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## Legal Rights of the Mentally Retarded: Pennhurst State School & (and) Hospital v. Halderman

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# LEGAL RIGHTS OF THE MENTALLY RETARDED: *PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN*

**I**N 1974 Terri Lee Halderman, a mentally retarded resident of Pennhurst State School and Hospital,<sup>1</sup> initiated a class action suit on behalf of all Pennhurst residents<sup>2</sup> to challenge conditions at the institution.<sup>3</sup> After a lengthy and comprehensive court proceeding,<sup>4</sup> a federal district court concluded that Pennhurst was "inappropriate and inadequate for the habilitation of the retarded."<sup>5</sup> The court found that conditions at the institution<sup>6</sup> violated the fourteenth amendment due process right to minimally adequate habilitation in the least restrictive environment,<sup>7</sup> the eighth amendment right to be free from harm,<sup>8</sup> and the fourteenth amend-

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1. Located in Spring City, Pennsylvania, Pennhurst provides long-term, institutionalized care for 1,230 mentally retarded citizens. Pennhurst is self-contained; the residents are confined within the grounds and do not participate in any aspect of community life outside the institution. Brief for the United States at 6-7, *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981).

2. The court certified the class as all those persons who were Pennhurst residents at the time the suit was initiated and those persons who might become residents in the future. In addition to Terri Lee Halderman, the named plaintiffs later included seven other mentally retarded citizens and the Parents and Family Association of Pennhurst, an advocacy organization formed by parents of Pennhurst residents. The United States and the Pennsylvania Association for Retarded Citizens subsequently were granted leave to intervene as plaintiffs. Defendants to the action were Pennhurst State School and Hospital, the Pennsylvania Department of Public Welfare, various state and county officials, and the superintendent and several employees of Pennhurst. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1300-02 (E.D. Pa. 1977).

3. *Id.* at 1298.

4. For the original plaintiff's attorneys' description of events prior to and at trial, see Ferleger & Boyd, *Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 STAN. L. REV. 717 (1979).

5. 446 F. Supp. at 1304.

6. The court described Pennhurst as impersonal, overcrowded, and understaffed. *Id.* at 1303. The court further concluded that neglect and abuse created a dangerous environment, that unsanitary conditions were common, and that improper care and service delivery deficiencies resulted in the deterioration of the residents' physical, mental, and emotional conditions. *Id.* at 1303-10.

7. *Id.* at 1319. The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. IV, § 1.

8. 446 F. Supp. at 1320. The eighth amendment proscribes the infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII. The eighth amendment was incorporated against the states through the fourteenth amendment in *Robinson v. California*, 370 U.S. 660 (1962). The *Pennhurst* court found Pennhurst residents, institutionalized under the care of the state, were entitled to be free from mistreatment and harm; anything less would be cruel and unusual punishments. 446 F. Supp. at 1320-21.

ment equal protection right to nondiscriminatory habilitation.<sup>9</sup> The district court further found that existing conditions violated the residents' statutory right to minimally adequate habilitation under federal law<sup>10</sup> and Pennsylvania state law.<sup>11</sup> The court ordered the eventual closing of Pennhurst and the placement of all Pennhurst residents in community living settings.<sup>12</sup>

On appeal the Third Circuit avoided the constitutional issues and affirmed the lower court's decision solely on federal and state statutory grounds.<sup>13</sup> Finding that the mentally retarded have a right to appropriate treatment<sup>14</sup> in the least restrictive environment under the Developmentally Disabled Assistance and Bill of Rights Act of 1975,<sup>15</sup> the court acknowledged a private cause of action.<sup>16</sup> The Third Circuit modified the district court's grant of relief to include the possibility of placement at an improved and adequate Pennhurst.<sup>17</sup> The appellate court, however, did not interpret federal or state law as mandating the closing of institutions such as Pennhurst that house the mentally retarded. According to the court, the

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9. 446 F. Supp. at 1320. The equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Through segregation in an institution that did not adequately provide habilitation, Pennhurst residents were held to have been denied education and training equal to that received by other citizens. 446 F. Supp. at 1321.

10. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976 & Supp. III 1979).

11. Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969).

12. 446 F. Supp. at 1325. The court found that inherently restrictive institutions, such as Pennhurst, impeded the process of normalization, a necessary component of constitutionally and statutorily mandated minimally adequate habilitation. The court, therefore, concluded that it had no choice but to close Pennhurst. *Id.*

The district court also mandated the creation of suitable community living arrangements for all plaintiff class members, the development of individual habilitation plans for each Pennhurst resident, the improvement of conditions at Pennhurst while the residents awaited alternative placement, and the appointment of a special master to supervise implementation of the court's order. *Id.* at 1326-29. The court found, however, no basis for awarding the money damages sought by plaintiffs. *Id.* at 1324.

13. *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84 (3d Cir. 1979). The court considered the preferred order of determining legal bases for relief to be federal statutory grounds, state statutory grounds, and then constitutional grounds. *Id.* at 94; *see Hagans v. Lavine*, 415 U.S. 528, 543 (1974); *Silver v. Louisville & N.R.R.*, 213 U.S. 175, 193 (1909).

14. The court used the terms treatment and habilitation interchangeably. 612 F.2d at 95 n.14.

15. 42 U.S.C. §§ 6000-6081 (1976 & Supp. III 1979) [hereinafter referred to as the DD Act]. The DD Act was not raised in the pleadings presented by the parties to the district court or in the original briefs filed on appeal. The Third Circuit requested supplemental briefing on the DD Act. *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 1535 n.3, 67 L. Ed. 2d 694, 702 n.3 (1981). The court, however, declined to rule on the district court's interpretation and application of § 504 of the Rehabilitation Act of 1974, 29 U.S.C. § 794 (1976 & Supp. III 1979), because "one clear federal statute" expressing the governing rule "is enough." 612 F.2d at 108.

16. The court ruled that the DD Act met the criteria for implying a private cause of action as set out in *Cort v. Ash*, 422 U.S. 66, 78 (1975): the retarded are special beneficiaries of the DD Act, judicial enforcement of the DD Act complies with congressional intent, a private right of action would facilitate the realization of the goals of the DD Act, and no infringement of state authority and function would occur. 612 F.2d at 97-98.

17. *Id.* at 115.

DD Act allowed individual determinations of the most appropriate means of providing habilitation and established a clear preference for deinstitutionalization or placement in community living arrangements.<sup>18</sup> The United States Supreme Court granted certiorari. *Held, reversed and remanded*: The mentally retarded do not have a substantive right to habilitation in the least restrictive environment under section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975. *Pennhurst State School & Hospital v. Halderman*, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981).

## I. LEGAL RIGHTS OF THE MENTALLY RETARDED

### A. *Constitutional Right to Habilitation in the Least Restrictive Environment*

While the past decade has witnessed a heightened awareness and recognition<sup>19</sup> of the rights of the mentally retarded,<sup>20</sup> the Supreme Court has never addressed the issue of the mentally retarded citizen's right to habilitation.<sup>21</sup> The lower federal courts first recognized a constitutional right to

18. *Id.* at 107.

19. Traditionally, the responsibility of providing care and services for the handicapped has been delegated to the states. Judge Frank M. Johnson, author of the *Wyatt* decision, observed that the federal courts historically have refrained from interfering in any area of public service assigned to the states. When the states, however, systematically deny the constitutional rights of citizens through the means chosen to deliver these services, the courts are compelled to intervene. Judge Johnson asserts that this has been the impetus for recent judicial recognition of the rights of the mentally retarded. Johnson, *The Constitution and the Federal District Judge*, 54 TEXAS L. REV. 903, 903-10 (1976); cf. *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 117 (3d Cir. 1979) (Seitz, J., dissenting) (while federal courts must intervene to end blatant disregard of constitutional rights of citizens evident in deplorable institutional conditions, judiciary cannot overextend its authority and dictate to state types of treatment and facilities that must be provided).

20. The American Association on Mental Deficiency has defined mental retardation as "subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior." H. ROBINSON & N. ROBINSON, *THE MENTALLY RETARDED CHILD* 33-34 (1965).

Mental retardation and mental illness must be distinguished. Mental illness is defined as an inability to cope with one's environment. Intelligence is not a factor. While mental retardation occurs during the early developmental years, mental illness can manifest itself at any stage of life. Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124, 147 n.72 (1976). The Supreme Court has indicated that the courts should observe this distinction; however, the Court has not discussed the difference in legal treatment between the two populations. *Kremens v. Bartley*, 431 U.S. 119, 135 (1977). See also *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1298 (1977).

21. A ruling, however, on the constitutional right of an involuntarily committed, mentally retarded patient to receive acceptable medical treatment may be forthcoming. The Supreme Court has granted certiorari to review the Third Circuit's finding that such a right does exist. *Youngberg v. Romeo*, 101 S. Ct. 2313, 68 L. Ed. 2d 838 (1981). For the definitions of habilitation and treatment, see note 22 *infra* and accompanying text.

The Supreme Court also has not resolved the issue of the mentally ill citizen's right to treatment. In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Court, avoiding the right to treatment question, held that the involuntary commitment of a nondangerous, self-sufficient individual is a deprivation of the constitutional right to liberty. *Id.* at 576. Chief Justice Burger's concurrence in *O'Connor*, however, warned that requiring the states to provide treatment for the mentally ill would be a limitation on state power that has no historical

habilitation<sup>22</sup> for the mentally retarded in *Wyatt v. Stickney*.<sup>23</sup> In *Wyatt* mentally retarded residents of Alabama's Partlow State School and Hospital argued that hazardous and substandard conditions at the institution<sup>24</sup> constituted a violation of their constitutional right to adequate habilitation.<sup>25</sup> Acknowledging that civil commitment is a massive curtailment of liberty, the district court ruled that the state must justify institutionalization as effectuating some permissible purpose.<sup>26</sup> Characterizing this purpose as the realization of the state's role of guardian of the disabled, the court reasoned that the Constitution requires habilitation; institutionalization was not to become a synonym for indefinite, unjustified imprisonment.<sup>27</sup> Thus, the court in *Wyatt* based its decision on a due process requirement of habilitation in return for civil commitment and held that the involuntarily committed mentally retarded "have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society."<sup>28</sup> In an effort to upgrade substandard conditions that denied the residents their constitutional right, the *Wyatt* court further ordered the implementation of forty-nine detailed minimum standards for adequate habilitation.<sup>29</sup>

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basis; thus, this creation of a new substantive constitutional right is discouraged. *Id.* at 582-83. In spite of its limitations, the *O'Connor* decision may be of particular significance to the mentally retarded. Recognizing that many mildly and moderately retarded individuals are certainly not dangerous and can be self-sufficient, the *O'Connor* right to liberty holding becomes inconsistent with the concept of continual confinement in an institution. Mason & Menolascino, *supra* note 20, at 156; see *Jackson v. Indiana*, 406 U.S. 715 (1972) (nature and duration of commitment must be reasonably related to the reason for commitment).

22. Habilitation, which is most appropriate to the needs of the retarded, refers to education and training, while medical treatment and cure are most appropriate to the needs of the mentally ill. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1314 n.49 (E.D. Pa. 1977). *But see* note 14 *supra*. For a more complete discussion of the meaning of habilitation, see Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 153-54 (1971).

23. 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, and reserved in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). The decision followed from a prior recognition of a constitutional right to treatment in favor of the mentally ill by the same court. *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971).

24. 344 F. Supp. at 391.

25. *Id.* at 389.

26. *Id.* at 390.

27. *Id.*, *commented on in* Mason & Menolascino, *supra* note 20, at 151-52.

28. 344 F. Supp. at 390. The legal foundation for the right is the fourteenth amendment. *See* note 7 *supra*.

29. 344 F. Supp. at 395-407. The decision and its mandated standards have been viewed as an implied acceptance of the scientifically and educationally accepted developmental model. Mason & Menolascino, *supra* note 20, at 149. The developmental model stresses the potential of any mentally retarded individual to learn and grow progressively, beginning from his current level of development, through interaction with other people and the environment. *Id.* at 137 n.33. Implementation of the developmental model is most successful when combined with the principle of normalization as an overall approach. Normalization refers to the treatment of the mentally retarded as normal people rather than as deviants. Inherent in that treatment is the idea that mentally retarded individuals should be exposed to everyday life to facilitate the development of behaviors that adhere to the societal norm. Roos, *The Law and Mentally Retarded People: An Uncertain Future*, 31 STAN. L. REV. 613, 613-14 (1979).

On appeal<sup>30</sup> the Fifth Circuit rejected the *Wyatt* defendants' argument that the state may institutionalize the mentally retarded because of their inability to care for themselves.<sup>31</sup> The court reasoned that even if the need for care justified commitment, the Partlow residents' right to appropriate care had been denied.<sup>32</sup> Furthermore, the court concluded that the need for care justification emphasized state prerogatives that could not outweigh the residents' personal interests in the preservation of their own liberty.<sup>33</sup> Thus, the Fifth Circuit affirmed the lower court's recognition of the constitutional right to habilitation for involuntarily committed mentally retarded citizens.<sup>34</sup>

Similarly, other federal courts have recognized the institutionalized mentally retarded citizen's right to habilitation.<sup>35</sup> While the *Wyatt* decision was limited to those involuntarily committed,<sup>36</sup> there has since been judicial recognition that voluntary commitment<sup>37</sup> of the mentally retarded is an illusory concept. Limited intellectual abilities and the absence of alternative living arrangements foreclose the possibility of the individual's making a well-reasoned decision concerning his own commitment.<sup>38</sup> Moreover, the initiation of civil commitment proceedings can prevent a voluntarily committed individual from exercising his right to leave an institution.<sup>39</sup> For these reasons some decisions have eliminated the voluntary versus involuntary distinction, ordering habilitation under both forms of commitment.<sup>40</sup> Nevertheless, the right to habilitation is not without

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30. *Wyatt v. Aderholt*, 503 F.2d 1305, 1312 (1974).

31. *Id.* at 1313.

32. *Id.*

33. *Id.*

34. *Id.* at 1313-14.

35. See, e.g., *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976), *aff'd*, 601 F.2d 240 (5th Cir. 1979); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977). But see, e.g., *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974).

36. Involuntary commitment refers to institutionalization through civil commitment procedures initiated by the state. *Murdock*, *supra* note 22, at 154. The state action is considered justified because society has an interest in protecting retarded citizens who are unable to make decisions as to their own needs. Schoenfeld, *A Survey of the Constitutional Rights of the Mentally Retarded*, 32 Sw. L.J. 605, 619 (1978).

37. See *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975). Voluntary commitment reserves to the individual the right to leave the institution at any time he chooses. Most institutionalized mentally retarded individuals are admitted when they are children on the consent of their parents; thus, their commitment can be termed voluntary. *Murdock*, *supra* note 22, at 154-55.

38. *Murdock*, *supra* note 22, at 156-61.

39. *Id.* at 154.

40. See *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975). The court originally based its decision on a constitutional right to protection from harm and rejected the constitutional right to habilitation argument. *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 764 (E.D.N.Y. 1973). In its subsequent approval of a consent decree, however, the court reasoned that the right to habilitation probably was not distinct from the right to protection from harm. 393 F. Supp. at 718-19. In any case the relief granted would be the same. *Id.*; *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1318 (E.D. Pa. 1977).

limitation,<sup>41</sup> and the precedential value of lower court decisions remains uncertain in the absence of a Supreme Court ruling on the mentally retarded citizen's constitutional right to habilitation.

The requirement that habilitation be provided in the environment that is least restrictive of personal liberty is an extension of the constitutional right to habilitation.<sup>42</sup> This right to habilitation in the least restrictive environment stems from the principle of "less drastic means."<sup>43</sup> The principle operates to restrict the pursuit of legitimate governmental purpose "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."<sup>44</sup> The Fifth Circuit's affirmation of *Wyatt*<sup>45</sup> linked the principle of "less drastic means" with the already accepted scientific and educational developmental model,<sup>46</sup> thus providing a rationale for the lower court's stated preference for deinstitutionalization.<sup>47</sup> A later class action challenging conditions in a Minnesota institution, *Welsch v. Likins*,<sup>48</sup> provided additional support for the deinstitutionalization concept. The *Welsch* court relied on decisions that had recognized that mentally ill persons "'cannot be totally deprived of their liberty if there are less drastic means' for achieving the same basic goals of protecting and treating them."<sup>49</sup>

#### B. Statutory Right to Habilitation in the Least Restrictive Environment

Judicial interpretations of statutory provisions also have affected the right of mentally retarded persons to habilitation in the least restrictive environment. In *Dixon v. Weinberger*<sup>50</sup> patients at St. Elizabeth's Hospital in Washington, D.C. brought a class action suit asserting a right under

41. The district court in *Pennhurst* stressed that the noninstitutionalized mentally retarded have no constitutional right to habilitation, because the legal basis for the right is derived from the restriction of liberty that institutionalization imposes. 446 F. Supp. at 1318.

42. See Ewing, *Health Planning and Deinstitutionalization: Advocacy Within the Administrative Process*, 31 STAN. L. REV. 679, 680-83 (1979).

43. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

44. *Id.*

45. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

46. See note 29 *supra* and accompanying text.

47. The district court had included in its habilitation standards a requirement that placement evaluation must have determined that the institution actually would provide the least restrictive habilitative setting. The order indicated that the court viewed community settings as better able to facilitate habilitation and normalization. *Wyatt v. Stickney*, 344 F. Supp. 387, 396 (M.D. Ala. 1972).

48. 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977).

49. 373 F. Supp. at 502 (quoting *Lessard v. Schmidt*, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972)). See generally *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); *Eubanks v. Clarke*, 434 F. Supp. 1022 (E.D. Pa. 1977). The district court in *Pennhurst* adopted a more radical anti-institutionalization stance. Finding that an institution is inherently restrictive, the *Pennhurst* court indicated that an institution can never serve as the least restrictive habilitative environment and that, as a result, all institutional placements violate constitutional rights. 446 F. Supp. at 1325; see note 12 *supra* and accompanying text.

50. 405 F. Supp. 974 (D.D.C. 1975); see Friedman, *Rights of the Mentally Handicapped: Which Way in the 1980s?*, 17 TRIAL 43, 43 (1981) (noting significant aspects of the *Dixon v. Weinberger* decision).

both the Constitution and the relevant District of Columbia law<sup>51</sup> to placement in a facility less restrictive than an institution. The federal district court refused to address the constitutional questions but ruled that a right to placement in a less restrictive facility existed under Washington, D.C.'s Hospitalization of the Mentally Ill Act of 1964.<sup>52</sup> The court further held that the appropriate District of Columbia and federal officials had an affirmative obligation to create suitable facilities if such institutions did not already exist.<sup>53</sup>

Significantly, the court in *Dixon* accepted statutory arguments with regard to the least restrictive environment that were analogous to constitutional arguments for habilitation.<sup>54</sup> Success in gaining recognition of statutory rights, and the limitations and uncertainties of the constitutionally based decisions,<sup>55</sup> have inspired advocates of the mentally disabled to direct their attention to federal statutes.<sup>56</sup> The possibility that congressional enactments of mental health laws represent codifications of constitutional rights<sup>57</sup> suggests that the statutes themselves may further the enforcement of these rights.<sup>58</sup>

The Developmentally Disabled Assistance and Bill of Rights Act of 1975<sup>59</sup> is designed to provide federal grant aid "to assist States to assure that persons with developmental disabilities receive the care, treatment, and other services necessary to enable them to achieve their maximum potential through a system . . . which ensures the protection of the legal and

51. Hospitalization of the Mentally Ill Act of 1964, D.C. CODE ENCYCL. §§ 21-501 to -591 (West 1967 & Supp. 1978-1979). A right to treatment under the same statute had already been recognized. *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966).

52. 405 F. Supp. at 974.

53. *Id.* at 978-79.

54. *Id.* at 976-77; see *Decisions, Court Orders Creation of Less Restrictive Facilities*, 1 MENTAL DISABILITY L. REP. 12, 13 (1976). For a discussion of the constitutional justification for the least restrictive placement principle, see notes 42-49 *supra* and accompanying text.

55. See notes 36-41 *supra* and accompanying text.

56. The Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6001-6081 (1976 & Supp. III 1979); see notes 59-64 *infra* and accompanying text. The Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1420 (1976), guarantees every handicapped child an appropriate education and the protection of relevant due process administrative procedures. The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976 & Supp. III 1979), provides vocational services for the handicapped. Section 504 of the Rehabilitation Act of 1973 prohibits federally funded programs from discriminating against handicapped persons. *Id.* § 794.

57. See, e.g., *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1977) (codification of the right to equal protection in § 504 of the Rehabilitation Act of 1973).

58. See, e.g., *Ewing*, *supra* note 42; *Rosenberg & Friedman, Developmental Disability Law: A Look into the Future*, 31 STAN. L. REV. 817 (1979); Note, *Public Law 94-103: An Implied Private Right of Action to Enforce the Right to Treatment for Institutionalized Mentally Retarded Persons*, 54 IND. L.J. 505 (1979).

59. 42 U.S.C. §§ 6001-6081 (1976 & Supp. III 1979). The DD Act is an amendment to the Developmental Disabilities Services and Facilities Construction Act, Pub. L. No. 91-517, 84 Stat. 1316 (1969), enacted to alleviate conditions in overcrowded and obsolete institutions by funding the creation of facilities and services. ABA Amicus Brief in the Case of *Pennhurst v. Halderman*, reprinted in part in 5 MENTAL DISABILITY L. REP. 54, 54-55 (1981).

human rights of persons with developmental disabilities."<sup>60</sup> State participation in the grant program is voluntary. Those states that accept aid under the DD Act agree to comply with certain conditions that also may represent benefits for the developmentally disabled.<sup>61</sup> The DD Act includes a bill of rights provision that sets out congressional findings as to the rights of the developmentally disabled.<sup>62</sup> Additional sections contain

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60. 42 U.S.C. § 6000(b)(1) (Supp. III 1979). The mentally retarded are by definition considered developmentally disabled for the purposes of the DD Act. *Id.* § 6001(b)(7). The DD Act, however, does not include an institutionalization requirement. Thus, a recognition of a right to habilitation under the DD Act would differ from a comparable constitutional right in that the statutory right would be extended to the noninstitutionalized mentally retarded. *See* 19 DUQ. L. REV. 149, 158 (1980).

61. Section 6005 requires that participating states affirmatively act to hire the handicapped. 42 U.S.C. § 6005 (1976). Section 6009 conditions the receipt of funds on the submission of a state plan for monitoring service delivery. *Id.* § 6009 (1976 & Supp. III 1979). Section 6011 provides for the development of an individual habilitation plan for each person receiving services under a program funded by the DD Act. *Id.* § 6011. Section 6012 mandates the establishment of advocacy systems on behalf of developmentally disabled persons. *Id.* § 6012.

Section 6012 has facilitated significant growth in a nationwide advocacy system for the developmentally disabled. For a discussion of the implementation of these advocacy programs, see Weisberg, *Statewide Advocacy Systems for the Developmentally Disabled—Profiles in Innovation: Study Executive Summary*, 3 MENTAL DISABILITY L. REP. 53 (1979).

62. 42 U.S.C. § 6010 (1976) states:

Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) does not meet the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

A 1978 amendment provides: "[T]he rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons." *Id.* (Supp. III 1979). The meaning and effect of § 6010 are the subject of the Supreme Court's review in *Pennhurst*.

funding<sup>63</sup> and enforcement<sup>64</sup> provisions.

Judicial interpretation of the DD Act is limited.<sup>65</sup> In *United States v. Soloman*<sup>66</sup> the Attorney General of the United States sought to enjoin Maryland health officials from allegedly violating the constitutional rights of institutionalized mentally retarded persons. The federal district court held that the DD Act did not provide the Attorney General with the statutory authority to sue to enforce the rights of the mentally retarded.<sup>67</sup> Furthermore, in a dictum, the court viewed the DD Act as representing nothing more than a congressional "carrot-and-stick" technique to encourage the states to provide the developmentally disabled with improved habilitative care.<sup>68</sup>

In *Naughton v. Bevilacqua*<sup>69</sup> Timothy Naughton, a voluntarily institutionalized mentally retarded youth, brought suit against Rhode Island mental health officials for permanent injunctive relief and damages. Naughton alleged that either his constitutional or federal statutory rights had been violated when the improper administration of a tranquilizer caused him to suffer an allergic reaction and injuries. The court accepted the plaintiff's argument that the drug had been administered for custodial purposes as a means of restraint rather than for habilitative or therapeutic purposes.<sup>70</sup> Explaining that the legislative history of the DD Act supported the recognition of a statutory "right to appropriate treatment" and "habilitation" for the mentally retarded,<sup>71</sup> the *Naughton* court held that the DD Act can be enforced through a private cause of action.<sup>72</sup> The issues on appeal, however, centered on the potential liability of the institution's director rather than on the recognition of rights under the DD Act.<sup>73</sup>

63. 42 U.S.C. §§ 6060-6063 (1976 & Supp. III 1979). Participating states must submit a satisfactory plan outlining proposed funding utilization plans. A plan must provide "assurances" that the state will protect the rights of the developmentally disabled pursuant to § 6010. *Id.* § 6063(b)(5)(C).

64. *Id.* § 6065. The Secretary of Health and Human Services has the authority to terminate or reduce aid to a noncomplying state.

65. Some of the relevant literature anticipated that § 6010 of the DD Act created a substantive right to appropriate treatment and habilitation in the least restrictive environment. See Ewing, *supra* note 42, at 707-08; Note, *Implied Executive Authority to Bring Suit to Enforce the Rights of Institutionalized Citizens*, 26 CATH. U.L. REV. 794, 810 (1977).

66. 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F.2d 1121 (4th Cir. 1977).

67. 419 F. Supp. at 370. The decision has not been without criticism. See Schoenfeld, *supra* note 36, at 626; Note, *supra* note 65, at 810-11.

68. 419 F. Supp. at 370.

69. 458 F. Supp. 610 (D.R.I. 1978), *aff'd*, 605 F.2d 586 (1st Cir. 1979).

70. 458 F. Supp. at 614.

71. *Id.* at 614-15 (quoting 42 U.S.C. § 6010(1) (1976)).

72. 458 F. Supp. at 615. Finding that the § 6010 statutory right was also a civil right, the court ruled that a private cause of action is available pursuant to 42 U.S.C. § 1983 (Supp. III 1979). 458 F. Supp. at 616. Section 1983 provides that "[e]very person who . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured." The *Naughton* court also ruled that the DD Act meets the *Cort v. Ash* requirements for an implied cause of action. *Id.*; see note 16 *supra* and accompanying text.

73. *Naughton v. Bevilacqua*, 605 F.2d 586, 588 (1st Cir. 1979). The First Circuit ruled that the institution's director could not be held individually liable for injuries sustained by Naughton. *Id.* at 589-90.

Accordingly, the First Circuit refused to decide whether the DD Act created any substantive rights in favor of the developmentally disabled.<sup>74</sup>

## II. PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN

In *Pennhurst State School & Hospital v. Halderman* the Supreme Court ruled that the DD Act does not provide the mentally retarded a statutory right to appropriate habilitation in the least restrictive environment.<sup>75</sup> Limiting its decision to review and interpretation of the DD Act, the Court avoided ruling on constitutional issues, questions presented under section 504 of the Rehabilitation Act of 1973, and Pennsylvania state law claims.<sup>76</sup> The Court remanded these issues to the Third Circuit for consideration.<sup>77</sup> Justice Rehnquist, writing for the majority, began by characterizing the DD Act as a federal funding program designed to benefit the developmentally disabled.<sup>78</sup> The majority reviewed the legislative authority for the DD Act to determine whether Congress intended to create enforceable rights under section 6010.<sup>79</sup> Traditionally, the Court has been reluctant to infer that Congress has exercised its power to act pursuant to section 5 of the fourteenth amendment.<sup>80</sup> The Court could find scant support for such an inference in *Pennhurst* because the alleged rights, if mandatory, would impose affirmative financial obligations on the states, thus upsetting the federal-state balance of power.<sup>81</sup> As a result the Court reasoned that Congress did not intend to impose an absolute obligation on the states to provide appropriate habilitation for the mentally retarded.<sup>82</sup>

The Court found that Congress enacted the DD Act pursuant to the spending power set out in the Constitution;<sup>83</sup> thus, the legislation proposes a contract whereby the states can voluntarily agree to comply with certain conditions in exchange for federal aid.<sup>84</sup> If Congress intends to impose conditions, the Court reasoned, it must do so unambiguously, so that the

74. *Id.* at 588 n.3.

75. 101 S. Ct. at 1536, 67 L. Ed. 2d at 703.

76. *Id.* at 1546-47, 67 L. Ed. 2d at 716.

77. *Id.*

78. *Id.* at 1536, 67 L. Ed. 2d at 703.

79. 42 U.S.C. § 6010 (1976 & Supp. III 1979); see note 62 *supra* and accompanying text.

80. U.S. CONST. amend. XIV, § 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* The Court has endorsed legislative exercise of § 5 power when Congress has expressed its intent to invoke that power. 101 S. Ct. at 1539, 67 L. Ed. 2d at 706 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

81. 101 S. Ct. at 1539, 67 L. Ed. 2d at 707.

82. *Id.* Legislation enacted pursuant to § 5 assigns an absolute duty to the states to conform to congressional policy. *Id.*, 67 L. Ed. 2d at 706. Therefore, if the Court in *Pennhurst* had found that § 5 provided the power to legislate the DD Act, then the states would have been required to provide habilitation to the mentally retarded regardless of the cost. *Id.* at 1540, 67 L. Ed. 2d at 708.

83. *Id.* at 1540, 67 L. Ed. 2d at 708. "The Congress shall have Power To . . . provide for the . . . general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. See generally *Harris v. McRae*, 448 U.S. 297 (1980); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968).

84. 101 S. Ct. at 1539, 67 L. Ed. 2d at 707.

states can knowingly and voluntarily agree to comply with the conditions.<sup>85</sup> The respondent class relied on section 6010 of the DD Act as a reservoir of guaranteed substantive rights for the mentally retarded.<sup>86</sup> Comparing section 6010 with other provisions of the DD Act that expressly impose conditions on the receipt of funding, the Court found the section did not meet the clear notice requirement and could not serve as a funding condition.<sup>87</sup> Furthermore, the Court expressed concern that a contrary finding would impose excessive financial obligations on the states.<sup>88</sup> As a result the Court in *Pennhurst* held that section 6010 represents a general federal policy of preference for community alternatives to institutionalization<sup>89</sup> and thus merely encourages, rather than mandates, better care for the handicapped.<sup>90</sup>

The Court discussed, without ruling on, three additional issues.<sup>91</sup> Although not precluding private citizens from enforcing other recognized conditional obligations existing under the DD Act,<sup>92</sup> the Court cautioned that a private cause of action is not guaranteed.<sup>93</sup> In addition, the Court

85. *Id.* at 1539-40, 67 L. Ed. 2d at 707.

86. See Brief for the Respondents at 34-49, *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981).

87. 101 S. Ct. at 1543, 67 L. Ed. 2d at 712. The Court's interpretation of the statute determined that: § 6010 is termed a "finding," while §§ 6005, 6009, 6011, 6012, 6063, and 6067 are termed "conditions"; if Congress had intended "appropriate treatment" as a requirement under the DD Act, more adequate funding would have been provided; "appropriate treatment" is too vague a term to represent an enforceable obligation. *Id.*, 67 L. Ed. 2d at 711-12. Of particular interest is the Court's treatment of the reference in § 6063(b)(5)(C) to § 6010. See note 63 *supra*. Rather than finding the reference to be supportive of § 6010's potential substantive significance, the Court stated that the reference would have been unnecessary if the states were required to fund § 6010 rights. *Id.* at 1544, 67 L. Ed. 2d at 712-13.

88. The Court, however, did not discuss any data relevant to that expense. Community facilities for the mentally retarded are less expensive to operate than institutions. See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1312 (E.D. Pa. 1977). Mental retardation professionals estimate that 75% of the mentally retarded are capable of becoming self-sufficient, while another 10%-15% are capable of partial self-sufficiency. Murdock, *supra* note 22, at 163 n.116. Although the initial outlay of establishing facilities and training programs may be high, in the long run, the cost of providing services will be much lower because the need for expensive custodial care would be significantly reduced. See *id.* at 161-65. But see 19 DUQ. L. REV. 149, 164 (1980). If habilitation rights are recognized under the DD Act, the financial impact from the states becoming obligated to provide care and services to all mentally retarded citizens, not just the institutionalized, would be extensive. *Id.*

89. 101 S. Ct. at 1540, 67 L. Ed. 2d at 708.

90. *Id.* at 1544-45, 67 L. Ed. 2d at 713. The Court emphasized a comparison between *Pennhurst* and *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). *Id.* In *Southeastern* the Court ruled that § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976 & Supp. III 1979) does not require the states to take affirmative action to help a handicapped individual overcome the school and work related problems inherent in the individual's disability. The states are only "encouraged" to take such action. 442 U.S. at 410. The Court also stressed that the DD Act's legislative history supported the holding. 101 S. Ct. at 1541, 67 L. Ed. 2d at 709.

91. The Court remanded the issues to the Third Circuit for consideration. 101 S. Ct. at 1546, 67 L. Ed. 2d at 715.

92. See note 61 *supra* and accompanying text.

93. The Court's discussion dealt with private enforcement under 42 U.S.C. § 1983 (Supp. III 1979). See note 72 and accompanying text. See also *Medley v. Ginsburg*, 492 F. Supp. 1294 (S.D. W. Va. 1980) (§ 1983 provides a cause of action to enforce DD Act rights).

stated that the imposition of penalties for noncompliance with the DD Act may require more than a showing that the state is a participant in the legislative program.<sup>94</sup> The Court suggested that a state will be subject to the DD Act's conditions only when the particular institution under review has benefitted directly from receipt of DD Act funds.<sup>95</sup> Finally, the Court's discussion of possible remedies for state noncompliance under the DD Act evidenced a preference for enjoining funding rather than mandating corrective measures that would require financial expenditures by the states.<sup>96</sup>

While concurring with the majority, Justice Blackmun expressed concern about inferences that the Court made as to future enforcement limitations.<sup>97</sup> He therefore advocated both the recognition of a private cause of action and the acknowledgement that state receipt of funds would bring all of a state's institutions under the provisions of the DD Act.<sup>98</sup>

Justice White authored a dissenting opinion on behalf of Justices Brennan and Marshall. While agreeing with the majority that Congress enacted the DD Act pursuant to the constitutional spending power,<sup>99</sup> the dissent's interpretation of the legislative history of section 6010 and the relative position of the section within the DD Act led to the conclusion that section 6010 operates to create a conditional right to appropriate treatment and habilitation in the least restrictive environment.<sup>100</sup> Accordingly, the dissent addressed significant issues flowing from the recognition of section 6010 rights. Justice White concluded that state receipt of funds requires adherence to section 6010 obligations even in institutions not directly receiving funds,<sup>101</sup> that the developmentally disabled can enforce these rights in a private cause of action,<sup>102</sup> and that noncompliance should be remedied by allowing the state to choose between compliance or cessation of funding.<sup>103</sup>

### III. CONCLUSION

In *Pennhurst State School & Hospital v. Halderman* the Supreme Court ruled that the mentally retarded do not have a substantive right to habilitation in the least restrictive environment under section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975. The decision hinders efforts to secure appropriate habilitation and to establish alterna-

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In comparison the Third Circuit held that an implied private cause of action existed under the DD Act pursuant to the *Cort v. Ash* requirements. See note 16 *supra* and accompanying text.

94. 101 S. Ct. at 1545, 67 L. Ed. 2d at 714.

95. *Id.*

96. *Id.* at 1545-46, 67 L. Ed. 2d at 714-15.

97. *Id.* at 1547, 67 L. Ed. 2d at 717.

98. *Id.* at 1547-48, 67 L. Ed. 2d at 716-17.

99. *Id.* at 1549, 67 L. Ed. 2d at 718.

100. *Id.*, 67 L. Ed. 2d at 719. The dissent particularly criticized the majority's treatment of § 6063(b)(5)(C) and its reference to § 6010. *Id.* at 1551-52, 67 L. Ed. 2d at 722; see note 87 *supra* and accompanying text.

101. 101 S. Ct. at 1552, 67 L. Ed. at 722.

102. *Id.* at 1558, 67 L. Ed. 2d at 729.

103. *Id.*, 67 L. Ed. 2d at 730.

tives to institutional care for the mentally retarded while reinforcing the prevailing role of the states as the provider of public services. Arguably, the Court's concern for states' rights and potential expense took precedence in *Pennhurst* over any concern the Court might have had for the impact of the decision on developmentally disabled persons. Advocates for the mentally retarded should take note that the decision is limited in its direct effect, because the Court rejected only the claim of entitlement under section 6010 of the DD Act. The existing constitutional precedents, which have addressed the right to habilitation and the less restrictive community facilities issues, have been left intact for the time being. Furthermore, while not providing encouragement, the decision does not preclude individuals from suing to enforce recognized requirements under the DD Act or from suing under other federal or state mental health laws. The Court's focus on the states' position, however, should serve as a reminder that arguments for aid to the mentally retarded may not be received by a Court not inclined to expand their legal rights.

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