

NOTES

PROTECTING LIBERTY INTERESTS: DEVELOPMENTS IN VERMONT'S MENTAL HEALTH LAW AS FEDERAL CONSTITUTIONAL PROTECTION DECLINES

This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.¹

INTRODUCTION

For more than a hundred years, the United States has confined the mentally retarded and mentally ill in asylums or institutions.² During the last thirty years, the public has been concerned with the inhumane and dreadful conditions within these institutions.³ Movements to reform institutional care have developed in the mental health field,⁴ in state and federal legislatures⁵ and, inevitably, in the courts.⁶ Class actions on behalf of institutional residents have alleged constitutional violations of the residents' rights to due process,⁷ equal protection,⁸ and freedom from cruel and un-

1. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (citations omitted).

2. B. ENNIS, *THE RIGHTS OF MENTAL PATIENTS* 23 (1978).

3. Rhoden, *The Limits of Liberty; Deinstitutionalization, Homelessness and Libertarian Theory*, 31 EMORY L.J., 375, 380-81 (1982).

4. *Id.*

5. *Id.* at 383. "For example, in 1963, Congress adopted the Mental Retardation Facilities and Community Mental Health Centers Construction Act, which represented the first comprehensive federal commitment to developing community residences and programs for the mentally retarded and mentally ill." *Id.*

6. *Id.* at 385. As de Tocqueville noted, "Scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question." A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 241 (1969).

7. See, e.g., *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974), *modified*, 379 F. Supp. 1376 (E.D. Wis.

usual punishment.⁹ The federal courts responded by affirming mentally disabled patients' rights to procedural and substantive due process protections¹⁰ and by ordering massive changes in the institutional conditions that violated these constitutional rights.¹¹

In 1972, the United States Supreme Court recognized involuntary commitment as a "massive curtailment of individual liberty"¹² which required judicial scrutiny of the purpose and necessity of the commitment. Many federal courts found that the constitutional right to liberty required the use of the least restrictive conditions of confinement necessary to accomplish the state's purpose when confining a person involuntarily.¹³

The Supreme Court's decisions in the nineteen seventies offered support for a constitutional right to the least restrictive alternative.¹⁴ However, the Burger Court has recently indicated that it frowns on federal judicial intervention into institutional issues and prefers to defer to the institutional staff.¹⁵ As the federal constitutional basis for the least restrictive alternative diminishes, state constitutional and statutory rights will acquire more significance in the protection of mental patients' liberty interests.

This note briefly discusses the rise and fall of the least restrictive alternative doctrine in federal law. It then analyzes Vermont's mental health statute and case law to assess what rights are recog-

1974), *vacated and remanded*, 421 U.S. 957 (1975), *prior judgment reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976).

8. *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976).

9. *New York Ass'n for Retarded Citizens v. Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973).

10. *See, e.g., Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974) (procedural due process requirements must be met before a person may be involuntarily committed); *Eubanks v. Clark*, 434 F.Supp. 1022 (E.D. Pa. 1977) (due process entitles an involuntarily committed mental patient to a hearing before transfer to a more restrictive hospital).

11. *See, e.g., Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part and rev'd in part sub nom., Wyatt v. Alderholt*, 503 F.2d 1305 (5th Cir. 1974) (federal district court's detailed order to compel state mental institutions to provide constitutionally required minimum levels of psychiatric care and treatment upheld); *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977) (federal district court's order imposing increased staffing requirements, improvements in the physical plant, and regulations of the use of seclusion and restraint upheld).

12. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

13. *See cases cited infra* note 41.

14. *See O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jackson v. Indiana*, 406 U.S. 715 (1972).

15. *See Youngberg v. Romeo*, 457 U.S. 307 (1982).

nized and what role the judiciary should assume in enforcing these rights.

I. THE EVOLUTION OF THE LEAST RESTRICTIVE ALTERNATIVE DOCTRINE

A. A Brief History

The least restrictive alternative doctrine requires the state to use the least drastic means possible when it infringes a constitutional right.¹⁶ Under this doctrine, "the state cannot choose means that unnecessarily burden or restrict constitutionally protected activity."¹⁷

The least restrictive alternative doctrine was initially applied in cases dealing with state intrusions upon the commerce power of the federal government.¹⁸ The doctrine was later applied during the *Lochner* era¹⁹ to legislation, which interfered with economic freedom, to determine whether the state action actually accomplished a legitimate goal in the least intrusive means.²⁰

After the demise of the *Lochner* era, the Court continued to apply least restrictive alternative analysis to state actions which infringed upon rights the Court found to be fundamental.²¹ To decide what is a fundamental right, "the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment."²² The rights that the

16. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

17. *Id.* at 343.

18. See *Chy Lung v. Freeman*, 92 U.S. 375 (1875) (statute requiring any passenger determined to be deaf, dumb, blind, poor, insane, a criminal or a lewd or debauched woman to post a bond before landing in the United States from a foreign country was held to exceed the means necessary to promote the state's interest and invaded Congress' commerce power).

19. From the 1905 decision in *Lochner v. New York*, 198 U.S. 45 to the late 1930's (*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)), the Court struck down state legislation which infringed on certain protected freedoms, such as freedom to contract using the least restrictive means analysis. See generally Struve, *The Less Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967).

20. *Lochner v. New York*, 198 U.S. 45, 56 (1905) (statute regulating bakers' hours unduly infringed upon the right to contract).

21. See Schwartz, *A "New" Fourteenth Amendment: The Decline of State Action, Fundamental Rights, and Suspect Classifications Under the Burger Court*, 56 CHI. [-] KENT L. REV., 865, 875-885 (1980).

22. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

Court has found to be fundamental include the right to freedom of speech,²³ the right to travel,²⁴ the right to privacy,²⁵ the right to vote,²⁶ and the right to marry.²⁷

The classic description of the least restrictive alternative doctrine was stated in *Shelton v. Tucker*.²⁸ This case concerned an Arkansas statute which compelled public school teachers to file annual affidavits listing all the organizations to which they belonged or contributed. The Court invalidated the statute and stated: "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."²⁹

B. *The Application of the Doctrine to Civil Commitment Cases*

During the past twenty years, civil commitment of mentally disabled individuals has attracted considerable judicial scrutiny of the state's purposes.³⁰ The governmental objectives in civil commitment include the protection of society and the protection (or treatment) of the individual.³¹ The state retains the authority under its police power "to protect the community from the dangerous tendencies of some who are mentally ill."³² Under its *parens patriae* power, the state is justified in confining those who pose a danger to themselves or those who are unable to care for them-

23. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (statute banning certain advertising by electric companies was held to be more extensive than necessary and violated the first and fourteenth amendments).

24. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (residence requirement as a condition for receiving medical care at county's expense found to unduly restrict the right to interstate travel).

25. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (state criminal abortion laws exempting only life-saving procedures on mother's behalf were held to be overly broad limitations on right to privacy).

26. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (eligibility requirements for voting in district elections were held not to satisfy legitimate state purposes with sufficient precision and hence violated equal protection clause).

27. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (statute requiring certain Wisconsin residents under court orders to support minor children to obtain court permission before marrying held to unnecessarily impinge on the right to marry).

28. 364 U.S. 479 (1960).

29. *Id.* at 488.

30. See generally *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974) [hereinafter *Developments*].

31. *Id.* at 1233-38.

32. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

selves as a result of mental disability.³³ The *parens patriae* doctrine is a legacy from English law, which required the king to promote the best interests and welfare of his wards: children, idiots and lunatics.³⁴

While the state's interest in a civil commitment may be legitimate, involuntary commitment to a mental hospital is a serious deprivation of individual liberty. Many courts have required the application of the least restrictive alternative scrutiny to ensure that the individual's liberty is protected.³⁵ An early example of the least restrictive alternative applied to civil commitment is *Lake v. Cameron*.³⁶ In that decision, the court held that the District of Columbia's mental health statute³⁷ required the trial court to explore less restrictive forms of treatment before ordering commitment.³⁸ Several years later, in *Covington v. Harris*,³⁹ the same court held that the least restrictive alternative also applied to treatment conditions after commitment. In that case, the court indicated in dictum that the Constitution also provided a basis for the application of this principle: "A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law."⁴⁰

Many federal suits following the *Covington* decision alleged violations of mental patients' constitutional rights to treatment in the least restrictive environment. The federal courts have been almost unanimous in affirming these rights.⁴¹

33. *Id.*

34. *Developments, supra* note 30, at 1207.

35. See cases cited *infra* note 41.

36. 364 F.2d 657 (D.C. Cir. 1966).

37. D.C. CODE ANN. §§ 21-501 to 21-545(b) (1981) provided: "the court may order . . . any other course of treatment which the court believes will be in the best interests of the person or of the public."

38. *Lake*, 364 F.2d at 660.

39. 419 F.2d 617 (D.C. Cir. 1969).

40. *Id.* at 623.

41. See, e.g., *Phillipp v. Carey*, 517 F.Supp. 513 (N.D. N.Y. 1981); *Eubanks v. Clark*, 434 F.Supp. 1022 (E.D. Pa. 1977); *Suzuki v. Quisenberry*, 411 F.Supp. 1113 (D. Hawaii 1976); *Welsch v. Likins*, 373 F.Supp. 487 (D. Minn. 1974), *aff'd in part and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *Saville v. Treadway*, 404 F.Supp. 430, 432 (M.D. Tenn. 1974); *Wyatt v. Stickney*, 344 F.Supp. 387, 390 (M.D. Ala. 1972), *aff'd in part and rev'd in part sub nom*, *Wyatt v. Alderholt*, 503 F.2d 1305 (5th Cir. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974). *But see Garry v. Gallen*, 522 F. Supp. 171 (D. N.H. 1981); *New York State Ass'n for Retarded Citizens v. Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973).

The Supreme Court's first major decision on the rights of civilly committed patients, *O'Connor v. Donaldson*,⁴² appeared in accordance with the trend in the lower federal courts. The plaintiff, Kenneth Donaldson, had been involuntarily confined in a Florida State Hospital for fifteen years though he had never been dangerous to himself or others. During this time Mr. Donaldson received no treatment, only custodial care. The hospital staff repeatedly rejected his requests for discharge to a friend's home or a halfway house.⁴³

The Supreme Court unanimously held that Donaldson's confinement was a violation of his constitutional right to liberty⁴⁴ and stated that: "[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."⁴⁵ The Court was unwilling to sanction confinement which was not demonstrably necessary and cited *Shelton v. Tucker*, implying that the least restrictive alternative analysis may apply to civil commitment.⁴⁶ *O'Connor* suggested that the state must justify its confinement of mental patients against a rigorous standard of review. However, the opinion did not define what that standard might be.

The trend in the lower federal courts and the *O'Connor* decision pointed to continuing active judicial scrutiny of civil commitment issues. But the Supreme Court's decision in *Youngberg v. Romeo*⁴⁷ adopted a different approach. In *Romeo*, the Court addressed the question of what rights a mentally disabled person committed to an institution has under the Constitution. Nicholas Romeo, a severely mentally retarded person civilly committed to the Pennhurst State School brought a 42 U.S.C. § 1983 action for damages against the superintendent of the school. He alleged violations of his constitutional rights to safe conditions of confinement, to freedom from bodily restraint and to training or habilitation.⁴⁸ He further alleged that he had been injured on at least sixty-three occasions and following the filing of this suit, had been

42. 422 U.S. 563 (1975).

43. *Id.* at 569.

44. *Id.* at 576.

45. *Id.*

46. *Id.* at 573.

47. 457 U.S. 307 (1982).

48. *Id.* at 309.

shackled to a bed or a chair for prolonged periods every day for over a year.⁴⁹ At trial, the federal district court decided that Romeo's treatment should be evaluated solely on the basis of the eighth amendment and rejected the plaintiff's proposed jury instructions maintaining his right to treatment in the least restrictive environment.⁵⁰ The jury returned a verdict for the superintendent.⁵¹

The Court of Appeals for the Third Circuit rejected the eighth amendment analysis⁵² and identified three constitutional rights based on the due process clause of the fourteenth amendment: the right to be free from undue bodily restraint; the right to personal security and protection; and the right to treatment.⁵³ The court established a separate standard of review for each right. It established a "compelling necessity" test and the least restrictive method test to review the patient's right to be free from undue bodily restraint.⁵⁴ The court stated that a failure to provide for the patient's safety and protection could only be justified by "substantial necessity."⁵⁵ Finally, the court held that the right to treatment must be reviewed as treatment acceptable in light of present medical or other scientific knowledge.⁵⁶

The Supreme Court agreed with the Third Circuit's recognition of Romeo's right to be free from bodily restraints and his right to be protected from harm.⁵⁷ The Court stated that those rights derived from the liberty concept in the due process clause of the fourteenth amendment.⁵⁸ Romeo's right to treatment, however, existed only to the extent necessary to avoid the infringement of the other two rights.⁵⁹ The Court held that Romeo's liberty interests require the state to provide minimally adequate training to assure

49. *Id.* at 310.

50. 644 F.2d 147, 156 (3d Cir. 1980). While the district court decided that the shackling of Romeo should be evaluated under the eighth amendment's prohibitions against cruel and unusual punishment, the Third Circuit, citing *Ingraham v. Wright*, 430 U.S. 651 (1977) and *Bell v. Wolfish*, 441 U.S. 520 (1979), held that the cruel and unusual punishment clause was inapplicable in a non-criminal context.

51. *Romeo*, 644 F.2d 147 (3d Cir. 1980).

52. *Id.* at 156.

53. *Id.* at 159.

54. *Id.* at 164.

55. *Id.* at 169.

56. *Id.*

57. *Romeo*, 457 U.S. 307, 315-16 (1982).

58. *Id.*

59. *Id.* at 319.

his safety and freedom from undue restraint.⁶⁰ However, the Court noted that these interests were not absolute and must be balanced with the state's interests.⁶¹

After it weighed the state's interests, the Court decided that the proper standard to determine whether the state had protected Romeo's liberty interests was whether professional judgment was exercised.⁶² In determining what was "reasonable" training in light of the identified liberty interests, the Court emphasized that "courts must show deference to the judgment exercised by a qualified professional."⁶³ Although the Court did not specifically mention what standard of scrutiny it used, its deference to the state's mental health professionals' judgment amounted to a very low standard of judicial review. The Court restricted judicial review of institutional action to minimize interference with the internal operations of the institution. There is no reason, the Court stated, "to think judges or juries are better qualified than appropriate professionals in making such decisions."⁶⁴

Romeo affects least restrictive alternative cases in two conflicting ways. First, the right to freedom from restraint may extend to the right to be free from the unnecessary restraint of institutionalization, but second, the deferential standard of review may undermine judicial protection of this right.

The Court did not reach the question whether Romeo had a right to treatment in the least restrictive environment because Romeo's counsel stipulated that Romeo would never be able to leave the institution.⁶⁵ However, the language of the decision provides a framework for the least restrictive alternative analysis. "Freedom from unreasonable restraints"⁶⁶ and "reasonably nonrestrictive

60. *Id.* at 321.

61. *Id.*

62. *Id.*

63. *Id.* at 322.

64. *Id.* at 323. *But see* Judge Wisdom's opinion in *Wyatt v. Alderholt*, 503 F.2d 1307 (5th Cir. 1974) which held "that the judiciary was competent to determine, at least in individual cases, whether psychiatric treatment was medically or constitutionally adequate. [E]ven in cases such as this one, 'when courts are asked to undertake the more difficult task of fashioning institution wide standards of adequacy' (citation omitted) the court would be able to formulate workable standards." *Id.* at 1314.

65. *Id.* at 319. *But see* Cook, *The Substantive Due Process Rights of Mentally Disabled Clients*, 7 MENTAL DISAB. L. REP. 346 n.74 (1983), Nicholas Romeo has since been placed in a community residence.

66. *Romeo*, 457 U.S. 307, 322 (1982).

confinement conditions"⁶⁷ could apply to unnecessary hospitalization as well as to physical restraints.

Subsequent decisions have indicated that *Romeo* has been interpreted to offer support for the least restrictive alternative doctrine. In *Scott v. Plante*,⁶⁸ on remand from the Supreme Court for further consideration in light of *Romeo*, the court concluded that *Romeo* did not "eliminate the necessity for further consideration of [the plaintiff's] claim that he should be assigned to some less restrictive setting within the Trenton Psychiatric Hospital."⁶⁹ The *Scott* court interpreted *Romeo* as restricting the restraint of residents in institutions except when necessary for the reasonable safety of the residents or personnel in the institution.⁷⁰ Moreover, in *Brewster v. Dukakis*,⁷¹ another court interpreted *Romeo* as offering general support for the plaintiff's demand that the state create appropriate community programs for persons hospitalized at Northampton State Hospital.⁷²

In *Association for Retarded Citizens of North Dakota v. Olson*,⁷³ the court interpreted *Romeo* to limit the right to the least restrictive alternative. Prior to *Romeo*, the district court had held that the fourteenth amendment guaranteed a right to treatment in the least restrictive environment.⁷⁴ After *Romeo*, the district court concluded that there was not an absolute right to the least restrictive alternative, but a right "only insofar as professional judgment determines that [the] alternatives would measurably enhance the resident's enjoyment of basic liberty interests."⁷⁵ Nevertheless, the court in *Olson* ordered the state to expand and maintain a state-wide comprehensive continuum of services to the mentally retarded, including the creation of community residences.⁷⁶

Assuming that *Romeo* supports a right to treatment in the least restrictive alternative, *Romeo's* standard of judicial scrutiny could seriously undermine judicial protection of this right. Defer-

67. *Id.* at 324.

68. 691 F.2d 634 (3d Cir. 1982).

69. *Id.* at 636.

70. *Id.* at 638.

71. 544 F. Supp. 1069 (D. Mass. 1982).

72. *Id.* at 1074-75.

73. 561 F. Supp. 473 (D. N.D. 1982).

74. *Association for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 470 (D. N.D. 1981).

75. 561 F. Supp. 473, 486.

76. *Id.* at 494.

ence to professional judgment means that if a court finds that the judgment of an appropriate professional was exercised, then that decision is presumed to be valid and will override the patient's liberty interest. This extremely deferential standard of review could result in mental patients being at the mercy of institutional professionals without any substantive legal protections. Indeed, it was the judgment of an appropriate professional, unrestrained by judicial scrutiny, that kept Kenneth Donaldson needlessly confined for fifteen years.⁷⁷

The Supreme Court justified this deference to professionals in three ways. First, it balanced the individual's interest with the state's interest.⁷⁸ Second, it concluded that federal judicial interference with the operation of these institutions should be minimized.⁷⁹ Third, the Court decided that the judiciary was not particularly qualified to make mental health decisions.⁸⁰

In weighing the individual's liberty interest with the state's objectives, the Court looked to the burden placed on the state's operation of large institutions.⁸¹ The Court concluded that a higher standard of scrutiny would unduly burden the administration of these institutions, which are "often, unfortunately, overcrowded and understaffed."⁸² However, judicial deference to institutional staff because the institutions are poorly managed is an abdication of responsibility where constitutional rights are involved. *Halderman v. Pennhurst State School & Hospital*,⁸³ a separate lawsuit

77. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

78. *Romeo*, 457 U.S. at 320.

79. *Id.* at 322.

80. *Id.* at 322-23.

81. *Id.* at 324.

82. *Id.*

83. 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd* 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded*, 451 U.S. 1 (1981), *on remand*, 673 F.2d 645 (3d Cir. 1982), 52 U.S.L.W. 4155 (Jan. 23, 1984) *rev'd and remanded*. The history of the Pennhurst case illustrates the tension between the lower federal courts and the Burger Court. In the first opinion, the district court ordered Pennhurst to be closed and the Third Circuit Court of Appeals affirmed, basing its decision upon a federal statute, The Developmentally Disabled Assistance and Bill of Rights Act. 42 U.S.C. §§ 6001-6081 (1976).

The Supreme Court held that this Act did not impose any affirmative obligations on the states, or create a substantive right to treatment in the least restrictive alternative. 451 U.S. 15-16. (*But see* "Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities. The treatment, services, and habilitation . . . should be provided in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6010(1)(2)). The Supreme Court reversed and remanded to the Third Circuit, with instructions to consider whether the state law provided an independent and adequate ground for the order to close Pennhurst. 451 U.S. at 31.

against the institution where Nicholas Romeo resided, illustrates the necessity for stricter judicial scrutiny. In 1977, all the parties to the Pennhurst litigation agreed that "Pennhurst as an institution [was] inappropriate and inadequate for the habilitation of the retarded."⁸⁴ Judge Broderick found that the "physical environment at Pennhurst [was] hazardous to the residents both physically and psychologically."⁸⁵ He also found that the residents had been physically abused and lived in an atmosphere of danger.⁸⁶ It is difficult to see how the administrative burden of operating Pennhurst can justify judicial deference to the institutional professional's judgment in depriving a patient of liberty.⁸⁷

The second basis for *Romeo's* deferential review was its wish to minimize judicial interference in institutional operations. While institutional staff must have some flexibility in making decisions on a day-to-day basis, a deference to their judgment is not adequate to determine whether a patient's constitutional rights have been violated. Judicial scrutiny is important particularly in light of the situation of institutional patients.

These patients are in isolated institutions, subject to complete control by institutional staff. Because of their mental disabilities, and the restrictions inherent in institutions, patients do not have access to the political process to effect change in their treatment or confinement. Without recourse to an impartial factfinder who can examine and weigh both sides of an issue, the patients are power-

On remand, the Third Circuit Court of Appeals held that Pennsylvania's Mental Health and Mental Retardation Act, as interpreted by the Pennsylvania Supreme Court, required habilitation of the mentally retarded in the least restrictive alternative. 673 F.2d at 652-56. The Supreme Court, hearing the appeal of this decision, held that the eleventh amendment prohibited the federal district court from ordering injunctive relief against state officials on the basis of a state law claim. 52 U.S.L.W. at 4164.

Thus, while the district court, in 1977, found Pennhurst to be hazardous to its residents and in violation of state law, federal law and the Constitution, the United States Supreme Court has invalidated any judicial attempts to protect the rights of the residents of Pennhurst. See Justice Stevens's dissent (joined by JJ Brennan, Marshall and Blackmun) 52 U.S.L.W. at 4165.

84. 446 F. Supp. at 1304.

85. *Id.* at 1308.

86. *Id.* at 1320.

87. See *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977) "If Minnesota chooses to operate hospitals for the mentally retarded, the operation must meet minimal constitutional standards, and that obligation may not be permitted to yield to financial considerations." *Id.* at 1132. See also *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . ." *Id.* at 580.

less to change or improve their plight. The judicial system offers the only channel to protection of their rights. Furthermore, because of the stigma attached to mental disabilities, mental patients are victims of various forms of prejudice, and are accorded little credibility in their beliefs or perceptions. Thus a more intensive judicial review is necessary to protect the rights of an isolated and powerless minority whose access to the political process is limited.⁸⁸

The third factor in the Supreme Court's decision to adopt a deferential standard of review was its conclusion that it is not appropriate for courts to decide what treatment choices should be made.⁸⁹ The Court stated that there was "no reason to think judges or juries are better qualified than appropriate professionals in making such decisions."⁹⁰ The existing data, however, does not support the superiority of psychiatric judgments.⁹¹

In fact, psychiatrists admit their inability to make accurate predictions about mental patients' behaviors, particularly in regard to dangerousness,⁹² and blame the judiciary for abdicating its responsibility in this area.⁹³ A review of the literature on the reliability and validity of psychiatric judgments concluded that most studies showed that psychiatric judgments were unreliable for diagnoses,⁹⁴ that psychiatric predictions of dangerousness were unusually wrong,⁹⁵ and that psychiatric judgments did not offer meaningful help to judges or juries in civil commitment cases.⁹⁶

Psychiatric decisions, although considered scientific, are often

88. See Note, *Mental Illness: A Suspect Classification?*, 83 YALE L. J. 1237 (1974).

89. *Romeo*, 457 U.S. at 321.

90. *Id.* at 322-23.

91. Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974) [hereinafter *Flipping Coins*].

92. A. STONE, *MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION* (1975). "It can be stated flatly on the basis of my own review of the published material on the prediction of dangerous acts that neither . . . psychiatric intuition, diagnosis and psychological testing can claim predictive success when dealing with the traditional population of mental hospitals. *Id.* at 33. Rapoport, Lassen, and Gruneward, *Evaluation and Followup of State Hospital Patients Who Had Sanity Hearings*, 118 AM. J. PSYCH. 1078 (1962) suggest that courts may do better than psychiatrists in predicting when it is safe to discharge mental patients.

93. See Stone, *Comment*, 132 AM. J. PSYCH. 829, 830 (1975). Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 AM. PSYCH. 224 (1978).

94. *Flipping Coins*, *supra* note 94, at 708-09.

95. *Id.* at 714.

96. *Id.* at 742.

biased and discriminatory.⁹⁷ For example, people in lower socio-economic classes are more likely to be perceived by psychiatrists as mentally ill and in need of hospitalization.⁹⁸ The diagnosis and hospitalization of women often reflects gender discrimination.⁹⁹ Moreover, the very nature of hospitalization imposes "a special environment in which the meanings of behavior can easily be misunderstood."¹⁰⁰

Given the uncertainty of psychiatric decisions, the judiciary should assume a greater role in reviewing those decisions which may deprive individuals of their freedom. The consequences of a wrong decision to commit a person to an institution or deny release, can be enormous. The harmful effects of institutionalization may range from regression, dependency and humiliation, to abuse, cruelty and torture.¹⁰¹ Certainly, courts are more competent than institutional social workers or psychiatrists to determine violations of constitutional rights. This is particularly true where liberty interests are involved.

The Third Circuit Court of Appeals grappled with the problem of the court's competence and decided that treatment decisions involving day-to-day expert choices required a lesser standard of review than decisions affecting the right to freedom.¹⁰² It concluded that treatment decisions should be viewed as acceptable in light of present medical knowledge.¹⁰³ This standard is higher than professional deference and closer to common law medical malpractice standards.¹⁰⁴

97. *Id.* at 724-29.

98. A. HOLLINGSHEAD AND F. REDLICH, *SOCIAL CLASS AND MENTAL ILLNESS: A COMMUNITY STUDY* (1958).

99. Roth and Lerner, *Sex-Based Discrimination in the Mental Institutionalization of Women*, 62 CALIF. L. REV. 789, 796 (1974). "It's harder for men to get into the hospital, and it's easier for men to get out." *Id.* at 797.

100. Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379 (1973). "It is clear that we cannot distinguish the sane from the insane in psychiatric hospitals." *Id.* at 398. Eight sane people gained secret admission to twelve different hospitals. After admission, each pseudopatient ceased any mention of simulation of abnormality. None of the pseudopatients were detected by the institutional professionals but many patients recognized them as sane. *Id.* at 384-85.

101. Shaffer, *Introduction, Symposium*, 13 SANTA CLARA LAW 369 (1973). "Mental patients are still beaten, shocked, drugged or mutilated into submission." *Id.* at 370.

102. *Romeo*, 644 F.2d at 168-69.

103. *Id.* at 169.

104. Meyer & Soskin, *Romeo, Romeo, Where Art Thou Romeo: Before the Court at the Mercy of Institutional Professionals*, 10 J. OF PSYCH. & L. 205 (1982).

In determining a patient's right to liberty, however, the court held that a much higher standard of review is necessary to protect the fundamental liberty interest.¹⁰⁵ Judicial deference does not adequately address the important issues of the patient's and state's interests. *Romeo's* deference to professional judgment may drastically reduce federal judicial protection of mental patients' liberty. Given this curtailment, state constitutional or statutory provisions may be a more promising means of protecting and enforcing mental patients' rights.

II. VERMONT'S CONSTITUTIONAL AND STATUTORY RIGHTS TO THE LEAST RESTRICTIVE ALTERNATIVE

Although the Vermont Supreme Court has interpreted the Vermont Constitution as "protecting rights which were explicitly excluded from federal protection,"¹⁰⁶ it has not addressed what rights the Vermont Constitution affords to the mentally disabled. Two provisions in the Vermont Constitution could establish a basis for a right to the least restrictive alternative for the mentally disabled. Article I provides "[T]hat all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty"¹⁰⁷ Article X provides "[N]or can any person be justly deprived of his liberty, except by the laws of the land"¹⁰⁸

These provisions may provide a basis for least restrictive alternative right, but Vermont's mental health statute expressly grants this right. Vermont, like most states,¹⁰⁹ changed its mental health laws to include a right to treatment in the least restrictive alternative.¹¹⁰ The statement of policy for the new law provides:

It is the policy of the state of Vermont to assure the availability of adequate treatment to persons in this state who are mentally ill. Treatment on a voluntary basis shall be pre-

105. *Romeo*, 644 F.2d at 164.

106. *State v. Badger*, 141 Vt. 430, 449 (1982).

107. VT. CONST. art. I.

108. VT. CONST. art. X.

109. All but three of the states (Alabama, Mississippi and Oregon) have enacted legislation which substantially or partially affirms this right. Lyon, *Patients' Bill of Rights: A Survey of State Statutes*, 6 MENTAL DISAB. L.REP. 178 (1982). Although Congress has recommended that the states provide treatment to mentally ill patients in the least restrictive environment, it has not required that they do so. Mental Health Systems Act, 42 U.S.C. §§ 9401-9522 (Supp. 1981).

110. VT. STAT. ANN. tit. 18, §§ 7101-7803 (Supp. 1984).

ferred to involuntary treatment and in every case, the least restrictive conditions consistent with adequate treatment shall be provided.¹¹¹

The purpose of the new policy is to guarantee adequate treatment in the least restrictive setting to the mentally disabled. The state has adopted the duty of providing a continuum of services and assuring the availability of those services. At every stage in the civil commitment process, the statute directs the district court to implement this policy by considering and, if appropriate, ordering the least restrictive conditions.¹¹² For example, the statute requires the court to determine whether an appropriate alternative to hospitalization exists before it may order hospitalization.¹¹³ Prior to ordering a commitment to the Vermont State Hospital (VSH), the court must also consider whether VSH can offer adequate and appropriate treatment.¹¹⁴

The court has the power to order a "program of treatment other than hospitalization," if appropriate.¹¹⁵ In hearings to determine whether a committed patient's hospitalization should continue, the court has the same authority to make treatment and least restrictive alternative determinations.¹¹⁶ The statute apparently does not limit the court to only consideration of existing alternatives in its power to order other treatment programs.¹¹⁷ Title 18 section 7618 of Vermont Statutes Annotated states that if "the court finds that a treatment program other than hospitalization is adequate to meet the person's treatment needs, the court *shall* order the person to receive whatever treatment other than hospitalization is appropriate for a period of 90 days."¹¹⁸ On its face, the statute mandates the provision of adequate treatment in the least restrictive alternative and requires the courts to enforce this right in every case.

The legislative history of the statute supports intensive judicial scrutiny to assure adequate treatment in the least restrictive

111. *Id.* Policy. 1977 No. 252 § 1.

112. VT. STAT. ANN. tit. 18, §§ 7612(f), 7617, 7618, 7621 (Supp. 1984).

113. *Id.* at § 7617(c). "The court shall not order hospitalization without a thorough consideration of available alternatives." *Id.*

114. *Id.* at § 7617(e).

115. *Id.* at §§ 7617(b)(3), 7618.

116. *Id.* at §§ 7621, 7801.

117. *Id.* at § 7618.

118. *Id.* (Emphasis added).

conditions. The Assistant Attorney General for the Department of Mental Health who testified at the senate committee hearings on the proposed statute stated "[t]he court has to assure itself that [it is], in fact, providing the least restrictive alternative. The court has to inquire into the adequacy of treatment provided."¹¹⁹ He also stated: "the intent of this section is to give the judge a little bit more leverage, or to open the can a little bit more so the judge can peer into it and find out what there is that goes into the highest standard of the medical practice."¹²⁰

Despite the clear statutory requirements and the supporting legislative history, the Vermont district courts have varied in their standards of interpretation and enforcement of the mental health law. An example of the most deferential review can be found in *In re M.M.*,¹²¹ a case involving the care of a geriatric patient whose mental and physical condition seriously deteriorated after her admission to the VSH, due to overmedication.¹²² Her condition worsened until she became stuporous and had to be transferred to a general hospital for medical care. The hospital records showed a causal relationship between the medication she had received and her gross deterioration.¹²³ When she returned to the VSH, she was prescribed additional medication and again showed signs of serious side effects.¹²⁴ At a district court hearing, the clinical director of the geriatric unit testified that she was unable to determine whether M.M. had continued to receive medication despite numerous notes in the patient's chart concerning the patient's overmedication and an order to stop all medication.¹²⁵ The patient's attorney argued that M.M. was not receiving adequate treatment and asked the court to adopt the treatment recommendations of an independent psychiatrist or order her discharged to a nursing home.¹²⁶ The court rejected this argument and stated:

I'm somewhat reluctant to start mandating treatment plans and ostensibly holding the hospital in contempt for not delivering them. I think the problem is essentially a legislative one

119. *Mental Health Law, 1977: Hearings on S.103 Before the Senate Health and Welfare Committee*, March 8, 1977 (statement of Peter Bluhm).

120. *Id.*

121. *In re M.M.*, No. 61-82 Wy-MH-AIT, (Vt. D. Ct., Waterbury Cir. July 15, 1982).

122. Record at 29, *In re M.M.*

123. *Id.* at 32.

124. *Id.*

125. *Id.*

126. *Id.*

and an administrative one And I think what I'm being asked to do here, which I'm not prepared to do, is in effect set up a treatment plan that may require this patient or some other group of patients . . . [to] receive certain things and in effect tell the commissioner . . . the superintendent . . . how they are going to run this hospital. I don't think I'm qualified"¹²⁷

The judge found that the patient was receiving adequate treatment and that there was no appropriate available alternative in the community.¹²⁸

In contrast, some district judges after finding that adequate treatment would be appropriate in a less restrictive environment have ordered the state to provide residents with placement in the community.¹²⁹ The court in *In re J.S.*¹³⁰ held that it has the statutory authority to "order the state to provide a student at the Brandon Training School with a less restrictive environment."¹³¹

Other judges have made searching inquiries into the facts and have issued orders to enforce the patients' rights both to treatment and to treatment in the least restrictive environment. For example, the judge in *In re D.B.*,¹³² concluded that D.B. could receive adequate treatment outside of the hospital if he participated in an out-patient treatment program, took medication as prescribed, and lived in a supervised setting.¹³³ The judge ordered the state to find such a setting within thirty days of the order. A different judge in *In re P.T.*,¹³⁴ directed the state to place P.T. on an open ward immediately, begin intensive rehabilitative programs to teach him the community living skills, and to discharge him to a supervised setting by a certain date.

The recent decisions by the Vermont Supreme Court offer

127. *Id.* at 45.

128. *Id.* at 50-51.

129. *In re J.S.*, No. 1, 2, 3, 4, 78-Br-MR-JR, (Vt. D. Ct., Brandon Cir., October 24, 1978); *In re Brace*, No. 27, 28, 44, 17, 18, 47, 78-Br-MR-JR, (Vt. D. Ct., Brandon Cir., October 16, 1980) (a consent decree which bound the Department of Mental Health to place any student eligible for discharge within a reasonable period of time without regard to present availability. The effect of this order is the gradual closing of the institution).

130. *In re J.S.*, No. 1, 2, 3, 4, 78-Br-MR-JR, (Vt. D. Ct. Brandon Cir., October 24, 1978).

131. *Id.* (The Brandon Training School is a state-operated institution providing custodial care and treatment for the mentally retarded).

132. *In re D.B.*, No. 171-83-Wy-MH-AD, (Vt. D. Ct. Waterbury Cir., August 4, 1983).

133. *Id.* at 5.

134. *In re P.T.*, No. 373-78-Wy-MH-AD, (Vt. D. Ct., Waterbury Cir., February 14, 1979).

some guidelines on these issues.¹³⁵ Although Vermont's mental health statute guarantees adequate treatment in the least restrictive alternative,¹³⁶ the Vermont Supreme Court may be treating adequate treatment differently than the least restrictive alternative.¹³⁷ Nevertheless, the court has supported active judicial scrutiny of both issues.¹³⁸

In *In re M.G.*,¹³⁹ the court considered the power of the courts to enforce the rights of residents at the Brandon Training School to treatment in the least restrictive setting. The Vermont statute governing commitment to Brandon Training School provided that continued commitment to the institution required a finding that the student was receiving adequate treatment which was not available in a less restrictive setting.¹⁴⁰ The district court, finding less restrictive alternatives appropriate, had ordered the state to place students in the community. The state appealed, arguing that the students were not entitled to release unless there was an available community placement.

The Vermont Supreme Court held that the court was required to consider as a constitutional matter, whether the students should be placed in the community,¹⁴¹ and it established that availability did not determine whether the district court could order placement. If it was limited to whether or not the state had an available placement at the time of the hearing, the court's inquiry would be "little more than an empty ceremony."¹⁴² Therefore, the district court could "certainly require the state to make its best effort to find appropriate placements for students who are properly eligible."¹⁴³ The court, however, stated that this case did not present

135. *In re M.G.*, 137 Vt. 521, 408 A.2d 653 (1979); *In re A.C.*, 144 Vt. 37, 470 A.2d 1191 (1984).

136. VT. STAT. ANN. tit. 18, § 7618 (Supp. 1984).

137. *See, In re M.G.*, 137 Vt. 521, 408 A.2d 653 (1979); *In re A.C.*, 144 Vt. 37, 470 A.2d 1191 (1984).

138. *See, In re M.G.*, 137 Vt. 521, 408 A.2d 653 (1979); *In re A.C.*, 144 Vt. 37, 470 A.2d 1191 (1984).

139. 137 Vt. 521, 408 A.2d 653 (1979).

140. VT. STAT. ANN. tit. 18, § 8810(e) (1977) provided: "If . . . the court finds . . . that the person admitted . . . is receiving adequate treatment, education, rehabilitation and remedial care which is adequate and does not appear upon reasonable inquiry to be available to him in a less restrictive environment, then the Court shall order that the person's admission shall continue." This section was repealed in 1979, but similar wording is now contained in VT. STAT. ANN. tit. 18, § 8834(e) (Supp. 1984).

141. *In re M.G.*, 137 Vt. 521, 527, 408 A.2d 653, 656 (1979).

142. *Id.* at 530, 408 A.2d at 658.

143. *Id.*

an occasion to decide whether the judiciary may require the state to construct special facilities.¹⁴⁴

The court in *In re M.G.* also established a test for the degree of restrictiveness, which must not amount to more than is "reasonably required for safety and the welfare and best interests of the student."¹⁴⁵ The court placed the burden of justifying any measure of restraint on the state, and required proof by clear and convincing evidence. The decision in *In re M.G.* supported close scrutiny of least restrictive environment issues and affirmed the court's power to order the state to make best efforts in seeking alternative placements.

The recent ruling by the Vermont Supreme Court, in *In re A.C.*,¹⁴⁶ while it supported a careful judicial scrutiny into mental health issues, limited the court's ability to order treatment programs. The court examined the power of the district court to order changes in the treatment of a mentally retarded woman committed to Brandon Training School. In reviewing her treatment, a district court judge had found that A.C. was receiving 800 milligrams of a psychotropic medication, thiorazine, for control of her behavior.¹⁴⁷ The thiorazine produced a side effect called "blue people syndrome," which turned her skin blue.¹⁴⁸ This disfiguring condition would progressively worsen as long as A.C. received thiorazine.¹⁴⁹ A psychiatrist testifying on behalf of A.C. stated that there was a high probability that other medication could effectively control her behavior without the adverse side effect of "blue people syndrome."¹⁵⁰ The district court judge ordered the state to stop administering thiorazine to the patient and to find an alternative method of treatment.¹⁵¹

On appeal to the Vermont Supreme Court, the Commissioner of Mental Health argued that the court's authority was limited to deciding whether appropriate treatment was available, and whether commitment should continue.¹⁵² The Vermont Supreme

144. *Id.*

145. *Id.* at 529, 408 A.2d at 65.

146. 144 Vt. 37, 470 A.2d 1191 (1984).

147. *Id.* at 40, 470 A.2d at 1193.

148. *Id.*

149. *Id.*

150. *Id.* at 41, 470 A.2d at 1193.

151. *Id.* at 39, 470 A.2d at 1192.

152. *Id.* at 41, 470 A.2d at 1193.

Court rejected these arguments and said "if we accept the Commissioner's arguments . . . then A.C. would be left without an adequate remedy for the violation of her statutory right to appropriate treatment."¹⁵³ The court held that the district court had the authority to reject the continued administration of thorazine, *but no more*.¹⁵⁴

The Vermont Supreme Court had originally decided *In re A.C.* in September, 1983.¹⁵⁵ In the first opinion, the court affirmed the district court's order and stated: "the court's order was carefully drafted so as to minimize judicial interference in A.M.C.'s [sic] course of treatment and maximize the Commissioner's discretion to design a new course of treatment."¹⁵⁶ However, four months later, the Vermont Supreme Court, on its own motion, revised the ruling to specifically limit the court's authority to acceptance or rejection of a treatment plan.¹⁵⁷ The Vermont Supreme Court vacated the order and remanded for a new order consistent with the new opinion.¹⁵⁸

Although the new ruling does not affect A.C., who has been given a different medication,¹⁵⁹ it may significantly limit the power of the courts to enforce the statutory rights of mental patients. The effects of *In re A.C.* are difficult to predict, as the opinion seems internally inconsistent. On one hand, the court stressed that courts must carefully scrutinize the facts in commitment cases and that courts must take "the particular needs and circumstances of the student"¹⁶⁰ into consideration when formulating a decision. On the other hand, the supreme court limited the district court's choices to either rejection or acceptance of the treatment offered.¹⁶¹ It could be argued that this case is limited to questions of purely medical treatment, where the judiciary must depend upon expert testimony and therefore should not "play doctor," by ordering different medications. But the district court only ordered the

153. *Id.* at 44, 470 A.2d at 1195.

154. *Id.* (emphasis added).

155. *In re A.M.C.*, No. 82-451 slip op. (Sept. 6, 1983).

156. *Id.* at 7.

157. *In re A.C.*, 144 Vt. 37, 470 A.2d 1191 (1984).

158. *Id.* at 44, 470 A.2d at 1195.

159. Burlington Free Press, January 10, 1984, at 3 col. 2. Statement by Janis Murcie, A.C.'s current attorney.

160. *In re A.C.*, 144 Vt. 37, 43, 470 A.2d 1191, 1195 (1984).

161. *Id.* at 44, 470 A.2d at 1195.

state to find a more appropriate form of treatment,¹⁶² one which would not turn A.C. blue.

The limits A.C. imposed have not been tested yet. The careful scrutiny of the facts in commitment cases A.C. requires is a better standard of review than *Romeo's* professional deference. If the court had deferred to the state's professional judgment in A.C., A.C. would still be receiving thorazine and suffering from "blue people syndrome." But some practical problems may arise from the limits in this decision. If the court can only reject a plan offered by the Department of Mental Health, the court and the patient must wait until the Department proposes another plan. Certainly, this could take weeks or months. If the second plan is also rejected, the waiting game can continue indefinitely, leaving the client in limbo, until the Department's plan finally meets with judicial approval.

The Vermont Supreme Court analogized its ruling in A.C. to its decision in *In re G.F.*,¹⁶³ which held that a juvenile court could accept or reject a placement plan for a juvenile in legal custody of the state, but it could not dictate "where and with whom a juvenile should live."¹⁶⁴ The juvenile statute, however, explicitly defines legal custody as the power to determine where the child shall live.¹⁶⁵ When the custody of a juvenile is transferred to the state agency, that agency then has the authority to decide where the juvenile will live. In contrast, the mental health statute expressly directs the court to make orders specifying what program of treatment (including where the patient will live) the patient will follow.¹⁶⁶ A.C.'s limits should be restricted to decisions involving medical treatment, where the court may be justified in not creating its own medical treatment plan. But in decisions involving a patient's right to the least restrictive setting, the court must be able to order specific steps to be taken to protect the patient's rights.

The Vermont Supreme Court has recently expanded the application of the least restrictive alternative doctrine to a situation where a proposed patient refused a court ordered psychiatric evaluation prior to a commitment hearing.¹⁶⁷ In *In re W.H.*,¹⁶⁸ a dis-

162. *Id.* at 39, 470 A.2d at 1192.

163. 142 Vt. 273, 455 A.2d 805 (1982).

164. *Id.* at 281.

165. VT. STAT. ANN. tit. 33, § 632(a)(10) (1983).

166. VT. STAT. ANN. tit. 18, §§ 7617(b)(3), 7618(a), (b)(1) (Supp. 1984).

167. *In re W.H.*, No. 83-417, slip op. (July 13, 1984).

strict court judge ordered W.H. to submit to a psychiatric examination necessary for an application for involuntary treatment. W.H. refused three times and the judge ordered law enforcement officials to take W.H. to Vermont State Hospital for the evaluation.

The order was appealed to the Vermont Supreme Court, which stressed the serious intrusion upon W.H.'s "constitutional right to personal liberty"¹⁶⁹ and ordered that less restrictive alternatives be considered first.¹⁷⁰ Although the statute did not require consideration of less restrictive alternatives, the Supreme Court held that this consideration was required "before an individual may be involuntarily transported to a hospital for a psychiatric examination."¹⁷¹ By expanding the requirement of less restrictive alternatives the Vermont Supreme Court recognized the doctrine's importance in protecting individual liberty.

CONCLUSION

The least restrictive alternative doctrine had strong support in federal mental health cases during the nineteen seventies. Although *Romeo* may be interpreted to support a constitutional right to freedom from unnecessary confinement, its deferential standard of review could preclude active judicial enforcement of this right. *Romeo* will undermine the activist role of the federal judiciary in mental health cases.

State statutory rights, often enacted to comply with what were considered constitutional requirements at the time, now offer a more promising basis for protection of the liberty interests of mental patients. Vermont's mental health law establishes a right to adequate treatment in the least restrictive environment. Vermont courts should take a strong stand in enforcing this right. Careful judicial scrutiny is particularly justified by the importance of this statutory right; the relative powerlessness of the individual affected; the absence of other means to remedy a violation of this right; and the unreliability of psychiatric judgments. The Vermont Supreme Court has indicated that mental health cases require a careful examination, but has limited the courts' powers to order specific remedies for violation of the right to adequate treatment.

168. *Id.*

169. *Id.* at 4.

170. *Id.*

171. *Id.*

The limitation imposed by *A.C.* should be confined to medical treatment issues and not applied to cases involving the right to the least restrictive conditions. As in *W.H.* the Vermont Supreme Court should affirm the authority of the courts to enforce the critical right to the least restrictive alternative.

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