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Constitutional Law—Youngberg v. Romeo: Moving Toward a Constitutional Right to Habilitation for the Mentally Retarded

Since the 1960s the issue of the constitutional right to habilitation for the involuntarily committed mentally retarded has created many confusing and inconsistent decisions based on a wide range of theories. While the lower courts have exhibited a growing recognition of the constitutional right, the Supreme Court, when given the opportunity to resolve the dispute, has consist-

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1. The American Psychiatric Association explains that the word "habilitation" is "commonly used to refer to programs for the mentally retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. . . . The principal focus of habilitation is upon training and development of needed skills." Youngberg v. Romeo, 457 U.S. 307, 309 n.1 (1982) (quoting Brief of American Psychiatric Association as Amicus Curiae at 4 n.1)

The concept of the right to habilitation first appeared in a thesis by Dr. Morton Birnbaum, who argued that if society deprived an individual of his liberty in order to provide care and treatment, courts should ensure that such treatment is provided. See Birnbaum, The Right to Treatment, 46 A.B.A. J. 499 (1960). Birnbaum's thesis gained judicial recognition in Rouse v. Cameron, 373 F.2d 451, 453 n.6 (D.C. Cir. 1966), in which Chief Judge Bazelon indicated, in dicta, that lack of psychiatric treatment beyond custodial care raises serious constitutional questions.

2. "Mental retardation," as defined by the American Association on Mental Deficiency, "refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and appearing in the 'developmental period.'" AMERICAN ASS'N ON MENTAL DEFICIENCY, MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION 5 (H. Grossman rev. ed. 1977). This definition encompasses three elements: to be classified as mentally retarded a person must score below 97% of the population on a standardized intelligence test, lack the social skills to cope with his particular environment, and have been recognized as having had problems of adaptive behavior since childhood or early adolescence. Herr, The New Clients: Legal Services for Mentally Retarded Persons, 31 STAN. L. REV. 553, 555 (1979).

3. As Chief Judge Bazelon pointed out in Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966), denying the right to treatment for the civilly committed raises three possible constitutional arguments: (1) violation of the due process of law since commitment is justified only because of its humane, therapeutic goals; (2) violation of equal protection of the law when a mentally retarded person charged with a crime is committed indefinitely, while others, convicted of the same offense, are sentenced to a fixed term; and (3) violation of the prohibition against cruel and unusual punishment since the patient is committed indefinitely without treatment. Id.

ently avoided making the determination. In *Youngberg v. Romeo*\(^5\) the Court finally addressed the issue directly. In an opinion written by Justice Powell and signed by seven other justices,\(^6\) the Court recognized that these institutionalized individuals have fourteenth amendment rights to reasonably safe conditions of confinement and freedom from unreasonable bodily restraints, and consequently, they are entitled to minimally adequate habilitation to protect those constitutional guarantees. While stopping short of finding an independent constitutional right to treatment the Court moved one step closer to ensuring that the involuntarily committed mentally disabled will receive some form of habilitation instead of mere custodial care.

In 1974 Nicholas Romeo, a profoundly retarded\(^7\) twenty-six year old, was involuntarily committed to Pennhurst state institution under the Pennsylvania Mental Health and Mental Retardation Act of 1966.\(^8\) After Romeo suffered attacks by other patients and hospital staff, his mother filed an action as his next friend for damages under 42 U.S.C. § 1983\(^9\) against the institution officials. She alleged that the institution's officials had denied Romeo's constitutional rights to safe conditions of confinement, freedom from bodily restraint, and treatment.\(^10\) In addition, she claimed that the officials knew or should have known about his injuries, but failed to take appropriate preventive procedures, thus violating his rights under the eighth and fourteenth amendments. In the ensuing trial the court instructed the jury that the eighth amendment was the proper standard of liability,\(^11\) and the jury returned a verdict for the defendants.

The Third Circuit Court of Appeals, sitting en banc, vacated the decision.

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7. Romeo "has the mental capacity of an eighteen month old child, with an I.Q. between 8 and 10. He cannot talk and lacks the most basic self-care skills." \(Id.\) at 309.
8. PA. STAT. ANN. tit. 50, § 4406 (Purdon 1969). The act provides in part that an individual may be committed if he is "believed to be mentally disabled, and in need of care or treatment by reasons of such mental disability." \(Id.\) (emphasis added).
11. The court instructed the jury that if any or all of the defendants were aware of and failed to take reasonable steps to prevent repeated attacks upon Nicholas Romeo, such failure deprived him of his constitutional rights. Also, if the defendants shackled Romeo or denied him treatment as punishment for filing the lawsuit, his constitutional rights were violated under the eighth amendment. Finally, the jury was instructed that only if they found the defendants deliberately indifferent to the serious medical and psychological needs of Romeo could they find that his eighth and fourteenth amendment rights had been violated. *Youngberg*, 457 U.S. at 312.

The Supreme Court adopted this "deliberate indifference" standard in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), a case dealing with the constitutional right of prisoners to be free from punishment that is "cruel and unusual" under the eighth amendment. Although the *Youngberg* trial did not expressly refer to *Estelle* in charging the jury, the Supreme Court later found that the district court had erroneously used the deliberate indifference standard adopted in that case. *Youngberg*, 457 U.S. at 312 n.11.
The court unanimously held that "the Eighth Amendment, prohibiting cruel and unusual punishment of those convicted of crimes, was not an appropriate source for determining the rights of the involuntarily committed." The court was sharply divided, however, on the nature of the substantive due process rights of the institutionalized mentally retarded. The majority held that the fourteenth amendment generated three separate constitutional rights. The right against undue bodily restraint and the right to personal security and protection from harm, according to the court, were "fundamental liberties" that could be limited only by an "overriding, nonpunitive state interest." In addition, the court found that the involuntarily committed have a right to habilitation. To determine whether this constitutional guarantee had been violated, the court established a "sliding standard" that depended upon the severity of the intrusion.

On review the Supreme Court recognized that a person does not lose his right to these substantive liberty interests merely because he has been committed under proper procedures. The Court dealt with two of these rights perfunctorily, since they "involve[d] liberty interests recognized by prior decisions of [the] Court." In examining the constitutional right to personal security, 

12. Youngberg, 457 U.S. at 312, rev'g 644 F.2d 147 (3d Cir. 1980).
13. Id. The court of appeals also noted that since the reason for confining the mentally retarded is completely different from the reason for confining criminals, patients in an institution for the mentally retarded have a right to be free from punishment. Youngberg, 644 F.2d at 157-58.
14. The majority held that because physical restraint "raises a presumption of punitive sanction," Youngberg, 644 F.2d at 159, it can be justified only by a showing of "compelling necessity." Id. at 160. In addition, the court stated that the restraints used must be "the least restrictive method of dealing with the patient, in light of his problems and the surrounding environment." Id. at 161.
15. The court of appeals found that a denial of this constitutional right could be justified only by a showing of "substantial necessity." Id. at 164. According to Chief Judge Seitz, "substantial necessity" was a more appropriate standard than the "compelling necessity" standard, which was applied to the undue restraint claim, because:

[I]t enables a court and jury to distinguish between isolated incidents and inadvertent accidents, on the one hand, and persistent disregard of patients' needs, on the other. If the defendants disregarded plaintiff's injuries or failed to take steps to protect plaintiff, then they should be liable unless they can offer explanations based on important state interests.

Id.
16. Id. at 158.
17. Supreme Court Affirms that Residents Have Certain Institutional Rights, MENTAL DISABILITY L. REP., July-August 1982, at 223. See Youngberg, 644 F.2d at 165-69. In his concurring opinion, Chief Judge Seitz explained that all institutionalized mentally retarded are categorically entitled to treatment unless there is a compelling explanation for the failure to provide it. Youngberg, 644 F.2d at 174 (Seitz, C.J., concurring). The court further found that once some treatment is provided, the fourteenth amendment requires that it be "acceptable . . . in light of present medical or other scientific knowledge." Id. at 169. The concurring judges, however, adopted a different standard of treatment, which was adopted by the Supreme Court. Id. at 178 (Seitz, C.J., concurring). See supra note 28.
18. Youngberg, 457 U.S. at 315. See Vitek v. Jones, 445 U.S. 480, 491-94 (1980) ("A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the state to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protection.").
the Court relied on its earlier decision in *Hutto v. Finney*,\(^{20}\) which held that imprisonment does not extinguish the right to personal security. The Court reasoned that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."\(^{21}\) The Court applied similar reasoning to the right to freedom from bodily restraint. Since this right survived criminal convictions and incarceration,\(^{22}\) the Court held that it survived involuntary commitment as well.\(^{23}\)

The Court found Romeo's claim to a constitutional right to habilitation "more troubling."\(^{24}\) Although it acknowledged that "a State is under no constitutional duty to provide substantive services for those within its border,"\(^{25}\) the Court recognized that once a person is institutionalized, the state does have a duty to provide certain services and care.\(^{26}\) To diffuse the problem, it assumed from the record that Romeo only sought training related to the constitutional rights to personal security and freedom from restraint, and "not some general constitutional right to training per se."\(^{27}\) As a result, the Court limited its holding to the particular circumstances of the case, requiring only that the state provide minimally adequate or reasonable training to ensure those constitutional rights.\(^{28}\) Further the Court found that the basic requirement of adequacy is satisfied by providing "that training which is reasonable in light of

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20. 437 U.S. 678 (1978) (affirming measures designed *inter alia* to protect prisoners from rampant violence). *See also* Rhodes v. Chapman, 425 U.S. 337 (1981) (inmates are constitutionally entitled to reasonable protection from harm, including protection from their fellow inmates).


22. "[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id.* at 316 (quoting *Greenholz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring)). *See also* *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (liberty preserved by the due process clause includes freedom from bodily restraint and punishment).


24. *Id.*


26. *Id.* The state, however, has considerable discretion in determining the nature and scope of its responsibilities. *Id. See* *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (the Constitution did not empower the Court to "second-guess" state officials charged with the responsibility of allocating limited public welfare funds).

27. *Youngberg*, 457 U.S. at 318. In the district court, Romeo had asserted that "state officials at a state mental hospital have a duty to provide residents . . . with such treatment as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit." *Id.* at 318 n.23 (citing Petition for Certiorari at 94A-95A, *Youngberg*, 457 U.S. 307). Later, Romeo not only dropped thisassertion, but also "expressly disavowed" any claim to treatment that would enable him "to achieve his maximum potential." *Id.* In his Supreme Court brief, Romeo indicated that "minimal habilitative efforts" were needed to reduce his aggressive behavior. *Id.* (citing Brief for Respondent at 22-23, *Youngberg*, 457 U.S. 307).

28. *Id.* at 318-19. The Court apparently adopted the view expressed by Chief Judge Seitz in his concurring opinion. Seitz stated "that the plaintiff has a constitutional right to minimally adequate care and treatment." *Youngberg*, 644 F.2d at 176 (Seitz, C.J., concurring). The Court noted that "Chief Judge Seitz did not identify or otherwise define—beyond the right to reasonable safety and freedom from physical restraint—the minimally adequate care and treatment that appropriately may be required for [the involuntarily committed individual]." *Youngberg*, 457 U.S. at 319.
identifiable liberty interests and the circumstances of [each] case."\textsuperscript{29}

Given the Court’s past record of side-stepping the right to habilitation issue, it was not surprising that it failed to recognize an independent constitutional right to treatment for the involuntarily committed mentally retarded. Several recent decisions evidence the reluctance to establish such a right on either constitutional or statutory grounds. The most obvious instance of this hesitation was \textit{O'Connor v. Donaldson},\textsuperscript{30} in which the Court expressly refused to decide whether mentally ill persons have a right to treatment when confined by the state.\textsuperscript{31}

In \textit{O'Connor} the plaintiff had been civilly committed in 1957 to a state hospital for "care, maintenance, and treatment,"\textsuperscript{32} but had received only custodial care until his release in 1971.\textsuperscript{33} The Fifth Circuit Court of Appeals held that a person civilly committed to a state hospital had a due process right to treatment based on two rationales.\textsuperscript{34} The court’s first rationale relied on the rule established by the Supreme Court in \textit{Jackson v. Indiana}.\textsuperscript{35} The Court in \textit{Jackson} recognized that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the indi-

\textsuperscript{29} \textit{Youngberg}, 457 U.S. at 319 n.25. The Court further noted that these liberty interests are not absolute; that is, "the question . . . is not . . . whether a liberty interest has been infringed, but whether the extent or nature of the restraint or lack of absolute safety is such as to violate due process." \textit{Id.} at 319-20. This determination depends on balancing the liberty interest of the involuntarily committed person against the legitimate interests of the state. The Court found that "this balancing cannot be left to the unguided discretion of a judge or jury." \textit{Id.} at 321. Instead, the Constitution requires only "that the courts make certain that professional judgment in fact was exercised." \textit{Id.} (quoting \textit{Youngberg}, 644 F.2d at 178 (Seitz, C.J., concurring)). The Court ruled that the decision by a professional is presumptively valid and that liability cannot be imposed except when there is "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." \textit{Id.} at 320-23. To support this limited judicial review, the Court, in an explanatory footnote, provided the following citations and quotations:

\textit{See} \textit{Parham v. J.R.}, 442 U.S. 584, 608 n.16 (1979) (In limiting judicial review of medical decisions made by professionals, "it is incumbent on courts to design procedures that protect the rights of individuals without unduly burdening the legitimate efforts of the states to deal with difficult problems."). \textit{See also} \textit{Rhodes v. Chapman}, 452 U.S. 337, [352] (1981) ("[C]ourts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system. . . . ").

\textit{Youngberg}, 457 U.S. at 322 n.29.

30. 422 U.S. 563 (1975), \textit{vacating on other grounds}, 493 F.2d 507 (5th Cir. 1974).

31. \textit{Id.} at 573.

32. \textit{Id.} at 565-66.

33. \textit{Id.} at 569.

34. Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974).

35. 406 U.S. 715 (1972). In \textit{Jackson} a mentally defective deaf mute was committed after the court determined that he was incompetent to stand trial. The medical report showed that his intelligence was not sufficient to enable him ever to develop the communication skills necessary to understand the nature of the charges against him or to participate in his defense. Thus, it was unlikely he would ever become competent to stand trial. The Supreme Court held that Indiana's indefinite commitment of a criminal defendant based solely on his lack of capacity to stand trial violated due process. The Court stated that such a defendant "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future." \textit{Id.} at 738. The Court added that even if it were determined that the defendant was likely to become able to stand trial, "his continued commitment must be justified by progress toward that goal." \textit{Id.}
MENTALLY HANDICAPPED'S RIGHTS

The Fifth Circuit reasoned that if the state, under its parens patriae power, commits a patient for the purpose of treatment but does not provide treatment, then the nature of the commitment and the purpose of the commitment are not reasonably related. Accordingly, the court found that the state’s commitment of the plaintiff in O'Connor violated the constitutional rule of Jackson.

The second rationale relied on by the O'Connor Court made no distinction between persons committed under the state’s parens patriae power and those committed under the state’s police power. The Court recognized that due process imposes specific limitations on the government’s power to detain. When confinement occurs without these conventional limitations, as in the involuntary commitment of the mentally disabled, the government must extend a quid pro quo to justify the confinement. According to the Fifth Circuit, this quid pro quo for the confined retarded citizen is the provision of rehabilitative treatment; when rehabilitation is impossible, the state must provide minimally adequate habilitation and care beyond the subsistence level custodial care that would be provided in a penitentiary.

On appeal, however, the Supreme Court refused to examine either of the

36. Id. at 738. The nature of the relationship between the government’s action and its goals is usually examined under the rational basis test. This test requires the one questioning the government action to demonstrate that the state does not have a legitimate interest that can be reasonably presumed to be advanced by the action in question. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

There are at least four purposes for involuntary civil commitment that clearly qualify as legitimate, if not compelling, state interests: (1) to protect others from the dangerous committed individual; (2) to protect the committed person from self-inflicted injury; (3) to protect the committed individual from passively harming himself; and (4) to provide needed treatment. Spece, Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories, 20 ARIZ. L. REV. 1, 6 (1978). See Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974) (recognizing three purposes of involuntary commitment), vacated on other grounds, 422 U.S. 563 (1975).


38. O'Connor, 493 F.2d at 521.

39. Id. at 522. These limitations provide that the detention be in retribution for a specific offense; that it be limited to a fixed term; and that it be permitted only after a proceeding in which fundamental procedural safeguards were observed. Id.

40. Id.

41. Id. The seminal formulation of a constitutional right to habilitation based on the quid pro quo theory appeared in Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.), enforced, 334 F. Supp. 387 (M.D. Ala. 1971), supplemented, 334 F. Supp. 373 and 344 F. Supp. 387 (M.D. Ala. 1972), aff'd in part, remanded in part, decision reserved in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). In Wyatt mentally retarded patients in an Alabama state hospital brought a class action alleging that their constitutional rights to due process and protection against cruel and unusual punishment had been violated because they were involuntarily confined for mental treatment purposes, but no such treatment had been given. The court emphasized that the patients were involuntarily committed through noncriminal procedures and without the constitutional protections afforded defendants in criminal proceedings. It concluded that “[w]hen patients are so committed for treatment purposes, they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.” Id. at 784 (citing Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969) and Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1967)). Speaking for the court, Chief Judge Johnson stated that the failure to provide adequate treatment “violates the very fundamentals of due process.” Id. at 782. See also Welsh v. Likens, 373 F. Supp. 487 (D. Minn. 1974) (due process
constitutional arguments advanced in O'Connor. Instead it cast its decision in terms of the fourteenth amendment right to liberty. The Court determined that a state could not constitutionally confine a nondangerous individual capable of surviving safely on his own or with the aid of family or friends. While the majority simply avoided the right to treatment issue, Chief Justice Burger, in a critical concurring opinion, vehemently rejected the circuit court's theory, contending that it was a "sharp departure from, and [could not] coexist with, due process principles." In condemning the appellate court's quid pro quo argument, he emphasized that "[t]he Court's opinion plainly gives no approval to that holding and makes clear that it binds neither the parties to this case nor the courts of the Fifth Circuit."

The Court has been equally reluctant to adopt a constitutional right to treatment based on eighth amendment grounds. In a 1962 case, Robinson v. California, the Court had held that any "punishment," whether criminal or not, of certain personal statuses is inherently cruel and unusual. Proponents of the eighth amendment argument thus contended that the mental illness or retardation of a person who is either dangerous or in need of treatment is a "status" to which the Robinson rule applies. Consequently, courts have found that civil commitment without treatment constitutes punishment that is inherently cruel and unusual. In Ingraham v. Wright the Supreme Court explicitly reserved the question whether involuntarily committed mental patients were entitled to eighth amendment protection. Nevertheless, in hold-

required that civil commitment for mental retardation be accompanied by minimally adequate treatment).

For a criticism of the quid pro quo theory, see Spece, supra note 36, at 10.
42. O'Connor, 422 U.S. at 573.
43. Id. at 576.
44. Four days after deciding O'Connor, the Supreme Court denied certiorari in another Fifth Circuit right to treatment case. Department of Human Resources v. Burnham, 422 U.S. 1057 (1975). In Burnham the district court had found no constitutional right to treatment. Burnham v. Department of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972). The Fifth Circuit reversed on the basis of its O'Connor decision. Even though the Supreme Court had vacated the O'Connor decision, it denied certiorari in Burnham, apparently allowing Wyatt's holding of a constitutional right to treatment to remain the law of the Fifth Circuit.
45. O'Connor, 422 U.S. at 586 (Burger, C.J., concurring).
46. Id. at 580.
47. 370 U.S. 660 (1962).
48. In Robinson the Court found that a California statute that made narcotics addiction punishable by imprisonment inflicted cruel and unusual punishment in violation of the eight and fourteenth amendments. Justice Stewart used the California legislature's own words in describing narcotics addiction as a state similar to mental illness, that is, a "status" for which one should not be punished. Id. at 667 n.8.
49. The Court in Wyatt adopted this view when it stated that "[a]dequate and effective treatment is constitutionally required because absent treatment, the hospital is transformed into a penitentiary where one could be held indefinitely for no convicted offense," Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971) (quoting Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960)).
51. The Court stated:
Some punishments, though not labeled "criminal" by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment . . . We have no occasion in this case,
ing that the right to be free from cruel and unusual punishment did not apply to disciplinary corporal punishment in schools, the Court strongly suggested that it would be hesitant to extend the *Robinson* rule to situations not involving criminal punishment.\textsuperscript{52} The decision in *Bell v. Wolfish*\textsuperscript{53} reinforced this position when the Court indicated that the eighth amendment is limited to formally adjudicated crimes; therefore, the pretrial detainees in *Bell* did not have eighth amendment protection.\textsuperscript{54}

Perhaps even more indicative of the Court's reluctance to find a right to habilitation for the mentally retarded—either on constitutional or statutory grounds—is *Pennhurst State School & Hospital v. Halderman*.\textsuperscript{55} The district court in *Pennhurst* found that the conditions at Pennhurst violated the fourteenth amendment due process right to minimally adequate habilitation in the least restrictive environment,\textsuperscript{56} the eighth amendment right to be free from harm,\textsuperscript{57} and the fourteenth amendment equal protection right to be free from nondiscriminatory habilitation.\textsuperscript{58} More importantly, the court concluded that habilitation could never be provided in the institution,\textsuperscript{59} and thus ordered the closing of Pennhurst and the placement of all its residents in community living settings.\textsuperscript{60} On appeal, the Third Circuit avoided the constitutional issue and affirmed the lower court's decision solely on federal and state statutory grounds.\textsuperscript{61} The Court found that the mentally retarded have a right to appro-

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\textit{Id.} at 669 n.37.
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\textsuperscript{52} In examining the history of the eighth amendment, the *Ingraham* Court noted that "the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." \textit{Id.} at 664. \textit{See also} *Powell v. Texas*, 392 U.S. 514, 532-33 (1968) (refusing to apply the *Robinson* rule to punishment for drunkenness in a public place, because such punishment was punishment of the act, not of a status).

\textsuperscript{53} 441 U.S. 520 (1979).

\textsuperscript{54} \textit{Id.} at 535 n.16. "[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." \textit{Id.} (quoting *Ingraham*, 430 U.S. at 671 n.40).

The Third Circuit in *Youngberg* agreed that the eighth amendment was not an appropriate source for determining the rights of the involuntarily committed. *Youngberg*, 644 F.2d at 156. The Supreme Court did not consider the eighth amendment argument. *Youngberg*, 457 U.S. 307.


\textsuperscript{57} \textit{Id.} at 1320.

\textsuperscript{58} Pennhurst residents were held to have been denied education and training equal to that received by other citizens because they were segregated in an institution that did not adequately provide habilitation. \textit{Id.} at 1321-22.

\textsuperscript{59} \textit{Id.} at 1318. "[T]here is no question that Pennhurst, as an institution for the retarded, should be regarded as a monumental example of unconstitutionality with respect to the habilitation of the retarded." \textit{Id.} at 1320.

\textsuperscript{60} \textit{Id.} at 1326.

ropriate treatment in the least restrictive environment under the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (DDA), but held that the DDA did not preclude institutionalization. The Supreme Court avoided ruling on the constitutional issues, questions presented under section 504 of the Rehabilitation Act of 1973, and Pennsylvania state law claims, remanding these issues to the Third Circuit for consideration. It limited its decision to the review and interpretation of the DDA, holding that the statute does not give the mentally retarded a right to appropriate habilitation in the least restrictive environment. Two primary factors influenced the Court in reaching its decision. First, the Court noted that “appropriate treatment in the least restrictive setting” would result in an “enormous financial burden.” Given Congress’ limited funding to the states, the Court concluded that Congress could not have intended to rezone an absolute obligation on the states to fund certain levels of treatment. Second, the majority expressed concern for states’ rights, noting that imposing vague affirmative financial obligations on the states would upset the federal-state balance of power. Consequently, the Pennhurst Court held that the DDA represents a general policy of preference for community alternatives to institutionalization, and thus merely encourages, rather than mandates, better care for the mentally retarded. While the Court’s concern for states’ rights and potential expense was restricted to the implementation of the DDA, it was arguably no less influential in the Court’s refusal to find an absolute and independent constitutional right to treatment in Youngberg.

Additional incentive to deny an independent constitutional right to habilitation lay in the Court’s ability to rely on state law to provide a form of

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62. 42 U.S.C. §§ 6000-6081 (1976 & Supp. V 1981). The DDA claim 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 Court of Appeals requested supplemental briefing on the DDA. Pennhurst, 451 U.S. at 8 n.3.

63. Halderman, 612 F.2d at 107. The court reasoned that although the DDA disfavored institutionalization, the DDA recognized that, for some patients, habilitation could only occur during long-term hospitalization. Id. For a discussion of the effect of Pennhurst on the DDA, see Boyd, The Aftermath of the DD Act: Is There Life After Pennhurst?, 4 U. ARK. LITTLE ROCK L.J. 448 (1981).


65. PA. STAT. ANN. tit. 50, § 4201(1) (Purdon 1969) states that: “The department shall have the power, and its duty shall be: (I) To assure within the state the . . . provision of adequate mental health and mental retardation services for all persons who need them . . . .”


68. Pennhurst, 451 U.S. at 24.

69. Id. at 18.

70. Id. at 15-18. See Note, supra note 67, at 968, 971.
habilitative services for the institutionalized mentally retarded. To what states have established a right to treatment or a responsibility to provide habilitation. To supplement these provisions, several states have explicitly required the providing of habilitative services in the least restrictive environment or of some individual rehabilitative plan. Each of these statutes could have been considered an alternative means of securing habilitative services for the mentally retarded citizen, thereby reducing the Court's incentive to establish the constitutional right to treatment.

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71. No state claim, however, was pled in Youngberg. See Second Amended Complaint in Petition for Certiorari, Appendix at 86A-92A, Youngberg, 457 U.S. 307.


76. The Court's reluctance to find a federal remedy when a state remedy exists is illustrated by its decision in Parratt v. Taylor, 451 U.S. 527 (1981). In Parratt the Court concluded that plaintiff, an inmate who had alleged that Nebraska prison officials had not delivered his mail-ordered packages, had not suffered a due process violation. First, the Court reasoned that the negligent deprivation of property was not a result of some established state procedure, but the unauthorized failure of state officials to follow established state procedure. Id. at 543. Second, and perhaps more important to the Youngberg Court, the Court in Parratt noted that the state had a tort claim procedure that provided a remedy to a person who had suffered a tortious loss at the hands of the state. Id. With the latter reason, the Court reaffirmed the principle that the fourteenth amendment is not intended to be a "font of tort law to be superimposed upon whatever systems may be administered by the States." Id. (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

Although Parratt involved deprivation of property and not liberty, the Parratt Court relied on two liberty cases to reach its decision, thereby indicating that its holding could have been applicable to Youngberg. The court cited Ingraham v. Wright, 430 U.S. 651 (1977) and Paul v. Davis, 424 U.S. 693 (1976). At the time of the Youngberg trial, however, the statutory right to habilitation for the involuntarily committed mentally retarded in Pennsylvania was uncertain and subject to controversy. Finally, in 1981, the Pennsylvania Supreme Court held in In re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981), that the state's Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, § 4201(1) (Purdon 1969), provided a right to habilitation. As a result, the Third Circuit Court of Appeals reinstated its December 1979 order in Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979), rev'd, 451 U.S. 1 (1981), which required state and county officials to provide habilitation for mentally retarded citizens in the least restrictive
Although the decision in Youngberg stopped short of adopting an independent constitutional right to treatment, the growing recognition of the capabilities of the mentally disabled by the lower courts, as well as the executive and legislative branches, made it all but impossible for the Court to continue to disregard altogether the right to treatment. In the last twenty years, retardation professionals have developed new methods for determining the capabilities of the most seriously disabled individuals. As a result, a dramatic reassessment of the learning potential of severely retarded individuals has occurred, producing extensive documentation of the improvements that can be achieved by these individuals in self-help, language, and vocational skills through appropriate instructional techniques. Judicial recognition of these abilities first appeared in Wyatt v. Stickney, which explicitly accepted that habilitation of a mentally retarded person could “raise the level of his physical, mental, and social efficiency.” Elaborating on the quid pro quo theory expressed in Wyatt, the District Court of Minnesota in Welsch v. Likins reaffirmed this judicial acceptance of the mentally retarded abilities. It noted that “documentary evidence indicates that everyone, no matter the degree or severity of retardation, is capable of growth and development if given adequate and suitable treatment.”

The district court in New York State Association for Retarded Children, Inc. v. Carey also recognized the growth potential of the mentally retarded, but unlike the court in Welsch, it established a right to habilitation based on a protection from harm theory. In a preliminary court order the court had rejected the plaintiff’s contention that residents of a state school for the mentally retarded had a constitutional right to treatment, but recognized the

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80. Id. at 395.


82. New York State Ass’n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1975) (ordering that certain remedial steps be taken to ensure minimally acceptable living conditions for the residents).

83. Id. at 758-64.
state's constitutional duty to protect the residents from harm. Two years later the court approved a consent decree that required services well beyond the protection from physical harm that the court had originally envisioned. Although consent decrees usually have little precedential value, the court in Carey enhanced the decree's impact by issuing a formal order ratifying it and an additional memorandum discussing its constitutional basis. The court noted that the decree was “based on the recognition that retarded persons, regardless of the degree of handicapping conditions, are capable of physical, intellectual, emotional and social growth, and . . . that a certain level of affirmative intervention and programming is necessary if that capacity for growth is to be preserved, and regression prevented.” Judge Orrin B. Judd, speaking for the court, further explained that harm can result not only from neglect but from conditions that cause regression or prevent development of an individual's capabilities.” “Thus, what had been a right merely to be protected from physical harm was transformed, by agreement of the parties, into a right to at least a maintenance level of psychological treatment.”

By the mid-1970s this judicial recognition of the mentally retarded's growth potential had extended to the legislative branch. In 1975 Congress passed the Developmentally Disabled Assistance and Bill of Rights Act, which stated that “treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person.” To allow the mentally retarded to achieve the greatest developmental potential, section 6010 of the Act further provided that these services “should be provided in the setting that is least restrictive of the person's personal liberty.” Until the Pennhurst decision, several courts relied on this language to recognize a right to treatment in the least restrictive environment.

Three years after the passage of the DDA, President Carter proposed the

86. Id. at 764-65. The court held that treatment could not be required since the state had no affirmative obligation to provide services to its citizens. Id. at 761-62. Nevertheless, the court indicated that the state had an obligation not to worsen an individual's condition. Id. at 761-65.
89. Carey, 393 F. Supp. at 771.
90. Id. at 718. Consequently, the right to minimally adequate treatment based on the right to protection from harm as expressed in Youngberg is more limited than the right to treatment described in Carey. The Youngberg Court limits the right to treatment that is necessary to protect the individual against physical harm. The New York district court, however, provided a higher standard of treatment, one that protects the individual from mental and physical regression.
91. Spece, supra note 36, at 29.
94. Id. at § 6010(2).
95. Id.
Mental Health Systems Act (MHSA) to promote the deinstitutionalization of the mentally disabled and provide them with appropriate community services.\textsuperscript{97} The passage of the MHSA, in 1980, provided grants to assure the initiation and improvement of comprehensive mental health services within the community for chronically mentally ill individuals. In addition, the MHSA provided that a person admitted to a facility for the purpose of receiving mental health services should be accorded "[t]he right to appropriate treatment and related services in a setting and under conditions that are the most supportive of such person's personal liberty"\textsuperscript{98} as well as "[t]he right to a humane treatment environment that affords reasonable protection from harm."\textsuperscript{99} More importantly, however, the MHSA recognized that the committed mentally disabled should have an:

individualized, written, treatment or service plan...the right to treatment based on such plan, the right to periodic review and reassessment of treatment and related service needs, and the right to appropriate revision of such plan, including any revision necessary to provide a description of mental health services that may be needed after such person is discharged from such program or facility.\textsuperscript{100} Implicit in this latter provision is the belief that, given adequate treatment, the skills of the mentally disabled can improve, especially outside the large institution. Nevertheless, the MHSA still does not provide a statutory right to treatment for the committed mentally retarded. At best, it only strongly recommends that treatment be provided to these committed individuals. Furthermore, since the MHSA is limited in scope to those hospitals actually receiving federal aid through the MHSA grant program, this "recommended treatment" only benefits those mentally disabled individuals who, by chance, are being treated at a MHSA hospital.

\textsuperscript{99} \textit{Id.} at § 9501(1)(G).
\textsuperscript{100} \textit{Id.} at § 9501(1)(B).
Faced with the emerging awareness of the capacities of the mentally retarded, the Court had to begin facing the right to treatment issue. Its “minimally adequate" standard, based on the liberty interests, however, falls far short of the standards established by Congress and the lower courts. Such minimum habilitative efforts, while reducing the individual's aggressive and self-destructive tendencies, do not necessarily ensure that the involuntarily committed mentally disabled person will maintain even the basic self care skills possessed when he entered a state institution.101 Extensive evidence indicates that residents of institutions suffer decreases in such significant areas as "intelligence quotient, motor skills, social competence, and verbal skills."102 This decrease in functional level is the result of lack of stimulation and practice in using already acquired skills. Experts contend that when adequate treatment is not given, mentally retarded individuals, confined to an institution because they are thought too helpless to improve their ability to function, actually learn helplessness there.103

The Court is not completely unaware of this unfortunate result. As Justice Blackmun noted in his concurring opinion,104 when such skills are lost, the mentally retarded person has arguably suffered “a loss of liberty quite distinct from—and as serious as—the loss of safety and freedom from unreasonable restraints.”105 The willingness of Justices Blackmun, Brennan, and O'Connor to "listen seriously to [such] an argument"106 is a clear indication that another decision concerning the constitutional right to rehabilitation may be forthcoming. If the Court does redefine the right as an independent constitutional guarantee, however, it may be expected still to refuse to establish a right to treatment that will preserve basic self-care skills. Such a decision, while bringing the Court yet one step closer to the requirements intended by


103. The term "learned helplessness" has been used to describe the process by which institutionalized residents become functionally incapacitated. DeVellis, Learned Helplessness in Institutions, 15 MENTAL RETARDATION, Oct. 1977, at 10. See also N. HOBBS, THE FUTURES OF CHILDREN 124-55 (1975); Lyle, supra note 102.

104. Youngberg, 457 U.S. at 325 (Blackmun, J., concurring). The concurring opinion was also signed by Justices Brennan and O'Connor. Chief Justice Burger wrote a separate concurring opinion. He agreed with the Court "that some amount of self-care instruction may be necessary to avoid unreasonable infringement of a mentally retarded person's interests in safety and freedom from restraint." Id. at 330 (Burger, C.J., concurring). He concluded, however, "that the Constitution does not otherwise place an affirmative duty on the State to provide any particular kind of training or habilitation—even such as might be encompassed under the essentially standardless rubric 'minimally adequate training,' to which the Court refers." Id.

105. Id. at 327.

106. Id. at 329.
Congress and the lower courts, would nevertheless fail to recognize the maximum potential of the mentally retarded.

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