 960 (2d Cir. 1983) (the right to refuse medication was gleaned from regulations providing objection to treatment); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (constitutional right to treatment for civilly committed patients); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966) (right to treatment in the least restrictive environment mandated

success, the numbers of ex-patients living on the streets, often in life-threatening situations, has increased.⁸

The aftercare facilities that exist are simply too overburdened and underfunded to handle the massive number of deinstitutionalized mental patients living in the community.⁹ So many of these ex-patients, although not sick enough to be confined, lack the skills necessary to cope in the "real world."¹⁰ Sadly, many discharged patients end up scratching out a meager existence on the streets.¹¹ Those of us living in major metropolitan areas are confronted daily by these mentally ill castaways as we proceed to and from work. The newspapers report tales of woe about these misfits of the streets.¹² A current problem confronting mental health advocates is

under D.C. CODE ANN. § 21-545(b)); *Birl v. Wallis*, 633 F. Supp. 707 (M.D. Ala. 1986) (newly released patient cannot be reconfined to state mental hospital for purpose of preventing further deterioration or danger to others without commitment hearing); *but see Dautremont v. Broadlawns Hosp.*, 827 F.2d 291 (8th Cir. 1987) (administration of psychotherapeutic medicine against the will of patient did not violate due process); *Rivers v. Katz*, 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986) (state may administer antipsychotic medication pursuant to the police power, when patient presents immediate danger to himself or others).

8. See Appleby & Desai, *Documenting the Relationship Between Homelessness and Psychiatric Hospitalization*, 36 HOSP. & COMMUNITY PSYCHIATRY 732, 732 (1985); Rhoden, *supra* note 2, at 375-76; Note, *Establishing a Right to Shelter for the Homeless*, 50 BROOKLYN L. REV. 939, 939 n.3 (1984).

Another problem, often encountered, is that so many of the existing treatment facilities prefer to treat the "worried well" as opposed to those with substantial mental health illnesses. Interview with Michael L. Perlin, Professor of Law, New York Law School, in New York City (Apr. 26, 1988).

9. See Rapson, *supra* note 2, at 194-97, 206-13. Contributing to this problem, for more than a decade discharges from public mental health facilities have exceeded admissions. See S. BRAKEL, J. PARRY & B. WEINER, *supra* note 1, at 208. See also Winslow, *Changing Trends in CMHCs: Keys to Survival in the Eighties*, 33 HOSP. & COMMUNITY PSYCHIATRY 273 (1982).

10. See Rapson, *supra* note 2, at 194.

11. See Rhoden, *supra* note 2, at 375-76 (quoting A. SCULL, *DECARCERATION: COMMUNITY TREATMENT AND THE DEVIANT: A RADICAL VIEW* 2 (1977)).

12. See N.Y. Times, Oct. 6, 1987, at B3, col. 2 (discussing new city programs to help remove disturbed people from street). See also the highly publicized case of *Boggs v. New York City Health & Hosps. Corp.*, 132 A.D.2d 340, 523 N.Y.S.2d 71 (1st Dep't 1987) (involuntary commitment of mentally ill homeless woman supported by evidence that she did not comprehend her need for food, clothing, or shelter, walked in front of moving cars, and was in danger of assault because she screamed racial epithets). The *Boggs* case was ultimately dismissed as moot by the New York Court of Appeals since the confining hospital had released Billie Boggs after she refused to accept any psychotropic medication. *Boggs v. New*

how to help these mentally ill individuals assume healthy and productive lives in our society. This paper seeks to show what has happened to the deinstitutionalized mentally ill, to identify the legal rights available to ex-patients in the community, and to suggest ways these rights may be realized by these social outcasts.¹³ In particular, the plight of ex-mental patients, now cast adrift in the community, will be examined in depth.¹⁴

II. THE DEINSTITUTIONALIZATION MOVEMENT

The strides made toward deinstitutionalization, largely brought about through the recognition of a legal right to treatment in the least restrictive environment,¹⁵ may be fairly touted as the greatest

York City Health & Hosps. Corp., 70 N.Y.2d 972, 520 N.E.2d 515, 525 N.Y.S.2d 796 (1988).

13. See generally Coye, *supra* note 5; Freddolino, *Findings from the National Mental Health Advocacy Survey*, 7 MENTAL DISABILITY L. REP. 416 (Sept.-Oct. 1983); Parry, *Rights and Entitlements in the Community*, in S. BRAKEL, J. PARRY & B. WEINER, *supra* note 1, at 607 [hereinafter *Rights*]; *Ten Years After*, *supra* note 3.

14. See generally, Kanter, *supra* note 2; *The Next Frontier*, *supra* note 3; Rhoden, *supra* note 2; Note, *Building a House of Legal Rights: A Plea for the Homeless*, 59 ST. JOHN'S L. REV. 531 (1982); M. PERLIN, MENTAL DISABILITY LAW: CIVIL & CRIMINAL 671-95 (1989).

15. The seminal case of *O'Connor v. Donaldson*, 422 U.S. 563 (1975), was the initial victory for mental patients who, until then, had been warehoused in mental hospitals. The Supreme Court ruled that "a State cannot constitutionally confine . . . 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" based solely on his mental illness. *Id.* at 576. This marked the beginning of a legal right to treatment. As Justice Burger aptly pointed out in his concurrence: a state cannot "lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment." *Id.* at 589.

After *O'Connor*, mental health advocates went to work on securing the further right to treatment in the least restrictive environment. Many courts have recognized this right, although the Supreme Court, thus far, has declined to go so far. See *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 647 (3d Cir. 1982) (future commitment unwarranted absent individual determination that a community living arrangement or other less restrictive environment unsuitable); *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969) (least restrictive alternative principle equally applicable to alternative dispositions within a mental hospital); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); *Dixon v. Weinberger*, 405 F. Supp. 974 (D.D.C. 1975) (right to treatment by placement in alternative facilities when appropriate); Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L.J. 595, 634-35 (1983); but see *Society for Goodwill v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984) (no entitlement to the least restrictive environment under the federal constitution); *Johnson ex rel. Johnson v. Brelje*, 701 F.2d. 1201 (7th Cir. 1983) (due

victory of all for mental patients. Unfortunately, the abuses suffered by these individuals while living in mental institutions has been supplanted by the abusiveness of a cold, cruel world ill-equipped to care for these nomads.¹⁶ The flaw in the deinstitutionalization process is that even though these patients were entitled to release from the institution, inadequate community treatment centers existed to help these discharges adapt to the outside world.¹⁷ To remedy this situation, release must be conditioned on continuing community or outpatient treatment.¹⁸ This procedure aims to assure successful reintegration of these individuals into society. Aside from continued treatment, ex-patients must be apprised of their legal rights in the community.¹⁹ With knowledge and exercise of their rights, this group can rejoin our society.

Today, ex-mental patients can assert several rights to better their human condition. These include voting rights,²⁰ parental

process does not guarantee right to least restrictive environment money can buy).

16. See Appleby & Desai, *supra* note 8, at 736-37; Bassuk, Rubin & Lauriat, *Is Homelessness a Mental Health Problem?* 141 AM. J. PSYCHIATRY 1546, 1548-49 (1984); Kanter, *supra* note 2, at 342-43, 356-57.

17. See Rapson, *supra* note 2, at 194; Rhoden, *supra* note 2, at 375-77.

18. See Rapson, *supra* note 2, at 195; Rhoden, *supra* note 2, at 376-77. Liability concerns may preclude outpatient commitment, but such fears seem ill-founded. See *Killeen v. State*, 66 N.Y.2d 850, 489 N.E.2d 245, 498 N.Y.S.2d 358 (1985) (decision to place patient in program to prepare him for life outside institution is a medical judgment, for which no liability could be imposed on state for injuries sustained by patient in program); *Schrempf v. State*, 66 N.Y.2d 289, 487 N.E.2d 883, 496 N.Y.S.2d 973 (1985) (state psychiatrist's failure to intervene in some manner upon belief that mental patient on outpatient status was not taking medication did not impose liability on state for death of man killed by patient).

Of course, not all releases need to continue on outpatient treatment, but even those discharges with less severe mental health problems could benefit from community aftercare services which help these ex-patients ease their way back into society. Where no aftercare facilities exist in the community, it becomes a medical decision whether a patient seeking release can survive on his own outside the institution.

19. Lecklitner & Greenberg, *Promoting the Rights of the Chronically Mentally Ill in the Community: A Report on the Patient Rights Policy Research Project*, 7 MENTAL DISABILITY L. REP. 422 (Sept.-Oct. 1983).

20. See *Manhattan Citizens' Group v. Bass*, 524 F. Supp. 1270, 1274 (S.D.N.Y. 1981); Parry, *Decision-making Rights over Persons and Property*, in S. BRAKEL, J. PARRY, & B. WEINER, *supra* note 1, at 435, 445-46) [hereinafter *Decision-making*]; Note, *supra* note 14, at 547-53.

rights,²¹ right to counsel,²² right to expungement of records,²³ right to freedom from discrimination in employment,²⁴ and a possible right to shelter for the mentally ill homeless, which some jurisdictions recognize.²⁵ These rights, together with the right to aftercare in the community,²⁶ can bring the promise of a better life for ex-mental patients.

21. See, e.g., *Lehmann v. Lycoming County Children's Servs. Agency*, 458 U.S. 502 (1982), where a writ of *habeas corpus* filed by a mother with "limited social and intellectual development" to regain custody of her three children from a county social services agency did not confer jurisdiction on the federal courts to consider collateral challenges to state court judgments involuntarily terminating parental rights.

22. See *Rights*, *supra* note 13, at 677-84.

23. See *Decision-making*, *supra* note 20, at 465-66.

24. See *Rights*, *supra* note 13, at 648-57.

25. See Note, *supra* note 8, at 939; Note, *supra* note 14, at 531; *In re Commitment of S.D.*, 212 N.J. Super. 211, 514 A.2d 844 (Super. Ct. App. Div. 1986) (findings that a patient in a mental institution was unable to care for himself outside of the institution did not support an order continuing patient's commitment); *In re Commitment of B.H.*, 212 N.J. Super. 145, 514 A.2d 85 (Law Div. 1986) (summary revocation of patient's conditional discharge status by recommitment for actions such as not attending outpatient program or taking prescribed medication, constituted violation of patient's due process rights, since it was not done by court of review); *Maticka v. Atlantic City*, 216 N.J. Super. 434, 524 A.2d 416 (Law Div. 1986) (plan to shelter homeless); *In re Carl C.*, 126 A.D.2d 640, 511 N.Y.S.2d 144 (2d Dep't 1987) (patient did not pose direct threat of physical harm to himself or others such as resulting from refusal or inability to meet essential needs for food, clothing, or shelter); *In re Harry M.*, 96 A.D.2d 201, 468 N.Y.S.2d 359 (2d Dep't 1983) (individual incapable of surviving without care and assistance provided by institutionalized setting poses clear danger to himself under involuntary commitment statute; this may be evidenced by failure to meet essential needs for food, clothing, or shelter); *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct., Dec. 5, 1981) (homeless men are entitled to board and lodging); *Eldredge v. Koch*, 98 A.D.2d 675, 469 N.Y.S.2d 744 (1st Dep't 1983) ("homeless women are constitutionally entitled to treatment equal to that accorded to homeless men." *Id.* at 676, 469 N.Y.S.2d at 745.); *McCain v. Koch*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1st Dep't 1986) (right to emergency housing for families recognized); *Mixon v. Phillips*, N.Y.L.J., Jan. 24, 1989, at 22, col. 5 (Sup. Ct. 1989); *People v. Merrill*, 123 Misc. 2d 498, 474 N.Y.S.2d 198 (Sup. Ct. 1984) (whether or not an individual is suitable for community living must be left to sound medical judgment); *but see*, *Lindsey v. Normet*, 405 U.S. 56 (1972) (no constitutional right to shelter); *Williams v. Barry*, 708 F.2d 789 (D.C. Cir. 1983) (no right to shelter).

26. Rapson, *supra* note 2; Rhoden, *supra* note 2; *infra* notes 29-72 and accompanying text discussing the right to aftercare.

III. LIFE AFTER DISCHARGE

Once a mental patient is released into the community, he must fend for himself. For some, the task is not insurmountable, but for many, the routine events of everyday living are not so routine. Finding living arrangements, such as an apartment, is nearly impossible, acquiring a job improbable, and just learning where to begin is frightening. Here, ex-patients' groups can assist newly discharged patients in daily living skills.²⁷ Many ex-patients may have no marketable job skills and are therefore dependent on government aid for mere sustenance.²⁸ Several government programs, such as Welfare, Medicaid, Medicare, and Social Security Supplemental Income can benefit these lost individuals.²⁹ Unfortunately, too many do not know how to go about filing for these benefits.³⁰ Mental health agencies must develop legal aid centers to help these ex-patients back on their feet. Without assistance, these individuals may quickly join the ranks of the homeless mentally ill or become recommitted to institutions.³¹ The goal of the mental health system is to bring these people back into society for their own benefit and the benefit of us all. Greater revenues devoted to community service will supply the means for ex-patients to readjust to the world. Without adequate aftercare, the deinstitutionalization process

27. Without the ability to carry on day to day functions, routine to most adults, many former mental patients, unable to readjust to society, are readmitted to institutions or join the ranks of the homeless. A list of advocacy groups is compiled in B. ENNIS & R. EMERY, *THE AMERICAN CIVIL LIBERTIES UNION HANDBOOK: THE RIGHTS OF MENTAL PATIENTS* 216-19 (1978); See also Federation For Community Planning, *Community-Sponsored Cooperative Apartments: A Handbook on how Volunteers Can Establish Cooperative Apartments for Former Mental Hospital Patients*, 10 *LAW & HOUSING J.* 37 (1982-83); Lecklitner & Greenberg, *supra* note 19, at 422; Rapson, *supra* note 2, at 196, 252-55.

28. Others may have lost their social skills while institutionalized as a result of iatrogenic illness and/or tardive dyskinesia. See *Rennie v. Klein*, 482 F. Supp. 1131, 1135 (D.N.J. 1978) (for a discussion of the side effects of psychotropic medication). Tardive dyskinesia is evidenced by repetitive, involuntary movements of the tongue, face, mouth, or jaw, sometimes accompanied by other bizarre muscular activity. *Id.*

29. For a thorough analysis of such programs, see *Rights*, *supra* note 13, at 670-77.

30. Many of these programs require verification of a "bona fide" residence before benefits may be received, this requirement, in effect, denies all homeless individuals access to such programs. See Note, *supra* note 14, at 533-37.

31. See Rapson, *supra* note 2, at 206-17; Rhoden, *supra* note 2, at 421 n. 211.

can only fail.³²

IV. ESTABLISHING A RIGHT TO AFTERCARE

Sadly, these ex-patients return to society with the stigma associated with mental illness.³³ The only true means of overcoming this stigma is through improved mental health. Bettering their condition has not been easy, since the United States Supreme Court has not recognized a federal constitutional right to aftercare.³⁴ Such a right, however, may be established under state constitutional law.³⁵

A. Right To Shelter

Hopefully, successful litigation on related issues will bring about better aftercare for ex-mental patients in the community. In *Callahan v. Carey*,³⁶ a class of New York City's homeless men asserted a right to shelter under the New York State Constitution and the Social Service Law.³⁷ A majority of these men were

32. See Rhoden, *supra* note 2 at 376-77.

33. Stigmatic effects of institutionalization include society's generalized attitudes of distrust, anxiety, and hostility toward former mental patients. This "scarlet letter" may affect an ex-patient's ability to locate housing, secure and hold a job, and enjoy legal privileges. Rapson, *supra* note 2, at 199; Armstrong, *Conference Report-Stigma: Its Impact on the Mentally Ill*, 31 HOSPITAL & COMMUNITY PSYCHOLOGY 342 (1980); Gove & Fain, *The Stigma of Mental Hospitalization*, 28 ARCHIVES GEN. PSYCHIATRY 494 (1973). See, A. BROOKS, *supra* note 1, at 646 (for a list of articles analyzing the stigma problem). See also *Addington v. Texas*, 441 U.S. 418, 425-26 (1979); *In re Ballay* 482 F.2d 648, 651-52 (D.C. Cir. 1973); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1088-89 (E.D. Wis. 1972).

34. Aftercare refers to community-based supportive services for discharged mental patients. Although the Supreme Court has ruled that nondangerous mentally ill individuals can not be warehoused if they are able to live by themselves or with assistance in the community, *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975), the Court has so far left undecided the issue of whether the states are constitutionally obligated to provide community support services to enable mentally ill and disabled persons to be released from institutions. See, *Rights*, *supra* note 13, at 620-22, for a summary of the current state of the law on the aftercare issue.

35. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A.L. REV. 1249 (1987).

36. *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct., Dec. 5, 1981).

37. N.Y. CONST. art. XVII, § 1 (which provides that: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions,

mentally ill; they had been discharged when the standards for continued commitment in New York were changed. Under the new admissions criteria, individuals who would have been confined under the former law, were now forced to fend for themselves.³⁸ The case was settled by a consent decree whereby the city agreed to provide food, shelter, and security to all the men applying for shelter.³⁹

In another New York case, *Klostermann v. Cuomo*,⁴⁰ the New York Coalition for the Homeless sought recognition of a constitutional and statutory right to aftercare for homeless ex-mental patients.⁴¹ The state's highest court recognized that the plaintiffs, who were denied community placement provided to others with less severe mental conditions, stated a valid claim for relief under both federal and state equal protection clauses.⁴²

B. Right to Treatment

Since a new dischargee from an institution had been previously confined for treatment under the state's *parens patriae* powers, the dischargee's right to treatment, a right implicitly recognized by the United States Supreme Court,⁴³ further entitles him to such care as

and in such manner and by such means, as the legislature may from time to time determine" *Id.*). N.Y. SOC. SERV. LAW §§ 62(1), 131(3) (McKinney 1983); N.Y. COMP. CODES R. & REGS. tit. 604, § 604-1.0(b) (1978).

38. *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct., Dec. 5, 1981).

39. *Id.* at 2-13.

40. *Klosterman v. Cuomo*, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984).

41. *Id.* at 535-41, 465 N.E.2d at 593-96, 475 N.Y.S.2d at 252-55.

42. *Id.* at 532, 463 N.E.2d at 591, 475 N.Y.S.2d at 250.

43. The right to treatment is premised on the fourteenth amendment right to liberty. *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (established that confining a nondangerous mental patient for the stated purpose of treating his illness without providing necessary treatment, violates that person's liberty interest). The right to treatment was extended in state and federal courts to include a right to treatment in the least restrictive environment. The United States Supreme Court has not yet explicitly recognized this right. The next step has been for some courts to find a right to community aftercare services based on the right to treatment in the least restrictive environment. See *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971) ("[to] deprive any citizen of his or her liberty interest upon the altruistic theory that confinement is for human therapeutic reasons and then fail to provide adequate treatment violates due process." *Id.* at 785); but see *Doe v. Public Health Trust of Dade County*, 696 F.2d 901 (11th Cir. 1983) (voluntary, minor mental

is needed in the community.⁴⁴ This argument supplies a link between the already recognized right to treatment and the presently unrecognized right to aftercare. Moreover, the right to treatment in the least restrictive environment, first recognized in *Lake v. Cameron*,⁴⁵ supports a theory of a right to treatment in the community.⁴⁶ *Lake v. Cameron*, although decided on statutory grounds, has stood as precedent for many later cases asserting the right to a least restrictive alternative for treatment. Only two years later in *Covington v. Harris*,⁴⁷ Judge Bazelon extended the right to a least restrictive placement within a mental institution.⁴⁸ This doctrine has set the stage for arguments in support of a right to community aftercare. Although this new found principle has failed in several instances,⁴⁹ recent cases demonstrate a willingness on the part of some courts to embrace this theory.⁵⁰ For instance, *Thomas S. v.*

patient has no constitutional right to treatment in the least restrictive environment).

44. See Note, *supra* note 8, at 951-56.

45. *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966).

46. Rhoden, *supra* note 2, at 385-86, 422-24; see also *Dixon v. Weinberger*, 405 F. Supp. 974 (D.D.C. 1975) (right to treatment in the least restrictive environment based on statutory grounds).

47. *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969).

48. *Id.*

49. *Lindsey v. Normet*, 405 U.S. 56 (1972) (no constitutional right to shelter); *Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987) (vacating consent decree establishing a least restrictive alternative setting as minimum standard of care for mentally retarded patients' habitation requiring community placements); *Society for Goodwill to Retarded Citizens, Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984) (residents not constitutionally entitled to community placement); *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983) (absent contention mentally retarded adults denied access to community residential facilities because of their handicap, Rehabilitation Act of 1973, 29 U.S.C. § 701 (1973), has no application to claim that state has an affirmative duty to create less restrictive community residential settings for them); *Williams v. Barry*, 708 F.2d 789 (D.C. Cir. 1983) (no right to shelter in the community).

50. *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986), *cert. denied*, 476 U.S. 1124 (1986), 479 U.S. 869 (1986) (right to minimally adequate treatment for incompetent, even though released from state hospital); *Clark v. Cohen*, 794 F.2d 79 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 459 (1986); *Dixon v. Weinberger*, 405 F. Supp. 974 (D.D.C. 1975) (right to treatment by placement in alternative facilities when appropriate); *New Jersey Ass'n for Retarded Citizens v. New Jersey Dep't of Human Servs.*, 89 N.J. 234, 445 A.2d 704 (1982) (the State Department of Human Services is required to provide a spectrum of settings in which programming can be given to mentally retarded); *Maticka v. Atlantic City*, 216 N.J. Super. 434, 524 A.2d 416 (Law Div. 1986); *Patients v. Camden County Bd. of Chosen Freeholders*, No. L-33417-74 (N.J. Super. Ct., Jan. 19, 1981); *Eldredge v. Koch*, 118 Misc. 2d 163, 459

Morrow,⁵¹ a 1986 decision from the Fourth Circuit, held that a released incompetent from a state hospital is entitled to minimally adequate treatment.⁵² An extension of this view is that not only mental discharges, but others who voluntarily present themselves for treatment in the community, are entitled to a right to community aftercare.⁵³

C. Discharged Conditioned on Continued Community Aftercare

The lack of success in the fight for aftercare has in part stemmed from a lack of community treatment facilities.⁵⁴ Several courts ordering release of mental patients have conditioned discharge on appropriate placement in the community.⁵⁵ Absent proper facilities, these patients end up classified as "discharged pending placement,"⁵⁶ forced to remain in confinement until proper community treatment becomes available.

N.Y.S.2d 960 (Sup. Ct. 1983) (right to shelter), *rev'd on other grounds*, 98 A.D.2d 675, 469 N.Y.S.2d 744 (1st Dep't 1983); *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct., Dec. 5, 1981); *In re Schmidt*, 494 Pa. 86, 429 A.2d 631 (1981) (Pennsylvania Mental Health/Mental Retardation Act, 50 Pa. Cons. Stat. Ann. §§ 4101-4704 (Purdon 1969 & Supp. 1988) requires state to provide care in least restrictive environment).

51. *Thomas S.*, 781 F.2d at 367.

52. *Id.* at 374-75.

53. See Rhoden, *supra* note 2, at 426-27.

54. See Rapson, *supra* note 2, at 206-13; Lecklitner & Greenberg, *supra* note 19, at 422; Beiser, Shore, Peters, & Tatum, *Does Community Care For The Mentally Ill Make A Difference? A Tale Of Two Cities*, 142 AM. J. PSYCHIATRY. 1047 (Sept. 1985); Scull, *Mental Patients And The Community: A Critical Note*, 9 INT'L J. L. & PSYCHIATRY 383 (1986).

55. See *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 647 (3rd Cir. 1982); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966) (the district court found no residential settings available, thus compelling Ms. Lake to continue hospital confinement); *Dixon v. Weinberger*, 405 F. Supp. 974 (D.D.C. 1975); *K.P. v. Albanese*, 204 N.J. Super. 166, 497 A.2d 1276 (App. Div. 1985) (exercise of clinical judgment in assignment of privilege level to mental patient eligible for discharge pending placement to effectuate treatment goals did not impinge on patient's right to least restrictive conditions necessary to achieve purposes of treatment).

56. *In re Commitment of S.L.*, 94 N.J. 128, 462 A.2d 1252 (1983) (*parens patriae* commitment of discharges pending placement in community until proper supportive settings available outside institution); see also Perlin, *Discharged Pending Placement: The Due Process Rights Of The Nondangerous Institutionalized Mentally Handicapped With Nowhere To Go*, 5 DIRECTIONS IN PSYCHIATRY 1 (1985).

Some states have statutory discharge planning requirements, embodying a right to community aftercare.⁵⁷ Such legislative schemes are commendable since they exhibit the proper forethought, taking the best interests of the mental patient into account.⁵⁸ At least, under these plans, patients are not prematurely released when inadequate support services exist to treat discharged patients.

D. Aftercare Premised on Fourteenth Amendment

A further argument in support of a right to community-based treatment stems from the fourteenth amendment⁵⁹ under the presupposition that a dischargee has a right to *continued* mental health service in the community.⁶⁰ This right is based on the patient's reliance on these services under a *Perry v. Sindermann*⁶¹ analysis. Former patients, now struggling in the community, as a result of inadequate community placement, may make an aftercare claim based on improper state action.⁶² Especially where these ex-patients have been confined for lengthy periods of time, thereby diminishing their capacity to survive independently upon release, a constitutional claim to continued treatment in the community is possible.⁶³ One commentator has thoughtfully posited this view,⁶⁴

57. See Rapson, *supra* note 2, at 246. For a comprehensive list of applicable statutes see *Rights, supra* note 13, at 626-27.

58. Notably, so far only thirteen states and the District of Columbia have statutes that require or encourage services in the least restrictive environment. *Rights, supra* note 13, at 627. Only three of those (Colorado, District of Columbia and Wisconsin) create a specific entitlement to community services or deinstitutionalization. *Id.*

59. U.S. CONST. amend. XIV, §1.

60. *Perry v. Sindermann*, 408 U.S. 593 (1972).

61. *Id.* The entitlement to continued treatment is premised on the "mutually explicit understanding" doctrine. Under that theory, an individual has the expectation that a government benefit will not be discontinued because state action has led him to anticipate and depend on it. *Id.* at 601. "[A] person's interest in a benefit is a property interest for due process purposes if there are such . . . mutually explicit understandings that support his claim of entitlement to the benefit that he may invoke at a hearing." *Id.*

62. See Rhoden, *supra* note 2, at 427.

63. *Id.*

64. Note, *supra* note 8, at 970-71; but see *Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985) (residents of shelter can not claim they relied on government promise to their detriment by choosing to live at shelter instead of in the streets).

however, it has not been tested before the courts.

*E. Right to Minimal Habitation or Treatment
in Least Restrictive Environment*

Despite the failure of the United States Supreme Court to recognize a constitutional right to community mental health services,⁶⁵ the battle rages on in state and federal district courts where plaintiffs seek to assert this right.⁶⁶ In the seminal case of *Halderman v. Pennhurst State School and Hospital*,⁶⁷ a federal district court finding a constitutional right to minimal habilitation or treatment in the least restrictive environment, provided the basis for an order directing the state to provide community living arrangements for most of the hospital's residents.⁶⁸ Even though the decision was later overturned by the Supreme Court on other grounds, the decision is still cited favorably by other courts.⁶⁹ Many jurisdictions fail to recognize a right to community-based treatment,⁷⁰ but recent litigation demonstrates that there is public support for the right to aftercare.⁷¹ Three states explicitly authorize an entitlement to community services or deinstitutionalization.⁷² At the very least,

65. See, e.g., *Lindsey v. Normet*, 405 U.S. 56 (1972).

66. See Perlin, *supra* note 35, at 1249.

67. *Haldermann v. Pennhurst State School & Hosp.*, 673 F.2d 647 (3rd Cir. 1982).

68. *Id.* at 651-56.

69. See *Phillip v. Carey*, 517 F. Supp. 513, 518 (N.D.N.Y. 1981); *Medley v. Ginsberg*, 492 F. Supp. 1294 (S.D.W. Va. 1980).

70. See *In re Expungement of Commitment Records of H*, 151 N.J. Super. 372, 376 A.2d 1292 (Juv. & Dom. Rel. Ct. 1977); see also discussion in *Rights*, *supra* note 13, at 627, pertaining to the lack of state statutes authorizing community treatment.

71. *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986), *cert. denied*, 476 U.S. 1124 (1986), 479 U.S. 869 (1986); *Clark v. Cohen*, 794 F.2d 79 (3d. Cir. 1986) (applying right to community treatment) *cert. denied*, 107 S. Ct. 459 (1986); *Maticka v. Atlantic City*, 216 N.J. Super. 434, 524 A.2d 416 (Law Div. 1986); *In re S.L.*, 94 N.J. Super. 128, 462 A.2d 1252 (App. Div. 1983); *Patients v. Camden County Bd. of Chosen Freeholders*, No. 33417-74 P.W. (N.J. Super Ct., Jan. 19, 1981); *Klostermann v. Cuomo*, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984); *Eldredge v. Koch*, 118 Misc. 2d 163, 459 N.Y.S.2d 960 (Sup. Ct. 1983); *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct., Dec. 5, 1981); *In re Schmidt*, 494 Pa. 86, 429 A.2d 631 (1981).

72. District of Columbia, by judicial decision, *Dixon v. Weinberger*, 405 F. Supp. 974 (D.D.C. 1975); Colo. Rev. Stat. § 27-10-101(a) & (b) (1982); Wis. Stat. Ann. § 51.61(3)(e)

some states have statutory discharge planning requirements mandating aftercare supervision to released mental patients.⁷³ The New York scheme requires that the releasing facility "take all necessary steps to obtain an adequate supply of safe, convenient and appropriate housing for patients to be discharged or conditionally released."⁷⁴ Further, mandatory outpatient treatment offers a viable alternative in many instances.⁷⁵

F. Zoning for Community Treatment Facilities

Aiding the quest for better community services are recent court holdings striking down discriminatory zoning ordinances excluding community mental health facilities from residential areas.⁷⁶

(West Supp. 1984). See also *Rights*, *supra* note 13, at 627.

73. *Patients v. Camden County Bd. of Chosen Freeholders*, No. L-33417-74 (N.J. Super. Ct., Jan. 19, 1981). This case has gone the furthest in recognizing a right of community care. See N.J. Stat. Ann. § 30:4-24.2(e) (West 1982).

74. N.Y. MENTAL HYG. LAW § 29.15(9) (McKinney Supp. 1981); see also N.Y. COMP. CODE R. & REGS. tit. 14, § 36.4(a) (1973).

75. See Appelbaum, *supra* note 5; Bursten, *supra* note 5.

76. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (zoning ordinance discriminatory); *J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983) (zoning ordinance discriminating against former mental patients); *Stoner v. Miller*, 377 F. Supp. 177 (E.D.N.Y. 1974) (hotel and boarding house ordinance provisions prohibiting registration of persons requiring continuous medical or psychiatric services unconstitutional, particularly in light of movement toward deinstitutionalization in treatment of mentally ill); *City of Livonia v. Department of Social Servs.*, Nos. 70315, 70316, 71155, 71377 (Mich. Sup. Ct., Nov. 21, 1985) (court upholds placement of small group homes serving six or fewer persons in residential neighborhoods against exclusionary zoning ordinances); *Township of Piscataway v. Concerned Citizens for Chronic Psychiatric Adults*, 200 N.J. Super. 615, 491 A.2d 1333 (App. Div. 1985) (community residence for mentally ill not required to be licensed pursuant to statute governing community residences for mentally retarded and developmentally disabled); *Crane Neck Ass'n v. New York City Long Island County Servs. Group*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984) (covenant prohibiting maintenance of other than single family dwelling not equitably enforceable because it contravenes public policy favoring establishment of residences for mentally disabled); *Town of Hempstead v. Commissioner of New York Office of Mental Retardation & Developmental Disabilities*, 112 A.D.2d 1042, 493 N.Y.S.2d 29 (2d Dep't 1985) (establishment of community residential facility at contested location ruled proper under N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney 1978)); *Human Dev. Servs. of Port Chester, v. Zoning Bd. of Appeals*, 110 A.D.2d 135, 493 N.Y.S.2d 481 (2d Dep't 1985) (denial of variance for residential facility for mentally disabled was abuse of discretion in light of strong public policy favoring such facilities); *City of Oswego v. Prevost*, 91 A.D.2d 848, 458 N.Y.S.2d 414 (Sup. Ct. 1982) (city's untimely objection to

The leading case on exclusionary zoning of homes for the mentally disabled is *City of Cleburne v. Cleburne Living Center*,⁷⁷ where the Supreme Court invalidated a zoning ordinance which impermissibly excluded a home for mentally retarded citizens from a residential neighborhood, because there was no rational basis to believe that the home for the mentally retarded posed "any special threat to the city's legitimate interests."⁷⁸ Mere negative attitudes and unsubstantiated fears about the mentally disabled are not proper interests justifying discriminatory treatment under the zoning laws.⁷⁹ *Cleburne*, along with other recent cases,⁸⁰ demonstrates a strong public policy favoring the establishment of residential mental health facilities. This policy will open barriers to residential living arrangements previously foreclosed to mental and ex-mental patients.

V. ESTABLISHED LEGAL RIGHTS

Although the right to aftercare in the community is not a presently established right, the discharged mental patient can nonetheless rely on other recognized legal rights in the community.⁸¹

proposed site of community residential facility for mentally handicapped confers approval by inaction); see also 2 A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 17.1-17A.98 (chs. 17 & 17A) (6th ed. 1986).

77. *City of Cleburne*, 473 U.S. 432; see, Margulies, *The Newest Equal Protection: City Of Cleburne And A Common Law For Statutes And Covenants Affecting Group Homes For The Mentally Disabled*, 3 N.Y.L. SCH. HUM. RTS. ANN. 359 (1986).

78. *City of Cleburne*, 473 U.S. at 448.

79. *Id.* at 448-50; see also *Township of Piscataway*, 200 N.J. Super. at 165, 491 A.2d 1333 (community residence for mentally ill not required to be licensed pursuant to statute governing community residences for mentally retarded and developmentally disabled); Coalter, *Michigan Supreme Court Upholds Community Placement Laws*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 65 (Jan.-Feb. 1986); Schonfeld, *Not In My Neighborhood: Legal Challenges To The Establishment Of Community Residences For The Mentally Disabled In New York State*, 13 FORDHAM URB. L.J. 281 (1985); Note, *Mental Health Community Commitment: To Accept or Reject the Mentally Ill? - City of Torrance v. Transitional Living Centers, Inc.*, 30 Cal.3d 516, 638 P.2d 1304, 179 Cal. Rptr. 907 (1982), 5 WHITTIER L. REV. 417 (1982).

80. See *supra* note 76, and accompanying text.

81. For a discussion of rights such as access to courts, contractual, wills, professional licensing, right to vote, holding political office, jury duty and testifying in court see *Decision-making*, *supra* note 20, at 436-47; Note, *supra* note 14, at 547-50; Lyon-Levine, Levine, Zusman, *Developments in Patients' Bill of Rights Since the Mental Health Systems Act*, 9

Even though the right to aftercare would establish the most supportive means of obtaining relief from the ex-mental patients' separation from society, shelter from their condition can be at least, in part, secured from this list of already recognized rights of ex-mental patients. By relying on these rights, a portion of their battle towards assimilation back into society has already been won.⁸² The major obstacle in this regard is making the mentally ill cognizant of these rights. This can be best accomplished through community support advocacy programs. Although at the present time, many such programs exist,⁸³ further progress could still be made if state and local governments would apportion more resources to this cause.

A. Economic Rights and Entitlements

Presently, there exist a number of federal and state programs and statutes conferring economic benefits and entitlements for mentally disabled individuals.⁸⁴ An in-depth analysis of each of these programs is beyond the scope of this paper, however a brief discussion of some of these rights is warranted.

1. Freedom from Employment and Housing Discrimination

The ex-mental patient's freedom from discrimination in housing and employment based on his ex-mental patient status goes a long way toward facilitating his ability to live a productive life in our society.⁸⁵ Most states have statutes prohibiting this type of discrimination,⁸⁶ and case law supports this antidiscriminatory

MENTAL & PHYSICAL DISAB. L. REP. 2, 146, 147 (1985); see generally *Rights, supra* note 13 (for a detailed analysis of federal reform in this area).

82. *Rights, supra* note 13, at 619.

83. *Id.* at 676-83; see also Freddolino, *supra* note 13, at 416, for a study of mental health rights and advocacy programs.

84. These include Social Security benefit programs, health service benefit programs, freedom from employment discrimination, educational benefits, right to counsel, freedom from discrimination in housing, state statutes governing group homes and community residences, legal advocacy services. *Rights, supra* note 13, at 608-14.

85. *Id.* at 648-69.

86. *Id.*

goal.⁸⁷ Besides preventing job and housing discrimination, many states have laws granting workers' and unemployment compensation to individuals incurring mental illness as a result of on the job physical injury.⁸⁸ Some states even hold that mental illness is a compensable occupational illness when a preexisting mental condition is aggravated by job stress.⁸⁹ Some employers, of course, fear the added cost of insurance occasioned by employing a former mental patient.⁹⁰ This fear is not unsubstantiated, since most insurers routinely charge higher premiums for mentally disabled individuals because they are deemed a higher risk group.⁹¹ New legislation spreading this increased risk to the general population could, however, remedy the added costs incurred by employers and thereby offer more incentive for them to hire the mentally disabled.⁹²

2. Public Benefit Programs

Further public benefits such as Social Security and Medicare can be of tremendous help to struggling discharged patients who are unable to find work.⁹³ The greatest problem in this area is that so many of these individuals do not know how to go about applying

87. *Newman v. Board of Educ. of City School Dist. of N.Y.*, 508 F.2d 277 (2d Cir. 1975), *cert. denied*, 95 S. Ct. 1447 (1975) (forced leave of absence based on nonadversary determination that teacher was psychologically unfit to teach violated teacher's due process rights); *Smith v. Schlesinger*, 513 F.2d 462 (D.C. Cir. 1975) (grant of security clearance may be denied to mental patients if illness may cause significant defects in judgment); *Lombard v. Board of Educ. of New York*, 502 F.2d 631 (2d Cir. 1974) (teacher had due process right to hearing before termination of employment based on finding he engaged in illogical, disoriented conversation); *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973) (a chauffeur license denial based on fourteen year old psychiatric records without checking applicant's present mental condition violates due process); *Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S.E.2d 757 (1980) (implied cause of action under state statute against private employer denying employment to otherwise qualified person based on individual's receipt of mental health services).

88. *Rights*, *supra* note 13, at 656.

89. *Id.* at 658.

90. *Id.* at 657.

91. *Id.* at 670.

92. *Id.*

93. This public assistance may, however, be denied to individuals lacking a fixed legal residence. Note, *supra* note 14, at 531-37.

for these benefits.⁹⁴ Again, community support services for ex-patients would enable them to exercise their rights and reap the benefits of these programs.

B. Decision-making Rights

1. Wills

Aside from the above-mentioned entitlement rights of ex-mental patients, the discharged patient is also afforded further decision-making rights.⁹⁵ For instance, the ex-mental patient, unless adjudged incompetent or not of "sound mind and memory" will be permitted to make a will.⁹⁶ Even if many ex-patients have few assets to devise, the power to distribute one's own property upon death is of great importance to everyone.⁹⁷

2. Parental Rights

Generally, an ex-patient's parental rights will not be diminished.⁹⁸ Ex-patient status is not grounds to restrict an individual's family rights and decision-making rights pertaining to one's children.⁹⁹ Naturally, an ex-mental patient is held to the same standard of conduct vis-a-vis his children as a person without this stigmatizing label.¹⁰⁰

94. *Id.* at 533-37.

95. *Decision-making supra* note 20, at 439-41.

96. *Id.* See also *DUKEMINIER & JOHNSON, WILLS, TRUSTS AND ESTATES*, 137-40 (3d ed. 1984).

97. See *Hodel v. Irving*, 107 S. Ct. 2076 (1987) ("the right to pass on property - - to one's family in particular - - has been part of the Anglo-American legal system since feudal times." *Id.* at 2083.)

98. See *COMMISSION ON THE MENTALLY DISABLED, ABA, MENTAL DISABILITY LAW: A PRIMER*, 30 (1984).

99. *Id.*

100. *Id.*

3. Voting

The right to vote, guaranteed under the Constitution,¹⁰¹ is a privilege afforded ex-mental patients so long as they are not adjudged incompetent.¹⁰² The restrictions on voting are governed by statute in every state,¹⁰³ but generally speaking, since discharged patients are seldom labeled incompetent, the franchise is not denied to them.¹⁰⁴ The greatest problems arise for those discharged patients without a residence. Without a mailing address, the homeless mentally ill are denied voting rights.¹⁰⁵ The limitations imposed on discharges regarding voting rights are very similar to those regarding holding public office¹⁰⁶ or serving on a jury.¹⁰⁷ In contrast, a mentally disabled individual is not prohibited from testifying in court.¹⁰⁸

4. Driving and Professional Licensing

Most states have legislation which disqualifies mentally ill persons from acquiring driving and professional licenses.¹⁰⁹ Generally, a finding of mental illness will require revocation of existing licenses.¹¹⁰ Procedures vary as to reinstatement of licenses after the individual's condition has improved.¹¹¹ Denial of a license based on

101. Voting is a fundamental right protected by the fourteenth amendment. *Bullock v. Carter*, 405 U.S. 134 (1972); *Harper v. Virginia State Bd. of Educ.*, 383 U.S. 663, 666 (1966); see also *Carroll v. Cobb*, 139 N.J. Super. 439, 354 A.2d 355 (App. Div. 1976) (impermissible to presume residents of state school for the retarded are "idiots or insane" and thus ineligible to register to vote).

102. *Decision-making supra* note 20, at 446.

103. See, Note, *supra* note 14, at 550-52; *Decision-making, supra* note 20, at 445-46.

104. Note, *supra* note 14, at 549.

105. See *id.* at 547-48.

106. See *Decision-making supra* note 20, at 446.

107. *Id.* at 447.

108. *Id.*

109. *Id.* at 441-44; *Jones v. Penny*, 387 F. Supp. 383 (N.D.N.C. 1974).

110. Thirty-one states place members of specific professions on probation if they have mental problems. *Decision-making supra* note 20, at 442. Some states require a due process hearing prior to revocation, suspension, or denial of a driver's license. *Id.* at 444.

111. *Id.*

a prior condition is, however, unconstitutional.¹¹²

5. Expungement of Mental Health Records

An important right facilitating the removal of the stigma associated with mental illness is the expungement of mental health records.¹¹³ Improvement of the discharged patient's condition is needed before this right can be exercised.¹¹⁴ Still, some jurisdictions asserting the state purpose of retaining records for possible future treatment, will not allow expungement.¹¹⁵ Expungement can be a valuable means of building a "new life" by enabling an ex-patient to rejoin society without the problems associated with his status as an ex-mental patient. Especially in light of the frequent abuses of this information by insurance companies and government agencies providing health benefits, expungement is an important aid to the ex-patient seeking to disassociate himself from his prior illness.¹¹⁶

VI. CONCLUSION

The mentally ill have seen their position in society make a turn for the better in the past twenty years. Particularly, the right to treatment in the least restrictive environment, which spawned the deinstitutionalization movement in our country, was of supreme importance in securing a better way of life for this nation's mentally ill population. Regrettably, our society was not prepared to embrace these discharges and draw them back into the mainstream of our society. The paucity and inadequacy of existing facilities pushed many ex-mental patients onto the streets, resulting in increased homelessness in addition to readmissions to mental hospitals. Fortunately, mental health advocates have started the crusade for

112. See *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973).

113. See *In re Expungement of Commitment Records of H.*, 151 N.J. Super. 372, 376 A.2d 1292 (Juv. & Dom. Rel. Ct. 1977); *Decision-making*, *supra* note 20, at 465-66; *The Next Frontier*, *supra* note 3, at 38.

114. See *Decision-making*, *supra* note 20, at 465.

115. *Id.* at 466.

116. *Id.*

better services and a right to shelter and aftercare for these social outcasts. Even though there is more to be done, especially in the fight for a right to community treatment, strides have been made. The cry of the mentally ill homeless is being heard, many rights have been secured already, and the stage has been set for more rights and a better way of life to come to our discharged mentally ill. Let us not desert these people in their hour of need by regressing back to conditions of earlier years, but instead afford the necessary time, funds, and compassion to help these individuals assume productive and satisfying roles in our society.

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