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NOTES

Mental Health—*Pennhurst State School & Hospital v. Halderman:* Back to the Drawing Board for the Developmentally Disabled†

Throughout the past decade, the judiciary has been struggling to define the extent of the legal and constitutional rights of the developmentally disabled. In 1972 a federal court in *Wyatt v. Stickney*[1] declared for the first time that the civilly committed mentally retarded have a constitutional right to habilitation. In 1975 Congress created a statutory right to habilitation by passing the Developmentally Disabled Assistance and Bill of Rights Act.[2] Section 6010 of this Act states that the developmentally disabled have a right to appropriate treatment provided in an environment that is the "least restrictive of the individual's personal liberty."[3] This "Bill of Rights" section was interpreted by the lower federal courts as providing developmentally disabled individuals

† For a discussion of the constitutional issues raised in the district court opinion, Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), see Note, Constitutional Law—Rights of the Mentally Retarded: *Halderman v. Pennhurst* Closes State Institution and Mandates Community Care, 57 N.C.L. Rev. 336 (1979).

1. 344 F. Supp. 387 (M.D. Ala. 1972), aff'd in part, remanded in part, and decision reserved in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *Wyatt* involved a class action brought on behalf of the residents of an Alabama state school for the mentally retarded. Plaintiffs alleged that the school was being operated in a constitutionally impermissible manner, raising the issue whether the mentally retarded (now labeled "developmentally disabled") have a right to adequate habilitation (since mental retardation cannot be cured, the term "habilitation" is more appropriate than treatment to describe the care of the mentally retarded). The court held that "[b]ecause the only constitutional justification for civilly committing a mental retardate, therefore, is habilitation, it follows ineluctably that once committed such a person is possessed of an inviolable constitutional right to habilitation." Id. at 390.

Since 1974 several other courts also have held that there exists a right to habilitation. See, e.g., Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978) (constitutional right to safe and humane living environment); Harper v. Cserr, 544 F.2d 1121 (1st Cir. 1976) (right extended to voluntary inmates if they are so helpless that they are confined de facto if not de jure); Eckerhart v. Hensley, 475 F. Supp. 908 (W.D. Mo. 1979) (right to habilitation exists for the criminally dangerous as well as for the involuntarily committed); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974) (right embodied within concept of due process).

The United States Supreme Court so far has refused to rule whether there is a constitutional right to habilitation. When given the opportunity in O'Connor v. Donaldson, 422 U.S. 563 (1975), the Court avoided the issue and based its decision on a right to liberty. The Court, however, soon will have to face the question squarely in Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980), cert. granted, 451 U.S. 982 (1981). The court of appeals dealt only with the constitutional right of the mentally retarded to habilitation.

2. Pub. L. No. 94-103, 89 Stat. 486 (1975), as amended by Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 3003 (codified at 42 U.S.C. §§ 6000-6081 (1976 & Supp. III 1979)) [hereinafter cited as the Developmentally Disabled Act]. The purpose of the federal-state grant program was to help states to develop new programs in otherwise unaided areas, to achieve more effective program planning, to help states to use existing funds better and to fill any gaps in current efforts. The program was meant to supplement funds already available. H.R. Rep. No. 1188, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. Code Cong. & Ad. News 7355, 7359.

3. 42 U.S.C. § 6010 (1976 & Supp. III 1979). Section 6010 provides:

with a statutory private cause of action.[4] In 1981, however, the United States Supreme Court held in *Pennhurst State School & Hospital v. Halderman*[5] that section 6010 did not establish affirmative rights upon which the developmentally disabled could base a private cause of action.

In 1974 Terri Lee Halderman filed suit against Pennhurst, an institution

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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.

(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—

(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary . . . as appropriate when taking into account the size of the institution and the service delivery arrangements of the facilities of the programs;

(B) in the case of other residential programs for persons with developmental disabilities which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs.

The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons.

4. Beginning with Naughton v. Bevilacqua, 458 F. Supp. 610 (D.R.I. 1978), aff'd, 605 F.2d 586 (1st Cir. 1979), in cases involving inadequate habilitation, courts began to rely heavily on what they perceived to be a right to treatment guaranteed by section 6010. See also Medley v. Ginsberg, 492 F. Supp. 1294 (S.D.W. Va. 1980); In re Petition of Ackerman, — Ind. App. —, 409 N.E.2d 1211 (1980). *Naughton* was cited extensively by the Court of Appeals for the Third Circuit in Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979).

5. 451 U.S. 1 (1981).

owned and operated by the State of Pennsylvania for the mentally retarded, in 1974 on behalf of herself and the other residents. Halderman alleged that the conditions at Pennhurst violated her eighth and fourteenth amendment rights, that she was being denied her rights under section 504 of the Rehabilitation Act of 1973[6] and that the institution was violating both the Developmentally Disabled Act and the Pennsylvania Mental Health and Mental Retardation Act.[7] The District Court for the Eastern District of Pennsylvania found that unsanitary conditions, assaults on patients by other residents and staff members, and instances of self-abuse existed at Pennhurst.[8] The trial court also found that members of the Pennhurst staff, for their own convenience rather than for treatment, subjected residents to dangerous physical restraints, psychotropic drugs and solitary confinement, and that the administration of the institution, particularly with respect to recordkeeping and evaluations, was inadequate.[9] The district court held that the developmentally disabled have a federal constitutional right to minimally adequate habilitation in the least restrictive environment.[10] Accordingly, it ordered that Pennhurst be closed and that all the residents be placed in community living arrangements.[11] The Court of Appeals for the Third Circuit essentially affirmed[12] the district court's decision, basing its opinion on a finding that section 6010 of the Developmentally Disabled Act does provide an implied private cause of action.[13]

Upon review, the Supreme Court, in an opinion by Justice Rehnquist,

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6. 29 U.S.C. § 794 (Supp. III 1979): "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."

7. Pa. Stat. Ann. tit. 50, §§ 4101-4704 (Purdon 1969).

8. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977). The opinion provides a detailed examination of the institution and its conditions and practices. See id. at 1302-11.

9. Id. at 1306.

10. Id. at 1319.

11. The Supreme Court noted that, although at the time of the suit Pennsylvania had set up a Community Living Arrangements (CLAs) Program and intended to transfer Pennhurst residents to CLAs, the institution still housed 1200 people, 75% of whom were severely retarded. 451 U.S. at 5.

12. Halderman v. Pennhurst State School & Hospital, 612 F.2d 84 (3d Cir. 1979). The court of appeals reversed the district court's order that Pennhurst be closed. Instead it ordered that the case be remanded for individual determinations by the court or a special master concerning the appropriateness of institutionalization for each patient (given that the conditions at Pennhurst would be improved). Id. at 114.

13. Id. at 97-98. The Supreme Court in Cort v. Ash, 422 U.S. 66 (1974), listed four factors to be considered in determining whether individuals have an implied private remedy: (1) Is the plaintiff one of the class for whose benefit the statute was enacted (does the statute create a federal right in favor of the plaintiff)? (2) Is there any showing of legislative intent, whether express or implied, to create or deny a remedy? (3) Is it consistent with the underlying purposes to imply a private remedy? and (4) Is the cause of action traditionally one of state law for which a federal cause of action would be inappropriate? Id. at 78. The Court of Appeals for the Third Circuit found that each of the *Cort* standards had been met. Plaintiffs were developmentally disabled and thus qualified as the recipients of the right to treatment granted by section 6010. 612 F.2d at 97-98. The conference report to the Developmentally Disabled Act expressed a desire that the right be enforced by the courts. Conf. Rep. No. 473, 94th Cong., 1st Sess. 42, reprinted in 1975 U.S. Code Cong. & Ad. News 943, 961. The private cause of action clearly would further the purposes of the Act. Moreover, states traditionally have been responsible for the health of their citizens, and Congress has not interfered in this instance. 612 F.2d at 97-98.

held that section 6010 does not create a substantive right to appropriate treatment in the least restrictive environment; thus, there can be no basis for an implied private cause of action. The Court founded its narrow holding on three grounds: the contractual nature of a federal-state grant program; the legislative history of the Developmentally Disabled Act; and the language and structure of the Act itself.[14]

First, regarding the contractual nature of the federal-state grant program, the Supreme Court reasoned that the Developmentally Disabled Act was enacted by Congress solely pursuant to its spending power[15] and that the Act itself provides for an ordinary federal-state grant program. According to the Supreme Court's interpretation, there is no language in the Act referring to the fourteenth amendment, nor is there any indication in the legislative history that Congress intended to act under the fourteenth amendment.[16] The Court concluded that any federal-state funding program enacted under the authority of Congress' spending power is a contract between the federal government and a state whereby the state agrees to fulfill certain conditions in exchange for federal funds. Because of this contractual nature, any conditions must be clear and unambiguous. Therefore, in the Court's view, if Congress intended to establish in section 6010 affirmative rights that would be binding on states taking part in the program, it had to make this intention plain to the states before they accepted the funds.[17]

The second basis for the Supreme Court's holding was the legislative history of the Developmentally Disabled Act. According to the Court, there was nothing in the legislative history to suggest that Congress intended the Act to be anything more than a funding statute.[18] Justice Rehnquist quoted several Senators[19] and interpreted their remarks as showing that Congress meant

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14. 451 U.S. at 18-20.

15. Id. at 17. The Court of Appeals for the Third Circuit had reasoned that Congress acted under both the spending power and section 5 of the fourteenth amendment when it enacted the Act. 612 F.2d at 98.

16. The Court noted that it had never developed a test to determine when Congress was enforcing the guarantees of the fourteenth amendment, but since any action pursuant to that amendment is binding on all states and often involves state concerns, courts should not infer an intent to enforce the fourteenth amendment without support from the statute and its legislative history. 451 U.S. at 15-16.

Past cases dealing with the source of Congress' authority did not require such a test because either the acts themselves or their legislative histories expressly mentioned the fourteenth amendment. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Civil Rights Act of 1964 authorizing courts to award money damages against state governments for employment discrimination); Oregon v. Mitchell, 400 U.S. 112 (1970) (banning voter literacy tests as racially discriminatory); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding Voting Rights Act banning literacy tests).

17. 451 U.S. at 17-18.

18. Id. at 22.

19. Among the Senators' remarks were the following: "We have developed a bill whose thrust, like the 1970 Act, is *to assist* states in developing a comprehensive plan to bring together available resources in a coordinated way so developmentally disabled individuals are appropriately served. Our goal is more thorough and careful planning and more effective evaluation." Id. (quoting 121 Cong. Rec. 16,514 (1975) (statement of Sen. Randolph)) (emphasis added by Court); "Title II of the Conference agreement establishes a *clear federal policy* that the mentally retarded have a right to appropriate treatment, services, and habilitation." Id. (quoting 121 Cong. Rec. 29,820 (1975) (statement of Sen. Javitts)) (emphasis added by Court).

merely to establish a federal policy that the developmentally disabled have a right to appropriate treatment in the least restrictive environment. The Court emphasized that the Senate's version of the bill,[20] containing 400 pages of standards designed to protect the developmentally disabled's rights, was rejected by the Conference Committee in favor of the more general "findings" of section 6010.[21] The Court argued that this action showed that Congress considered and expressly rejected the possibility of making section 6010 a true bill of rights that would be binding on the states.[22]

The third basis for the Court's decision was the language and structure of the Act itself as an indication of Congress' intent. The Court pointed to the lack of any clear "conditional language" in section 6010.[23] According to the Court, without such language, states cannot knowingly consent to any conditions imposed by section 6010. Furthermore, the Court noted that the conditions arising in other sections of the Act, namely sections 6011 and 6063, would be redundant if section 6010 were binding on states.[24] Under section 6011, a state may not receive funds without providing assurances that each state program has in effect an individualized habilitation plan for each developmentally disabled person in the program.[25] Section 6063(b)(5)(C) requires that each state plan "contain or be supported by assurances satisfactory to the Secretary [of Health and Human Services] that the human rights of all persons with developmental disabilities . . . who are receiving treatment, services, or habilitation, under programs assisted under this chapter will be protected consistent with § 6010 of this Title (relating to rights of the developmentally disabled)."[26] If section 6010 were binding on the states, both of these provisions would be unnecessary. Finally, an interpretation of section 6010 requiring deinstitutionalization for most developmentally disabled individuals renders section 6063(b)(4)(A)(ii) meaningless.[27] This latter section requires the state to develop a comprehensive plan to address unmet needs in at least one of four areas of priority service.[28] Only one of these stipulated areas involves deinstitutionalization.[29]

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20. See S. Rep. No. 160, 94th Cong., 1st Sess. 34 (1975).

21. Conf. Rep. No. 473, 94th Cong., 1st Sess. 41-42, reprinted in 1975 U.S. Code Cong. & Ad. News 919, 960.

22. 451 U.S. at 23.

23. Id. Other sections of the Act contain clear conditional language. Section 6005 requires affirmative action in employment of handicapped. 42 U.S.C. § 6005 (1976). Section 6011 conditions allotment on assurances that the state has a habilitation plan for each person in its program. Id. § 6011 (1976 & Supp. III 1979). Section 6012 requires that the state put into effect an advocacy system for the developmentally disabled. Id. § 6012. Section 6063 covers the state plans, which must contain objectives for the program, describe services to be provided, set up a plan to address unmet needs in one of the priority service areas and provide assurances that human rights are protected. Id. § 6063.

24. 451 U.S. at 25-26.

25. 42 U.S.C. § 6011 (1976 & Supp. III 1979).

26. Id. § 6063(b)(5)(C) (Supp. III 1979).

27. 451 U.S. at 26-27.

28. 42 U.S.C. § 6063(b)(4)(A)(ii) (Supp. III 1979).

29. Congress wished states to have flexibility in the spending of federal grants but at the same time wanted to set particular service goals. It did not intend that a state would remain committed to only one service area. Instead Congress expected the states to review the priority service areas

The Supreme Court's holding in *Pennhurst* that section 6010 contains merely precatory language and does not provide affirmative rights for the developmentally disabled[30] was not unexpected in light of a series of prior cases decided by the Court. In *Cannon v. University of Chicago*,[31] in which the Court held that there was an implied private cause of action under section 901 of Title IX of the Education Amendments of 1972[32] prohibiting discrimination on the basis of sex in educational programs receiving federal aid, Justice Rehnquist had foreseen cases such as *Pennhurst* when he stated in his concurring opinion:

> Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.[33]

In *Maine v. Thiboutot*,[34] which held that a section 1983 suit[35] may be brought based on federal statutory violations, the dissenters had expressed a strong fear that individuals would bring private suits under statutes such as the Developmentally Disabled Act.[36] In *O'Connor v. Donaldson*,[37] in refusing to rule on whether the involuntarily committed have a right to treatment, the Court demonstrated its unwillingness to be "thrust into the middle of sensitive policy determinations which it is ill-equipped to handle by virtue of its inexperience in the administration of programs for the mentally retarded."[38]

Although the holding in *Pennhurst* was not surprising in light of *Cannon*, *Thiboutot* and *O'Connor*, it did require the Court to introduce contract theory into federal-state funding programs by requiring that all conditions placed by Congress on the receipt of federal funds be clear and unambiguous. Previously the Court had held that Congress could fix the terms on which it allocated money,[39] but never had it placed any limitations on this power other than that the conditions be appropriate and plainly adapted to a permitted end.[40] The

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each year and reallocate funds as needed. None of the service areas was ranked higher than the others. H.R. Rep. No. 1188, 95th Cong., 2d Sess. 10-11, reprinted in 1978 U.S. Code Cong. & Ad. News 7312, 7364-65.

30. See 451 U.S. at 31-32.

31. 441 U.S. 677 (1979).

32. Pub. L. No. 92-318, § 901, 86 Stat. 235 (codified at 20 U.S.C. § 1681 (1976)).

33. 441 U.S. at 718 (Rehnquist, J., concurring).

34. 448 U.S. 1 (1980).

35. 42 U.S.C. § 1983 (Supp. III 1979).

36. 448 U.S. at 22-23 (Powell, J., dissenting). The majority declared that section 1983 encompasses claims based solely on violations of statutory federal law. Id. at 4. The dissent attached, by way of an appendix, a list of statutes that arguably could give rise to a suit under section 1983. Id. at 34-37 (Powell, J., dissenting). This list included the Developmentally Disabled Act. The dissent urged that this cause of action be limited to equal rights claims. Id. at 12 (Powell, J., dissenting). See also text accompanying notes 57-62 infra.

37. 422 U.S. 563 (1975).

38. Schoenfeld, A Survey of the Constitutional Rights of the Mentally Retarded, 32 Sw. L.J. 605, 625 (1978).

39. See Lau v. Nichols, 414 U.S. 563 (1974); King v. Smith, 392 U.S. 309 (1968); Oklahoma v. United States Civil Serv., 330 U.S. 127 (1947).

40. Oklahoma v. United States Civil Serv., 330 U.S. 127, 143 (1947). The Court, in Lau v. Nichols, 414 U.S. 563 (1974), did foreshadow *Pennhurst* when it stated that the school district had

Pennhurst Court cited *Employees v. Department of Public Health and Welfare*[41] and *Edelman v. Jordan*[42] as support for its holding that the conditions imposed by the contract be express and clear.[43] These cases, however, dealt with the issue whether a state had knowingly waived its immunity from suit under the eleventh amendment.[44] Traditionally, when a contract has involved the waiver of a fundamental right, the courts have required that the waiver be made expressly and knowingly.[45] By its decision in *Pennhurst* the Court expanded the scope of this requirement beyond the waiver of fundamental rights to acceptance of conditions to federal funding in general.[46]

The Court's decision in *Pennhurst* also required it to apply a very narrow interpretation to the "least restrictive environment" standard of section 6010(2),[47] which mandates that habilitation for the developmentally disabled should be provided in a setting that is the least restrictive of an individual's liberty. The Court accepted without question the interpretation of the federal district court that "least restrictive environment" is synonymous with deinstitutionalization.[48] This interpretation contrasts sharply with that of the Court of Appeals for the Third Circuit, which ruled that section 6010 stated a clear preference for deinstitutionalization but did not prohibit institutions. The court of appeals' holding would permit the institutionalization of some individuals if the institutions could provide adequate habilitation and living conditions.[49] Such an interpretation would eliminate any conflict between sections 6010 and 6063(b)(4)(A)[50] and would counter the Supreme Court's

"contractually agreed" to meet the requirements of the Civil Rights Act when accepting funds. Id. at 568.

41. 411 U.S. 279 (1973).

42. 415 U.S. 651 (1974).

43. 451 U.S. at 17.

44. See Edelman v. Jordan, 415 U.S. at 673-74; Employees v. Department of Pub. Health & Welfare, 411 U.S. at 285.

45. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 95 (1972) (signing a conditional sales contract does not by itself constitute a waiver of procedural due process rights); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-87 (1971) (in a transaction between merchants a waiver of constitutional rights had been "voluntarily, intelligently, and knowingly" made with "full awareness of the legal consequences").

46. *Pennhurst* has been cited for this precise proposition. See University of Tex. v. Camenisch, 451 U.S. 390, 399 (1981) (Burger, C.J., concurring).

47. 42 U.S.C. § 6010(2) (1976 & Supp. III 1979).

48. See 446 F. Supp. at 1319-20. The district court was not considering section 6010 of the Developmentally Disabled Act. Rather it was forced to interpret "least restrictive environment" because of its finding that there is a constitutional right to minimally adequate habilitation in the least restrictive environment.

49. See 612 F.2d at 114-15. See also Romeo v. Youngberg, 644 F.2d 147, 166-69 (3d Cir. 1980), cert. granted, 451 U.S. 982 (1981).

50. 42 U.S.C. § 6063(b)(4)(A) (Supp. III 1979):

The plan must—

(i) provide for the examination not less often than once every three years of the provision, and the need for the provision, in the State of the four different areas of priority services . . . ; and

(ii) provide for the development, not later than the second year in which funds are provided under the plan after . . . [November 6, 1978], and the timely review and revision of a comprehensive statewide plan to plan, financially support, coordinate, and otherwise better address, on a statewide and comprehensive

fear that section 6010 imposes too great a financial burden on the states.

The court of appeals' interpretation of "least restrictive" also would resolve an ambiguity in the legislative history. The majority opinion of the Supreme Court pointed to statements by Senators as support for its belief that Congress intended only to create a federal policy.[51] The dissenters, however, included quotations from some of the same Senators that led them to conclude that Congress had meant to establish specific rights.[52] Under the court of appeals' interpretation, however, these seemingly contradictory congressional purposes are not actually inconsistent. Congress was distinguishing between a right to appropriate treatment and a policy of encouraging deinstitutionalization. Congress set forth this concept in the conference report's statement of the purpose of the substituted section 6010:

> These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts.[53]

The statement of purpose clearly declares a right to appropriate treatment, but at the same time it also recognizes institutionalization as an ongoing method of care. The final sentence seems to suggest that Congress expected this right to appropriate treatment to be a basis for a private cause of action.

The ultimate effect of the *Pennhurst* decision is to prohibit the developmentally disabled from bringing a private cause of action under section 6010 of the Developmentally Disabled Act. The developmentally disabled must look to other theories in seeking redress for improper and inadequate conditions in mental institutions. The Supreme Court remanded *Pennhurst*[54] for consideration of these theories: suits brought under 42 U.S.C. § 1983[55] and section 504 of the Rehabilitation Act,[56] and violations of the eighth and fourteenth amendments.

With respect to the first theory—a suit brought under 42 U.S.C. § 1983 to force compliance with sections 6011 and 6063(b)(5)(C) of the Developmentally Disabled Act—Justice Rehnquist strongly suggested that the Court would not view favorably such an approach.[57] He doubted that there would be a private

> basis unmet needs in the State for the provision of at least one of the areas of priority services, such area or areas to be specified in the plan and (at the option of the State) for the provision of an additional area of services for the developmentally disabled, such area also to be specified in the plan.

See text accompanying notes 28-29 supra.

51. 451 U.S. at 21-22.

52. Id. at 43-44 nn.9-11 (White, J., dissenting).

53. Conf. Rep. No. 473, 94th Cong., 1st Sess. 42, reprinted in 1975 U.S. Code Cong. & Ad. News 943, 961.

54. 451 U.S. at 31.

55. 42 U.S.C. § 1983 (Supp. III 1979).

56. 29 id. § 794. See note 6 supra.

57. 451 U.S. at 27-30.

cause of action under *Maine v. Thiboutot*[58] because plaintiffs could claim only that the state plan did not provide adequate assurances to the Secretary of Health and Human Services and because there might be an exclusive express remedy under the Act.[59] Justice Rehnquist also questioned whether Pennsylvania had violated the Act since Pennhurst did not receive federal funds.[60] He intimated that there was not an available remedy since the Court would not force a state to carry such a heavy financial burden. Justice Rehnquist's comments concerning a section 1983 suit, however, may be viewed as mere dictum. Thus, it is not certain that a suit under section 1983 would be without merit. *Pennhurst* was a six-to-three decision,[61] with Justice Blackmun concurring on the ground that he considered a section 1983 suit appropriate.[62] With the intervening departure of Justice Stewart, a member of the majority, the key vote on this issue may belong to the newly appointed Justice, Sandra Day O'Connor.

The developmentally disabled person who is denied a private cause of action under section 6010 of the Act may be able to resort to section 504 of the Rehabilitation Act of 1973.[63] The rationale supporting a cause of action under section 504 is that unnecessary institutionalization represents illegal discrimination.[64] To date, the Supreme Court has been reluctant to impose upon an institution affirmative obligations based on section 504.[65] Because of the Court's emphasis in *Pennhurst* on the expense of deinstitutionalization and the resultant additional administrative burdens, it is unlikely that the Court readily would allow a developmentally disabled person to recover under section 504. An additional obstacle to the successful use of section 504 is that it applies only to programs or activities receiving federal assistance.[66] In *Pennhurst* the institution itself was not receiving federal funds. Arguably, however, sec-

58. 448 U.S. 1 (1980). See text accompanying notes 34-36 supra.

59. Justice Rehnquist suggests that this could be the elimination of federal funds. 451 U.S. at 29.

60. Id. at 28. The district court suggested that counties had a financial incentive to send their retarded to institutions rather than placing them in community living arrangements (CLAs). The state reimbursed the counties 100% if the individuals were placed in an institution. For CLAs, which are federally funded, the county had to supply 10% of the funds. 446 F. Supp. at 1312.

61. Justice Rehnquist wrote the majority opinion, joined by Chief Justice Burger and Justices Powell, Stewart and Stevens. Justice Blackmun concurred in part and concurred in the judgment. Justice White dissented, joined by Justices Brennan and Marshall.

62. 451 U.S. at 33 (Blackmun, J. concurring).

63. See note 6 supra. For cases recognizing a private cause of action under section 504, see NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977) (per curiam); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

64. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. at 1323.

65. See Southeastern Community College v. Davis, 442 U.S. 397 (1979). The Court held that a nursing school did not have to admit a deaf student. Although the Court stated that section 504 was not meant to require affirmative action, it distinguished illegal discrimination. It stressed that, under the particular facts, the requirement that the applicant meet certain physical standards was reasonable in light of the financial burden, but the Court expressly left open the possibility that a situation could arise in which a refusal to modify a program was unreasonable and thus discriminatory. Id. at 411-13.

66. 29 U.S.C. § 794 (Supp. III 1979). See note 6 & text accompanying note 60 supra.

tion 504 would be applicable if it could be shown that the institution was a part of a federally-supported state program, although not itself receiving federal moneys.

In addition to relying upon suits brought under 42 U.S.C. § 1983 and section 504 of the Rehabilitation Act, a developmentally disabled person could rely on the constitutional theories developed by courts prior to the Developmentally Disabled Act. In the past, residents of institutions have brought suits alleging that the conditions of their institutional care violated their eighth amendment right to be free from cruel and unusual punishment.[67] The Supreme Court, however, has stated that "[a]n examination of the history of 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."[68] A more productive approach may be for plaintiff to assert that she has a right, arising out of the fourteenth amendment, to treatment or habilitation. Lower federal courts have been quite willing to recognize such a right,[69] but the Supreme Court thus far has yet to rule on the issue. This issue, however, is currently before the Court.[70]

In *Pennhurst* the Court once again refused to clarify the legal and constitutional rights of the developmentally disabled: "In many ways, this very limited decision simply muddies the water, providing the states and developmentally disabled with minimal guidance for making immediate policy recommendations."[71] While the holding in *Pennhurst* is narrow and appears to deny developmentally disabled plaintiffs only one possible theory in their suits against institutions, that theory—a private cause of action under section 6010—not only avoided any constitutional issues but also represented a direct and simple approach. In the absence of a cause of action under section 6010, a plaintiff must rely on multiple theories, none of which is very effective. While lower federal courts, Congress and the Executive Branch have been moving forward rapidly in establishing and protecting rights for the de-

67. See, e.g., Welsch v. Likins, 373 F. Supp. 487, 502-03 (D. Minn. 1974) (seclusion, physical restraints, excessive use of tranquilizers, and overall conditions may amount to an eighth amendment violation). But see Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980), cert. granted, 451 U.S. 982 (1981) (eighth amendment inappropriate in civil context).

68. Ingraham v. Wright, 430 U.S. 651, 664 (1977). See also Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

69. See note 1 supra.

70. Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980), cert. granted, 451 U.S. 982 (1981). *Romeo*, like *Pennhurst*, is a suit against Pennhurst State School & Hospital. The Court of Appeals for the Third Circuit described the parameters of the right to treatment. This right arises when a person is involuntarily committed. Treatment must be provided for patients who need treatment and are willing to accept it. The right to treatment limits the state's power to impose treatment on unwilling patients. The form of treatment must be that which is acceptable for the patient given the current medical or scientific knowledge. 644 F.2d at 165, 169. The Supreme Court's ruling in *Romeo* will be very important for the developmentally disabled since section 6010 is no longer a viable approach.

71. Summary & Analysis, 5 Mental Disability L. Rep. 139, 139 (1981).

velopmentally disabled, the Supreme Court seems to be both lagging behind and increasing the confusion. After *Pennhurst* the developmentally disabled are back where they were when *Wyatt v. Stickney*[72] was decided in 1972.

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72. 344 F. Supp. 387 (M.D. Ala. 1972). See note 1 supra.