

A NEW APPROACH TO CIVIL COMMITMENT OF THE MENTALLY ILL

I. INTRODUCTION

Civil commitment in institutions became the socially accepted method of caring for the mentally ill in the late nineteenth century.¹ Today, every jurisdiction provides for involuntary civil commitment of mentally ill individuals who meet certain commitment standards.² Several courts, however, have found that these commitment standards impermissibly restrict patients' fourteenth amendment right to liberty³ by allowing confinement of individuals who could adequately survive outside of an institution.⁴ Accordingly, these courts have struck down civil commitment statutes because they are uncon-

1. Comment, *The Constitutional Right to Treatment Services for the Noncommitted Mentally Disabled*, 14 U.S.F.L. REV. 675, 676 (1980).

2. See Comment, *Judicial Schizophrenia: An Involuntarily Confined Mental Patient's Right to Refuse Anti-Psychotic Drugs*, 51 UMKC L. REV. 74 (1982). See also *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1202-05 & nn.11-15 (1974) (listing and analyzing the differences between state voluntary commitment statutes).

3. The fourteenth amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. It is clearly settled that involuntary commitment of mentally ill persons is within the liberty and property interests protected by the due process clause. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) (involuntary commitment to a mental hospital "is a deprivation of liberty which the State cannot accomplish without due process of law"); *In re Ballay*, 482 F.2d 648, 655 (D.C. Cir. 1973) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *Commonwealth ex rel. Finken v. Roop*, 234 Pa. Super. 155, 168-69, 339 A.2d 764, 768 (1975) (involuntary commitment involves a major curtailment of liberty "subject to and regulated by the Due Process Clause"), *cert. denied*, 424 U.S. 960 (1976).

4. Commitment standards drawn too broadly without sufficiently objective criteria allowed confinement of individuals in institutions "whose detention or treatment [was not] supported by sufficient governmental interests." Dix, *Major Current Issues Concerning Civil Commitment Criteria*, 45 LAW & CONTEMP. PROBS. 137, 138 (1982). The Supreme Court has noted that although a person is mentally ill, involuntary confinement solely because of mental illness is unconstitutional if he is "dangerous to no one and can live safely in freedom." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

stitutionally vague and overbroad.⁵ Subsequently, many states have attempted to cure these constitutional defects by setting narrowly circumscribed commitment standards.⁶ The trend in civil commitment reform is to permit commitment only upon a finding of a mental disability that renders the individual dangerous to himself or to others, or unable to meet his personal needs.⁷ Since courts and legislatures have implemented these new standards, many institutionalized individuals who no longer meet the commitment criteria have become eligible for release.⁸ Several of these patients, however, still require treatment and care and are unable to survive solely on their own outside of an institution.⁹ This Recent Development addresses the problem of providing further treatment and care for mentally ill persons who no longer require institutionalization, without restricting their constitutionally protected rights.

Part II of this Recent Development will focus on prior judicial and legislative attempts to provide the means for treating mentally ill patients while simultaneously protecting the patients' right to liberty.¹⁰ Part III of this Recent Development will examine the approach recently announced by the New Jersey Supreme Court in *In re S.L.*,¹¹ which provides treatment for those mentally ill persons who are unable to live without some level of institutional care, but no longer meet civil commitment standards.¹²

5. See, e.g., *Commonwealth ex rel. Finken v. Roop*, 234 Pa. Super. 155, 180-84, 339 A.2d 764, 776-79 (1975) ("need of care" requirement for involuntary commitment violates substantive due process and is unconstitutionally vague), *cert. denied*, 424 U.S. 960 (1976); *State ex rel. Hawks v. Lazaro*, 157 W. Va. 417, 437-39, 202 S.E.2d 109, 123-24 (1974) (in "need of custody, care or treatment" requirement for involuntary hospitalization is unconstitutionally vague and invites abuse). For a discussion of civil commitment reform, see *Dix*, *supra* note 4, at 137-54. See also *infra* text accompanying notes 13-50.

6. See *infra* notes 43-50 and accompanying text.

7. *Dix*, *supra* note 4, at 140. Some jurisdictions also require a finding that the patient's decision-making capacity is impaired as a result of the mental disability. *Id.* at 149-50. See also *infra* note 50 and accompanying text.

8. See, e.g., *In re S.L.*, 94 N.J. 128, 130-31, 462 A.2d 1252, 1253 (1983) (discussion of the nine patients). See *infra* notes 53-55 and accompanying text.

9. See *infra* notes 53-59 and accompanying text.

10. See *infra* notes 14 & 21-24 and accompanying text.

11. 94 N.J. 128, 462 A.2d 1252 (1983).

12. For a discussion of civil commitment standards, see *infra* notes 13-50 and accompanying text.

II. PRIOR TREATMENT EFFORTS AND THE PATIENT'S RIGHT TO LIBERTY

A. *Constitutional Standards for Civil Commitment*

Lower federal courts that first became involved in mental health reform recognized that mentally ill persons who may need supervision for their own protection may not need the restrictiveness of an institution.¹³ These courts sought to preserve the patients' constitutional right to liberty¹⁴ while allowing protective care by mandating commitment in the least restrictive environment.¹⁵ The *Wyatt v. Stickney*¹⁶ decisions are a group of landmark decisions which held

13. See, e.g., *Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966) (a deprivation of liberty solely because a mentally ill person may not be able to care for himself without civil commitment should not go beyond what is necessary for his protection), *cert. denied*, 382 U.S. 863 (1965).

14. See *supra* note 3 and *infra* notes 21-27 and accompanying text for a discussion of the Supreme Court's interpretation of the right to liberty in *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

15. See *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966), *cert. denied*, 382 U.S. 863 (1965); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1133 (D. Hawaii 1976) (state bears the burden of placing civilly committed individuals in the least restrictive environment); *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1219 (E.D. La. 1976) (obligating the state to give thoughtful consideration to placing a civilly committed mental patient in the least restrictive environment; however, the state is not required to develop a new system of facilities); *Lynch v. Baxley*, 386 F. Supp. 378, 392 (M.D. Ala. 1974) (the state bears the burden of placing involuntarily committed mentally ill persons in the least restrictive environment), *rev'd on other grounds*, 651 F.2d 387 (5th Cir. 1981); *Wyatt v. Stickney*, 344 F. Supp. 387, 396 (M.D. Ala. 1972), *aff'd in part, remanded in part on other grounds sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). See also *New Jersey Ass'n for Retarded Citizens v. New Jersey Dep't of Human Servs.*, 89 N.J. 234, 239, 445 A.2d 704, 705-06 (1982) (mentally retarded patients have a statutory right to treatment in settings least restrictive of their personal liberty); *State v. Krol*, 68 N.J. 236, 258-60, 344 A.2d 289, 300-01 (1975) (confinement must reasonably minimize infringements on liberty and autonomy). *But see Sanchez v. New Mexico*, 80 N.M. 438, 441, 457 P.2d 370, 372-73 (1969) (institutionalized mentally ill persons may be deprived of their liberty for the good of society or themselves; confinement is not a deprivation of liberty without due process of law, but merely a temporary restraint on liberty), *cert. denied*, 396 U.S. 276 (1970).

For an overview of the trend towards de-institutionalization of the mentally ill, see generally Note, *The Due Process of Community Treatment of the Mentally Ill: A Case Study*, 59 TEX. L. REV. 1481 (1981); Rapson, *The Right of the Mentally Ill to Receive Treatment in the Community*, 16 COLUM. L. REV. 193 (1980); Comment, *supra* note 1.

16. 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (the case name changed because Aderholt replaced Stickney as Executive Officer of the Alabama State Mental Health Board). *Wyatt v. Stickney* is the case name for several federal district court decisions that established minimum constitutional standards for adequate care and treatment at

that mentally ill persons have a constitutional right to treatment in the least restrictive environment.¹⁷ The *Wyatt* decisions proved significant because the district court established remedial steps to achieve constitutionally adequate treatment for the mentally ill.¹⁸ Thus, *Wyatt* attempted to de-institutionalize civilly committed patients who needed limited care rather than total confinement.¹⁹

The United States Supreme Court first confronted the issue of constitutional standards for civil commitment in *O'Connor v. Donaldson*.²⁰ In *O'Connor*, Kenneth Donaldson challenged his fifteen-year civil commitment in a mental hospital on the ground that the hospital

several Alabama state mental hospitals. See 344 F. Supp. 387 (M.D. Ala. 1972) (establishing minimum standards for adequate treatment at Partlow State School and Hospital); 344 F. Supp. 373 (M.D. Ala. 1972) (ordering minimum standards for adequate care and treatment at Bryce and Searcy State Hospitals); 334 F. Supp. 1341 (M.D. Ala. 1971) (minimum standards for adequate treatment of the mentally ill at Bryce and Searcy State Hospitals judicially formulated); 325 F. Supp. 781 (M.D. Ala. 1971) (patients involuntarily committed to Bryce State Hospital deprived of constitutional right to receive treatment that would give each patient a realistic opportunity to be cured or improve their mental condition). For a general discussion of *Wyatt*, see generally Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

17. See, e.g., 344 F. Supp. at 396. The *Wyatt* court set out constitutional minimum standards for adequate habilitation in a detailed appendix to its decision. *Id.* at 395-407. The standards included a threshold decision that institutional commitment is the least restrictive setting for habilitation and treatment. *Id.* at 396.

18. *Id.* at 395-407. The *Wyatt* court described conditions at the state institution as overcrowded, nontherapeutic, dehumanizing, and plagued by fire and other emergency hazards. *Id.* at 391. The court then held that these conditions caused constitutionally deficient treatment of the mentally ill. *Id.* at 390. To ensure that the institution would upgrade its conditions and treatment to meet constitutional standards, the court established constitutional minimum standards in its appendix. *Id.*

19. Since the mid-nineteenth century, three great reform movements have evolved in mental health care. The first, in 1830, involved the state's acceptance of responsibility for the mentally ill with the establishment of asylums. The second, in 1900, began the advent of psychotherapy and prevention. Finally, in 1960, the de-institutionalization trend commenced with psychotropic medication enabling many mental patients to survive outside the institution. Gosling & Ray, *Historical Perspectives on the Treatment of Mental Illness in the United States*, 10 J. OF PSYCHIATRY & L. 135 (1982). Professionals in the field of psychiatry have become concerned about the adequacy of care provided for mentally ill persons in the community. John Talbott, professor of psychiatry at Cornell University Medical College, states that because of de-institutionalization, patients often find themselves isolated and in substandard community settings. *Id.* at 156.

20. 422 U.S. 563 (1975). *O'Connor* was the first mental health case to reach the United States Supreme Court. Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW & CONTEMP. PROBS. 7, 10 (1982).

had deprived him of his constitutional right to liberty.²¹ The Supreme Court, finding that Donaldson had been confined unjustly,²² held that a state cannot constitutionally confine a nondangerous individual who is capable of surviving in freedom, by himself or with the help of others, unless other factors are present to justify his commitment.²³ The Court based its reasoning on a consti-

21. 422 U.S. at 565. In *O'Connor*, the state civilly committed Kenneth Donaldson to confinement as a mentally ill person at Florida State Hospital. Donaldson's father had initiated the commitment in 1957 because he believed that his son was suffering from delusions. *Id.* At the civil commitment hearing, the judge determined that Donaldson was suffering from "paranoid schizophrenia" and ordered him committed for "care, maintenance, and treatment," pursuant to Florida's commitment statute. *Id.* at 565-66.

The evidence at trial showed that the hospital had the authority to release a patient posing no danger to himself or to others, even if he had been committed lawfully. *Id.* at 567. Yet, Donaldson remained in Florida State Hospital for the following 15 years despite his repeated demands for release. *Id.* at 565. Trial testimony demonstrated that Donaldson had not been a danger to others during confinement or at any other time during his life. *Id.* at 568. No evidence existed that Donaldson had been suicidal or likely to harm himself. *Id.* One of the defendants acknowledged that Donaldson could have earned a living outside the hospital, and in fact, Donaldson secured employment after his release. *Id.* Testimony also showed that during Donaldson's confinement three persons sent in requests for his release and offered to care for him. *Id.* at 567-68.

Treatment in the hospital consisted of confinement without any program to alleviate or cure Donaldson's alleged illness. *Id.* at 569. For a discussion of *O'Connor*, see Meisel, *supra* note 20, at 10-13; Note, Donaldson, *Dangerousness, and the Right to Treatment*, 3 HASTINGS CONST. L.Q. 599 (1976).

22. 422 U.S. at 576. Justice Stewart, writing for an unanimous Court, accepted the jury's findings that Donaldson was neither dangerous to himself nor to others, and if mentally ill, he had not received treatment. *Id.* at 573. The jury's conclusions, and the "abundant evidence" supporting their verdict, convinced the Court that Donaldson's confinement violated his constitutional right to liberty. *Id.* at 576.

23. 422 U.S. at 576. The Supreme Court explicitly narrowed the issues in *O'Connor* to find that a state cannot constitutionally confine nondangerous persons in institutions when they are capable of surviving in freedom. *Id.* The court of appeals had decided the case on broader grounds and held that institutionalized mental patients had a constitutional right to treatment. Donaldson v. O'Connor, 493 F.2d 507, 520-21 (5th Cir. 1974). The Supreme Court expressly refused to address this issue and stated that the sole issue presented by Donaldson's case was whether his continued confinement as a "nondangerous person" violated his constitutional right to liberty. 422 U.S. at 572-73. Professor Dix points out that *O'Connor* left several unanswered questions regarding the extent of mentally ill persons' constitutionally protected liberty rights. Professor Dix notes that *O'Connor* "provides no hint as to the Court's view of the extent to which 'nondangerous' mentally ill persons can be confined if treatment is provided; of what constitutes 'treatment' that will support such confinement; or of what constitutes 'dangerousness' for purposes of this analysis." Dix, *supra* note 4, at 138-39. See also Meisel, *supra* note 20, at 12-13 ("The Court has not defi-

tutional right to liberty.²⁴ Using a due process analysis, the Court stated that because Donaldson was not a danger to himself or others, the state lacked an adequate constitutional justification for confining Donaldson.²⁵ Although the Court found that Florida's commitment statute allowed confinement of persons solely because of mental illness,²⁶ this finding did not justify deprivation of an individual's physical liberty.²⁷

The *O'Connor* Court left unclear what civil commitment standards would satisfy due process requirements.²⁸ The Supreme Court did not decide whether a state constitutionally could commit a non-dangerous mentally ill individual solely for the purpose of providing treatment.²⁹ The Court, however, rejected the idea that a state con-

nitely settled the question of whether or not the Constitution secures a right to treatment, and if so what its boundaries are."). For further discussion of the right to treatment, see *infra* note 29.

24. 422 U.S. 573. In dictum, the Court defined the liberty interest protected by the Constitution as follows: "That a wholly sane and innocent person has a constitutional right not to be physically confined by the State when his freedom will pose a danger neither to himself nor to others. . . ." *Id.* at 573 n.8. The Court stated that the mere fact that state law authorized commitment would not be sufficient to justify deprivation of Donaldson's liberty. *Id.* at 574. Furthermore, the *O'Connor* Court found that although a mentally ill person's original confinement may have a constitutionally adequate basis, commitment was unconstitutional when the original basis for confinement no longer existed. *Id.* at 574-75.

25. *Id.* at 573-74.

26. *Id.* at 574.

27. *Id.* at 575.

28. *Id.* at 573. For a discussion of the state's interest in civil commitment and the patient's due process protection, see Comment, *Mental Health Law—Temporary Detention of Voluntary Patients by Hospital Authorities: Due Process Issues*, 12 N.M.L. REV. 791 (1982).

29. 422 U.S. at 573. The court of appeals in *O'Connor* had determined that involuntarily committed mentally ill persons have a constitutional right to treatment. 493 F.2d at 520-21. The Supreme Court did not address these issues because they were not "presented" by the *O'Connor* case "in its present posture." 422 U.S. at 573. The Court left unresolved "whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment." *Id.* at 573.

Prior to the Supreme Court's decision in *O'Connor*, other courts expressly had found that institutionalized mentally ill individuals have a constitutional right to treatment. See, e.g., *Wyatt v. Aderholt*, 503 F.2d 1305, 1314 (5th Cir. 1974). Since the *O'Connor* decision, lower courts either have avoided expressly the question whether the Constitution guarantees involuntarily committed persons a right to treatment or have indicated that there is no constitutional right to treatment. See, e.g., *Bowring v. Godwin*, 551 F.2d 44, 48 n.3 (4th Cir. 1977) (expressing no opinion on the right to

stitutionally could confine mentally ill persons merely to ensure them better living conditions than they would have in the community.³⁰ Furthermore, the *O'Connor* Court suggested in dictum, by broadly defining the term "dangerousness," that a state arguably could in-

treatment in civil commitment cases but stating "in many cases treatment is obviously called for and is available in some form"); *Scott v. Plante*, 532 F.2d 939, 947 (3d Cir. 1976) (court will not consider if mentally ill prisoners have a constitutional right to treatment).

The courts also have avoided consistently the question whether the Constitution guarantees a right to treatment for mentally retarded individuals. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (leaving unanswered whether institutionalized mentally retarded persons have a constitutional right to treatment but holding that they have fourteenth amendment rights to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimum adequate training as required to protect their interests); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 31 (1981) (refusing to address the right to treatment issue); *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973) (due process does not establish a right to treatment but only perhaps a right to protection from harm). *But see Gary W. v. Louisiana*, 437 F. Supp. 1209, 1219 (E.D. La. 1976) (finding a constitutional right to treatment that affords mentally retarded individuals a reasonable chance to acquire and maintain those life skills necessary to cope as effectively as an individual's capacity permits). For an overview of the constitutional right to treatment for mentally retarded persons, see Note, *The "Right" to Habilitation: Pennhurst State School & Hospital v. Halderman and Youngberg v. Romeo*, 14 CONN. L. REV. 557 (1982) (right to cure and to treatment under the Developmentally Disabled Assistance and Bill of Rights Act); Note, *Constitutional Law—The Rights of Involuntarily Committed Mentally Retarded Persons Under the Fourteenth Amendment—Youngberg v. Romeo*, 31 U. KAN. L. REV. 451 (1983) (analyzing the substantive rights of institutionalized mentally retarded persons under the due process clause).

Other courts have found a statutory right to treatment for civilly committed persons. *See, e.g., Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966) (Congress established a statutory right to treatment in the 1964 Hospitalization of the Mentally Ill Act, D.C. CODE ANN. § 21-562 (1981)); *New Jersey Ass'n For Retarded Citizens v. New Jersey Dep't of Human Servs.*, 89 N.J. 234, 238-39, 445 A.2d 704, 705-06 (1982) (interpreting statute to provide mentally retarded children a right to treatment). For a discussion of New Jersey's statutory right to treatment, see *infra* notes 87-92.

30. 422 U.S. at 575. Justice Stewart dismissed the idea that the state constitutionally could exercise its *parens patriae* power to provide custodial care for mentally ill persons. Justice Stewart stated:

That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends.

Id.

clude persons unable for physical or other reasons to avoid the "hazards of freedom."³¹ Because the *O'Connor* Court did not address the scope of constitutionally acceptable justifications for civil commitment, the states were left to determine the appropriate standards that would satisfy the due process requirements protecting a patient's right to liberty.

B. *State Standards for Civil Commitment*

Many state legislatures have interpreted *O'Connor* as justifying broad standards for confinement.³² For example, Missouri,³³ California,³⁴ and Illinois³⁵ provide for commitment when a person is, as a

31. *Id.* at 574 n.9. The Court observed that the phrase "dangerous to himself" has a broader meaning than the foreseeable risk of self-injury or suicide. The Court noted that "a person is literally 'dangerous to himself' if for physical or other reasons he is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends." *Id.*

32. See *infra* notes 33-42 and accompanying text. See also Dix, *supra* note 4, at 138-48.

33. MO. REV. STAT. §§ 632.005(9)(b), 632.355 (Supp. 1983). Section 632.355-2 of the Comprehensive Psychiatric Services Act provides that "if the court or jury finds that the respondent, as the result of mental illness, presents a likelihood of serious physical harm to himself or others, . . . the court shall order the respondent to be detained for involuntary treatment. . . ." *Id.* Section 632.005(9)(b) defines a likelihood of serious physical harm as follows:

A substantial risk that serious physical harm to a person will result because of an impairment in his capacity to make decisions with respect to his hospitalization and need for treatment as evidenced by his inability to provide for his own basic necessities of food, clothing, shelter, safety or medical care.

Id.

34. CAL. WELF. & INST. CODE §§ 5008(h)(1), 5213 (Deering 1979). Section 5213 of the Lanterman-Petris-Short Act provides: "If, upon evaluation, the person is found to be in need of treatment because he is, as a result of mental disorder, a danger to others, or to himself, or gravely disabled, he may be detained for treatment. . . ." *Id.* Section 5008(h)(1) defines "gravely disabled" as "a condition in which a person, as a result of mental disorder, is unable to provide for his basic personal needs for food, clothing or shelter." *Id.*

35. ILL. REV. STAT. ch. 91 1/2, §§ 1-119, 3-700 (1983). Section 3-700 of the Mental Health and Developmental Disabilities Code states that a person subject to involuntary admission may be admitted to a mental health facility pursuant to a court order. Section 1-119 defines "person subject to involuntary admission" as follows:

- 1) A person who is mentally ill and who because of his illness is reasonably expected to inflict serious physical harm upon himself or others, in the near future; or
- 2) A person who is mentally ill and who because of his illness is unable to provide for his basic physical needs so as to guard himself for serious harm.

Id.

result of a mental disorder, a danger to himself or to others or unable to provide for his basic personal needs. Thus, as *O'Connor* suggested, these states allow commitment when a person is unable for physical or other reasons to avoid the hazards of freedom.

State courts also have authorized broad commitment criteria.³⁶ The Colorado Supreme Court in *People v. Taylor*³⁷ found the state's commitment statute constitutional on its face.³⁸ The statute authorized confinement when a court determined that a person was mentally ill and "gravely disabled."³⁹ The statute defined "gravely disabled" as a condition "in which a person, as a result of mental illness, is unable to take care of his basic personal needs."⁴⁰ Although the statute did not define "basic personal needs," the court refused to invalidate the statute on the ground that further specificity is not constitutionally required if a person of ordinary intelligence could understand the meaning of the words.⁴¹ The *Taylor* court then interpreted the phrase "basic personal needs" to mean "those fundamental necessities of human existence, such as food, shelter, clothing, and medical care, which an individual must obtain and maintain in order to live safely."⁴²

Other state courts have limited the scope of their commitment statutes by narrowing the commitment criteria.⁴³ In *Commonwealth ex rel. Finken v. Roop*,⁴⁴ the Pennsylvania Superior Court invalidated, on the ground of vagueness,⁴⁵ a statute allowing confinement based on a finding of mental illness that required care.⁴⁶ Similarly, in *State ex rel. Hawks v. Lazaro*,⁴⁷ the West Virginia Supreme Court of Ap-

36. See, e.g., *People v. Taylor*, 618 P.2d 1127 (Colo. 1980). For a discussion of state courts' treatment of their state civil commitment statutes, see Dix, *supra* note 4.

37. 618 P.2d 1127 (Colo. 1980).

38. 618 P.2d at 1134.

39. COLO. REV. STAT. § 27-10-107 (1973). See also *Taylor*, 618 P.2d at 1133.

40. COLO. REV. STAT. § 27-10-102(5) (Supp. 1979). See also *Taylor*, 618 P.2d at 1134.

41. 618 P.2d at 1134.

42. *Id.*

43. See *infra* notes 46 & 49 and accompanying text. See also Dix, *supra* note 4, at 139-49.

44. 234 Pa. Super. 155, 339 A.2d 764 (1975), cert. denied, 424 U.S. 960 (1976).

45. *Id.* at 183, 339 A.2d at 778.

46. See 50 PA. CONST. STAT. § 4406 (1966). See also *Finken*, 234 Pa. Super. at 164-65, 339 A.2d at 768-69.

47. 157 W. Va. 417, 202 S.E.2d 109 (1974).

peals held its commitment statute unconstitutionally vague and an invitation for abuse.⁴⁸ The statute allowed commitment when a court determined that an individual needed custody, care, or treatment in a hospital and, because of mental illness or retardation, lacked "sufficient insight or capacity to make responsible decisions with respect to his hospitalization."⁴⁹

Thus, state courts and legislatures have given different interpretations to the scope of *O'Connor's* justifications for civil commitment. The trend, however, is to authorize commitment when a mental disability renders a patient dangerous to himself, others, or unable to meet personal needs.⁵⁰

III. *IN RE S.L.*: NEW JERSEY'S APPROACH TO TREATMENT WITHOUT VIOLATING A PATIENT'S RIGHT TO LIBERTY

A. *Background and Discussion*

In *In re S.L.*,⁵¹ the New Jersey Supreme Court recently confronted the problem of finding a means of providing treatment for mentally ill persons without unnecessarily restricting a patient's liberty.⁵² *In re S.L.* involved a consolidation of nine individual suits that challenged orders continuing each person's commitment at Greystone Park Psychiatric Hospital in Morristown, New Jersey.⁵³ Each individual had spent most of his adult life confined in a mental institution.⁵⁴ The nine mentally ill patients alleged that they no longer met New Jersey's legal standards for civil commitment and sought a "Dis-

48. *Id.* at 437, 202 S.E.2d at 113.

49. W. VA. CODE § 27-5-4 (1981). *See also State ex rel. Hawks*, 157 W. Va. at 437, 202 S.E.2d at 113.

50. *See Dix, supra* note 4, at 140. *See also supra* note 4 and accompanying text.

51. 94 N.J. 128, 462 A.2d 1252 (1983).

52. *See supra* notes 3-4 & 14-50 and accompanying text.

53. 94 N.J. at 130-31, 462 A.2d at 1253. In prior proceedings a judge had determined that seven of the nine patients no longer met the legal standards for commitment but were unable to live independently of the institution. The judge ordered these seven patients discharged pending placement (DPP). *Id.* A second court refused to recognize the validity of the prior adjudications and found that the seven patients met the legal commitment standards. The remaining two patients never received a DPP status. *Id.* at 131-32, 462 A.2d at 1253-54. For a discussion of the DPP classification, see *infra* notes 55-59 and accompanying text.

54. 94 N.J. at 130, 462 A.2d at 1253. The following chart indicates the age of the nine patients on the date of the decision and the commitment date of each patient:

charged Pending Placement" (DPP) classification.⁵⁵

New Jersey legal standards only allow a judge to commit an individual because of mental illness if he is a danger to himself, to others, or to property.⁵⁶ Administrators of the mental health system and judges in New Jersey found that although many institutionalized patients no longer met these civil commitment standards, they also were unable to live independently of an institution.⁵⁷ Administrators and judges used the DPP classification to detain these patients in the insti-

<u>Appellant</u>	<u>Age</u>	<u>Date Committed</u>
S.L.	71	July 30, 1934
A.F.	70	February 13, 1942
P.M.	74	October 22, 1931
F.G.	36	August 21, 1963
R.B.	Died at age 78 in 1981	February 8, 1952
E.A.	65	June 28, 1965
C.S.	83	May 12, 1937
J.A.	40	November 17, 1980
R.G.	49	March 6, 1980

Id. at 130 n.1, 462 A.2d at 1253 n.1.

Before November 17, 1980, patient J.A. had a nine year commitment in Greystone Park Psychiatric Hospital. Patient R.G. had intermittent hospitalizations over the preceding 30 years. *Id.*

Although at the time the New Jersey Supreme Court decided this case patient R.B. had died and patient R.G. had become a voluntary patient, the court addressed all nine cases in order to address fully all issues raised by the appeals. *Id.* at 131 n.2, 462 A.2d at 1253 n.2.

55. *Id.* at 131-33, 462 A.2d at 1253-54. New Jersey statutes, administrative regulations, and court rules did not formally recognize the DPP classification. Judges and mental health administrators, however, often used the classification for patients not meeting legal commitment standards but unable to survive outside the institution. *Id.* at 131, 462 A.2d at 1253.

The Public Advocate representing the nine patients urged the court to recognize formally the DPP status as an intermediate stage between involuntary commitment and immediate discharge. *Id.* at 133, 462 A.2d at 1254. The Public Advocate urged that with the promulgation of procedural safeguards, DPP status would ensure that "patients who are no longer dangerous will be integrated in an expeditious manner into settings less restrictive of their liberty." *Id.*

56. N.J. Sup. Ct. R. 4:74-7(f). *See* 94 N.J. at 131, 462 A.2d at 1253. *See also* State v. Krol, 68 N.J. 236, 249, 344 A.2d 289, 296 (1975) (standard of commitment must be cast in terms of continuing mental illness and dangerousness to oneself or to others—not solely in terms of continuing mental illness). The *Krol* court stated that a substantial risk of dangerous conduct within the foreseeable future must exist to justify civil commitment. 68 N.J. at 260, 344 A.2d at 302. Furthermore, the *Krol* court stated that once the court determines that a patient is dangerous, the object is to place the patient only in the necessary degree of restraint. *Id.* at 261-62, 344 A.2d at 302-03.

57. 94 N.J. at 131, 462 A.2d at 1253.

tution.⁵⁸ Thus, DPP status enabled the court to discharge technically nondangerous patients while supervising and caring for them in the institution pending alternative placement.⁵⁹

In *In re S.L.*, the New Jersey appellate court had refused to recognize the DPP classification and ordered continuing civil commitment for the nine patients.⁶⁰ The New Jersey Supreme Court reversed.⁶¹ The court held that patients who no longer meet legal commitment standards and are unable to survive independently of an institution should be retained temporarily in the institution pending alternative placement.⁶²

The New Jersey Supreme Court directly confronted an issue in *In re S.L.* not decided by *O'Connor*⁶³ and the *Wyatt*⁶⁴ line of cases:⁶⁵ in the absence of less restrictive alternative placements, what should the state do with mentally ill persons who need care and supervision but

58. *Id.* See *supra* note 55.

59. 94 N.J. at 131, 462 A.2d at 1253.

60. *Id.* at 131-32, 462 A.2d at 1253-54. One of the lower courts refused to recognize the validity of the DPP classification by finding it a nullity. *Id.* at 131, 462 A.2d at 1253. The court then determined that the patients met the legal standards for commitment and therefore were not eligible for discharge. *Id.* at 131-32, 462 A.2d at 1253-54.

61. *Id.* at 143, 462 A.2d at 1259-60. The court reversed the order continuing commitment and remanded the cases for placement review hearings. *Id.* at 143, 462 A.2d at 1259-60.

62. *Id.* at 140, 462 A.2d at 1258.

63. 422 U.S. 563 (1975). In addressing the issue of justifications for civil commitment, the Court stated:

We need not decide whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness.

Id. at 573-74 (citation omitted).

64. 344 F. Supp. 387 (M.D. Ala. 1972). See *supra* note 16. The *Wyatt* court held that if the state failed to satisfy its constitutional obligation to place the patients in the least restrictive environment, the court would appoint a special master to oversee implementation of its decree. 344 F. Supp. at 394. The Fifth Circuit affirmed and added that the Governor must use his best efforts to obtain funds from the legislature to implement the court's order. 503 F.2d at 1317. For a discussion of the use of special masters and institutional reform, see Montgomery, *Force and Will: An Exploration of the Use of Special Masters to Implement Judicial Decrees*, 52 U. COLO. L. REV. 105 (1980-81); Nathan, *The Use of Masters in Institutional Reform*, 10 U. TOL. L. REV. 419 (1979).

65. See *supra* notes 13-19 and accompanying text. Many courts have refused to follow *Wyatt's* solution of forcing states to develop less restrictive facilities for pa-

no longer meet the state's civil commitment standards?⁶⁶ The court refused to define the civil commitment standard of dangerousness in terms of one's inability to take care of himself.⁶⁷ The court stated that such an interpretation would be overbroad and would allow commitment solely for custodial care.⁶⁸ The court's decision therefore limits the reach of the commitment statute only to those patients who are dangerous to themselves or others through active conduct rather than by passive inability to care for themselves. Although the Supreme Court in *O'Connor* held that confinement for mere custodial care is unconstitutional,⁶⁹ the Court also approved a broad definition of "dangerousness."⁷⁰ Thus, the *In re S.L.* court arguably could have constitutionally broadened its definition of "dangerousness" and civilly committed the nine patients who were unable to care for themselves. The New Jersey Supreme Court, however, discouraged confinement of nondangerous mentally ill patients in unnecessarily restrictive conditions.⁷¹ While acknowledging that the state lacks the

tients who need care but cannot survive outside an institution. *See, e.g., Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976).

The United States Supreme Court has expressed a policy of deference to the states in the area of mental health. *See Bryant, Pennhurst, Romeo, and Rogers: The Burger Court and Mental Health Law Reform Litigation*, 4 J. LEGAL MED. 323, 330-38, 348 (1983)(Supreme Court's clear signal that it does not want federal courts overseeing the operation of public mental health facilities means that conditions will not change substantially and thus, patients' rights are merely theoretical).

66. 94 N.J. at 132, 462 A.2d at 1254. The court noted that if mentally ill individuals had the capacity to exist safely in freedom, then according to *O'Connor*, they would be entitled to immediate release. *Id.* at 138, 462 A.2d at 1257.

67. *Id.* at 139, 462 A.2d at 1257. The New Jersey Supreme Court appointed a Task Force on Mental Commitments that urged the court in its proposal to expand New Jersey's standards of commitment to include individuals who by reason of mental illness are unable to care for themselves without some supervision. The court refused to expand the standards, stating:

To widen the net cast by the civil commitment process in the manner suggested by the Task Force is inconsistent with the central purpose of the commitment process. It would permit the State to commit individuals to mental institutions solely to provide custodial care. This authority cannot be justified as a measure to safeguard the citizenry under the police power. Nor is it a proper exercise of the State's *parens patriae* power because confinement in a mental hospital is not necessary to provide the care needed by individuals who are simply incapable of living independently.

Id.

68. *Id.*

69. *See supra* note 30 and accompanying text.

70. *See supra* note 31 and accompanying text.

71. 94 N.J. at 140, 462 A.2d at 1258. The court stated that individuals' rights must

authority to commit nondangerous mentally ill individuals, the *In re S.L.* court held that the state temporarily can retain committed patients who are no longer dangerous to ensure their placement in an appropriate less restrictive setting.⁷²

Although *Wyatt* also ordered placement in the least restrictive facility,⁷³ *In re S.L.* may be distinguished because it did not authorize legal commitment for nondangerous patients.⁷⁴ The patients, therefore, legally were entitled to re-enter the community.⁷⁵

B. *A New Approach to Treatment*

In *In re S.L.*, the New Jersey Supreme Court sanctioned the DPP classification for previously committed patients⁷⁶ and developed procedural safeguards to ensure that the state would pursue good faith efforts to place patients in the least restrictive environments.⁷⁷ The court specifically stated that an individual, who is determined to be "nondangerous," is entitled to leave the institution.⁷⁸ If the court finds that an individual is "nondangerous," the court must ascertain whether the individual is capable of surviving without depending on an institution.⁷⁹ If the court finds the patient incapable of independ-

be protected by procedures that minimize restrictions on their liberty. *Id.* See also *supra* notes 3-5 & 32-50 and accompanying text.

72. 94 N.J. at 140, 462 A.2d at 1258. See *supra* notes 31-42 and accompanying text.

73. See *supra* notes 14-19 and accompanying text.

74. See *supra* text accompanying notes 16-19. See also 94 N.J. at 139, 462 A.2d at 1258. The court stated that the patients legally were entitled to leave the hospital. The court added, however, that because of the effects of extensive periods of institutionalization, the patients were incapable of competently exercising the right to leave. *Id.*

75. *Wyatt* is also distinguishable from *In re S.L.* because *Wyatt* concerned an initial commitment proceeding while *In re S.L.* concerned a commitment review hearing for previously institutionalized patients. The *Wyatt* court focused on the type of commitment mentally ill patients were entitled to after the court found that the patients met commitment standards. The court determined that one constitutional requirement for confinement was commitment in the least restrictive environment. 344 F. Supp. at 391-96. In contrast, the patients in *In re S.L.* were contesting the status of their commitment. The court chose a restrictive placement as a means to avoid legal commitment while maintaining care and supervision. 94 N.J. at 131, 140, 462 A.2d at 1253, 1258.

76. 94 N.J. at 140, 462 A.2d at 1253, 1258.

77. *Id.* at 140-42, 462 A.2d at 1258.

78. *Id.* at 140, 462 A.2d at 1258.

79. *Id.*

ent survival, then the court must direct that the patient temporarily remain in the institution and must schedule a placement review hearing within sixty days.⁸⁰ If a less restrictive placement is available, the court must order confinement in that facility.⁸¹ If no alternative is available, the patient must remain in the institution's least restrictive setting with subsequent placement hearings scheduled every six months.⁸² At these hearings, the court shall inquire into the state's good faith efforts to find alternative placement.⁸³

Justifying the DPP classification, the New Jersey Supreme Court reasoned that the state could not "simply pull the rug from under these people when they physically deteriorate to a point where they are no longer dangerous."⁸⁴ The court stated that although it lacked the authority to continue confinement of nondangerous individuals, it would not cast them adrift in the community.⁸⁵ The *In re S.L.* court concluded that it constitutionally could confine patients for their protection pending foster placement.⁸⁶

The court's holding in *In re S.L.* is consistent with New Jersey's statutory requirements⁸⁷ and its prior case law.⁸⁸ New Jersey statutes recognize that the mentally ill are entitled to fundamental civil rights, medical care, and other professional services.⁸⁹ The commitment statute specifically states that the mentally ill are entitled to "the least restrictive conditions necessary to achieve the purposes of treat-

80. *Id.*

81. *Id.* at 141, 462 A.2d at 1258.

82. *Id.*

83. *Id.* at 141, 462 A.2d at 1258-59. The individual has the right to counsel at placement hearings. The individual and his attorney have a right to notice of the time and place of the hearing at least 10 days prior to the hearing date. The patient's attorney is entitled to inspect and copy all records relating to the patient's condition and placement, and may introduce evidence, offer testimony, and cross-examine adverse witnesses at the hearing. *Id.* at 142, 462 A.2d at 1259.

84. *Id.* at 139, 462 A.2d at 1258.

85. *Id.* at 140, 462 A.2d at 1258.

86. *Id.*

87. See N.J. STAT. ANN. § 30:4-24.1 (West 1981). The statute provides that "[e]very individual who is mentally ill shall be entitled to fundamental civil rights, and to medical care and other professional services in accordance with accepted standards, provided however that this shall not be construed to require capital construction." See also *infra* note 90 and accompanying text.

88. See, e.g., *State v. Krol*, 68 N.J. 236, 344 A.2d 289 (1975). See also *supra* note 56 and *infra* notes 91-92.

89. See *supra* note 87.

ment.”⁹⁰ Providing further protection for the mentally ill, the New Jersey Supreme Court held, in *New Jersey Association for Retarded Citizens v. Department of Human Services*,⁹¹ that the state has a duty to offer a spectrum of possible settings that furnish services and ensure the right to treatment in the least restrictive environment.⁹²

Although the *New Jersey Association for Retarded Citizens* decision places a burden on the state to provide an array of treatment settings, this duty is meaningless unless the legislature appropriates funds for the development of alternative facilities. When addressing the judiciary's role in funding these facilities, the *In re S.L.* court noted that the legislature had the exclusive authority to appropriate funds and that the judiciary could not compel the legislature to allocate money to alternative treatment facilities.⁹³ Without action by the legislature, it is unclear how *In re S.L.* will affect the rights of nondangerous mentally ill persons. The lack of alternative treatment facilities is arguably a violation of the state's statutory and good faith obligation to confine individuals in the least restrictive setting. The remedy, however, for violating this duty is unclear.

IV. CONCLUSION

The New Jersey Supreme Court's approach in *In re S.L.* is, in theory, a legally sound middle ground approach. The decision does not go as far as *O'Connor* suggested by broadly defining “dangerousness” to include persons unable to survive independently of an institution,⁹⁴ nor does it follow *Wyatt* and order legal commitment in the least restrictive environment.⁹⁵ Instead, by directing a DPP, the court attempts to provide nondangerous mentally ill persons with the necessary care while avoiding legal commitment. Thus, in theory, the approach protects the patients' constitutional right to liberty.

The practical effect of *In re S.L.* depends on the legislature's response to the New Jersey Supreme Court's solution. Without fund-

90. N.J. STAT. ANN. § 30:4-24.2(e)(2) (West 1981).

91. 89 N.J. 234, 445 A.2d 704 (1982).

92. *Id.* at 250-51, 445 A.2d at 712. The court stated that as a practical matter it is impossible to provide a least restrictive setting if only one setting is available. Therefore, it concluded that the legislature intended an array of settings. *Id.* at 250, 445 A.2d at 712.

93. 94 N.J. at 133 n.5, 462 A.2d at 1254 n.5.

94. *See supra* note 31 and accompanying text.

95. *See supra* notes 16-19 and accompanying text.

ing for additional treatment and care alternatives, *In re S.L.* may not affect the continued practice of institutionalizing nondangerous mentally ill persons who could survive in settings that provide freer exercise of their constitutional right to liberty.

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