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Introduction

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SYMPOSIUM ON DEVELOPMENTAL DISABILITIES AND THE LAW

INTRODUCTION

*L. Lynn Hogue**

*New occasions teach new duties
Time makes ancient good uncouth.*

—James Russell Lowell

And what is Habilitation without Intention and Act?

—Francis Bacon

Patterns in the quest for greater legal rights for the developmentally disabled¹ have become more difficult to identify. In sharp contrast to the obvious exuberance of Professor Charles Halpern² and Judge David Bazelon,³ who in his prefatory comments for a

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1. A "developmental disability" is:

a severe, chronic disability of a person which—

(A) is attributable to a mental or physical impairment or combination of mental and physical impairments;

(B) is manifested before the person attains age twenty-two;

(C) is likely to continue indefinitely;

(D) results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and

(E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

42 U.S.C. § 6001(7) (Supp. III 1979).

2. The next several years will see fascinating doctrinal developments, and interchanges among courts, legislatures, and administrators. The course of these developments will suggest some of the ways that the legal system does or does not assure the fair and humane treatment of a helpless minority.

Halpern, *Introduction*, 31 STAN. L. REV. 545, 551 (1979).

3. This symposium on mental retardation and the law, which focuses on developments in the civil law context, provides a welcome occasion to reflect on the progress that has occurred in that field since the Task Force Report [THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW] was

1979 symposium on mentally retarded people and the law,⁴ could discern portents of "fascinating doctrinal developments" and trace "significant progress" in recent congressional enactments, this introduction must begin on a more cautious footing. Erosion of the legal basis for many milestones in the rights of the disabled is evident. For example, the carefully constructed edifice of constitutionalized rights to treatment and habilitation⁵ so cogently elaborated by Judge Frank M. Johnson, Jr.:

When patients are . . . committed for treatment purposes they unquestionably have a constitutional right to receive such indi-

issued. It is heartening to look back and realize that we have indeed made significant progress in many of the areas enumerated in the 1963 report: Congress has recently passed legislation to guarantee adequate education for retarded children, as well as legislation to ensure advocacy services for retarded persons of all ages.

Bazelon, *Preface*, 31 STAN. L. REV. 541 (1979), citing The Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1411-1420 (1976)) and the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 496 (1975) (codified at 42 U.S.C. §§ 6001-6081 (1976)).

4. 31 STAN. L. REV. 541-829 (1979).

5. There is a technical difference between 'treatment,' which applies to curable mental illness, and 'habilitation,' which consists of education and training for those, such as the mentally retarded, who are not ill.

Pennhurst State School & Hosp. v. Halderman, 101 S. Ct. 1531, 1534 n.2 (1981). *See also* *Wyatt v. Aderholt*, 503 F.2d 1305, 1306 n.1 (5th Cir. 1974):

'Treatment' means care provided by mental health professionals and others that is adequate and appropriate for the needs of the mentally impaired inmate. Treatment also encompasses a humane physical and psychological environment. The term 'habilitation,' used by the parties and amici in the district court and by the district court in its order of April 13, 1972 (Partlow State School and Hospital) is a term used to describe that treatment which is appropriate to the condition of the mental retardate. For convenience, in this opinion we group 'habilitation' and 'treatment' under the single term "treatment," and to include those instances where rehabilitation is impossible in which event the requirement is minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary. *Donaldson v. O'Connor*, 493 F.2d 507, 522 (5th Cir. 1974).

See also *Wyatt v. Stickney*, 344 F. Supp. 387, 395 (M.D. Ala. 1972), *approved sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (app. A(I)(E), MINIMUM CONSTITUTIONAL STANDARDS FOR ADEQUATE HABILITATION OF THE MENTALLY RETARDED), defining "habilitation" as:

[T]he process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to programs of *formal*, structured education and treatment.

On the right to an habilitation program *see id.* at 396; on the content of individualized habilitation plans *see id.* at 397. *Cf.* *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1298 (E.D. Pa. 1977), *modified*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 101 S. Ct. 1531 (1981) (" 'Habilitation' is the term of art used to refer to that education, training and care required by retarded individuals to reach their maximum development.").

vidual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. [Citations omitted.] Adequate 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. * * * The purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions⁶

had given way under the assaults of *O'Connor v. Donaldson*.⁷ The "Bill of Rights Act"⁸ for the developmentally disabled was reduced to the level of "Congressional 'encouragement' of state programs" by the *Pennhurst* case.⁹ Even apart from the subsiding legal plateau, opposition has emerged to such programs as deinstitutionalization¹⁰ and advocacy programs¹¹ to insure that the legal rights of the men-

6. *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971). See also *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972), *approved sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

7. 422 U.S. 563, 578-90 (1975) (Burger, C.J., concurring) and *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 1539 n.12 (1981) ("[T]his Court has never found that the involuntarily committed have a constitutional 'right to treatment,' much less the voluntarily committed.") *O'Connor* apparently approved involuntary commitment for the purpose of treating a condition even when it poses no risk of danger to the community.

8. 42 U.S.C. § 6010 (1976).

9. 101 S. Ct. 1531, 1544 (1981). Compare *Pennhurst with Meek v. Pittenger*, 421 U.S. 349 (1975): "[T]his holding . . . penalizes *children*—children who have the misfortune to have to cope with the learning process under extraordinarily heavy physical and psychological burdens, for the most part congenital." *Id.* at 386 (Burger, C.J., concurring with respect to the constitutionality of Pennsylvania's textbook loan program but dissenting with respect to the Court's holding that other aid programs for parochial schools including counseling, testing, psychological services, speech and hearing therapy, and related services for exceptional, remedial, or educationally disadvantaged students were unconstitutional).

10. Frohboese and Sales, *Parental Opposition to Deinstitutionalization: A Challenge in Need of Attention and Resolution*, 4 LAW AND HUMAN BEHAVIOR 1 (1980).

11. Compare Shwed, *Social Policy and the Rights of the Mentally Ill: Time for Re-examination*, 5 J. HEALTH POL., POL'Y & L. 193, 193-94 (1980):

Mental health advocacy has provided a natural niche for socially-minded young lawyers who have rejected traditional legal career tracks. The vagaries of the job market for law school graduates have given additional impetus to this new brand of legal ombudsmanship. However, the reformist zeal of this group is often in conflict with the clinical realities of psychiatric practice. Acute psychiatric emergencies with suicidal, homicidal, or agitated psychotic potential require rapid medical-psychiatric assessment, treatment and disposition. Cumbersome regulations protecting the civil liberties of such acutely ill patients paralyze or significantly impede appropriate, swift treatment.

Although such civil libertarian safeguards may seem thoughtful and reasonable in the context of a law or medical school seminar, they become obstructive to

tally impaired are respected. Evidence of a failing consensus on the proper role of law in the world of the disabled, foreseen by Rosenberg and Friedman,¹² may be emerging. Signs of "progress" are more difficult to detect.¹³

Recent developments both in litigation and legislation regarding the developmentally disabled suggest that any progress during the decade of the 80s is likely to be measured in small rather than large steps. Consonant with this view, the articles which comprise this Symposium focus on a number of practical issues which are likely to survive even in a time of retrenchment and hence to have ongoing utility for practitioners who elect to work in this challenging and vital area.

Contrasting with the limited holding in *Pennhurst*, which denies the existence of a Bill of Rights as such incorporating substantive entitlements to which the developmentally disabled could have laid claim, is the decision in *Battle v. Commonwealth of Pennsylvania*¹⁴ which held that an administrative policy setting a limit of 180 days of instruction per year for all children was incompatible with the Education for All Handicapped Children Act's¹⁵ emphasis on individuals and individual education plans. The refusal of the United States Supreme Court to grant certiorari suggests that the Act's mandate of "free and appropriate public education"¹⁶ may enjoy a more robust life than Congress' effort in the Developmentally Disabled Assistance and Bill of Rights Act to spell out a "bill of

'front line' mental health professionals working in a busy hospital emergency room setting with an acutely disturbed patient and his distraught family.

with Tancredi, *The Rights of Mental Patients: Weighing the Interests*, 5 J. HEALTH POL., POL'Y & L. 199, 203 (1980):

Obviously, the arguments for and against libertarian posture with regard to the mentally ill are complex. The medical profession is influenced, not only by its desire to treat those in need of care, but by its own philosophical perspective with regard to the taxonomy of mental diseases and the implications of this for individual patient decisions. The legal profession, on the other hand, approaches this situation from the standpoint of civil rights, and looks to the application of legal principles to a vulnerable group in society. The mentally ill and retarded are among the most vulnerable to abuse.

12. Rosenberg and Friedman, *Developmental Disability Law: A Look into the Future*, 31 STAN. L. REV. 817, 819-22 (1979).

13. See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1978).

14. 629 F.2d 269, 276 (3d Cir. 1980) ("[T]he 180 day rule precludes the proper determination of the content of a free appropriate public education and accordingly, . . . it violates the Act.")

15. Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1411-1420 (1976)).

16. 20 U.S.C. § 1414(a)(5) (1976).

rights." Such minor steps will serve as markers in the litigation strategies for the developmentally disabled during the 80s.

I cannot conclude this Introduction without special thanks to the Arkansas Governor's Developmental Disabilities Planning Council members and staff whose support made possible both this Symposium and the conference which preceded it (Conference on Developmental Disabilities and the Law, October 10-11, 1980) on which these articles are based. This collective labor testifies to a hope that through law the promise of a better life, true habilitation for mentally retarded and other developmentally disabled persons, may be placed on a surer foundation. For no better measure of the quality of life in our state or nation can be devised than that assured to those whose handicapping conditions make them less able to build a world of their own making.