

IN THE
United States Court of Appeals
For the District of Columbia

No. 72-2834

Walter Wyatt, by and through his Agent and legal
counsel, Mrs. W. C. BAWLINS, JR., et al.,
Plaintiffs,

Charles A. Anderson, as Commissioner of Mental Health
and State of Alabama Mental Health Officer, et al.,
Defendants.

UNITED STATES OF AMERICA, AMERICAN PSYCHOLOGICAL
ASSOCIATION, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION,
THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN
ASSOCIATION ON MENTAL DEFICIENCY, NATIONAL ASSOCIATION
FOR MENTAL REHABILITATION and NATIONAL ASSOCIATION
FOR RETARDED CHILDREN,
Amici Curiae.

BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION
ON MENTAL DEFICIENCY, AMERICAN CIVIL LIBERTIES
UNION, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION,
AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION
FOR MENTAL REHABILITATION AND NATIONAL ASSOCIATION FOR
RETARDED CHILDREN

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ISSUES PRESENTED

I. Whether mentally impaired persons who are involuntarily confined in state mental institutions without treatment and under the conditions of deprivation found by the district court are:

- a. deprived of liberty without due process in violation of the Fourteenth Amendment;
- b. deprived of equal protection in violation of the Fourteenth Amendment, and
- c. subjected to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

II. Whether a justiciable controversy is presented by the allegation that mentally impaired persons are deprived of their constitutional rights when they are involuntarily confined in state mental institutions without treatment and under the conditions of deprivation found by the district court.

III. Whether the district court's orders entered to protect the constitutional rights of inmates in state mental institutions are consistent with the separation of powers and concepts of federalism.

IV. Whether the district court abused its discretion in awarding attorneys' fees to plaintiffs' counsel.

PREFACE

Interest of Amici

Amici curiae are national organizations with a direct interest in the adequacy of services available to the mentally ill and mentally retarded; in the appropriate use and deployment of mental health professionals; and in assurance of the constitutional rights of persons alleged to be mentally ill or mentally retarded. Amici's membership includes psychiatrists, psychologists, social workers, members of other relevant professions and laymen concerned with the delivery of services to the mentally ill and mentally retarded.

In the district court, American Orthopsychiatric Association, American Association on Mental Deficiency, American Psychological Association and American Civil Liberties Union were granted amicus status with the same rights to participate in the proceedings as the parties. Order of August 20, 1971. Amici participated actively, presenting expert testimony, introducing exhibits, and bringing their professional expertise to bear on the problems framed by the district court's orders. In particular, amici marshalled expert assistance to develop standards for adequate treatment and participated with counsel for the parties in formulating stipulated standards for submission to the Court.

In this Court, the amici above-named, together with the National Association for Mental Health and the National Association for Retarded Children have been granted leave to file this brief and present oral argument.¹

¹ Amici in this Court include (1) the *American Association on Mental Deficiency*, which is an organization made up of over 9,000 professionals in the mental deficiency field; (2) the *American Orthopsychiatric Association*, an interdisciplinary organization concerned with the problems of mental disorder and abnormal be-

From the perspective of mental health professionals and national organizations concerned with the adequacy of services to the mentally impaired, amici strongly support the decisions of the court below and urge affirmance. Persons civilly committed as mentally ill or mentally retarded are entitled to the protection of the due process and equal protection guarantees of the Fourteenth Amendment. They are entitled to the protection of the Eighth Amendment guarantee against cruel and unusual punishment, made applicable to the states by the Fourteenth Amendment. Amici contend that these constitutional provisions require, among other things, that the mentally impaired person who is involuntarily committed be given adequate treatment. See discussion, pp. 47-67, *infra*. Amici do not advocate framing "a new constitutional right," but bringing the protection of the Constitution to helpless people who have been too long victimized and denied the constitutional rights enjoyed and taken for granted by other citizens.

havior; (3) the *American Psychological Association*, which has a membership of 30,000 psychologists, many of whom are employed in public mental hospitals; (4) the *National Association for Mental Health*, a voluntary citizens' organization with approximately one million members, whose purposes include working for the prevention of mental illness and the promotion of mental health and improvement of services for the mentally impaired; (5) the *National Association for Retarded Children*, a voluntary organization with approximately 225,000 adult members, devoted to promoting the welfare of mentally retarded children and adults; and (6) the *American Civil Liberties Union*, an organization of 160,000 members engaged in defense of the principles embodied in the Bill of Rights.

With the exception of the American Civil Liberties Union, amici have all had a long-standing interest and involvement in setting standards for adequate treatment of the mentally impaired. The American Civil Liberties Union has a particular interest in protecting and expanding the civil rights of persons who are alleged to be mentally ill.

Terminology in this Brief

The following terminology will be used in this brief:

1. "Amici"—depending on the context, the amici group in the district court, or the larger group which are filing this brief. The term does *not* include the United States which also participated as amicus in the court below and has filed a brief amicus in this Court.

2. "The state mental institutions"—the Partlow State School and Hospital, the Bryce Hospital and the Searcy Hospital, collectively.

3. "Inmates"—persons involuntarily committed to the state mental institutions. Calling them patients would be a misleading euphemism; the term inmates comes closest to describing accurately the nature of their confinement.

4. "Mentally impaired"—both the mentally ill and mentally retarded inmates involuntarily confined in state mental institutions.

5. "Treatment"—care provided by mental health professionals and others that is adequate and appropriate for the needs of the mentally impaired inmate. Treatment also encompasses a humane physical and psychological environment. The term habilitation, used by the parties and amici in the district court and by the district court in its order of April 13, 1972 (Partlow State School and Hospital) is a term used to describe that treatment which is appropriate to the condition of the mental retardate. For convenience, in this brief, amici will group habilitation and treatment under the single term treatment.

STATEMENT OF THE CASE

A. Proceedings Below

The original complaint in this action was filed on October 23, 1970 in the United States District Court for the Middle District of Alabama, Northern Division. The complaint alleged, *inter alia*, that because of prospective mass terminations of employees at Bryce Hospital—one of Alabama's two public institutions for the mentally ill²—the approximately 5,000 inmates faced the bleak prospect of having "no treatment." On January 4, 1971, plaintiffs amended the prayer for relief section of their original complaint to request "that this Court declare that patients confined to any state operated mental health facility are constitutionally entitled to adequate, competent treatment," and that "defendants be enjoined from operating Bryce Hospital in a manner that does not conform to constitutional standards of delivering adequate mental treatment to its patients." As investigations proceeded, and the facts indicated an extension was necessary, the complaint was amended a third time on August 4, 1971 to expand the plaintiff class to include inmates from Bryce's two sister institutions—Searcy Hospital (for the mentally ill) and Partlow State School and Hospital (for the mentally retarded). Order of August 12, 1971.

Although defendants fail to mention any factual evidence adduced during the three hearings held by the district court in this case on January 4-5, 1971; February 3-4, 1972; and February 28-March 1, 1972,³ amici believe that the nature of plaintiffs' confinement must be understood in order for the essential constitutional issue to be resolved. See *Jackson v. Indiana*, 406 U.S.

² See 45 Ala. Code § 189 (1969).

³ Hereinafter cited as "Hearing I," "Hearing II," and "Hearing III," respectively.

at 738. However, since the factual record in this case is so voluminous, a summary of conditions at the challenged institutions is deferred until the following section of this brief. Suffice it to say here that on the basis of testimony elicited at the first hearing (January 4-5, 1971), Judge Johnson found that the treatment at Bryce Hospital prior to the reorganization then taking place was inadequate. *Wyatt v. Stickney*, 325 F.Supp. 781, 784 (M.D. Ala., March 12, 1972).

Following the January 4-5, 1971 hearings, in an Order of March 12, 1971, the court, adopting defendants' own words, held that:

"The patients at Bryce Hospital, for the most part were involuntarily committed through noncriminal proceedings and without the constitutional protections that are afforded defendants in criminal proceedings. When patients are so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. *Rouse v. Cameron*, 125 U.S.App.D.C. 366, 373 F.2d 451; *Covington v. Harris*, 136 U.S.App.D.C. 35, 419 F.2d 617." 325 F.Supp. at 784.*

The court's March 12 Order continued:

"There can be no legal (or moral) justification for the State of Alabama failing to afford treatment—and adequate treatment from a medical standpoint

*This language comes directly from defendants' Memorandum of Proposed Findings of Fact and Conclusions of Law, filed February 5, 1971. In this same Memorandum, defendants also acknowledged that "a large number of patients at Bryce Hospital are inappropriately there" and that "there is some apparent confusion about the primary mission and function of Bryce Hospital since certain non-psychotic geriatric patients and certain mental retardates and perhaps other non-mentally ill persons have been committed there for a variety of reasons." p. 4.

—to the several thousand patients who have been civilly committed to Bryce for treatment purposes. To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.” 325 F.Supp. at 785.

At the conclusion of the first hearing, defendants had asked the court to give them an opportunity to promulgate and implement proper standards for the adequate care of the patients at Bryce. Accordingly, the court’s March 12, 1971 Order allowed defendants six months within which to raise the level of care at Bryce to the constitutionally required minimum. 325 F.Supp. at 785-86. In this connection, the court required defendants to file reports defining the mission and functions of Bryce Hospital, specifying the objective and subjective standards required to furnish adequate treatment, and detailing the hospital’s progress. *Id.* at 785.

In his Order of March 12, 1971, Judge Johnson also invited the United States to participate in this case as *amicus curiae*. Still later the court granted the motions of the American Psychological Association, the American Orthopsychiatric Association, the American Civil Liberties Union and the American Association on Mental Deficiency for leave to participate as *amici curiae* and to provide expert assistance.

On December 10, 1971, based upon a review of defendants’ six month progress report and plaintiffs’ and amici’s response to that report, the court found that defendants had failed to promulgate and effectuate minimum standards for adequate treatment:

“In the matters presented to this Court by the parties there seem to be three fundamental conditions for adequate and effective treatment programs in public mental institutions. These three fundamental

conditions are: (1) a humane psychological and physical environment, (2) qualified staff in numbers sufficient to administer adequate treatment, and (3) individualized treatment plans. The report filed by defendants with this Court, as well as the reports and objections of other parties who have studied the conditions at Bryce Hospital, demonstrates rather conclusively that the Hospital is deficient in all three of these fundamental respects." 334 F.Supp. at 1343.

The facts supporting this finding were summarized by the court as follows:

"... the dormitories are barn-like structures with no privacy for the patients. For most patients there is not even a space provided which he can think of as his own. The toilets in restrooms seldom have partitions between them. There are dehumanizing factors which degenerate the patients' self esteem. Also contributing to the poor psychological environment are the shoddy wearing apparel furnished the patients, the non-therapeutic work assigned to patients (mostly compulsory, uncompensated house-keeping chores), and the degrading and humiliating admissions procedure which creates in the patient an impression of the hospital as a prison or as a 'crazy house.' Other conditions which render the physical environment at Bryce critically substandard are extreme ventilation problems, fire and other emergency hazards, and overcrowding caused to some degree by poor utilization of space.

* * * * *

"More psychiatrists, Doctor of Philosophy level psychologists and Medical Doctors are not only a medical but also a constitutional necessity in this public institution. . . . The nonprofessional staff is poorly trained; nurses, for example, are required to have only a tenth grade education. Also, there is no effective 'in-service' training program for, or even any regular supervision over, the non-professional

staff. The nonprofessionals are spread very thinly; thus, they are overworked, creating not only an inadequate situation for the patients but extreme stresses for individual aides. . . .

* * * *

"Although every patient has been classified as to treatability, the records made on each patient are inadequate. Minimum medical standards require that periodic inquiries be made into the needs of the patients with a view toward providing suitable treatment for them. Yet, at Bryce the records evidence no notations of mental change. They consist generally only of notations of the times and amounts of drugs given and participation in the Patient Operated Program, the Token Economy Program or the Level Program. Bryce's own consultant advises that treatment is geared primarily toward house-keeping functions. . . ." *Id.* at 1343-44.

"It must be kept in mind," wrote the court, "that plaintiffs' rights are present ones, and they must be not only declared but secured at the earliest practicable date." *Id.* at 1344. Because of defendants' failure to formulate minimum medical and constitutional standards for the operation of their institutions, the court ordered additional hearings to allow the parties and amici to present proposed minimum standards and evidence by experts in support thereof.

Separate hearings were scheduled on the standards of adequate treatment for the mentally ill (February 3-4, 1972) and the mentally retarded (February 28-March 1, 1972). Before these hearings were held, events occurred that are extremely relevant to an understanding of this case as it developed in the district court. Prior to the hearings, plaintiffs, defendants and amici met to discuss proposed standards developed by amici, and entered into a number of stipulations which were then presented to

the court.⁵ Defendants state that "the standards established by the Court are detailed, comprehensive, and far reaching." Governor's Brief, p. 9. But they fail to mention that almost all of the standards actually ordered by the court were either agreed to by plaintiffs, defendants and amici, or were standards recommended by defendants themselves.⁶ These standards were supported and supplemented by the many distinguished experts who

⁵ In connection with standards at Bryce and Searcy, the parties met in Atlanta, Georgia on January 17, 1972. Defendants' description of these meetings follows:

"Defendants and other parties (other than the United States) have disposed of the greater part of the issues presented by the Court's holding through stipulations following extensive discussions. Defendants, at the outset of such discussions, took the view that generally recognized standards of accreditation applicable to mental hospitals should be adopted. Thus, Defendants proposed adoption of the minimum standards of care promulgated by the Joint Commission on Accreditation of Hospitals and the American Psychiatric Association. The stipulations arrived at by the parties concerning (i) a humane psychological and physical environment; and (ii) individualized treatment plans are based substantially upon those issued by these recognized expert associations." Memorandum on Behalf of Defendants with respect to Bryce and Searcy Hospitals, filed March 24, 1972, at 2-3.

A similar procedure was followed in developing standards for adequate treatment for Partlow. According to defendants:

"For the most part there is no dispute among the parties as to adequate standards of care. Extensive discussions among the parties has [sic] resulted in a memorandum of agreement incorporating minimum standards for the habilitation of residents of Partlow. That memorandum was filed with the Court during the course of the Feb. 28 Hearings." Defendants' Post-Hearing Memorandum, filed March 24, 1972, at 2.

⁶ For example, all 49 of the standards relating to Partlow State School and Hospital—with the exception of the standards relating to seclusion, temperature, Human Rights Committee, and proper care of patients' physical conditions such as tuberculosis—were agreed upon and stipulated to by the parties.

testified at the latter two hearings held by the district court in this case.⁷

⁷ The following expert witnesses presented testimony in court or by deposition on the inadequacy of treatment in the state mental institutions and on minimum standards of adequate treatment:

Dr. Israel Zwerling is Executive Chairman of the Department of Psychiatry, Albert Einstein College of Medicine and Director of Bronx State Hospital in Bronx, New York. He is also Chairman of the Psychiatry Training Review Committee of the National Institute of Mental Health, which position requires him to review the programs of a wide range of public mental hospitals, evaluating the adequacy of their treatment programs.

Dr. Harold Visotsky is Professor and Chairman of the Department of Psychiatry of the Northwestern University Medical School. From 1963 through 1969, he was Director of the Illinois Department of Mental Health. Dr. Visotsky has been Chairman of the Council on Mental Health Services of the American Psychiatric Association and served *ex officio* on a task force on standards for psychiatric facilities which was set up by the Council.

Dr. Ignacy Goldberg is Professor of Education of the Department of Special Education of Teachers College, Columbia University, New York. Dr. Goldberg is a past-president of the American Association on Mental Deficiency and a past director of education and training in the institutions for mentally retarded of the State of Indiana.

Dr. Walter Fox is Assistant Commissioner for Mental Health of Arizona. Dr. Fox is a consultant on psychiatric facilities to the National Institute of Mental Health and a past president of the Association of Medical Superintendents of Mental Hospitals.

Dr. Jack R. Ewalt is Bullard Professor of Psychiatry and Chairman of the Department of Psychiatry at Harvard University Medical School. He is also the Superintendent of the Massachusetts Mental Health Center and a past-president of the American Psychiatric Association.

Dr. Francis Tyce is Director of the Rochester State Hospital in Rochester, Minnesota and a past-president of the Association of Medical Superintendents of Mental Hospitals.

Dr. Gunnar Dybwad is Professor of Human Development at the Graduate School for Advanced Studies in Social Welfare at Brandeis University. Dr. Dybwad has served as a special presidential consultant in the field of mental retardation.

David Rosen is Superintendent of the Macomb-Oakland Mental Retardation Center, and is President Elect of the American Association on Mental Deficiency. As past chairman of the National

At the close of the February 28-March 1, 1972 hearing on Partlow, the court, having in its own words "been impressed by the urgency of the situation," issued an interim emergency order "to protect the lives and well-being of the residents of Partlow." The court took this extraordinary step because:

"[T]he evidence elicited from an extensive hearing concerning the mental retardation aspects of the above-styled cause has vividly and undisputedly portrayed Partlow State School and Hospital as a ware-

Association of Superintendents of Public Residential Facilities, Mr. Rosen has just completed a survey of the programs of all public institutions in the United States.

Dr. James Clements is Director of the Georgia Retardation Center, Atlanta and Athens, Georgia. Dr. Clements is first Vice-President Elect of the American Association on Mental Deficiency. In 1967 Dr. Clements prepared an evaluation study of the Partlow State School and Hospital for the American Association on Mental Deficiency.

Dr. Philip Roos is Executive Director for the National Association for Retarded Children. Dr. Roos served as Director of Mental Retardation Community Services for the State of Texas for one year and served for a year as Associate Commissioner for Mental Retardation in the New York State Department of Mental Hygiene. Recently, Dr. Roos served as Chairman of the Task Force on the Development of Standards for Residential Living of the Joint Commission of Accreditation of Hospitals.

Dr. Peter S. Blouke was at the time of trial the Acting Superintendent at Partlow State School.

Dr. Donald Lee Clopper was at the time of trial Associate Commissioner for Mental Retardation for the Alabama Department of Mental Health.

For testimony in support of the April 13, 1972 court-ordered standards, see: Hearing III, testimony of Dr. Gunnar Dybwad, at 12; Hearing III, testimony of Dr. Peter S. Blouke, at 117; Hearing III, testimony of David Rosen, at 137; Hearing III, testimony of Dr. James Clements, at 165-166; Hearing III, testimony of Dr. Philip Roos, at 310-311; Hearing III, testimony of Dr. Donald Lee Clopper, at 411-422; deposition of Dr. Harold Visotsky, Jan. 22, 1972, at 9-40, 47-48; deposition of Dr. Walter Fox, Jan. 27, 1972, at 7-20, 23-35, 37-38.

housing institution which, because of its atmosphere of psychological and physical deprivation, is wholly incapable of furnishing treatment to the mentally retarded and is conducive only to the deterioration and debilitation of the residents. The evidence has reflected further that safety and sanitary conditions at Partlow are substandard to the point of endangering the health and lives of those residing there, that the wards are grossly understaffed, rendering even simple custodial care impossible, and that overcrowding remains a dangerous problem often leading to serious accidents, some of which have resulted in deaths of residents." Order of March 2, 1972.

Subsequently, on April 13, 1972, the court rendered two final "Orders and Decrees," one relating to Bryce and Searcy and the other relating to Partlow, which reviewed its earlier findings and holdings, enjoined defendants from failing to implement certain standards set forth by the court as constitutional minimums, and required defendants to submit a report within six months concerning this implementation of these standards.

Early in these proceedings, plaintiffs had requested attorneys' fees. Motion of June 1, 1971. In its final orders, the district court awarded such fees. 344 F.Supp. at 378, 394.

Appellant Wallace and appellant Mental Health Board filed separate notices of appeal on May 12, 1972.³

B. The Background Of The Alabama Mental Health System

The public mental institutions in Alabama were established as treatment institutions, not as warehouses

³ On May 22, 1972 Governor Wallace filed a motion for order of modification and a motion for stay of execution of the decree pending appeal. These motions were denied by the district court by order of June 26, 1972.

for a miscellaneous group of eccentrics and societal rejects. Bryce Hospital was built during the 1850's, a time of great optimism about the curability of mental illness. D. Rothman, *The Discovery of the Asylum* 131 (1971). Enthusiasm was so widespread that Deutsch, referring to this period, speaks of the "cult of curability"; superintendents of mental institutions published statistics claiming 75% to 100% recovery rates. A. Deutsch, *The Mentally Ill in America* 153 (1937).

The impulse to confine the mentally ill in new mental institutions arose out of the feeling that this was the optimal way to provide proper treatment. Rothman, *supra*, at 137.⁹ In this spirit, the Alabama legislature authorized its first mental hospital in 1852. The efforts to pass this legislation were led by the nationally known mental health reformer Dorothea Dix; Alabama's Governor, H. W. Collier; and the Medical Association of Alabama. In 1849, Miss Dix, who had taken up residence in the Governor's mansion, sent a memorial to the legislature stressing the need for a mental hospital "as a curative means" [K. Vickery, *A History of Mental Health in Alabama* 20 (1972)], and concluding with a moving appeal:

"Commence your work now; hasten, for no time should be lost; hasten to gather up and repair the deranged mechanism by which healthful action is imparted to disabled minds; hasten to restore those whose sole hope of deliverance from life-long miseries rests on your present appreciation of the calamity which has smitten them. So far as human agencies are sufficient, you are their Saviors or the Destroyers; from one of these positions, you cannot retire; from the responsibility of declaring for them here, in your halls of legislation, an intellectual life or death, you

⁹ The number of hospitals for the mentally ill in the U.S. grew sharply from 9 to 65 between 1825 and 1865. [N. Dain, *Concepts of Insanity in The United States* 55 (1964)].

cannot shield yourselves. Nothing can absolve you from a duty imperious above all others." Memorial of Dorothea Dix delivered to the 1849-1850 Alabama legislature, quoted in Vickery, *supra*, at 21.

Dr. Peter Bryce, the first superintendent of what is now Bryce Hospital, wrote of his institution as one "*organized expressly for the treatment of insanity.*" (Emphasis supplied). *Annual Report of the Superintendent of the Alabama Insane Hospital, Tuscaloosa, Alabama* 24 (1867). In a later report he wrote:

"As you are all aware, the Hospital is not a PRISON in any respect, nor so intended by its originators or founders . . . Iron bolts and chains and grated doors . . . are not to be tolerated in a hospital designed expressly for the treatment of a diseased nervous organism, without the sacrifice of all the advances made by science and civilization." *Annual Report* 10 (1878).

Dr. Bryce emphasized this point in focusing on the problems of overcrowding:

"... and the functions of the institution would have rapidly degenerated into those of a mere custodial establishment instead of a hospital, in fact as well as in name, for the treatment and relief of one of the most serious, at the same time one of the most tractable of all organic diseases." *Annual Report* 24 (1878).

This same commitment to a treatment philosophy is reflected in the defendants' filings in the district court:

"The mission of Bryce Hospital may be defined very briefly as 'to provide appropriate and adequate psychiatric treatment to patients who, from a medical standpoint, may be responsive to psychiatric treatment.'" Defendants' Report to the Court, June 10, 1971 at 5.

See also Stickney, *Philosophy and Goals of the Alabama Department of Mental Health* 7 (1970), amici's ex. 9, Hearing II. Unfortunately, this philosophy is not reflected in the practices of the state mental institutions.

C. Unconstitutional Conditions Of Confinement In
Alabama's Mental Institutions

1. Introduction

At the time that this action was initiated, there were approximately 5,000 inmates at Bryce, 1,600 inmates at Searcy, and 2,200 inmates at Partlow, almost all of whom were involuntarily committed. Alabama Law contemplates the commitment of harmless persons (45 Ala. Code § 205-06), and there is no evidence in the record that any of the plaintiffs are dangerous. The district court's Order of March 12, 1971 found that the Bryce population included between 1500 and 1600 geriatrics, approximately 1,000 mental retardates, and perhaps other non-mentally ill persons. 325 F.Supp. at 784. The court adopted defendants' own finding that "there is some apparent confusion about the primary mission and function of Bryce since certain non-psychotic geriatric patients and certain mental retardates and perhaps other non-mentally ill persons have been committed there for a variety of reasons." Proposed Findings of Fact and Conclusions of Law, filed February 5, 1971 at 4. According to the Associate Commissioner for Mental Retardation for the Alabama Department of Mental Health at least 300 Partlow inmates could be discharged immediately, and approximately 70% of the inmates at Partlow should never have been committed there in the first place. Testimony of Dr. Clopper, Hearing III at 412-13.

The district court found further that treatment at the state's mental institutions was inadequate. 325 F. Supp. at 784. Amici fully concur in the district court's holding that there are three essential preconditions to an

adequate and effective treatment program: "(1) a humane psychological and physical environment, (2) qualified staff in numbers sufficient to administer adequate treatment, and (3) individualized treatment plans." 334 F.Supp. at 1343. The largely uncontested evidence of record,¹⁰ adduced from written reports by defendants, depositions introduced into evidence by amici, and testimony of experts, indicated that none of these necessary requisites for adequate treatment existed in Alabama's mental institutions, conditions in all of which were essentially similar.¹¹

2. Defendants' Admissions Of Unconstitutional Conditions

The most comprehensive testimony on the conditions currently prevailing at Partlow was elicited from Dr. Philip Roos, the Executive Director for the National Association for Retarded Children. Dr. Roos inspected Partlow over a two-day period and testified as to his evaluation of the institution. According to Dr. Roos: ". . . the institution and its programs as now conceived are incapable of providing [treatment] of the residents." Hearing III at 309. Defendants subsequently adopted the testimony of Dr. Roos in its entirety. Testimony of Dr. Clopper, Hearing III at 411-422; 334 F. Supp. at 391, n. 8.

On February 22, 1972, defendants filed with the court a statement of position providing in relevant part that:

"Assuming that such a federal constitutional obligation exists . . . , defendants will not contest the

¹⁰ See pp. 17-34, *infra*.

¹¹ In their "Answer to Plaintiffs' Amendment" of August 4, 1971, dated September 2, 1971, defendants agreed that whatever standards the court would set in reference to Bryce Hospital would also apply at Searcy—the other Alabama institution for the mentally ill. For this reason, no factual evidence was presented concerning Searcy.

factual accuracy of an ultimate finding . . . that defendants have not met the constitutional obligation to provide adequate care at [Partlow], . . ."

When asked why Partlow was so substandard, Dr. Clopper, the Associate Commissioner for Mental Retardation of the Alabama Department of Mental Health replied:

"Because historically Partlow has been held as a stepchild in the State of Alabama, it does not receive the community, the public, or the legislative support necessary to implement programs that should have been implemented a long time ago." Hearing III at 411.

When asked whether in his own expert judgment he thought the physical environment of Partlow was adequate for the purposes of treating inmates, Dr. Clopper replied: "It is not." Hearing III at 411. When asked what was lacking at Partlow, Dr. Clopper replied, "We don't have the staff, we don't have the facilities nor do we have the financial resources." *Id.*

Focusing on Bryce Hospital, Dr. Folsom, the Deputy Commissioner for Hospitals of the Alabama Department of Mental Health took a similar position:

"I believe that out of this hearing and the ruling of this Court, it will make it clear to the people of Alabama that something has to be done in this area; and I think it is long overdue, of course." Hearing II at 405.

3. Defendants' Proven Failure To Improve Conditions

In 1967, pursuant to its standard setting and inspection program, the American Association on Mental Deficiency conducted an evaluation of the Partlow State School and Hospital. Dr. James Clements was a member of the evaluation team and co-author of its evaluation survey, "Final Report for Partlow State School and Hos-

pital, AAMD Institutional Evaluation Project (1967)." Hearing III, *Amici's* Exhibit No. 6 [Hereinafter cited as "Evaluation."] The evaluation team found Partlow's facilities grossly inadequate and submitted a detailed report to defendant Alabama Mental Health Board, detailing problems and urging prompt remedial action. According to the evaluation report, Partlow was 60% over-crowded with residents warehoused in "primitive living areas" receiving "very little individual attention . . . due to space and personnel limitations." Evaluation at 23. Beds were jammed together; plumbing was described as inadequate and antiquated; bath and toilet areas afforded little or no privacy; dirty linen was left on the ward creating a health hazard. Evaluation at 28-29.

According to the evaluation team, treatment programs were virtually non-existent due to an extreme shortage of professional staff. Evaluation at 18. Resident care workers were insufficient in number, and their annual turnover rate was 70%. Much of the direct care of residents and janitorial work was performed by unpaid inmates. The Evaluation included the report of a visit to a ward for severely retarded ambulatory young males where:

"Ground food was brought to the day room in a very large aluminum bowl along with nine metal plates and nine metal spoons. Nine working residents were sent in to feed these 54 young boys from this one bowl of food and nine plates and nine spoons. The feeding was accomplished in a total state of confusion. Since there were no accommodations to even sit down to eat, it was impossible to tell which residents had been fed and which had not been fed with this system." Evaluation at 11-12.

According to the evaluation team, Partlow had no statement of philosophy, program goals, or written pro-

cedures to guide staff members. It was virtually isolated from the community despite the fact that the evaluation team "sensed a readiness on the part of the community for even more interaction and interplay with the facility." The evaluation team noted:

"[The] lack of enthusiasm for change was reflected in this statement heard many times during the visit concerning new programs and ideas, 'We have been thinking about this for a long time.'" Evaluation at 63.

Defendants in their brief, quoting the *Burnham v. Department of Public Health*, Civ. No. 16385 (N.D. Ga. 1972) opinion, cautioned that judicial intervention might stifle "the need for creative and imaginative efforts of its concerned individual citizens." Governor's Brief, p. 3. Unfortunately, such individual creativity and imagination were lacking in this case. Despite the fact that the AAMD Evaluation Report had been available to the Mental Health Board for five years, the head of the evaluation team found upon his return to Partlow in 1972 that there had been virtually no action taken to correct the deplorable conditions of resident deprivation he had previously reported. Hearing III at 165.

4. *Inhumane Psychological And Physical Environment*

The underlying, threshold condition for successful treatment in a mental hospital is a humane environment in which treatment can be administered. *Wyatt v. Stickney*, 334 F.Supp. 1341, 1343 (M.D. Ala. 1971). Yet as the discussion below indicates, this basic prerequisite was lacking in the state's mental institutions.

Lack Of Privacy And Respect For Inmate Dignity

All parties agreed that an inmate's sense of his own dignity and privacy are necessary for effective treatment. Memorandum of Agreement of Plaintiffs, Defendants, and

Amici Curiae, filed February 2, 1972, paragraph 1.¹² But defendants' own consultants indicated that in most ward areas at Bryce there was little "which contributes to patient self-esteem, privacy, or a therapeutic environment":

"The wards are overcrowded, most frequently without even a minimum of privacy for the patients. For the most part there are no partitions between the stools in the bathroom and no individual furniture where patients could keep clothing. Many of the living areas are essentially large dormitories with 40 or 50 or 60 beds placed row on row (it impressed me as a depressing and dehumanizing environment, reminding me of graveyard lots where the patients are essentially living out their lives without the rights of privacy (or ownership))." Consultant Report of Dr. William Tarnower, (Exhibit X of Defendants' Report to the Court dated September 23, 1971) at 1. [Hereinafter cited as "Tarnower"]

Lack Of Safety

Every institution and especially one in which patients are involuntarily confined, should provide for the safety of its residents. Memo of Agreement I, paragraph 17. Yet crowding remained a dangerous problem often leading to serious accidents. Emergency Interim Order of March 2, 1972, at 1. Many residents slept on mattresses on the floor. Hearing III at 14, 148, and 285. Residents with open wounds and inadequately treated skin diseases were in immediate danger of infection because of the unsani-

¹² Two separate although very similar memoranda of agreement were filed in this case. The first (filed February 2, 1972) [hereinafter cited as Memo of Agreement I] pertained to standards for the operation of Bryce and Searcy Hospitals, and the second (filed February 28, 1972) [hereinafter cited as Memo of Agreement II] pertained to standards for the operation of Partlow. Because of the essential similarity of these two memoranda, most citations are simply to Memo of Agreement I.

tary conditions existing in the wards, including urine and feces on the floor. Hearing III at 15-16. There was evidence of insect infestation, including cockroaches in the kitchens and dining areas. Hearing III at 281-82; Consultation Report of Glenn Morris (Exhibit XI of Defendants' Report to the Court dated September 23, 1971) [Hereinafter cited as "Morris."] at 4-5.

Partlow officials had been notified about serious fire and safety violations by the State Fire Marshall in a letter dated August 10, 1971; but by February 1972 few of their recommendations had been implemented. Hearing III at 111-113.

"In visiting patient ward areas, the question was raised as to what would be done in case of fire or other emergency. The response by many indicated very little knowledge as to what to do other than call the supervisor. No fire evacuation plan, diagrams or routing directives were observed. Remarks of aides indicated that since the relocation of patients because of the unit system no plan had been provided them. While sprinkler systems were in evidence, most of the buildings visited were not fire resistant, most wards were locked and it is feared that a well started fire would be disastrous in patient areas. Morris at 6.

Malnutrition

Charlotte Smith, the Government's nutritional expert, testified that malnutrition could be a causal factor of inmate mental problems, and that adequate nutrition was an important element of treatment. She testified further that the average per patient dietary cost in Alabama's acute care hospitals was \$4.00. Hearing III at 221-22. At Bryce Hospital, the food distribution and preparation systems were unsanitary and "somewhat less than 50 cents per patient a day" was allocated for food. Morris at 4-5. As the United States commented

in its response to Defendants' Report of September 23, 1971, "Food, both in its delivery and its quality, in our judgment, is unacceptable and indeed comes closer to 'punishment' by starvation than 'nutrition.'"

Exploitive Patient Labor

Work performed by inmates should be therapy for them and not exploitation to operate and maintain the institution. Memo of Agreement I, paragraph 16. While supervised short periods of work can properly be part of an integrated treatment plan, where work at a particular hospital-maintaining task is for substantial periods of time the parties agreed that it must be compensated, both as a matter of therapy and as a matter of law. *Id.* However, the record indicates that approximately 500 working residents at Partlow were engaged in uncompensated labor, including janitorial duties, care of severely and profoundly retarded inmates, laundry and farm work. Hearing III at 276-277; Hearing III, *Amici's* Exhibit 2: Defendants' "List of Residents, Their Work, and Pay." According to Dr. Roos, there is "... no written policy protecting these resident workers," and "[m]any of them have been working in the same job for periods of twenty, thirty, and some in excess of forty years." Hearing III at 277. Residents prepared all the meals on some wards and worked as many as 70 hours per week. Hearing III at 141-42.

Misuse Of Solitary Confinement And Restraints

Expert testimony indicated that lack of programs at Alabama's institutions, and not mental impairment was the cause of much "crazy" behavior. Hearing III at 23-24. Defendants further acknowledged that overuse of restraint or isolation is an unacceptable substitute for active treatment programs; and that, to protect against abuse, inmates should be restrained or placed in isolation only on the written order of a qualified

professional, and for short periods of time. Memo of Agreement I, paragraph 7; Hearing III at 14-15; 168-69; 283-84; 287. Yet testimony established that aides frequently put inmates in seclusion or physical restraints as a mode of controlling their behavior and punishing them. Hearing III at 14-15.

Contrary to proper medical procedure, physicians' orders for the use of restraints and seclusion were issued without examining the resident, at the request of ward staff. These orders had no automatic expiration date and were not subject to periodic review. Hearing III at 250-51. One inmate who was difficult to control had been in constant seclusion for at least six years. Hearing III at 81-82, 167. An aide testified that he brought this inmate out of seclusion only when there was sufficient staff on duty to closely supervise him which had occurred infrequently in the past six years. Hearing III at 84. "Seclusion rooms" were cells with locked doors and barred windows, large enough for one bed and a coffee can, which served as a toilet. Hearing III at 14-15.

As a complement to isolation, residents were frequently placed in restraints—including straitjackets—by resident care workers to control their behavior. One resident had been regularly confined in a straitjacket for more than nine years. Hearing III at 305-9. Residents were frequently tied to their beds at night so that they would not get up and walk around. Hearing III at 141; 250-51. Testimony was presented concerning one inmate who was restrained in a straitjacket on a summer day, unable to ward off the flies swarming around her. Hearing III at 199-200; see photograph, Hearing III, United States Exhibit 1.

Brutality And Inmate Deaths

Because of inadequate supervision, inmates were in danger of assault by other inmates and by untrained



aides who often resorted to physical violence for purposes of control. Hearing III at 98-99; 259-62. Former aides testified that residents were beaten by staff aides with fists and broom handles. They were also, on occasion, choked by staff until they lost consciousness. Hearing III at 90-91.

Testimony established that four residents died due to understaffing, lack of supervision, and brutality. One had a garden hose inserted in his rectum for five minutes by a working inmate who was cleaning him; one died when a fellow inmate hosed him with scalding water; another died when soapy water was forced into his mouth; and the last died by a self-administered overdose of drugs which had been inadequately secured. Hearing III at 99, 101-2; 104; 126-27.

5. *Inadequate Staffing*

The professional staffing patterns which are described in the paragraphs immediately following fall far below the minimums which all parties conceded were a necessary prerequisite for adequate treatment. On the basis of the inadequate staffing patterns alone, the experts were able to conclude that adequate and effective treatment could not be delivered at Alabama's mental institutions.¹⁸

Defendants' chief witness on standards for adequate treatment of the mentally ill maintained that treatment could be delivered with the ratios of one psychiatrist,

¹⁸ See Deposition of Harold M. Visotsky, January 22, 1972 at 17, 18, 72; Deposition of Zwerling, January 24, 1972 at 14, 15; Deposition of Ignacy Goldberg, January 24, 1972, at 17; Deposition of Dr. Walter Fox, January 27, 1972, at 22; Testimony of Dr. Jack Ewalt, Hearing II at 19-20, 54; Testimony of Dr. Francis Tyce, Hearing II at 301, 302; Testimony of Dr. Donald Hammersley, Hearing II at 419-20; Testimony of Dr. Gunnar Dybwad, Hearing III at 21-22; Testimony of Dr. Peter S. Blouke, Hearing III at 117; Testimony of David Rosen, Hearing III at 138; Testimony of Dr. James Clements, Hearing III at 155; Testimony of Dr. Philip Roos, Hearing III at 309.

one graduate level psychologist, and one masters level social worker for every 125 inmates, and the district court ultimately adopted this recommendation.¹⁴ But at the time this suit was instituted there were ratios of only one medical doctor with some psychiatric training for 5,000 inmates, one Ph.D. psychologist for every 1,670 inmates, and one masters level social worker for every 2,500 inmates at Bryce Hospital. Hearing I at 18-21. A colloquy between Judge Johnson and Dr. James E. Morris, Jr., Assistant Superintendent at Bryce Hospital, indicated that even before the staffing cuts which precipitated this lawsuit, Bryce Hospital had been unable to deliver anything more than "the kind of custodial treatment expected in a jail" to most of its inmates. Hearing I at 38, 41.

While there was some disagreement between defendants and other participants as to minimum necessary staffing ratios for the mentally ill, there was complete consensus as to the necessary minimums for treatment of the mentally retarded. In their Memorandum of Agreement II, paragraph 41, the parties and amici agreed that adequate treatment could be delivered at Partlow with ratios of one masters level psychologist and one masters level social worker for every 60 inmates, and one physician for every 200 inmates. These ratios were subsequently approved by the chief witness of the United States. Hearing III at 310. Yet a joint stipulation of facts, admitted into evidence on February 29, 1972, indicated that at Partlow there were only one psychologist with masters level training or above for every 1,200 inmates; one masters level social worker for every 730 inmates and one physician for every 550 inmates. Of the four physicians at Partlow, two were not licensed to practice in Alabama.

¹⁴ Amici had recommended higher ratios—one psychiatrist, one psychologist, and one social worker for every 30-50 inmates.

A secondary effect of the Bryce staffing cuts brought out in testimony was that the hospital would lose its accreditation from the American Psychological Association and probably the National Association of Social Workers. The graduate departments of universities would thus be unable to send interns to Bryce for clinical experience, and Bryce Hospital would in turn lose this cost-free resource for securing subordinate staff. Hearing I at 296, 297, and 79, 80. Because of inadequate staffing, the institutions are also ineligible for federal funding under Medicare and Medicaid. 324 F.Supp. 784, n. 4.

A severe shortage of non-professional staff paralleled the inadequacies of professional staff described above. After a tour of Bryce, defendants' own consultants noted that:

"Aide staff is spread very thin, creating extreme stresses for individual aides, who at times must cover one or two or three wards, housing as many as 100 or 200 patients. Obviously, it is impossible under such circumstances to provide anything more than a cursory observation and the hope of avoiding disturbing incidents. An aide under these circumstances is hard pressed to meet even minimum patient needs." Tarnower at 4; see also Morris at 6.

The institutional staff was inadequate not only in sheer numbers but also in training. Morris at 2, 7; Tarnower at 9; Hearing III, Roos at 297. The shortage of adequately trained non-professional aides contributed to the lack of treatment of inmates, and even more fundamentally to an environment of actual physical danger. At the time of the Partlow hearing there were approximately 520 aides with 24-hour-a-day responsibilities for 2,190 inmates. Testimony of Dr. Blouke, Hearing III at 129-130. Inmates who presented disciplinary problems were placed in restraints or in seclusion

for long periods of time because there were not sufficient aides assigned to wards to supervise the inmates and control those with behavioral problems. Hearing III at 14, 15. This lack of supervision also contributed to inmate deaths. See p. 25, *supra*. This problem was exacerbated by the high turnover rate among aides. Testimony of Dr. Peter Blouke, Acting Superintendent of Partlow. Hearing III at 116.

Staffing deficiencies at Alabama's mental institutions also helped account for the unnecessary incarceration of numerous persons. 324 F.Supp. at 784. Defendants' Report to the court of September 23, 1971 (which summarized conditions at the Hospital as of August 31, 1971) indicated that a full six months after the March 12, 1971 Order, Bryce continued to harbor 1,800 "inappropriate patients." (p. 18). This was due in part to a lack of sufficient personnel to arrange for more appropriate alternatives to hospitalization. Defendants' own consultant observed:

"It is this treatment function—discharge at a point when hospitalization is untherapeutic rather than therapeutic—that requires further emphasis and expansion. Additional personnel to accomplish this task is needed. Unless these patients can be discharged, the staff will continue to falter under the heavy load of a chronic hospital population whose chronicity increases with each day of unnecessary hospitalization." Tarnower at 5.

Dr. Philip Roos testified that 50 percent of the population of Partlow had been institutionalized for ten or more years, and 274 of the residents had been institutionalized for more than thirty years. Hearing III at 278. The extreme harmfulness of this extended institutionalization is discussed at p. 31, n. 15, *infra*.

6. *Lack Of Individualized Treatment Plan And Program*

Another essential precondition for treatment is an individualized treatment plan and program for each inmate. 334 F.Supp. at 1343. The parties and amici in this case were in agreement that the treatment plan should be based upon a thorough physical and psychological examination of each inmate and should contain, *inter alia*, a statement of his specific problems and needs; a description of intermediate and long range treatment goals, with the projected timetable for their attainment; a specification of staff responsibility, and a description of proposed staff involvement with the inmate to attain these goals. Memo of Agreement I, paragraph 21. The parties and amici also agreed that the treatment plan must be continuously reviewed by a qualified professional responsible for supervising the implementation of the plan and that detailed patient records should be kept on the inmate's ward, and should contain such items as his medical history; his evaluation; a medication history and status including the signed orders of the prescribing physician; a detailed summary of each significant contact of the inmate with a qualified professional, and a signed order by a qualified professional for any physical restraints or isolation. Memo of Agreement I, paragraphs 24, 25. But testimony indicated that there were *no* treatment plans or programs in Alabama's institutions. As one expert stated:

"I did have an opportunity to talk in a rather relaxed way with the attendants on this unit. I had the feeling they had little understanding of any program goals for any of these residents . . . There was no indication of any evaluation of any program goals, of any regular review of the individual's progress. I found this to be generally the case on other units as well." Testimony of Dr. Roos, Hearing III at 282.

As another expert observed:

"There were people that were urinating, that required changes of clothes; people—some people in camisoles, some in the isolation rooms. There was no organized program, absolutely no organized program; it would be impossible with the staff that was on hand." Testimony of Mr. David Rosen, Hearing III at 140.

Care of the inmates is not now suited to the needs of particular individuals, but is at best "geared primarily to housekeeping functions—cleaning floors, cleaning beds, cleaning patients—and to a continuation of work assignments." Tarnower at 5. As still another expert summarized the situation:

"The situation which exists and obviously has existed in Partlow for a long time is one of storage, of persons. I am using that word because I would not use care, which involves—has a certain qualitative character, and I would not even use the word, 'custodial,' because custody, in my term, means safekeeping. And, as is visible to the visitor at the present time, employees at Partlow are not in a position to effect safekeeping, considering the number of people they have to take care of; so I would say it is a storage problem at the moment." Testimony of Dr. Gunnar Dybwad, Hearing III at 13.

Experts further reported that inmate records in Alabama's institutions contained virtually none of the information which the participants agreed was necessary; and they were written in such a way as to be incomprehensible to the aide level staff that had major prime responsibility for inmate care. Testimony of Dr. Clements, Hearing III at 166. Moreover, records were kept where they were not accessible to the direct care staff which particularly needed them. Testimony of Dr. Roos, Hearing III at 302. Dr. Dybwad testified that where drugs were issued for behavioral reasons, there were no follow-

up notations in inmates' records to indicate whether these drugs were effective. Contrary to accepted practice, physicians sometimes prescribed medication by telephone without examining the inmate. Hearing III at 166-67. Dr. Dybwad testified that he encountered one inmate who had been taking phenobarbital for years without any indication that the original prescription had ever been reviewed. Hearing III at 16, 17, 20. Dr. Clements testified that he found no formal record of complete physical examinations, which good medical practice would have required. Hearing III at 167.

7. Deterioration Of Inmates In The State Mental Institutions

Not only are inmates of Alabama's mental institutions deprived of treatment, they are deprived of even the most minimal stimulation and activity, with the result that their condition seriously deteriorates. Defendants' consultant characterized the patient population at Bryce as "apathetic, hopeless, sitting immobile, staring, sluggishly responsive if spoken to—showing little interest in their surrounding environment," and suggested that the symptoms of these patients may have developed as a result of prolonged hospitalization. Tarnower at 17. It is now generally recognized that *long-term* commitment will be destructive to the inmate. As Dr. Visotsky explained:

"when you keep a patient in a hospital too long, you damage his coping capacity to live in the outside world. You institutionalize him. You take away from him those skills we all need to live in a kind of stressful world." Visotsky at 25.¹⁵

¹⁵ See also Zwerling at 23, 24; Fox at 40-41; Pittmen, et al., "Family Therapy as an Alternative to Psychiatric Hospitalization," *Psychiatric Report No. 20, American Psychiatric Association* (February, 1966) at 188; Langsley, et al., "Follow-up Evaluation of Family Crisis Therapy," 39 *American Journal of Orthopsychiatry*

Testimony established that the inmates of Alabama's institutions should and could be moved out into more "normal" and less restrictive treatment programs in the community. See generally Testimony of Linda Glenn, Hearing III at 51-72; see also Hearing III at 278, Tarnower at 5.

But instead inmates were kept in the state mental institutions where their condition deteriorated. As David Rosen testified:

"I walked around and saw many and talked with a number of the residents at that facility—particularly, to give an example, to the people that were accompanying us; I wanted them to realize that these—these people could react, that they weren't going to just sit and rock; if they got a little attention, they would react; and I was able to elicit conversation, smiles, and some affection from a number of these severely and profound retarded residents. . . . The institutionalization, if an individual is kept beyond a certain period, certainly contributes to regression, to activities we would consider unacceptable, emotional disturbance, etcetera. By the way, physically, I was appalled at the condition of the residents of these facilities; not so much in regard to cleanliness as in regard to the fact that they were not getting exercise I would feel that even with the limited services that are available in Alabama, or at least as has been described to me, a large number of people with appropriate

(October, 1969), at 753, 759; Frazier & Carr, *Introduction to Psychopathology* (1964), p. 224; Linn, "State Hospital Environment and Rates of Patient Discharge," 23 *Archives of General Psychiatry* (October, 1970), at 1. And in their recent book, *Community Lives for the Mentally Ill—An Alternative to Institutional Care* (1969), Fairweather, et al., acknowledge the "negative effects" of the mental hospital (at 10). See also Penn, Sindberg & Roberts, "The Dilemma of Involuntary Commitment," *Mental Hygiene* (January, 1969), at 5.

supervision, could be independent contributors to our society." Hearing III at 142-43.

Dr. Gunnar Dybwad, also testified as to the profoundly dehumanizing effects of confinement of residents at Partlow:

"I think if you walk through Partlow, you can see it; you can see the effect—the people who begin to become involved in eccentric mannerisms, the rocking back and forth, peculiar behavior mechanisms, the people who sit in a semi-stupor in a place, without any activity, the people who slowly deteriorate and turn to the simple elements of human behavior. There was, for instance, a young woman coming out a dining room at the time when we were moving down the hallway, and she was unaided. In other words, she was not one of the profoundly retarded who were in constant need of supervision. Without any hesitation, she sat down and urinated on the floor in the open hallway without any attention to our being there. And in Boy's two, in the presence of the supervisor, several other people, young men, simply went in the corner and urinated. I can assure you that this kind of behavior is due to neglect and is not an outcome of the mental retardation, itself . . . In other words, it is a deterioration. I would further now add to this from my own observations, but not at Partlow that we have ample documentation in this country that *individuals who come to institutions and can walk stop walking, who come to institutions and can talk will stop talking, who come to institutions and can feed themselves will stop feeding themselves; in other words, in many other ways, a steady process of deterioration.*" Hearing III at 23-24. (Emphasis added).

The Testimony established that the inmates of Alabama's institutions should and could be moved out into more "normal" and less restrictive treatment programs in the

community. See generally Testimony of Linda Glenn, Hearing III at 51-72. Dr. Roos testified that he "saw massive evidence of deprivation—emotional, intellectual, social, and in some cases physical. Hearing III at 298. And Dr. Clements stated that "it [Partlow] is one of the worst examples of overall deprivation I have ever witnessed." Hearing III at 168.

ARGUMENT

I. RECENT CASES HAVE AFFIRMED THE JUDICIAL OBLIGATION OF SAFEGUARDING THE CONSTITUTIONAL RIGHTS OF INVOLUNTARY INMATES OF MENTAL INSTITUTIONS, INCLUDING THE RIGHT TO ADEQUATE TREATMENT.

Appellants, placing their reliance exclusively on the district court decision in *Burnham v. Department of Public Health*, Civ. No. 16385 (N.D. Ga. Aug. 4, 1972), have suggested that the treatment of involuntary inmates in mental institutions is an issue "beyond the pale of judicial definition and resolution." Governor's Brief, p. 3, quoting *Burnham*. The *Burnham* court seemed to believe that recognition of the constitutional rights of such inmates would place it in the forefront of the law. Slip opin. at 6. To the contrary, by dismissing the complaint of inmates in Georgia mental institutions with the statement that their claims did not involve any "federally-protected rights," the *Burnham* court stands in lonely isolation, set off from numerous decisions in the Supreme Court, the lower federal courts and the state courts, in which the constitutional rights of mentally impaired inmates and others involuntarily confined under analogous circumstances have been recognized. Indeed, this Court has recently affirmed, in another context, that "our constitutional duties require that the courts be ever vigilant to assure that the conditions of incarceration do not overstep the bounds of

federal constitutional limitations." *Campbell v. Beto*, 460 F.2d 765, 767-68 (5th Cir. 1972).

Amici will briefly review the decisions in the area, then, in the next section, set out the evidence and legal doctrine which establish that the inmates in the Alabama mental institutions are denied due process and equal protection of the laws and that they are subjected to cruel and unusual punishment.

A. The Supreme Court Has Recently Held That Courts Have A Duty To Review The "Nature And Duration" Of Confinement Of The Mentally Impaired Who Are Involuntarily Incarcerated.

In its last term the Supreme Court issued four decisions concerning the rights of the mentally impaired who are involuntarily incarcerated. *Jackson v. Indiana*, 406 U.S. 715 (1972); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972).¹⁶ In addition to its rulings in these cases, the Supreme Court observed that the rights of persons subjected to civil commitment had received remarkably little scrutiny in the past. *Jackson v. Indiana*, 406 U.S. at 737.

In *Jackson v. Indiana*, a unanimous Supreme Court held that the indefinite confinement in a state mental institution without treatment of a mental retardate committed as incompetent to stand trial violated the due process clause of the Fourteenth Amendment. The Court held:

"At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 738.

¹⁶ None of these cases were cited by appellants.

The Court found that the nature of petitioner's confinement—incarceration without suitable treatment—bore no reasonable relation to the purpose of confinement—restoration of petitioner to competency.

The due process clause, of course, does not apply only to persons found incompetent to stand trial. The Supreme Court also held that the same judicial scrutiny of the nature and duration of confinement is necessary in other situations involving involuntary confinement to the care of mental health professionals. In *McNeil v. Director, supra*, the Court held that the "nature and duration of commitment" for psychiatric observation must meet the same standard—a reasonable relation to the purpose of the commitment.

Inquiry into the nature of confinement necessitates factual investigation. In *Humphrey v. Cady, supra*, the Court considered a case in which the petitioner, who had been confined under a civil sex-offender act, claimed, among other things, that he was not receiving treatment in the sex-offender unit of a prison. The Court held that the petitioner had raised "substantial constitutional claims" and remanded the case to the district court for an inquiry into the factual basis of his claims. And, in *Murel v. Baltimore City Criminal Court, supra*, the Supreme Court granted certiorari in a case in which the petitioners alleged "that they [were] being denied a constitutional right to treatment" (407 U.S. at 356) in the Patuxent Institution, a psychiatric facility established by the State of Maryland to provide rehabilitative treatment for mentally impaired habitual criminals. The Court of Appeals for the Fourth Circuit had reviewed the factual record in the district court and found treatment to be adequate to meet constitutional challenge. *Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971). The Court subsequently dismissed its writ of certiorari with an opinion noting that relevant state stat-

utes concerning rights of the civilly committed were in the process of revision and the factual posture of the case had changed since the time of the grant of certiorari.¹⁷ See also *In Re Gault*, 387 U.S. 1, 22, n. 30 (1967).

These Supreme Court holdings are directly applicable to the instant case. The courts must consider whether the nature of plaintiffs' confinement bears a reasonable relationship to the purpose of confinement. The Supreme Court has established this principle in the case of persons whose proven criminal activity or involvement in the criminal process had led to their civil incarceration for involuntary treatment of mental disorders. *A fortiori*, due process requires the same judicial concern for the civilly committed who have engaged in no criminal conduct and are confined without adequate treatment.

It is clear from the record in this case that there is no reasonable, constitutionally permissible relationship between the humane and therapeutic purpose of civil commitment and the barren, hopeless conditions to which the inmates of Alabama mental institutions are abandoned. The *Burnham* decision, on which appellants rely, states that inquiry into these conditions is "beyond the pale." This flatly contradicts the Supreme Court holdings outlined above.

¹⁷ In *Donaldson v. O'Connor*, 400 U.S. 869 (1970), the United States Supreme Court denied certiorari where one of the grounds for the writ was that plaintiffs there had been constitutionally denied a right to treatment. The Court, in denying the petition, took the unusual step of stating that the case could be refiled in the United States District Court. When the case was refiled, the state made a motion to dismiss, urging a holding similar to the holding in *Burnham*. In an unreported decision, the federal district court denied the motion to dismiss and the case has been set for trial.

B. The Federal Courts And State Courts Have Recognized That The Mentally Impaired Who Are Involuntarily Confined Have A Right To Treatment.

Lower federal courts, with the exception of the district court in *Burnham*, have uniformly held that the mentally impaired who are involuntarily committed have a right to receive adequate treatment. In appropriate cases, these courts have held hearings and closely scrutinized the adequacy of treatment within mental institutions.

The decision of the Court of Appeals in *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966), was the seminal case in the right to treatment field.¹⁸ After noting that "[t]he purpose of involuntary hospitalization is treatment, not punishment," Judge Bazelon described confinement without treatment as "shocking." 373 F.2d at 455. The Court of Appeals ordered the case remanded to the district court for a hearing to determine whether petitioner was in fact receiving adequate treatment. *Rouse v. Cameron*, H.C. No. 287-65 (D.D.C. 1967). There was no intimation in the Court of Appeals decision that it was impossible to formulate "judicially ascertainable and manageable standards." *Burnham*, p. 14; Governor's Brief, p. 22.

There is little purpose in debating whether the Court of Appeals decision in *Rouse* was "a constitutional holding." One of the two judges who made up the majority, Judge Fahy, explicitly relied on constitutional guarantees, not on the District of Columbia statute. 387 F.2d 241, 246, n. 5. Chief Judge Bazelon also set out the

¹⁸ The existence of a right to treatment had been anticipated in earlier decisions. See *Darnell v. Cameron*, 348 F.2d 64, 68 (D.C. Cir. 1965); *Miller v. Overholser*, 206 F.2d 415, 418-19 (D.C. Cir. 1953); *Williams v. U.S.*, 250 F.2d 19, 25-26 (D.C. Cir. 1957); *Hough v. U.S.*, 271 F.2d 458, 462 (D.C. Cir. 1959); *Overholser v. Lynch*, 288 F.2d 388, 394 (D.C. Cir. 1961) (en banc), *rev'd.* on other grounds, 369 U.S. 705 (1962); *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring).

constitutional arguments for a right to treatment. 373 F.2d at 453. He interpreted a District of Columbia statute as affording the appellant a right to treatment, explicitly recognizing the constitutional objection if this statute were interpreted otherwise. 373 F.2d at 454, n. 18a. Clearly, then, this is a decision with "constitutional underpinnings." *Tippett v. Maryland*, 436 F.2d 1153, 1159, n. 1 (concurring opinion of Judge Sobeloff). The constitutional underpinnings of the *Rouse* holding have been recognized by numerous courts which, like the court below, have held that a constitutional right to treatment exists. *Martarella v. Kelley*, 71 Civ. 3159 (S.D.N.Y. Oct. 16, 1972); *State v. Bargo* (case No. CR 32784, Cir. Ct. for County of Wayne), Jan. 12, 1970, Slip opin., pp. 24-25; *Maatallah v. Warden, Nevada State Prison*, 470 P.2d 122 (Nev. 1970); *Nason v. Supt. of Bridge-water State Hospital*, 353 Mass. 604, 233 N.E.2d 908 (1968). See also *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071, 1087-88 (2nd Cir. 1969), cert. denied, 396 U.S. 847 (explicitly reading *Rouse* as finding "a constitutional right to treatment").¹⁹

The Court of Appeals for the Fourth Circuit has also had occasion to consider the constitutional rights of persons confined for involuntary psychiatric treatment. This consideration has involved the Patuxent Institu-

¹⁹ Commentators have also recognized the constitutional dimension of the *Rouse* decision. "Civil Restraint, Mental Illness, and the Right to Treatment," 77 Yale L.J. 87, 90-1 (1967); "The Nascent Right to Treatment," 53 Va.L.R. 1134, 1137 (1967); Goodman, "Right to Treatment: The Responsibility of the Courts," 57 Georgetown L.J. 680, 689-90 (1969). Chief Judge Bazelon has subsequently written:

"[W]hether the right to treatment is rooted in statutory provisions or in concepts of due process of law, equal protection, or cruel and unusual punishment, the duty that society assumes, to fulfill the promise of treatment employed to justify involuntary hospitalization, is clear." Bazelon, "Implementing the Right to Treatment," 36 U.Chi.L.Rev. 742, 749 (1969).

tion, a psychiatric facility in Maryland, in which mentally impaired habitual criminals are civilly confined for an indeterminate period for purposes of treatment. Lengthy hearings on the adequacy of treatment in Patuxent were held in state courts, *Dir. of Patuxent Institution v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966); *Murel v. Director*, 240 Md. 258, 213 A.2d 576 (1965), and then in the federal district court. *Sas v. Maryland*, 295 F.Supp. 389 (D.C. Md. 1969). The courts found that staffing was adequate in number and professional competence; that group therapy was available to all inmates; that follow-up work with the inmates was better than in most private hospitals; that the institution had established a halfway house for parole consultations and an outpatient clinic; that vocational rehabilitation facilities were excellent; that speech therapy programs had been instituted; and that the unit system was effectively functioning with adequate staff, including for each 90-patient unit, two psychiatrists, two psychologists, and two social workers.²⁰ *Sas v. Maryland*, 295 F.Supp. at 416-17. See also, *Director v. Daniels*, 243 Md. 16, 221 A.2d 397 (Ct. of App. Md. 1966).

The Patuxent litigation was considered by the Court of Appeals for the Fourth Circuit under the name *Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed sub nom. Murel v. Baltimore City Criminal Court*, *supra* (discussed at p. 36, *supra*). The Court of Appeals reviewed the district court's findings concerning adequate treatment and, stressing the high ratio of psychiatrists, psychologists and social workers to patients in the institution (436 F.2d at 1157, n. 16), sustained the district court's findings. Nonetheless, the court emphasized that it was not resolving for all time the question of whether the administration of the Institution was

²⁰ Compare these staffing ratios with those at Bryce and Partlow. See pp. 26-27, *supra*.

adequate to meet constitutional standards. 436 F.2d at 1158, n. 18. In his opinion concurring in this part of the court's decision, Judge Sobeloff, citing *Rouse*, emphasized that adequacy of treatment was one matter which would have to be reviewed in the future:

"One of the issues we should consider open for future evaluation is the adequacy of treatment at Patuxent. Our approval of the Maryland Defective Delinquent Act is grounded partly on the assumption that the state will continue to furnish Patuxent with sufficient funds, personnel and facilities to justify realistic hopes of rehabilitating its inmates." 436 F.2d at 1159.²¹

See also *Ricci v. Greenblatt*, Civ. No. 72-469F (E.D. Mass. 1972) (temporary restraining order granted upon showing that mentally retarded in institution did not receive adequate treatment).

In *U.S. ex rel. Schuster v. Herold*, *supra*, a case primarily focusing on procedural rights, the Court of Appeals for the Second Circuit noted that petitioner was receiving no treatment in a New York mental institution. The court cited the *Rouse* decision, a number of state decisions relating to the right to treatment, and the "growing number of scholars" who had urged recognition of the right to treatment. 410 F.2d at 1087-88. In light of these authorities, the court suggested that "the State may wish to reexamine the validity of its confinement" of petitioner without treatment.²² 410 F.2d at 1088.

²¹ See also *McCray v. Maryland*, Misc. Pet. 4363, Cir. Ct. Montgomery Cty., Nov. 11, 1971. In *McCray*, another case challenging conditions at the Patuxent Institution, the court entered a detailed decree prohibiting certain practices involving isolation of recalcitrant inmates and ordering modification of various practices in treatment areas.

²² The court did not resolve the issue definitively, however, leaving the petitioner to pursue it in the state courts.

The recent developments in this area are summed up in *Martarella v. Kelley*, 71 Civ. 3159, decided October 16, 1972 (S.D.N.Y.), in which the district court stated:

"There can be no doubt that the right to treatment, generally, for those held in non-criminal custody (whether based on due process, equal protection or the Eighth Amendment, or a combination of them) has by now been recognized by the Supreme Court, the lower federal courts and the courts of New York." Slip opin., p. 58.²³

C. The Courts Have Applied Constitutional Standards To Conditions Of Confinement In Other Institutional Contexts.

In recent years, there has been an increasing judicial concern with the conditions in all institutions in which citizens are involuntarily confined—prisons and juvenile detention facilities, for example, as well as institutions for the mentally impaired. The new philosophy was summed up by Judge (now Justice) Blackmun in *Jackson v. Bishop*, 404 F.2d 571, 577 (8th Cir. 1968):

"[T]he courts, including this one, have not hesitated to entertain petitions asserting violations of fundamental rights and, where indicated, to grant relief.

²³ The constitutional rights of the mentally impaired in mental institutions are not limited to the right to receive adequate treatment. In dealing with other issues, federal courts have found that other aspects of confinement must pass constitutional scrutiny. *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969) (right to least restrictive alternative within mental institution); *Jones v. Robinson*, 440 F.2d 249 (D.C. Cir. 1971) and *Williams v. Robinson*, 432 F.2d 637 (D.C. Cir. 1970) (procedural due process applies to decision to confine inmate in maximum security within mental institutions); *U.S. ex rel. Schuster v. Herold*, 440 F.2d 1334 (2nd Cir. 1971) (serious constitutional question raised by inadequate access to legal research materials in mental institution); *Winters v. Miller*, 446 F.2d 65 (2nd Cir. 1971) (forcing medication on Christian Science practitioner in mental institution violated First Amendment).

In *Glenn v. Ciccone*, which we have just cited, this court clearly indicated that a 'factual showing of cruel and unusual punishment in violation of the Eighth Amendment' would support interference by a federal court." 370 F.2d at 363.

See also the cases discussed in Section III, pp. 67-69, *infra*.

In the prison cases, for example, the courts have held that while conviction of a crime may justify deprivation of liberty, it does not strip the prison inmate of basic constitutional protections; and the courts have been willing to assure that such rights are respected. See, e.g., *Holt v. Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Newman v. Alabama*, Civ. No. 3501-N (M.D. Ala. Oct. 4, 1972); *Landman v. Royster*, 333 F.Supp. 621 (E.D. Va. 1971). In some cases judicial decrees have required substantial restructuring of state prison systems, but such system-wide impact has not deterred necessary judicial intervention to safeguard the constitutional rights of prisoners. As the court stated in *Holt v. Sarver*:

"Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionality does not depend upon what the Legislature may do, or upon what the Governor may do, or indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States." 309 F.Supp. at 385.

Similar developments can be traced in the juvenile field. Courts have held that juveniles must be treated in institutions in a fashion consistent with constitutional safeguards and with the rehabilitative purposes of the juvenile justice system. See *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967); *In Re Elmore*, 382 F.2d 125 (D.C.

Cir. 1967); *Martarella v. Kelley*, Civ. No. 71-3159 (S.D. N.Y. Oct. 16, 1972); *Stockton v. Alabama Industrial School for Negro Children*, Civ. No. 2834-N (M.D. Ala. July 23, 1971); *D.C. Family Rights Organization v. Thompson*, No. 71-1150-J (D.C. Super. Ct. Fam. Div. June 18, 1971), 1 Pov.L.Rep. 5843; *Nelson v. Heyne*, No. 72-S-98 (N.D. Ind. June 15, 1972); *In Re Harris*, 2 Crim.L.Rep. 2412 (Cir. Ct., Juv. Div., Cook Cty., Ill. 1967); Pyfer, "The Juvenile's Right to Receive Treatment," 6 Family L.Q. 279 (1972); Comment, 23 Ala.L. Rev. 642 (1971).

D. The Allegation That Treatment Is Not Provided To The Mentally Impaired Who Have Been Involuntarily Committed Presents A Justiciable Controversy.

Appellants have argued that plaintiffs' claims of constitutional violations do not present a "justiciable controversy." Governor's Brief, pp. 22-24. This argument amounts to a suggestion of judicial incompetence which must be summarily rejected. Briefly stated, appellants argue that "the requested relief does not 'provide such reasonably specific, judicially ascertainable and manageable standards as are required for a controversy to be justiciable.'" Governor's Brief, p. 22. In other words, vindication of plaintiffs' constitutional rights would be so difficult and complex that the courts should not entertain their complaint.²⁴ But the task is not so difficult. The district court in the instant case has already dealt with the matter effectively, and so have several other courts in similar cases. See pp. 38, 39-41, *supra*.

It is important, in this connection, to stress that agreement was reached among the parties on almost all

²⁴ Appellants cite no cases in which a court refused to enforce constitutional rights because of the difficulty of doing so. Appellants cite *Baker v. Carr*, 396 U.S. 186 (1962) and *Powell v. McCormack*, 395 U.S. 486 (1969), both cases in which the Court held that judicial definition and resolution of the controversies was possible.

of the minimum standards for adequate treatment ordered by the district court in this case, and that defendants joined in submitting these standards to the district court. These stipulated standards were supported and supplemented by testimony from numerous expert witnesses. See pp. 10-11, n. 7 *supra*. There was a striking degree of consensus among the experts, including defendants' own experts, as to the minimum standards for adequate treatment. The district court, with the expert assistance provided by the parties and amici, found it quite possible to develop "judicially ascertainable and manageable standards." Furthermore, the defendants have already been able to implement a large number of these standards. See Defendants' Report to the Court of October 10, 1972. Most significantly, even now on appeal, *the appellants do not challenge any of the standards of adequate treatment adopted by the district court*. It appears, then, that the effort to define standards was successful. The Court of Appeals in *Rouse* expressed the hope that a fruitful dialogue between lawyers and mental health professionals would develop and help to define the content of the right to treatment. 373 F.2d at 457. Precisely such a dialogue has taken place in this case.

Appellants have clouded the justiciability issue by suggesting that a court must choose among various psychotherapies in order to assure that constitutionally adequate treatment is provided. Governor's Brief, pp. 23-24. There is, however, no suggestion in the district court record—or, to the best of our knowledge, in other cases involving the treatment of the mentally impaired—that such an inquiry must be undertaken. Rather, the emphasis in the district court was on assuring the existence of those minimum conditions, which are a prerequisite to *any* kind of therapy—a humane physical and psychological environment, adequate staff, and individualized treatment plans. See *Tribby v. Cameron*, 379 F.2d 104 (D.C. Cir.

1967);²⁵ *Covington v. Harris*, 419 F.2d 617, 621 (D.C. Cir. 1969); Bazelon, "Symposium: The Right to Treatment, Introduction," 57 *Georgetown L.J.* 673 (1969). See also *Hamilton v. Love*, 328 F.Supp. 1182, 1196 (E.D. Ark. 1971); *Novak v. Beto*, 453 F.2d 661, 670 (5th Cir. 1971).

Appellants' argument that this is an improper class action because each inmate has unique treatment needs must also be rejected. Every inmate has a constitutional right to have his particular treatment needs assessed and a treatment plan adopted. But the particulars of each such plan are not involved in this suit. The undisputed evidence is that there are no treatment plans for *any* of the inmates. Hence, the failure of the state institutions to provide adequate treatment is properly treated on a class basis.²⁶

²⁵ The Court of Appeals in *Tribby v. Cameron*, *supra*, stated:

"We do not suggest that the court should or can decide what particular treatment this patient requires. The court's function here resembles ours when we review agency action. We do not decide whether the agency has made the best decision, but only make sure that it has made a permissible and reasonable decision in view of the relevant information and within a broad range of discretion." 379 F.2d at 105.

²⁶ The court in *Martarella v. Kelley*, Civ. No. 71-3159 (S.D.N.Y., Oct. 16, 1972), in holding that the case was properly brought as a class action, wrote:

"Plaintiffs do not challenge the power of the Family Court to determine where and whether each of them should be remanded. What they attack as unconstitutional is their detention in secure custody without, as they claim, treatment, under conditions amounting to cruel and unusual punishment and in the same facilities as juvenile delinquents. These claims are obviously common to the named plaintiffs and to all PINS [Persons in Need of Supervision] housed at the centers." Slip opin., p. 46.

II. BY VIRTUE OF THEIR CONFINEMENT WITHOUT TREATMENT AND OF THEIR CONFINEMENT UNDER CONDITIONS OF EXTREME DEPRIVATION, PLAINTIFFS HAVE BEEN DEPRIVED OF LIBERTY WITHOUT DUE PROCESS, SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT, AND DENIED THE EQUAL PROTECTION OF THE LAWS.

Before discussing in detail the constitutional provisions which plaintiffs contend are violated by their confinement in the state mental institutions, amici will briefly address themselves to the anomolous group of inmates in the state mental institutions who do not suffer from mental illness or mental retardation. The district court found, on the basis of uncontroverted testimony, that many inmates of the state institutions do not suffer from mental illness or require psychiatric care. 325 F.Supp. at 784. As defendants acknowledged, these people came to the institutions because the institutions have served as "alms houses" and "as a 'catch-all' facility for the elderly, the poor, criminals, vagrants, and assorted harmless indigent persons." Defendants' Report to the Court of June 10, 1971, p. 2, and Exhibit IV-A to that report. See *supra*, p. 16.

There is no colorable legal authority for confining such people. The district court found that they were improperly confined and entered an order requiring that appropriate services and assistance be provided to ease their return to the community and help make up for the damage done to them by incarceration.²⁷ Continued con-

²⁷ See Appendix A, ¶ 34, Order of April 13, 1972 (Bryce Hospital and Searcy Hospital); and Appendix A, ¶ 47, Order of April 13, 1972 (Partlow State School and Hospital). Defendants agreed, and the district court ordered, that adequate transitional treatment for persons released after a period of involuntary confinement is a necessary element in an adequate treatment program. 344 F. Supp. at 386, 407.

finement cannot be squared with the statutes of Alabama or the Constitution.

A. Plaintiffs' Incarceration Deprives Them Of Liberty Without Due Process.

Civil commitment of the mentally impaired deprives them of their personal liberty, an "interest of transcending value" [*Speiser v. Randall*, 357 U.S. 513, 525 (1958)], on which other constitutionally protected rights depend. Civil commitment is one of those exceptional processes by which the government can incarcerate a person who has committed no crime, without the panoply of safeguards which surround the criminal defendant. This extraordinary process, with its massive interference in the life of innocent citizens, must be closely scrutinized by the courts. *Covington v. Harris*, 419 F.2d 617, 623 (1969); cf. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). The due process clause of the Fourteenth Amendment is the starting point for such scrutiny.

In its last term, the Supreme Court dealt with the due process yardstick by which involuntary confinement of the mentally impaired must be measured. In *Jackson v. Indiana*, *supra*, a deaf-mute retardate was found incompetent to stand trial and, like plaintiffs in this case, confined to a mental institution where he was not provided treatment suitable to his mental impairment or calculated to lead to release. The Court held that his confinement for a period of three and one-half years without treatment violated his right to due process of law. The language of the unanimous Court, speaking through Mr. Justice Blackmun, is directly relevant to this case:

"At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 738.

See also *McNeil v. Director*, *supra*.

Under the *Jackson* decision, the due process clause imposes substantive requirements on the nature of confinement; there must be a "reasonable relation" between the nature of confinement and its purpose. The Alabama civil commitment statutes are humane statutes intended to assure adequate treatment for the mentally impaired. See pp. 13-16, *supra*. In light of the lack of treatment in the state mental institutions and the treatment purpose of the statutes, the district court, in effect, concluded that the nature of commitment bore no reasonable relation to the purpose for which the individual is committed. The Court held that such confinement without treatment "violates the very fundamentals of due process." 325 F.Supp. at 784.

Not only is the purpose of the Alabama civil commitment procedure to assure treatment, but treatment is a necessary purpose for any constitutionally acceptable statute for the civil commitment of the mentally impaired. The district court stated:

"Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely for no convicted offense.' *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960)." 325 F.Supp. at 784.

As a general matter, an individual can be deprived of his liberty only if (a) he has committed an act previously described as a crime, and (b) he has the opportunity provided by a criminal trial to contest the allegations made against him. See *Powell v. Texas*, 392 U.S. 514, 533 (1968), 392 U.S. at 542-43 (concurring opinion, Black, J.). In civil commitment cases, both of these traditional safeguards are removed. The constitutionally necessary *quid pro quo* is the assurance that treatment will be provided to the civilly committed person. See *Nason v. Bridgewater*, 233 N.E.2d 908 (Mass.

1968); cf. *Robinson v. California*, 370 U.S. 660 (1962); *Commonwealth v. Page*, 159 N.E. 2d 82 (Mass. 1959). In *Martarella v. Kelley*, 71 Civ. 3159, dec. Oct. 16, 1972 (S.D.N.Y.), the district court held that civil incarceration of non-delinquent children under primitive conditions without rehabilitative treatment violates due process:

"[E]ffective treatment must be the quid pro quo for society's right to exercise its parens patriae controls. Whether specifically recognized by statutory enactment or implicitly derived from the constitutional requirements of due process, the right to treatment exists." Slip opin., p. 63.²⁸

What the court held in *Martarella* applies with equal force to the civilly committed inmates in plaintiff class. The concept of fundamental fairness which is at the root of due process forbids the denial of such treatment as is appropriate to the inmate's condition.²⁹

²⁸ See also *Anonymous v. Fish*, 20 App.Div.2d 395 (1st Dept. 1969) (non-delinquent children entitled to rehabilitative treatment); *In Re Ilone*, 64 Misc. 878, 316 N.Y.S. 356 (1970) (detained child entitled to psychiatric care or release).

²⁹ The opinion of the Court in *Jackson v. Indiana*, *supra*, also states that due process is violated if there is not a "reasonable relation" between the *duration* of confinement and its purpose. The record in this case establishes that no such "reasonable relation" exists. Inmates are detained in the state mental institutions long after any treatment opportunities have been exhausted and custodial warehousing is the only possible purpose of continued confinement.

Many of the mentally ill inmates in the state mental hospitals have been incarcerated for ten or more years. Yet the uncontradicted testimony indicates that involuntary treatment of the mentally ill, if effective at all, is effective only during the first few months of involuntary confinement. Indeed, after approximately one year of confinement, institutionalization itself becomes a *cause for mental deterioration*. Deposition of Dr. Israel Zwerling, Jan. 24, 1972, pp. 23-24; deposition of Dr. Harold Visotsky, Jan. 22, 1972, pp. 24-25; deposition of Dr. Walter Fox, Jan. 27, 1972, pp. 37-38; Hearing II, testimony of Dr. Francis Tyce, pp. 310-11. See Katz, "The Right

In the district court, defendants acknowledged that civil commitment of the mentally impaired necessitated adequate treatment. Indeed, before the court had ruled on the question, defendants submitted the following conclusion, which the court adopted verbatim:

"The patients at Bryce Hospital, for the most part, were involuntarily committed through non-criminal procedures and without the constitutional protections of criminal proceedings. *The patients so committed, therefore, unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.* Rouse v. Cameron, 373 F.2d 451; Covington v. Harris, 419 F.2d 617." Defendants' Proposed Findings of Fact and Conclusions of Law, filed February 5, 1971, p. 2. (Emphasis supplied.)

But in this Court, appellants have changed their position and adopted a new theory: It is preferable if treatment is given, but only "if science and the State's resources permit. . . ." Governor's Brief, p. 26. The appellant Board embellishes upon this theory by asserting that the "primary" purpose of civil commitment "is avoidance of the injury which they [the civilly committed] might inflict upon themselves or others if they are not confined." Brief of Appellant Mental Health Board, p. 11.

There are two problems with this newly-minted rationalization for confinement without treatment:

1. In Alabama, a person can be civilly committed without any showing of dangerousness—indeed, commitment of people who are "harmless" is expressly contemplated.

to Treatment—An Enchanting Fiction," 36 U.Chi.L.Rev. 755 (1969). See pp. 31-34, *supra*.

In light of the uncontradicted evidence that long incarceration is inconsistent with therapeutic objectives, the unduly long confinement suffered by members of plaintiff class is a deprivation of liberty without due process.

45 Ala. Code §§ 205-06 (1969). It can hardly be argued that the "primary" purpose of such a statute is "avoidance of injury." Moreover, there is no evidence in the record that members of plaintiff class are dangerous to themselves or to others. The Governor's brief candidly admits that many people are committed because they are a burden to their families. Governor's Brief, p. 27.³⁰

2. Even if only "dangerous" mentally impaired people were civilly committable in Alabama, treatment would still be a prerequisite to a constitutionally acceptable commitment scheme. Contrary to appellants' suggestion, merely identifying another characteristic that is shared by mentally impaired people who are committed—i.e., dangerousness—does not free the state from the obligation to provide treatment suitable to their mental impairment.

This point was made in *Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971). In that case, the court considered the constitutionality of Maryland's program for civilly committing and providing psychiatric treatment to mentally impaired criminals. Only dangerous habitual criminals were to be committed under the statute, and procedural safeguards were much tighter than under Alabama's civil commitment laws. The Court of Appeals upheld the constitutionality of the program, but only so long as adequate treatment was assured. 436 F.2d at 1157, 1159. Indeed, lengthy hearings were held in federal district court and in the state courts to assure that treatment was adequate. The Court of Appeals indicated that continuing review of adequacy of treatment would be necessary to assure that the act was constitutional as

³⁰ The question can be raised whether a statute like the Alabama statute, which provides for the involuntary incarceration of "harmless" people, is unconstitutional, whether or not treatment is provided. And the vast difficulties of predicting dangerousness, for the mentally impaired or anyone else, counsels extreme caution in relying on the dangerousness concept.

applied. In *Kent v. United States*, 401 F.2d 408, 411-12 (D.C. Cir. 1968), the Court of Appeals for the District of Columbia Circuit noted that the treatment requirement was not to be waived in the case of antisocial juveniles:

"*Parens patriae* requires that the juvenile court do what is best for the child's care and rehabilitation so long as this disposition provides adequate protection for society.

* * * *

"But it is clear that society can be protected without departing from civilized standards for the prompt and adequate care of disturbed children."

See also *Inmates of the Boys Training School v. Affleck*, Civ. No. 71-4529, pp. 27-28 (D.R.I., July 28, 1972) (due process requires that rehabilitative services be assured to institutionalized juveniles, including delinquents); *Commonwealth v. Page*, 159 N.E.2d 82 (1959 Supreme Judicial Court of Massachusetts) (civil commitment of sex offenders constitutionally permissible only if adequate rehabilitative treatment is provided—"it is necessary that the remedial aspect of confinement thereunder have foundation in fact." 159 N.E.2d at 85).

The courts have, then, held that the assurance of adequate treatment is the necessary justification for the civil commitment even of persons who have demonstrated their dangerousness by past criminal and antisocial conduct. *A fortiori*, the inadequate treatment afforded to the inmates of state mental institutions who have never been found to have committed criminal acts undermines the constitutionality of their continued detention. Such detention violates due process if treatment is not provided.³¹

³¹ The Board claims in its brief to have found "the philosophical root of the district court's error" (Board's Brief, p. 11) in the court's assertion that treatment "is the only justification, from a

Needless to say, the due process issue cannot even be addressed by a court if it fails to undertake an inquiry into the "nature" of the confinement of persons who are confined because of their mental impairment. The district court in *Burnham* erred in dismissing the petitioners' complaint and refusing even to take this threshold step. Petitioners in that case, inmates of the state's mental institutions, had alleged that they were not receiving adequate treatment, and specifically that they were denied a humane psychological and physical environment, that staff was insufficient to provide adequate treatment, and that there were no individualized treatment plans for the members of the alleged class. See Complaint, p. 4, para. 2. On the basis of this allegation, under the *Jackson* decision, the district court had an obligation to hold a hearing. See also *Haines v. Kerner*, 404 U.S. 519 (1972) (bare allegation of onerous penal conditions is sufficient to require a hearing); *Beard v. Lee*, 396 F.2d 749, 751 (5th Cir. 1968) (allegation of cruel and unusual punishment by prisoner is sufficient to require hearing); *Cruz v. Beto*, 405 U.S. 319 (1972); *Woolsey v. Beto*, 450 F.2d 321 (5th Cir. 1971); *McNeil v. Director*, *supra*; *Humphrey v. Cady*, *supra*.

constitutional standpoint," for civil commitment of the mentally impaired. See 325 F. Supp. 781, 784 (M.D. Ala. 1971). But it is the appellant's error, not Judge Johnson's. Treatment is the *sine qua non* of a constitutionally acceptable statute for the civil commitment of the mentally impaired. That does not mean that the need for treatment is necessarily the only criterion for the decision whether to commit. Many statutes, like the Georgia statute, make the prediction of dangerousness relevant as well. See 88 Ga. Code § 507.1. But that additional factor does not relieve the state of the constitutional duty of providing treatment to the mentally impaired person who is civilly committed.

B. Plaintiffs Are Subjected To Cruel And Unusual Punishment In Violation Of The Eighth And Fourteenth Amendments.

The undisputed evidence dramatically illustrates both a lack of treatment and the stark conditions of deprivation under which plaintiffs are involuntarily confined. Amici contend that such incarceration constitutes cruel and unusual punishment in violation of the guarantee of the Eighth Amendment, made applicable to the states by the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666 (1962).

The nature of confinement in the state mental institutions must be measured against the Eighth Amendment proscription of cruel and unusual punishment, notwithstanding the fact that the plaintiffs committed no crime and are not confined for any punitive purpose. Rather, their confinement reflects a humanitarian intention to assure them adequate treatment for their mental impairment. However, the fact remains that "any deprivation of liberty, incarceration, or physical detention is, in reality, a form of punishment," *Hamilton v. Love*, 328 F.Supp. 1182, 1193 (E.D.Ark. 1971). Hence, as the Court of Appeals for the First Circuit has recently held, the nature of confinement of the mentally impaired must be reviewed by the courts under the Eighth Amendment standard. *Rozecki v. Gaughan*, 459 F.2d 6 (1st Cir. 1972). See also, *Cross v. Harris*, 418 F.2d 1095, 1101 (D.C. Cir. 1969) ("Incarceration may not seem 'punishment' to the jailors, but it is punishment to the jailed."); *United States ex rel. von Wolfersdorf v. Johnston*, 317 F.Supp. 66 (S.D.N.Y. 1970); *Inmates of the Boys Training School v. Affleck*, Civ. No. 4529 (D.R.I., July 28, 1972).³²

³² See *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071, 1090-91 (2nd Cir. 1969) (detailed comparison showing conditions in Massachusetts mental institution more restrictive than prison).

[Footnote continued on page 56]

The Supreme Court has stated:

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

Amici submit that standards in this country have already evolved well beyond a willingness to tolerate the incarceration of the mentally impaired under the conditions shown to exist in the Alabama mental institutions and that such standards have been incorporated in judicial decisions under the Eighth Amendment.

The conditions in the Alabama mental institutions—the physical deprivation, the lack of basic sanitation, the overcrowding, the lack of physical exercise, the inadequate diet, the unchecked violence of inmates against each other and of employees against inmates, the lack of adequate medical care and psychiatric care, the abuse of solitary confinement and restraint—constitute cruel and unusual punishment. Indeed, the conditions bear a close resemblance to conditions which have been held to be unconstitutional in cases involving convicted criminals and persons accused of crime. *Haines v. Kerner*, 404 U.S. 519 (1972); *Wright v. McMann*, 387 F.2d 519 (2nd Cir. 1967); *Hancock v. Avery*, 301 F.Supp. 786 (M.D. Tenn. 1969); *Jones v. Wittenberg*, 323 F. Supp. 93 (N.D.

²²[Continued]

In *Landman v. Royster*, 333 F. Supp. 621, 646 (E.D. Va. 1971), the district court found violations of the cruel and unusual punishment prohibition in state penal institutions, without finding it necessary to focus on whether particular conditions in the institution were deliberately imposed with punitive intent.

What is more, the record clearly establishes that there is no such thing as humane warehousing. Long-term confinement in a mental institution without treatment necessarily causes the mental condition of inmates to deteriorate. See discussion, *supra*, pp. 31-34.

Ohio 1971). *A fortiori*, these conditions subject the plaintiffs in this case to cruel and unusual punishment.

In *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971), this Court considered the application of the cruel and unusual punishment clause to solitary confinement practices in the state prisons of Texas. There was disagreement on the Court about the permissibility of such practices under the cruel and unusual punishment clause. The majority, in sustaining the Texas practices against constitutional challenge, stressed the fact that these were extreme disciplinary procedures invoked as a last resort in handling the most recalcitrant criminals. 453 F.2d at 671. See also opinion of Judge Coleman, concurring in the denial of rehearing *en banc*, No. 31116, 12-16 (5th Cir., Mar. 8, 1972).

The *Novak* case is particularly striking in the present context because the prison solitary confinement is similar to the solitary confinement conditions to which mentally impaired inmates at the state mental institutions are subjected. See pp. 23-24, *supra*. That innocent, mentally-impaired inmates can be subjected to such conditions does not present a close question under the cruel and unusual punishment provisions. Conditions which may be marginally acceptable for incorrigible prisoners are wholly unacceptable for the mentally impaired.

After noting the adverse consequences of solitary confinement on rehabilitation, Judge Tuttle observed:

"One does not have to be a trained psychologist to conclude that such treatment intended to 'break the spirit' of an unruly inmate will, if successful, destroy all except the very strongest personality." 453 F.2d at 685 (dissenting opin.).

What can be the impact on a mentally impaired person of being locked in solitary confinement for six years? Testimony of David L. Robertson, Hearing III, at 81-82.

But the cruel and unusual punishment prohibition is not limited to physical torture or barbaric mistreatment; judicial interpretation has broadened the concept. Imprisonment of a narcotics addict for ninety days without treatment has, for example, been held to constitute cruel and unusual punishment. *Robinson v. California, supra. Trop v. Dulles, supra*, at 101 ("There may be involved no physical mistreatment . . . [but] [t]here is instead the total destruction of the individual's status in organized society").

Incarceration of members of plaintiff class without adequate treatment violates the Eighth Amendment even if the barbaric conditions shown in the district court were not present. For prisoners, humane incarceration without rehabilitation may be constitutionally sufficient.³⁸ But the failure to provide treatment to mentally impaired persons who have been involuntarily committed is, in itself, a violation of the cruel and unusual punishment clause. People who are involuntarily committed in Alabama suffer from a mental impairment which requires the specialized treatment that psychiatrists, psychologists and other mental health professionals can provide. Confinement without such treatment is indistinguishable from penal institution. See cases cited pp. 38-39, *supra*; *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960) (concurring opinion).

The Supreme Court held in *Robinson v. California*, 370 U.S. 660 (1962) that punishment of addicts for their status—drug addiction—constitutes cruel and unusual punishment. Drug addiction, the Court reasoned, is an illness, involuntarily contracted, and punishment for an illness is unconstitutional. In explaining the con-

³⁸ In *Holt v. Sarver*, the district court noted the lack of rehabilitation services as a constitutional factor, but did not rule that they were necessary. 304 F. Supp. at 379. Cf. *Hamilton v. Love, supra*; *Novak v. Beto*, 453 F.2d 661, 685 (dissenting opinion).

stitutional proscription, the Court analogized the status of addiction to mental illness. In contrast, confinement for "compulsory treatment" would not violate the Eighth Amendment:

"It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Robinson v. California, supra*, at 666.

Moreover, the Supreme Court has cautioned against evasion of the Eighth Amendment standard by the adoption of sham treatment programs—"the hanging of a new sign reading 'hospital' over one wing of the jailhouse." *Powell v. Texas*, 392 U.S. 514, 529 (1968). See also *Easter v. District of Columbia*, 361 F.2d 50, 55 (D.C. Cir. 1966); *Driver v. Hinnant*, 356 F.2d 761, 765 (4th Cir. 1966) (incarceration of chronic alcoholic for status violates cruel and unusual punishment but detention for treatment and rehabilitation is permissible). The critical issue for Eighth Amendment purposes is whether treatment is in fact provided.³⁴

³⁴ In recent cases, the courts have held that the failure to provide adequate medical care to prisoners constitutes cruel and unusual punishment. *Newman v. State of Alabama*, Civ. No. 3501-N (M.D. Ala., Oct. 4, 1972); *Ramsey v. Ciccone*, 310 F. Supp. 600 (W.D. Mo. 1970); *Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972); *Schack v. State of Florida*, 391 F.2d 593 (5th Cir. 1968). The district court in *Newman* explicitly held that constitutionally required treatment includes psychiatric care for mentally disturbed prisoners. See *Inmates v. Atleck, supra*, at 54 (psychiatric services must be avail-

The Eighth Amendment requires us to confront some of the basic values of our society. Judge Tuttle's words, written about the treatment of prisoners, apply equally in this case:

"[H]ow we treat these particular individuals determines, to a large extent, the moral fibre of our society as a whole and if we trespass beyond the bounds of decency, such excesses become an affront to the sensibility of each of us." *Novak v. Beto*, 453 F.2d 661, 676 (5th Cir. 1971) (Tuttle, J., concurring in part, dissenting in part).

able in juvenile detention institutions); *Martarella v. Kelley*, *supra*, Civ. No. 71-3159 (S.D.N.Y. Oct. 16, 1972). Mentally impaired persons who are confined because of an illness cannot have a lesser right to treatment than prisoners. Moreover, since they have been committed specifically for their mental illness, treating all diseases except that one is absurd. This would be exactly like civilly committing a narcotics addict for treatment and then providing him with treatment for everything except his narcotics addiction.

The alternative prayer for relief suggested by the Governor seems particularly ironic. This prayer recognizes that:

"[T]he United States Constitution [requires the states] to adequately provide for the physical and medical needs of civilly-committed patients in state mental institutions, including a safe habitation, a nutritious diet, sufficient clothing, competent ordinary medical attention, and a humane supervision." [Brief of Governor, p. 44].

In other words, the state recognizes its constitutional obligation to provide all the elements of humane custody and adequate medical care, *except* treatment for the mental impairment which justifies confinement.

This prayer for relief submitted by the Governor is, of course, wholly inconsistent with the arguments presented in the body of his brief, all of which contend that there are no "federally protected rights" involved in this case whatsoever. Amici submit that the concept of humane warehousing of the mentally impaired implied in the Governor's alternative prayer for relief would not meet constitutional standards.

C. Plaintiffs' Confinement Deprives Them Of Equal Protection Of The Laws In Violation Of The Fourteenth Amendment.

1. *Where A Person's Fundamental Rights Are Affected By A Classification, Equal Protection Requires That The Classification Be Subject To Rigid Scrutiny And Justified By A Compelling State Interest.*

Equal protection requires scrutiny of the standards by which persons are classified by law. The guarantee insures that a minimal standard of equity and reasonableness constrains the process by which government regulation allocates burdens and benefits. *Faruki v. Rogers*, Civ. Action No. 175-72 (D.D.C., Oct. 1972) (three-judge court). Where fundamental rights of one class are affected, the courts will scrutinize such classification closely. In such cases the classification must be "measured by a strict equal protection test," and the government has the burden of showing "a substantial and compelling reason" for the classification in question. See *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972). See also *Developments in Law—Equal Protection*, 82 Harv.L.Rev. 1065 (1969).

Classification in the instant case affects the most fundamental rights of the persons civilly committed. The right of personal liberty is "an interest of transcending value." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). See *Williams v. Illinois*, 399 U.S. 235, 263 (1970) (Harlan, J., concurring); Chambers, "Alternatives to Civil Commitment of the Mentally Ill—Practical Guides and Constitutional Imperatives," 70 Mich.L.Rev. 1107, 1155-1168 (1972). Moreover, denial of the right to liberty necessarily infringes on other fundamental rights, including the right to travel and the right of free association.³⁵

³⁵ The Supreme Court has placed great emphasis on the right to travel and the right to free association. "Freedom of movement,"

The adverse impact of civil commitment on these fundamental rights was forcefully stated by Professor David Chambers:

"Civil commitment does not merely penalize movement, as do welfare residency requirements, or somewhat curtail it, as do passport limitations. It eradicates it altogether. In the same manner, freedom of association—the right of 'the people to gather in public places for social or political purposes,' their right to associate with people of their own choice, protected under the first amendment—is drastically circumscribed. Suddenly, the sphere within which the ill person may travel or associate shrinks from the globe, or the state, or the city down to a day room of forty, or sixty, or two hundred others whom he did not choose to know.

* * *

"And that is not the end of the commitment's curtailment of an ill person's liberties. His rights peaceably to assemble, to communicate and receive communications from others, to exercise his religious belief through ceremonies of his choice, and to enjoy his privacy in the company of his spouse, or even someone not his spouse, are all but totally ended." *Id.* at 1158-59, 61. [footnotes omitted]

Since the classification of plaintiffs as mentally impaired and civilly committable drastically impinges on fundamental rights, the state's compelling interest in such classification must be given the closest scrutiny.

the Court has found, "is basic to our scheme of values." *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163-64 (1972) (freedom to wander and stroll "have been in part responsible for giving our people the feeling of independence and self confidence"). See Chambers, "Alternatives to Civil Commitment of the Mentally Ill—Practical Guides and Constitutional Imperatives," 70 Mich.L.Rev. 1107, 1159 (1972). Similarly, the Court has protected the right to free association. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

2. *Since The Classification Of Persons Who Are Civilly Committed Is Based On Their Need For Treatment, Confinement Of Plaintiffs Without Treatment Deprives Them Of Equal Protection Of The Laws.*

Under the Alabama statutes, a person may be incarcerated in a state mental institution if, for example, he is "sufficiently deficient or defective mentally to require that for his own or others' welfare, he be moved to the insane hospital for restraint, care and treatment." 45 Ala. Code § 205.³⁶ The basis for the classification of persons to be committed to the state mental institutions and the only characteristic which sets the members of plaintiff class apart from the rest of Alabama's population is the fact that each one of them has been found to suffer from a degree of mental impairment which requires that special treatment be provided to him. Alabama has no general policy of providing involuntary "restraint, care, and treatment" to its citizens who are not mentally impaired, whether or not such restraint, care, and treatment would be for their "own or others' welfare."

Mental impairment is a constitutionally permissible basis for a classification which affects fundamental rights only if the state provides persons in this class with suitable treatment to alleviate their mental condition and permit them to function more effectively and return to the community. It is the provision of such treatment which, if it existed, would save this classification from challenge under the equal protection clause.

As the Supreme Court recently indicated, courts must scrutinize classification systems to assure that the factual premises which allegedly justify divergent treatment of

³⁶ This does not necessarily mean that he must be found to be "dangerous." Indeed, the statutes provide for the commitment of "harmless" people. See 45 Ala. Code §§ 205-06.

different classes of citizens in fact exist. In *Jackson v. Indiana, supra*, the state contended that a mentally impaired person confined for a relatively short term could be committed as incompetent to stand trial with more limited procedural safeguards than provided for persons civilly committed for an indefinite term. The Court, however, focused on the fact—the limited duration of confinement—that allegedly justified differing treatment. Finding that commitment was not, in fact, for a limited term, the Court found that the varying commitment procedures constituted a denial of equal protection. Similarly, in the instant case, an adequate treatment program might justify the classification of the mentally impaired for confinement. But, since treatment does not exist, plaintiffs are denied equal protection of the laws.

As the Supreme Court has held in another context, “equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.” *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966). In the instant case, “the purpose for which the classification is made” is to provide treatment. Since plaintiffs are incarcerated without treatment, “all semblance of rationality of the classification” purportedly based on the need for treatment disappears. *Baxstrom v. Herold, supra*, at 115.

3. By Withholding From Plaintiffs The Normal Protections Which It Extends To Its Other Citizens Through Exercise of The Police Power And Parens Patriae Function, The State Deprives Plaintiffs Of Equal Protection Of The Laws.

Through a variety of regulations, the State of Alabama protects the welfare of its citizens. Among these regulations are comprehensive requirements for the licensing of hospitals, 22 Ala. Code §§ 204(42), *et seq.*; certification of physicians who are qualified to practice on

Alabama citizens, 46 Ala. Code §§ 260, *et seq.*; regulations for fire safety, 55 Ala. Code §§ 34-51. Alabama also regulates a variety of other matters, such as the sanitary requirements necessary in institutions which serve food to the public.

Whether by statutory exemption, administrative practice, or simple neglect, this panoply of state regulations intended to protect the general citizenry is denied to persons committed to the state mental institutions. The evidence in the record shows that the state mental institutions do not meet the standards for other hospitals in the state; that the medical needs of inmates are attended to by unlicensed physicians who would not be qualified to practice on any other person in the state; that the buildings are woefully out of compliance with the state's fire regulations; and that the general sanitary conditions, particularly with regard to food service, fall far below the standards which are otherwise required by the state. There is no compelling state interest which justifies the state's singling out this class of people and denying it the protections which it affords to other persons in the state.

The same analysis holds true for the state's failure to safeguard, as *parens patriae*, the welfare of institutionalized inmates. State policy, for example, shows an extreme solicitude for the welfare of children. Alabama statutes provide that custody of a child will be taken from the parent or guardian if "by reason of neglect, cruelty or depravity [such home] . . . is an unfit or improper place for such child," or if the child does not receive medical and other care necessary for his health and well being. 13 Ala. Code §§ 350, *et seq.* The Alabama courts have found home environments to be so inimical to the welfare of a child that they have taken the child out of the home. See, *e.g.*, *Long v. O'Mary*, 270

Ala. 99, 116 So.2d 563 (1959) (adopted father who had served time in prison held unsuitable father).³⁷

It is ironic, then, that this solicitude for the welfare of children disappears in the mental institutions of the state which house many deprived children and others, who, because of their mental incompetency, are entitled to the same solicitude as a child under the *parens patriae* concept. Amici submit that the denial of this protection to plaintiff class constitutes a denial of equal protection of the laws.³⁸

³⁷ The constitutional right of retarded children, including children living in mental institutions, in the District of Columbia to a free public education was recognized in *Mills v. Board of Education*, Civ. Action No. 1939-71 (D.D.C. 1972), pp. 25-26. See *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971). Equal protection demands that mentally impaired children, whether or not involuntarily placed in institutions by the state acting as *parens patriae* be given educational opportunities suitable to their needs.

³⁸ A number of courts have stated that absence of treatment for persons civilly committed after the commission of crime raises serious equal protection problems. See, e.g., *Rouse v. Cameron*, 373 F.2d 451, note 18a (D.C. Cir. 1966); *Millard v. Cameron*, 373 F.2d 468, 473 (D.C. Cir. 1966); *Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971); *Inmates v. Affleck*, Civ. No. 4529 (D.R.I. July 28, 1972). Under statutes which apply variously to persons found not guilty by reason of insanity, persons found to be "defective delinquents" and persons adjudicated to be juvenile delinquents, a person can be confined beyond the term which would be permitted if he were merely found guilty of a criminal charge. The courts have upheld this discrimination because treatment is afforded. In *Millard v. Cameron*, for example, the Court of Appeals stated:

"Lack of treatment destroys any otherwise valid reason for differential consideration of the sexual psychopath." 373 F.2d at 473.

The court also stated:

"Indefinite commitment under the sexual psychopath law is 'justifiable only upon a theory of therapeutic treatment.'" 373 F.2d at 472-473.

See also *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953).

Since persons who have committed criminal acts must be given treatment if they are to be confined for an indefinite term, how

The district court for Rhode Island followed this line of reasoning in holding that detention of juveniles in a substandard facility violated equal protection. The court stated:

"If a boy were confined indoors by his parents, given no education or exercise and allowed no visitors, and his medical needs were ignored, it is likely that the state would intervene and remove the child for his own protection. See R.I.G.L. § 14-1-34. Certainly, then, the state acting in its *parens patriae* capacity cannot treat the boy in the same manner and justify having deprived him of his liberty." *Inmates v. Affleck*, Civ. No. 4529, (D.R.I., July 28, 1972), p. 34.

III. PROTECTION OF CONSTITUTIONAL RIGHTS OF INMATES OF STATE MENTAL INSTITUTIONS BY FEDERAL COURTS IS CONSISTENT WITH THE SEPARATION OF POWERS DOCTRINE AND WITH MAINTENANCE OF THE FEDERAL SYSTEM.

The record below has established massive invasions of the constitutional rights of the inmates of Alabama mental institutions. Amici contend that the district court's order to redress these constitutional violations is wholly appropriate, does not infringe on legislative prerogatives, and is not inimical to the federal system.

In the related area of prisoners' rights, the Supreme Court has recently clarified the proper response of the federal courts to problems arising in the administration

much more persuasive is the argument that the civilly committed in Alabama who have neither committed criminal acts nor been found dangerous must receive treatment.

As *Covington v. Harris*, 419 F.2d 617, 625 (D.C. Cir. 1969), pointed out, it is an extraordinary deviation from our constitutional system to waive criminal safeguards in a proceeding which can lead to a deprivation of liberty. This deviation is permissible only because of the rehabilitative character of the confinement. If treatment is missing, this justification disappears and the scheme is unconstitutional.

of state penal systems. In *Cruz v. Beto*, 405 U.S. 319 (1972), the Court stated:

"Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners." 405 U.S. at 321.

See also *Johnson v. Avery*, 393 U.S. 483, 486 (1968) (state detention facilities "are subject to federal authority only where paramount federal constitutional or statutory rights supervene."). The principle that federal courts will intervene in state systems to safeguard federal constitutional rights applies equally to the relationship between federal courts and state mental institutions. Hence, the appellants' argument that the district court in the instant case has overstepped its bounds by entertaining plaintiffs' claims of violations of constitutional rights must be rejected. See *Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972); *Jackson v. Bishop*, *supra*; *Hancock v. Avery*, 301 F.Supp. 786, 791 (M.D. Tenn. 1969).

Judicial intervention to safeguard the constitutional rights of inmates of a state mental institution was held to be proper in *Rozecki v. Gaughan*, 459 F.2d 6 (1st Cir. 1972). In that case inmates at the Bridgewater State Hospital in Massachusetts contended that they were subjected to cruel and unusual punishment because of inadequate heat within the facility. The district judge dismissed the complaint, noting that "the authorities are doing all they can with what they have." 459 F.2d at 8. The Court of Appeals reversed the district court and remanded the case for a hearing on the alleged violation of the inmates' constitutional rights.

The recognition of such rights is not dependent on the uncertainties of legislative action. The language of *Holt v. Sarver*, 309 F.Supp. at 385, typifies the consistent response of the federal judiciary:

"[T]he obligation of the Respondents to eliminate unconstitutionality does not depend upon what Legislatures may do. . . ."

Judicial intervention to assure that constitutional rights are respected does not invade the legislative domain. *Hawkins v. Town of Shaw*, 437 F.2d 1286, 1292 (5th Cir. 1971).³⁹

Equally without substance is the suggestion that the district court's decree herein is "a definite threat to the end of federalism. . . ." (Brief of Appellant Alabama Mental Health Board, p. 22; see also Brief of Governor, p. 35-36). Far from being a novel encroachment into an area reserved to the states, the court's decision falls within the well-recognized ambit of federal judicial authority. As this Court has stated, "our constitutional duties require that the courts be ever vigilant to assure that the conditions of incarceration do not overstep the bounds of federal constitutional limitations." *Campbell v. Beto*, 460 F.2d 765, 767-768 (5th Cir. 1972). See *Johnson v. Avery*, *supra*.

Federal courts have not lacked the power to issue orders which necessitate state action—requiring legislative reapportionment, amelioration of prison conditions, school desegregation, and provision of counsel to indigents. Those decisions specifically or impliedly reject the arguments which appellants here advance.⁴⁰ See *Bell v. Hood*, 327 U.S. 678 (1946).

³⁹ It should be noted that the court below did not invade the legislative province so as to require the levy of specific taxes, in specific amounts, or on specific property. Funding of the programs necessitated by its order were left to the discretion of the legislature. Compare *Griffin v. County School Board*, 377 U.S. 218, 232-33 (1964) with *United States v. Plaquemines Parish School Board*, 451 F.2d 817, 833 (5th Cir. 1969). The Court should not assume that this body is impotent or unwilling to conform to constitutional requirements.

⁴⁰ E.g., *United States v. Plaquemines Parish School Board*, 415 F.2d 817, 833 (5th Cir. 1969) (desegregation); *Swann v. Charlotte-*

Moreover, where constitutionally protected rights have been invaded, it has been held uniformly that financial considerations are not a bar to judicial relief.⁴¹ In *Rozecki v. Gaughan*, *supra*, the Court of Appeals for the First Circuit explicitly rejected the argument that inadequate funds was a justification for violations of the constitutional rights of inmates of state mental institutions, cit-

Mecklenburg Board of Education, 318 F. Supp. 786, 801 (W.D. N.C. 1970), *aff'd*, 402 U.S. 1 (1971) (desegregation); *Bradley v. School Board*, 325 F. Supp. 828, 846 (E.D. Va. 1971) (desegregation); *Holt v. Sarver*, 309 F. Supp. 362, 385, *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (right to transcript); *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (indigent access to divorce courts); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (pre-termination hearing for welfare recipient); see *Moss v. Burkhardt*, 220 F. Supp. 149, 155 (Okla. 1963), *aff'd sub nom.*, *Williams v. Moss*, 378 U.S. 558 (1964) (legislative reapportionment).

⁴¹ See *Inmates of the Boys Training School v. Affleck*, Slip opin., p. 55. In *Hamilton v. Love*, *supra* at 1194, the district court, in finding that conditions in a county prison violated inmates' constitutional rights, stated:

"Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons." 328 F. Supp. at 1194.

This principle has been upheld in such constitutionally protected areas as education by virtue of the equal protection clause (*Griffin v. County School Board*, 377 U.S. 218, 232-33 (1964); *Mills v. Board of Education*, Civ. No. 1939-71 (D.D.C. August 1, 1972); *Bradley v. School Board*, 325 F. Supp. 828, 846 (E.D. Va. 1971); *Hosier v. Evans*, 314 F. Supp. 316, 329 (D.V.I. 1970); *Swann v. Charlotte-Mecklenburg Board of Education*, 311 F. Supp. 265, 318 F. Supp. 786, 801 (W.D. N.C. 1970), *aff'd*, 402 U.S. 1 (1971); *United States v. School District 151 of Cook County, Ill.*, 301 F. Supp. 201, 232, (N.D. Ill. 1969), *aff'd as mod.*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *United States v. Plaquemines Parish School Board*, 291 F. Supp. 841, 855 (E.D. La. 1967), *aff'd*, 415 F.2d 817 (5th Cir. 1969)); right of indigents, by virtue of the 14th Amendment (*Boddie v. Connecticut*, 401 U.S. 371, 382 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970)). See also *United States v. Alsbrook*, 336 F. Supp. 973, 980 (D.D.C. 1971); *Rakes v. Coleman*, 318 F. Supp. 181 (E.D. Va. 1970).

ing an Eighth Circuit decision written by Judge (now Justice) Blackmun:

"'Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations.' Jackson v. Bishop, 8th Cir. 1968, 404 F.2d 571, 580." 459 F.2d at 8.

Even if financial considerations were relevant, there is no credible evidence before the court to support Appellants' allegations concerning the cost of implementing the district court's decree. It is true that compliance with the district court's order protecting the constitutional rights of the plaintiffs will substantially affect the character of the state mental institutions and may, at least over the short run, entail additional outlays of funds by the state. However, the Appellants' estimates of the probable necessary expenditures set out are wholly unsupported by the record and do not merit consideration. Brief of Governor, pp. 30-33. Defendants had an opportunity to present evidence in the district court on the cost of compliance, and they failed to do so. Instead they introduced in the Court of Appeals wholly unsupported estimates without any underlying factual basis.⁴²

⁴² The inadequacy of appellants' figures is highlighted by the fact that they presented two mutually inconsistent sets of figures—differing by approximately \$3-9 million in their estimate of cost of implementation of the district court's orders in the Bryce and Searcy Hospitals. Brief of Governor, pp. 31-32.

Appellants' estimates do not take account of the substantial decline in inmate population which has already taken place and the further decline which will occur under the court's orders. Nor do they indicate what percentage of the estimated cost of implementation would cover those reforms which the Governor's Brief itself concedes are necessary in its alternative prayer for relief, i.e., "to adequately provide for the physical and medical needs of civilly-committed patients in state mental institutions, including safe habitation, a nutritious diet, sufficient clothing, competent, ordinary medical attention, and humane supervision." Brief of Governor, p. 44.

The net financial impact of operating a treatment program in state mental institutions rather than a warehousing operation is unknown. The amount of federal funds which would be available for such a conversion is unknown. The savings that result from community as opposed to institutional care, while the record clearly establishes that they are substantial, see *supra*, p. 32, are unknown. Hence, even if financial considerations could properly be considered in this context, there is no data before the court which would permit an informed judgment.

Appellants' suggestion that protection of the constitutional rights of the plaintiff class must be weighed against more effective consumer protection in the state or modernized highways (Brief of Governor, p. 34) must be summarily rejected. The legislature has ample scope for balancing competing social interests. But it cannot take the option of denying a group of citizens their constitutional rights in order to free up funds for highways or civic improvements.⁴³

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING PLAINTIFFS REASONABLE ATTORNEYS' FEES.

This is a class action based upon 42 U.S.C. §§ 1981 and 1983 and brought on behalf of the inmates of the Alabama mental institutions. The suit was filed on October 23, 1970 and has been diligently pursued by plaintiffs' counsel since that time. Through this litigation, the rights of plaintiffs within the state mental institutions were defined and clarified. A number of novel issues in the area of law and mental health were explored. Because this suit was brought, it can be anticipated that the quality of treatment in the state mental institutions

⁴³ See also *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972); *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark. 1970).

will be improved, with consequent benefits to all present and future inmates and to the entire state of Alabama.

Plaintiffs filed a motion for interim award of attorneys' fees on June 1, 1971, supported by all amici, including the United States. The court ordered an award of attorneys' fees. 344 F.Supp. at 408-11.

Amici, all organizations with a substantial interest in assuring the adequacy of treatment in state mental institutions and in safeguarding the constitutional rights of the residents of such institutions, submit that the district court exercised its discretion properly in awarding attorneys' fees. Its decision will help to assure that the constitutional rights of residents in mental institutions will be safeguarded by similar litigation when necessary in the future.

Federal courts possess inherent equitable power to award attorneys' fees to successful plaintiffs in suits serving the public interest, notwithstanding the lack of specific statutory authority to make such awards. As the United States observed in the district court, in supporting the award of attorneys' fees:

"[W]hen a plaintiff, as a 'private attorney general,' sues to protect an interest in which the public has a stake, equity courts can—in their discretion—award reasonable attorneys' fees to plaintiffs who successfully litigate such actions in order to encourage the protection of these public interests." Post-Hearing Memorandum of the United States, p. 57.

This Court has recently ordered the award of attorneys' fees in a suit to enjoin the State of Alabama from trying traffic offenses in the justice courts where the judges were paid out of fines collected. *Callahan v. Wallace*, No. 71-3309, dec. Sept. 11, 1972 (5th Cir.). This Court recognized that the "trail was blazed by other counsel" in previous cases which had established the relevant legal

principle. Slip opin., p. 7. Nonetheless, the Court found it "unquestionable that plaintiffs' attorneys rendered a public service" by clarifying the law and ending an improper practice. *Ibid.* On this basis, the Court remanded the case for award of attorneys' fees.

The instant case presents a much clearer case for the award of attorneys' fees. Plaintiffs' counsel "presented a full blown case at trial," (Slip opin., p. 7) in a highly technical area that required much out-of-court preparation. *Ibid.* And, unlike counsel for plaintiffs in *Callahan*, they "navigated through a heretofore uncharted course" (344 F.Supp. at 409), and developed issues that had never previously been considered in Alabama.

The award of attorneys' fees by the district court in this case is amply supported by Supreme Court decisions. "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939). The Supreme Court most recently affirmed the broad scope of the federal courts' equitable power to award attorneys' fees in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) in which the Court made clear that judicial power to award fees is contingent neither upon express statutory authorization nor upon the generation of monetary recovery in the form of a common fund.

In a variety of recent decisions, the courts have recognized that "private suits are necessary to effectuate congressional policy and that awards of attorneys' fees are necessary to encourage private litigants to initiate such suits." *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 145 (5th Cir. 1971). See also *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (plaintiff functions as "private attorney general"); *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970); *NAACP v. Allen*, 340 F.Supp. 703 (M.D. Ala. 1972);

Sims v. Amos, 340 F.Supp. 691 (M.D. Ala. 1972).⁴⁴ Plaintiffs' successful action has implemented the state policy of providing treatment to the mentally impaired. In light of the neglect which characterized defendants' past practices, 344 F.2d at 408, the filing of this suit was necessary to assure implementation of this policy.

Attorneys' fees should be awarded so as to spread the cost of securing the benefits among those who share in its bounties. See *Bright v. Philadelphia-Baltimore-Washington Stock Exchange*, 327 F.Supp. 495 (E.D. Pa. 1971). Substantial and direct benefit to the state and its citizens has resulted and will continue to result from the prosecution of this suit. The institutions affected by the court's decision are public and available to all citizens of the state. As the district court noted in its order awarding attorneys' fees:

"So prevalent are mental disorders in our society that no family is immune from their perilous incursion. Consequently, the availability of institutions capable of dealing successfully with such disorders is essential and, of course, in the best interest of all Alabamians." 344 F.Supp. at 409.

The existence of adequate facilities for the treatment of mental impairment benefits all state citizens in the same manner in which they are benefited by adequate police and fire protection. Raising the standards of the institutions in a manner which changes their character from mere caretaker status to centers of treatment also increases the probability that patients will become productive members of society who contribute to its well being

⁴⁴ Attorneys' fees have been awarded in numerous school desegregation cases brought under 42 U.S.C. § 1983. See, e.g., *Bradley v. School Board*, 53 F.R.D. 28 (E.D. Va. 1971); *Nesbit v. Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969); *Hill v. Franklin County Board of Education*, 390 F.2d 583 (6th Cir. 1968); *Bell v. School Board*, 321 F.2d 494 (4th Cir. 1963) (en banc).

rather than depend upon it for support. That resulting benefit to the state and its citizens may serve as a part of the basis for an award of attorneys' fees against state agencies who have been recognized by other courts. In *La Raza Unida v. Volpe*, No. C-71-1166 (N.D. Calif. Oct. 19, 1972), plaintiffs who had sued to enjoin construction of a California highway project were awarded attorneys' fees to be paid by state agencies. In basing its award partly upon the benefits plaintiffs conferred by successfully bringing the action, the court cited not only the benefit to homeowners subject to displacement by the project, but upon the benefits resulting to all residents of the state.

In light of these factors, the district court's exercise of its discretion in awarding attorneys' fees should not be disturbed.

CONCLUSION

For the reasons set forth herein, amici urge the Court to affirm the decision of the district court.

Respectfully submitted,

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