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IV. Civil Rights

unreasonable use issue. By omitting the seventh amendment consideration, the second step of the *Justice* analysis is unsatisfactory. If the seventh amendment requires a jury trial in a case, then the right to jury trial outweighs any state rule to the contrary which might be applicable under *Erie*.[51]

Although the *Justice* court's analysis of the *Erie* issue was consistent with previous Fourth Circuit cases, that analysis was modified, if not abandoned, by the Supreme Court.[52] By going no further than resolving the *Erie* issue, the Fourth Circuit failed to address the more important question of whether use of the federal rule was required by the seventh amendment.[53] *Byrd* requires consideration of the seventh amendment,[54] and the seventh amendment requires a jury trial in *Justice*.[55]

MARK A. WILLIAMS

IV. CIVIL RIGHTS

A. *Constitutionally Adequate Safeguards in Commitment Proceedings*

One of the most troublesome areas of mental health law centers around the rights of criminal defendants adjudged not guilty by reason of insanity.[1] After acquittal,[2] these defendants often face commitment to

[51] The right to a jury trial is superior to a contrary state rule which may be applicable under *Erie*. WRIGHT, *supra* note 3, § 92 at 448; *see* Simler v. Conner, 372 U.S. 221, 222 (1963) (per curiam); Smith, *supra* note 6, at 451; Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 Iowa L. Rev. 248, 268 (1963).

[52] *See* text accompanying notes 42-44 *supra*.

[53] *See* text accompanying note 51 *supra*.

[54] *See id.*

[55] *See* text accompanying notes 45-51 *supra*.

[1] *See, e.g.*, In Re Ballay, 482 F.2d 648, 653-54 (D.C. Cir. 1973); American Bar Found., *The Mentally Disabled and the Law* (S. Brakel & R. Rock ed. 1971). The difficulties faced by the courts in adjudicating the rights of insanity acquittees are the consequence of competing societal values. A strong conflict exists between the public mandate for controlling deviant behavior and the individual interests of the acquittee. *See* United States v. Ecker, 543 F.2d 178, 198 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 U.C.L.A. L. REV. 637, 673 (1978); Note, *Compulsory Commitment Following Successful Insanity Defense*, 56 NW. U. L. REV. 409, 411-13 (1962)[hereinafter cited as *Compulsory Commitment*]. The utilization of uncertain judicial guidelines for determining the fate of the insanity acquittees has intensified this conflict. *See* Schoenfield, *Recent Developments in the Law Concerning the Mentally Ill - "A Cornerstone of Legal Structure Laid in the Mud,"* 9 U. TOL. L. REV. 1, 29 (1977). Much of the uncertainty is due to the lack of scientific precision in the area of psychiatric evaluation. *See* Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 590-626 (1978). However, procedural and constitutional issues have magnified the difficulties included in determining the rights of mentally deficient individuals. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 425-33 (1979) (standard of proof); Baxstrom v. Herold, 383 U.S. 107, 110-15 (1966) (equal protection ramifications of commitment procedures); People v. McQuillan, 392 Mich. 511, _, 221 N.W.2d 569, 574-75, 577-79 (1974) (due

mental institutions.[3] Such commitments may constitute substantial deprivations of liberty and thus are subject to constitutional scrutiny.[4] A recent Fourth Circuit Court of Appeals decision, *Dorsey v. Solomon*,[5] reflects responsiveness to the need for constitutionally adequate safeguards in commitment procedures following acquittal.

In *Dorsey v. Solomon*, three named plaintiffs brought suit challenging the constitutionality of Maryland's statutory commitment scheme.[6] All three plaintiffs had been involuntarily confined to a state mental hospital

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process considerations for commitment); Chase v. Kearns, 278 A.2d 132, 134-38 (Me. 1971) (presumption of continuing insanity); Note, *The Insanity Defense: The Need for Articulate Goals at the Acquittal, Commitment, and Release Stages*, 112 U. PA. L. REV. 733, 749-51 (1964) [hereinafter cited as *Insanity Defense*].

[2] One acquitted by reason of insanity is absolved from criminal liability because he has committed the crime but lacks the autonomy of will to be found guilty. *See* Note, *Commitment and Release Standards and Procedures: Uniform Treatment of the Mentally Insane*, 41 U. CHI. L. REV. 825, 834 (1974) [hereinafter cited as *Uniform Treatment*]; *Insanity Defense, supra* note 1, at 734. However, some commentators maintain that insanity should not constitute a defense barring conviction for a crime. *See* Ringer & McCormack, *The Elusive Insanity Defense*, 63 A.B.A.J. 1721, 1722 (1977). Under this view, the insane defendant is held responsible for the commission of the criminal act, and the lack of free will during the crime's commission becomes relevant only in regard to the type of punishment or treatment imposed. *Id.* at 1724.

The insanity defense differs from a court's determination of incompetency. Incompetency involves the capability of the accused to stand trial and comprehend the nature of the proceedings against him. The insanity defense focuses exclusively on the accused's mental state at the time of the commission of the criminal act. *See* Cameron v. Mullen, 387 F.2d 193, 198 n.12 (D.C. Cir. 1967).

[3] Statutory standards vary from jurisdiction to jurisdiction in the degree of mental deficiency and dangerousness required for commitment. *See Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1201-06 (1976) [hereinafter cited as *Developments*] (comparison of various statutory standards). Procedural requirements in statutory commitment provisions also vary. *Compare* WYO. STAT. § 7-11-306 (1977 Repl. ed.) (requiring finding of present mental deficiency for commitment) *with* MD. CODE ANN. art. 59, § 27 (Repl. Vol. 1972) (summary commitment at court's discretion).

[4] *See, e.g.*, Specht v. Patterson, 386 U.S. 605, 608-11 (1967) (indefinite commitment under Colorado's Sex Offenders Act held violative of due process); Baxstrom v. Herold, 383 U.S. 107, 110-15 (1966) (equal protection); Anderson v. Solomon, 315 F. Supp. 1192, 1194 (D. Md. 1970) (noting due process requirement of hearing before indefinite commitment). Unlike prison sentences of definite duration, most statutory commitment schemes allow commitment for an indefinite period. *See Developments, supra* note 3, at 1193 n.6. Moreover, involuntarily committed patients do not necessarily have the right to refuse treatment. *Id.* at 1194 n.11.

[5] Dorsey v. Solomon, 604 F.2d 271 (4th Cir. 1979).

[6] Dorsey v. Solomon, 435 F. Supp. 725, 729-30 (D. Md. 1977). Maryland's judicial release statute provides for judicial release only if the patient can show that he does not have any mental disorder and that he is not dangerous to himself or others. MD. CODE ANN. art. 59, § 15 (Repl. Vol. 1972); *see* Note, *"We're Only Trying to Help": The Burden and Standard of Proof in Short-Term Civil Commitment*, 31 STAN. L. REV. 425, 446 (1979)[hereinafter cited as *Burden and Standard*] (noting loss of personal liberty, stigma of commitment, unwanted medical treatment, future legal disability); *Uniform Treatment, supra* note 2, at 826 (emphasizing the right to vote, driver's license, and other rights and privileges affected by commitment); Livermore, Malmquist, & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968).

after acquittal of criminal charges by reason of insanity.[7] Court hearings were not held to determine the plaintiffs' mental conditions at the time of committal. Bringing suit as a class,[8] the plaintiffs contended that Maryland's summary commitment law unconstitutionally permitted the state to confine insanity acquittees in contravention of the due process and equal protection clauses of the fourteenth amendment.[9]

The constitutional challenge focused on the commitment scheme's lack of judicial safeguards protecting the insanity acquittee's personal liberty.[10] Under Maryland law, the acquitted defendant could be committed for a potentially indefinite period without a court determination of insanity at the time of commitment.[11] After committal, the patient could obtain judicial release only if he could show a lack of mental disorder and dangerousness.[12] Consequently, the plaintiffs maintained that equal protection mandated court proceedings for insanity acquitees similar to those afforded persons civilly committed under Maryland law.[13] Furthermore, the plaintiffs asserted that the existing commitment procedures violated due process because there was no requirement that the state affirmatively prove the present insanity of

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[7] Dorsey v. Solomon, 435 F. Supp. at 729-30.

[8] *Id.* at 728. The certified class consisted of all persons who, at the time of the filing of the suit or subsequent to that date, faced commitment or conditional release under Maryland law. *Id.* at 728 & n.1.

[9] *Id.* at 728; *see* U.S. CONST. amend. XIV, § 1.

[10] Dorsey v. Solomon, 435 F. Supp. at 728.

[11] *See* MD. CODE ANN. art. 59, § 27 (Repl. Vol. 1972). *See also* note 6 *supra.*

[12] *See* MD. CODE ANN. art. 59, § 15 (Repl. Vol. 1972).

[13] 435 F. Supp. at 730. Equal protection of the law requires that similarly situated persons receive similar treatment under the law. *See* Reed v. Reed, 404 U.S. 71, 75-76 (1971). In the context of commitment procedures, courts employ equal protection analysis to ascertain the constitutionality of any variations in treatment of persons civilly committed and those committed as a result of insanity acquittals. *See, e.g.*, Dorsey v. Solomon, 435 F. Supp. 725, 732 (D. Md. 1977). Although equal protection does not require the administration of uniform commitment methods, the state must justify procedural variations. *Id.* at 740.

Generally, the courts employ a rational basis test when faced with an equal protection challenge to a commitment scheme. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 729 (1972) (utilizing a "reasonable justification" standard); Baxstrom v. Herold, 383 U.S. 107, 111 (1966) (some relevance to purpose for which classification is made); State v. Krol, 68 N.J. 236, _, 344 A.2d 289, 296-97 (1975)(continuing mental illness and dangerousness to self or others). *But see* Note, *Constitutional Standards for Release of the Civilly Committed and Not Guilty By Reason Of Insanity: A Strict Scrutiny Analysis,* 20 ARIZ. L. REV. 233, 267-70 (1978) (discussing the applicability of strict scrutiny, compelling state interest standard); *Developments, supra* note 3, at 1330; Note, *Commitment Following Acquittal By Reason of Insanity and the Equal Protection of the Law,* 116 U. PA. L. REV. 924, 926 (1968)[hereinafter cited as *Commitment and Equal Protection*]. The rational basis test requires merely a reasonable justification for any disparity in the statutory treatment of similarly situated persons. *See* McGinnis v. Royster, 410 U.S. 263, 270 (1973); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Walters v. City of St. Louis, 347 U.S. 231, 237-38 (1954). As a result, courts have inferred that substantially similar procedural treatment must be afforded to civil and criminal commitees. *See* Schuster v. Herold, 410 F.2d 1071, 1073 (2nd Cir. 1969); Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968); People v. McQuillan, 392 Mich. 511, _, 221 N.W.2d 569, 581 (1974); *Uniform Treatment, supra* note 2, at 832.

the acquittees upon commitment.[14]

Following discovery, the district court approved a stipulation presented by the parties entitling subsequent acquittees to a prompt judicial hearing before confinement.[15] The decree obviated the need for the court to consider whether hearings were required for subsequent commitments.[16] Therefore, the Fourth Circuit addressed only the issue of whether the right to judicial commitment hearings should be extended to those persons already summarily committed to state mental institutions.[17] The Fourth Circuit held that those persons previously committed under the summary proceeding statute were entitled to judicial hearings with a proper allocation of the burden of proof.[18] The court concluded that the state had committed them on a finding of dangerousness made without due process of law.

In deciding the merits of *Dorsey,* the Fourth Circuit relied on the principles found in Supreme Court decisions involving commitment procedures.[19] These opinions have been subject to various interpretations

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[14] Dorsey v. Solomon, 435 F. Supp. at 730. The fourteenth amendment forbids any state from depriving a person of his liberty without due process of law. U.S. CONST. amend. XIV, § 1. The due process requirement ensures that the integrity of the judiciary's truth finding function is maintained. *See* Boddie v. Connecticut, 401 U.S. 371, 374-76 (1971); State v. Kee, 510 S.W.2d 477, 485 (Mo. 1974). Due process is especially relevant in evaluating the constitutionality of commitment procedures since involuntary commitment involves a substantial deprivation of liberty. *See* Specht v. Patterson, 386 U.S. 605, 608 (1967); Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968). *See also* note 4 *supra.*

[15] Dorsey v. Solomon, 435 F. Supp. at 730-32.

[16] Dorsey v. Solomon, 604 F.2d 271, 273 (4th Cir. 1979). The *Dorsey* appeal focused on the right to judicial commitment hearings while the lower court dealt primarily with the specific features of such hearings such as the right to counsel, jury, and independent experts. The district court rejected the request for state appointed independent psychiatrists, jury determinations, and periodic review hearings. Dorsey v. Solomon, 435 F. Supp. at 742. The plaintiffs did not appeal those determinations.

[17] Dorsey v. Solomon, 604 F.2d 271, 273 (4th Cir. 1979). Prior to the *Dorsey* decision, the criminal defendant who chose to present the insanity defense would file an insanity plea with the court. MD. CODE ANN. art. 59, § 25 (Repl. Vol. 1972). If the state failed to prove the defendant sane but could show that he perpetrated the crime charged, then the state could summarily commit the defendant. *Id.* After ninety days, the acquittee could request a release hearing where the burden to prove lack of dangerousness would be placed on him. *Id.*

[18] Dorsey v. Solomon, 604 F.2d 271, 273 (4th Cir. 1979).

[19] *See* Addington v. Texas, 441 U.S. 418 (1979); Jackson v. Indiana, 406 U.S. 715 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966). In *Baxstrom,* the petitioner was informally committed to a mental institution upon expiration of his prison term. 383 U.S. at 108. Under the applicable statutory scheme, persons with past criminal records were entitled to judicial hearings to determine dangerousness whereas incarcerated individuals were denied such procedures. *Id.* at 115. Due to the significant nature of the commitment hearing, the Supreme Court held that equal protection required that the procedural review afforded other civilly committed persons must be extended to those nearing the end of their prison terms. *Id.* at 110.

In *Jackson,* the petitioner was a twenty-seven year old deaf mute with a preschool level of intelligence who was arrested for stealing a few dollars in cash. 406 U.S. at 717. Before trial, the petitioner was judically committed to a mental institution because of his incompetence to stand trial. *Id.* at 718-19. In view of the state's lack of adequate treatment facilities,

and may arguably apply only to the particular fact situations at hand or interpreted as enunciating broad principles of law.[20] Although recent court decisions have been limited to specific factual situations,[21] the cases, broadly construed, support the proposition that involuntary commitment involves a substantial deprivation of freedom which must be subjected to constitutional scrutiny.[22] Liberally interpreting Supreme Court holdings, the Fourth Circuit maintained that such deprivations of individual liberty must be predicated on a finding of dangerousness made with due process of law.[23]

The Fourth Circuit's due process analysis hinged on the significant restraint of liberty which commitment entails.[24] In view of such restraint, the court maintained that due process requires the state to prove the necessity for commitment before depriving the acquitted defendant of his freedom by incarceration in a mental hospital.[25] Accordingly, the *Dorsey*

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the commitment amounted to a life sentence in the mental institution. *Id.* at 719-20. The Supreme Court held that due process requires that "the nature and duration of commitment have some reasonable relation to the purpose for which the individual is committed." *Id.* at 738. The Court further maintained that the petitioner was denied equal protection since he was subjected to a more lenient commitment standard and stricter release procedures than individuals not charged with an offense. *Id.* at 730.

The petitioner in *Addington* was civilly committed following a judicial hearing featuring counsel and a jury. 441 U.S. at 421. Although conceding that he suffered from mental illness, the petitioner challenged his committal on the basis that the standard of proof utilized in proving his dangerousness was improper. *Id.* at 421-22. In holding constitutional the clear and convincing standard, the Court considered the substantial restraint on personal liberty which results from involuntary commitment. *Id.* at 425-33.

[20] *Compare* Dower v. Boslow, 539 F.2d 969, 972 (4th Cir. 1976)(citing *Baxstrom* in dealing with equal protection claim) and Waite v. Jacobs, 475 F.2d 392, 399 (D.C. Cir. 1973)(citing *Jackson* in reference to acquittees) *with* United States v. Ecker, 543 F.2d 178, 198 n.83 (D.C. Cir. 1976)(rejecting broad interpretation of *Baxstrom*) and State ex rel. Schope v. Schubert, 45 Wis. 2d 644, _, 173 N.W.2d 673, 676 (1976) (limiting *Baxstrom* to civil rather than criminal commitment) and Daniels v. O'Connor, 243 So. 2d 144, 146 (Fla. 1971)(limiting *Baxstrom* to commitments near end of prison sentence).

[21] *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972); note 19 *supra.*

[22] The varied interpretations of the Supreme Court decisions depend on the manner in which the fact situations of the cases are treated. For example, *Jackson* and *Baxstrom* stand for the general proposition that commitment procedures must satisfy equal protection and due process. *See* Dorsey v. Solomon, 604 F.2d at 274. Through such an interpretation, the types of commitments involved are viewed as similar in that they involve substantial restraints on liberty. However, through a narrow interpretation, the holdings of *Jackson* and *Baxstrom* are limited to incompetency commitments in the former case and commitment following prison sentence in the latter. *See* note 19 *supra.*

[23] Dorsey v. Solomon, 604 F.2d at 276.

[24] *Id.* at 274.

[25] *Id.* The due process standard is less strict in the cases of emergency commitment or temporary confinement for examination. Courts, however, have held that a sanity hearing must be initiated upon completion of the observation period. *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972) (due process required nature and duration of commitment to bear reasonable relation to purpose of confinement); Specht v. Patterson, 386 U.S. 605, 608 (1967) (indefinite commitment under Colorado's Sex Offenders Act held violative of due process); Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968) (commitment without hearing permissible to determine present mental condition); People v. McQuillan, 392 Mich. 511, _, 221

court found Maryland's summary commitment statute violative of due process because the state did not have the burden of proving the insanity of acquittees at the time of commitment.[26]

After establishing the due process implications of Maryland's summary commitment procedures, the Fourth Circuit focused on the state law to examine whether adequate remedies existed for prior acquittees.[27] The *Dorsey* court found Maryland's judicial release procedure inadequate because the patient had the burden of proving lack of dangerousness to himself or others.[28] The Fourth Circuit maintained

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N.W.2d 569, 577 (1974) (same); State v. Kee, 510 S.W.2d 477, 484-85 (Mo. 1974) (Seiler, J., dissenting) (suggesting due process satisfied by prompt post-commital hearing). *See also* Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), *aff'd mem.*, 411 U.S. 911 (1973) (holding no violation of due process in emergency commitment situations). *But cf.* State v. Alto, 589 P.2d 402, 405 (Alas. 1979) (holding allocation of proof on defendant at commital hearing not violative of due process).

[26] Dorsey v. Solomon, 604 F.2d at 274. The due process outcome of commitment litigation often is determined by the statutory treatment of the insanity defense. In jurisdictions where insanity is proven at trial, courts have rejected the due process right to judicial commitment hearings, and use a presumption of continuing insanity to justify summary or automatic commitments. Such jurisdictions permit commitment statutes shifting the burden of proving lack of dangerousness for release to the commitee. *See* State v. Kee, 510 S.W.2d 477, 482 (Mo. 1974); *In re* Franklin, 7 Cal. 3d 126, 135, 496 P.2d 465, 474, 101 Cal. Rptr. 553, 562 (1972) (holding presumption of continuing insanity under California's statutory scheme); State v. Allan, 166 N.W.2d 752, 758 (Iowa 1969). *See also* Mills v. State, 256 A.2d 752, 756 (Del. 1969) (holding burden on acquittee proper since he successfully claimed insanity to avoid punishment); Chase v. Kearns, 278 A.2d 132, 135 (Me. 1971) (summary commitment justified by possibility of being incapable of controlling behavior); *see generally* James, *Burdens of Proof*, 47 U. VA. L. REV. 51 (1961) [hereinafter cited as *Burdens*]; *Compulsory Commitment, supra* note 1, at 409; *Uniform Treatment, supra* note 2, at 835; *Commitment and Equal Protection, supra* note 13, at 935.

The presumption doctrine has been justified on procedural grounds since it obviates the need to have new sanity hearings whenever a return to sanity is claimed or collateral suits involving the patient are initiated. *See Compulsory Commitment, supra* note 1, at 423. However, the presumption doctrine is not adopted in those jurisdictions where the defendant's insanity is not affirmatively proven at trial. *See* Bolton v. Harris, 395 F.2d 642, 647 (D.C. Cir. 1968); Allen v. Radack, 426 F. Supp. 1052, 1057-58 (D.S.D. 1977); People v. McQuillan, 392 Mich. 511, _, 221 N.W.2d 569, 578 (1974). *See also* State v. Kee, 510 S.W.2d 477, 484 (Mo. 1974) (Seiler, J., dissenting).

[27] Dorsey v. Solomon, 604 F.2d at 274.

[28] *Id.* The allocation of the burden of proof in commitment proceedings can be dispositive in determining whether the acquittee is to be committed. Generally, in jurisdictions where the presumption of continuing sanity is not invoked, the majority of the courts and commentators favor an allocation of the burden to the state. *See* Waite v. Jacobs, 475 F.2d 392, 399-400 (D.C. Cir. 1973) (justifying State's burden on account of imprecise nature of psychiatric testimony); Covington v. Harris, 419 F.2d 617, 627 (D.C. Cir. 1969) (finding that allocation of burden to acquittee makes it nearly impossible to negate inference of dangerousness); *Burden and Standard, supra* note 6, at 440 (noting evidentiary disadvantages resulting from imposition of burden on patients); Note, *Procedural Safeguards for Periodic Review: A New Commitment to Mental Patient's Rights*, 88 YALE L. REV. 850, 862-63 (1979)[hereinafter cited as *Procedural Safeguards*]; Note, *Due Process for All — Constitutional Standards for Involuntary Civil Commitment and Release*, 34 U. CHI. L. REV. 633, 655 (1966). *But see* State v. Alto, 589 P.2d 402, 405-06 (Alas. 1979) (finding legitimate allocation of burden on acquittee). *See generally Burdens, supra* note 26, at 66 (allocation placed on party with readier access to knowledge); *see also* note 32 *supra*.

that reliance on release procedures to remedy the deficient commitment law fails to satisfy due process because the state is not required to demonstrate the need for committal.[29] Since Maryland's release procedure would not redress the harm caused by the previous commitments, the *Dorsey* court mandated the "retroactive" application of the consent decree to remedy the previous defective procedures by giving unjustly committed defendants new hearings.[30]

Although noting that the decision did not involve a question of pure retroactivity, the Fourth Circuit framed its analysis in those terms.[31] If the court had ordered retroactive hearings in the ordinary meaning of the word "retroactive", the hearings would have focused on the mental condition of the commitee at the time of acquittal.[32] Realizing the difficulty in making such a determination, the Fourth Circuit assumed that any new hearings would focus on the inmate's present state of mind.[33] The court maintained, however, that the principle behind pure retroactivity, to redress prior wrongs that a defective guilt-determining process produced, was applicable to the issue presented.[34]

Rather than require new commitment hearings for all persons summarily committed, the Fourth Circuit modified the lower court's holding in three ways to lessen the administrative impact of the decision. First, the Fourth Circuit ordered new hearings for only those commitees who request them.[35] Second, rather than require new commitment

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Some courts have held that the burden of proof may be allocated to the acquittee if the statutory procedures adequately safeguard the commitee's interests. *See* Kovach v. Schubert, 64 Wis. 2d 612, _, 219 N.W.2d 341, 347 (1974), *cert. dismissed,* 419 U.S. 1117 (1975) (finding burden placed on the acquittee during release proceedings as proper since two examining psychiatrists were appointed); Bolton v. Harris, 395 F.2d 642, 653 (D.C. Cir. 1968) (placing burden on acquittee in habeas corpus proceedings proper since committing hospital must assist court in acquiring all relevant information on defendant's condition).

[29] Dorsey v. Solomon, 604 F.2d at 274.

[30] *See* note 32 *infra.*

[31] Dorsey v. Solomon, 604 F.2d at 274.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 275. The basic factor used in determining whether a decision should apply retroactively is the effect of the decision in redressing wrongs that the defective guilt-determining process produced. Woodall v. Pettibone, 465 F.2d 49, 50, 51 (4th Cir. 1972), *cert. denied,* 413 U.S. 922 (1973). Retroactive applications of commitment decisions are influenced by other concerns. Courts apply decisions retroactively where initial commitment created continuing effects that could not be remedied by later attack. *See* Humphrey v. Cady, 405 U.S. 504, 513 (1972). Courts have balanced the public interest against the gravity of the effect of commitments to determine whether to require retroactivity. *See* Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).

The *Dorsey* court's retroactive mandate is not without precedent. *Compare* People v. McQuillan, 392 Mich. 511, _, 221 N.W.2d 569, 586 (1974) (granting examination and hearing rights to some persons who were denied such procedures prior to court's holding) *with* Bolton v. Harris, 395 F.2d 642, 653-54 (D.C. Cir. 1968) (giving prospective effect to court's decision which extended the right to judicial commitment hearing to acquittees). *But see* Waite v. Jacobs, 475 F.2d 392, 395 n.7 (D.C. Cir. 1973) (remarking that prospective application of *Bolton* discriminates between pre- and post-*Bolton* acquittees).

[35] Dorsey v. Solomon, 604 F.2d at 275.

hearings, the *Dorsey* court modified the lower court's decree to allow the state to substitute the traditional release procedures as long as the burden of proof on the dangerousness issue shifted from the inmate to the state.[36] Finally, instead of providing new proceedings to previously committed, conditionally released patients,[37] the court accepted the state's assurance that the burden of proof would be shifted to the state if subsequent recommitment proceedings are initiated.[38]

In reaching its decision, the Fourth Circuit weighed the interests of both parties involved. The state has both an interest in protecting society from dangerous individuals and a duty to see that persons unable to care for themselves receive adequate attention.[39] Balanced against the state's interests are the rights of the individual who faces potentially indefinite incarceration if committed.[40] Recognizing the shortcomings of Maryland's statutory scheme, the Fourth Circuit tipped the balance in favor of the patient and attempted to fashion a remedy for the previous damage caused by the defective statute.[41]

The court, however, recognized the potential administrative problems and expense involved in ordering new hearings for all persons committed under the defective statute. The Fourth Circuit, therefore, modified the lower court's grant of new commitment hearings to make the state's burden less onerous.[42] Although intending to preserve the thrust of its decision, the court diluted its effect by altering the lower court's decree.

The Fourth Circuit restricted the grant of new hearings by making available the proceedings on a request basis.[43] The court maintained that the committed patients, or someone on their behalf, could be expected to initiate the procedures.[44] The *Dorsey* court correctly recognized the need for giving notice to those patients affected by the decision since inadequate notice could have the practical effect of limiting the

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[36] *Id.* at 276.

[37] Conditional release occurs when the patient is adjudged capable of returning to the community with more limited restrictions on freedom. Under such procedures, the patient may be recommitted if the terms of the release are breached. *See* MD. CODE ANN. art. 59, § 28 (Repl. Vol. 1972).

[38] Dorsey v. Solomon, 604 F.2d at 276.

[39] The government derives its interest in ensuring the safety of the general public from the police power of the state. *See* Berman v. Parker, 348 U.S. 26, 32 (1954). *See generally Developments, supra* note 3, at 1227-45. In addition, the state justifies commitment of the mentally ill by its role as guardian of the people. *See generally id.* at 1207-22.

[40] *See* note 4 *supra.*

[41] Dorsey v. Solomon, 604 F.2d at 275-76.

[42] *Id.* Many courts have faced administrative claims in commitment cases. *See* Woodall v. Pettibone, 465 F.2d 49, 52 (4th Cir. 1972) (retroactive application affecting 122 persons); Schuster v. Herold, 410 F.2d 1071, 1086-87 (2nd Cir. 1969) (possibility of administrative burden no justification for failure to provide long overdue relief); Heryford v. Parker, 396 F.2d 393, 397 (10th Cir. 1968) (possibility for wholesale release from institutions is compelling reason for retroactivity). *But see* Bolton v. Harris, 395 F.2d 642, 653-54 (D.C. Cir. 1968) (prospective application in the interests of justice and administrative convenience).

[43] Dorsey v. Solomon, 604 F.2d at 275-76.

[44] *Id.*

availability of the new hearings. Without a strict notice requirement, many patients, isolated in the confines of an institution, will remain unaware of their rights under the court's decree.[45] Other commitees might be too mentally deficient or drugged to opt for new hearings. Therefore, by making available the new procedures on a request basis with an unstipulated notice requirement, the court, in its pragmatic desire for economy, might have mollified the thrust behind its holding.

The Fourth Circuit further diluted the impact of its decision by altering the lower court's order granting new proceedings to conditionally released patients previously committed under defective procedures.[46] Instead of granting new hearings to these outpatients, the court accepted the state's proposition that any subsequent recommitment hearings would be modified to satisfy the procedural safeguards mandated by the lower court.[47] This change reflects the court's view that conditionally released patients are not entitled to the same relief granted to those persons confined in an institution, since the restraint on liberty can be seen as less restrictive.[48]

The lesser limitation on freedom, however, is as much a deprivation as that faced by inpatients because both the conditionally released and the confined commitee face the same due process deprivation upon committal.[49] A recommitment procedure which provides the safeguards required by the lower court is of little benefit to the conditionally released commitee because the paroled commitee may make use of the newly refurbished proceedings only by violating the conditions of his release.[50] Thus, for the paroled commitees, the denial of due process in the initial defective commitment procedures ordinarily will go unrectified and contravene the very constitutional safeguards the court is trying to enforce.

The existence of summary commitment statutes such as Maryland's mental health law may be traced to the public mandate for keeping all

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[45] *See Procedural Safeguards, supra* note 28, at 853-58 (1979).

[46] Dorsey v. Solomon, 604 F.2d at 276.

[47] *Id.* The procedural safeguards featured in the revised recommitment hearings include the right to counsel and a requirement that the state must prove the present insanity of the acquittee. *See* Dorsey v. Solomon, 604 F.2d at 273-74.

[48] *Id.* at 276. Interestingly, the Fourth Circuit cited parole cases when discussing the restraint on liberty faced by persons conditionally released. *Id.* at 276 n.5. The parole cases stand for the proposition that parole constitutes a significant restraint on liberty. *See* Carafas v. LaVallee, 391 U.S. 234, 237-38 (1968); Jones v. Cunningham, 371 U.S. 236, 242 (1963). Even under Maryland law, a conditionally released patient is deemed to be a retained patient for the purposes of the mental hygiene law. MD. CODE ANN. art. 59, § 18(b) (Repl. Vol. 1972).

[49] *See* note 14 *supra.*

[50] The Fourth Circuit's procedural modification of the recommitment hearings has 'Catch-22' consequences. *See* Slovenko, *Criminal Justice Procedures in Civil Commitment,* 24 WAYNE L. REV. 1, 22 (1977) (discussing the definitional problems of the dangerousness standard).

potentially dangerous individuals off the streets.[51] Summary procedures represent an ill-considered attempt to dispose of society's outcasts by failing to take into account the fact that the mentally ill acquittees are entitled to exercise their constitutional rights. Because of the legislative response to public opinion, the courts must insure that the interests of the acquittee are adequately protected.[52]

In *Dorsey,* the Fourth Circuit properly determined that Maryland's commitment procedures were constitutionally defective.[53] By applying the dictates of the consent decree to previously committed acquittees, the court did not unduly impose on the legislature's function of providing statutory guidelines. Instead, the Fourth Circuit took the initiative to alleviate a substantial injustice imposed by the defective commitment procedures.[54] Thus, *Dorsey v. Solomon* is consistent with the trend within the judiciary to expand the civil rights of those persons who face potentially indefinite commitments in mental institutions.[55]

CHARLES JUSTER

B. Availability of Medicaid Funded Abortions

An individual's right to abortion is qualified by the state's significant interest in promoting maternal health and protecting potential life.[1] The extent of government regulation, however, is a highly controversial issue,[2]

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[51] *See* text accompanying note 39 *supra.*

[52] *See* American Fed'n of Labor v. American Sash and Door Co., 335 U.S. 538, 556-57 (1949) (Frankfurter, J., concurring) (urging judicial resistance to majoritarian decision-making).

[53] *See* notes 12 & 13 *supra.*

[54] *See* text accompanying note 4 *supra.*

[55] *See* Kovach v. Schubert, 64 Wis. 2d 612, _, 219 N.W.2d 341, 343 (1974), *cert. dismissed,* 419 U.S. 1117 (1975)(noting trend towards greater protections of individual rights).

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[1] The state's interest varies according to the trimester of pregnancy in which the governmental action applies. *See* Roe v. Wade, 410 U.S. 113, 154 (1973); text accompanying note 20 *infra.* The interest is minimal during the first trimester of pregnancy but increases thereafter. The Court, however, has emphasized that the state has a legitimate interest during the first trimester to require abortion procedures to be safe and clinically performed. *See* Connecticut v. Menillo, 423 U.S. 9, 10 (1975). The Supreme Court further defined the state's legitimate interests in Planned Parenthood v. Danforth, 428 U.S. 52 (1976). In *Danforth,* the Court upheld, as a legitimate exercise of the state's interests, a statute requiring recordkeeping and the pregnant woman's written consent for the abortion, *id.* at 67, 80-81, while rejecting blanket parental and spousal consent requirements. *Id.* at 71, 74. In addition, the Court invalidated a statutory provision which would ban saline amniocentesis, because no reasonable and legitimate maternal health interest could be shown in support of the ban. *Id.* at 79.

[2] The abortion controversy ranges from the proper forum for dealing with abortion questions to the permissible degree of government action. *Compare* Hardy, *Privacy and Public Funding:* Maher v. Roe *as the Interaction of* Roe v. Wade *and* Dandridge v. Williams, 18 ARIZ. L. REV. 903, 937 (1976) (judiciary should defer to legislature) *with* O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection,* 54 N.Y.U.L. REV. 19,

and state regulation of abortion has been the subject of extensive litigation.[3] Abortion adjudication has generated intense emotionalism because the court decisions intrude on areas of personal conviction regarding sexual freedom and responsibility.[4] One of the more controversial areas is the sponsoring of abortions with Medicaid funds derived from the taxpaying public. In *Doe v. Kenley*,[5] the Fourth Circuit examined the standards untilized to determine the availability of Medicaid funded abortions.

Doe v. Kenley arose as a class action challenging Virginia's Medicaid policy standard for reimbursement and physician certification for state funded abortions.[6] Although the acknowledged purpose of the Commonwealth's Medicaid program was only to eliminate funding for nontherapeutic abortions,[7] the Board of Health's policy standard limited reimbursements to situations where the expectant woman's life would be endangered by carrying the pregnancy to term.[8] Consequently, out of their concern for reimbursement, members of the medical community hesitated to perform many abortions for indigent women who failed to satisfy the life endangerment criteria.[9] This reluctance of physicians

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75-78 (1979) (greater likelihood of corrupt legislative decisionmaking). *See also* Geary, *Analysis of Recent Decisions Involving Abortions*, 23 CATH. LAW. 237 (1978) (pro-life); Bryn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973) [hereinafter cited as *American Tragedy*] (pro-life); Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191 (1978) [hereinafter cited as *Abortion Funding Cases*] (advocating publicly funded abortions).

[3] Abortion litigation has dealt with virtually every aspect of the abortion question. The issues decided range from the proper circumstances under which abortion challenges may be raised, *see, e.g.*, Singleton v. Wulff, 428 U.S. 106 (1976), to whether abortion procedures can be excluded from Medicaid coverage. *See, e.g.*, Beal v. Doe, 432 U.S. 438 (1977) (sustaining state policy excluding nontherapeutic abortions from coverage under Title XIX).

[4] *See* Roe v. Wade, 410 U.S. 113, 116 (1973). Both the courts and commentators have demonstrated emotional responses to the abortion issue. *See An American Tragedy supra* note 2, at 807 (pro-life analysis of Supreme Court decisions); Comment, *The Moral Interest of the State in Abortion Funding: A Comment on* Beal, Maher *and* Poelker, 22 ST. LOUIS L.J. 566, 578 (noting emotional commitment of several members of the Court).

[5] 584 F.2d 1362 (4th Cir. 1978).

[6] *Id.* at 1363. The plaintiff, a Medicaid recipient, brought suit on behalf of similarily situated women with medical conditions which fail to satisfy the Board of Health's standard for reimbursement. *See* Brief for Appellant at 2, Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978).

[7] 584 F.2d 1363 (4th Cir. 1978). The Commonwealth did not dispute the lower court's policy objective finding. *Id.* at 1365.

[8] *Id.* at 1363. The Board of Health first expressed the life endangerment standard in a November 30, 1977 amendment to the State Plan for Medical Assistance. *Id.* The Board of Health adopted the standard in response to the passage of the Hyde Amendment which placed a similar restriction on federal HEW appropriations. *Id.* at 1363 n.1; *see* note 27 *infra*. Subsequent Board of Health directives reiterated the life endangerment standard. *See* March 20, 1978 Medicaid Memo, *quoted in* 584 F.2d 1363 n.2; April 26, 1978 Board of Health Resolution, *quoted in* 584 F.2d 1364 n.3; June 19, 1978 Medicaid Memo, *quoted in* 584 F.2d 1364 n.4.

[9] *Id.* at 1363. The plaintiff documented the medical community's reluctance to accept

provided the basis for the plaintiff's complaint.

During the first trimester of pregnancy, the plaintiff sought a Medicaid funded abortion asserting that she would suffer severe emotional strain and possible physical difficulties if forced to carry the fetus to term.[10] Despite her claim of therapeutic necessity, the Commonwealth refused the request for funding.[11] The plaintiff brought suit, alleging that the Board of Health's life endangerment policy directives provided the grounds for refusal to reimburse in contravention of the Commonwealth's stated objective of excluding payments only for nontherapeutic abortions.[12] She maintained that the funding objective and the reimbursement standard were inconsistent and violative of Title XIX of the Social Security Act of 1965,[13] as well as the due process and equal protection clauses of the fourteenth amendment.[14]

Upon the filing of the suit, the court issued a temporary restraining order enjoining the Board of Health's implementation of the Commonwealth's funding policy pending an adjudication of the plaintiff's claim. The Board of Health responded to the court's action by drafting a resolution reaffirming the agency's sole desire to eliminate abortion reimbursements where no good medical reasons existed under a life endangerment standard.[15] The lower court ultimately found the Medicaid guidelines unambiguous and consistent with both Title XIX and the Constitution.[16]

On appeal, the Fourth Circuit reversed the lower court's decision. The

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Medicaid recipients as patients through statements issued by several Virginia medical centers. *See* Reply Brief for Appellant at 1, 13, Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978).

[10] Brief for Appellant at 5, Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978).

[11] 584 F.2d at 1364.

[12] *Id.* at 1363.

[13] *Id.; see* 42 U.S.C. §§ 1396-1397i (1976). The plaintiff's Title XIX claim hinged on the Act's objective in providing necessary medical services to eligible Medicaid recipients. 42 U.S.C. § 1396 (1976). She maintained that the Board of Health, by implementing the restrictive life endangerment standard, eliminated reimbursement for many medically necessary abortions. 584 F.2d at 1363.

[14] Doe v. Kenley, 584 F.2d 1362, 1363 (4th Cir. 1978). The plaintiffs maintained that the life endangerment standard contravened the fourteenth amendment by unduly burdening their right to privacy concerning the decision to abort. *See* note 20 *infra.*

[15] 584 F.2d at 1364. The April 26, 1978 Board of Health Resolution stated that the Commonwealth desired to eliminate abortion funding where no good medical reasons existed, and where no life endangering threat could be demonstrated. *Id.* at 1364 n.3.

[16] *Id.* at 1364. Viewing the Board's objective as the elimination only of nontherapeutic abortions, the district court relied on Beal v. Doe, 432 U.S. 438 (1977), to reject the plaintiff's Title XIX claim. *Beal* involved a challenge to Pennsylvania's federally approved Medicaid plan which limited reimbursements to abortions certified as medically necessary. Through a statutory analysis of Title XIX, the Beal court held that state Medicaid programs did not have to provide coverage for nontherapeutic abortions. *Id.* at 445.

The lower court found further support in Maher v. Roe, 432 U.S. 464 (1977), to sustain the Commonwealth's funding policy. In *Maher,* the Supreme Court focused on the constitutional implications of a welfare policy that limited reimbursements to medically necessary abortions. The Court upheld the policy on the grounds that no violation of equal protection resulted from a state's policy judgment favoring the funding of childbirth costs over abortion reimbursements. *Id.* at 474.

court held that Virginia could not implement its policy of eliminating funding only for nontherapeutic abortions by using a standard requiring a physician certification that the Medicaid applicant's life would be endangered if she carried the pregnancy to term.[17] The court ordered the "life endangerment" guidelines replaced by a "substantial endangerment of health" standard which would take into consideration all relevant physical and mental health factors.[18] In addition, the court directed that adequate notice of the change be given to all Medicaid program participants.[19]

The Supreme Court has played a major role in the formulation of abortion law. In 1973, the Supreme Court maintained that women have a right to abortion subject only to the state's interest in promoting maternal health.[20] The Court stated that the medical judgment of the pregnant woman's attending physician is controlling on the decision to abort during the first trimester of pregnancy.[21] Subsequent Court decisions, however, limited the pronounced qualified right to abortion.

In 1977, a series of Supreme Court opinions effectively paved the way for states to bar indigent women from enjoying the newly established abortion rights.[22] The Court distinguished between direct limitations on abortions and state encouragement of alternative activities to sustain practices which restricted government funds and medical facilities for abortions.[23]

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[17] 584 F.2d at 1363.

[18] *Id.* at 1366. The court's wording change cannot be deemed judicial legislating since the court made the substitution only for clarification purposes. Furthermore, the immediacy of the problem lent credence to the court's action. *See* note 28 *infra.*

[19] 584 F.2d at 1366. The Fourth Circuit ordered public notice of the change and the issuance of a revised policy directive for members of the medical community. *Id.*

[20] *See* Roe v. Wade, 410 U.S. 113, 162-64 (1973). In *Roe,* the Supreme Court faced a constitutional challenge to a state criminal abortion statute making it illegal to procure or attempt an abortion except in life threatening circumstances. *Id.* at 117. Although noting that the right to abort is derived from a right to personal privacy, the Court maintained that the state has an interest in the abortion decision. *Id.* at 154. Accordingly, the Supreme Court held that the state must not interfere with medical judgments on abortion during the first trimester of pregnancy. *Id.* at 163. The abortion right, however, is limited in the second and third trimesters, since the Court recognized that the state has an interest in promoting maternal health and protecting potential life. *Id.*

[21] *Id.*

[22] *See generally* Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977)(per curiam) (no constitutional violation by City of St. Louis providing public health services for childbirth while refusing corresponding services for nontherapeutic abortions); note 16 *supra.*

[23] According to the Court, state resources could be properly redirected toward promoting the state's interst in encouraging normal childbirth. Poelker v. Doe, 432 U.S. 519, 521 (1977). However, such funding policies could create insurmountable obstacles to indigents who cannot afford to enter private facilities. *See id.* at 523-24 (Brennan, J., dissenting). Economics aside, commentators have noted the inadequacy and unavailability of private facilities in various parts of the country. *See* Note, *The Effect of Recent Medicaid Decisions on a Constitutional Right: Abortions Only for the Rich?,* 6 FORDHAM URB. L.J. 687, 710 (1978). Consequently, the childbirth encouragement policy only encourages indigent women

In addition to Supreme Court precedent, Title XIX of the Social Security Act of 1965[24] is relevant in determining the permissible standards for abortion funding. The federal government implements its funding of state Medicaid programs under Title XIX, which requires state programs to conform to federal standards in order to qualify for federal funding.[25] Conformity is required to ensure that medicaid benefits are equitably provided and distributed to persons eligible under the Act.[26] Although Title XIX makes no specific reference to abortion, all states desiring to participate in the federal program must ensure that necessary medical services are made available.[27]

The Fourth Circuit did not discuss Title XIX and the constitutional implications of the Commonwealth's abortion funding program because the court viewed *Doe v. Kenley* as merely involving a question of seman-

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to carry pregnancy to term, *see* Note, *Medicaid Funding for Abortions: The Medicaid Statute and the Equal Protection Clause*, 6 HOFSTRA L. REV. 421, 441 (1978) [hereinafter cited as *Medical Funding*], and will force indigents to turn to illegal unsafe abortion procedures. *See* Note, *Abortion, Medicaid and the Constitution*, 54 N.Y.U.L. REV. 120, 131 n.87, 145-47 (1979)[hereinafter cited as *Medicaid and the Constitution*]; Note, *A Right Without Access? Payment for Elective Abortions After* Maher v. Roe, 7 CAP. U.L. REV. 483, 492-94 (1978).

[24] 42 U.S.C. §§ 1396-1397i (1976).

[25] To ensure a balanced program of benefits distribution, Title XIX provides general categories of medical services under which participating states must reasonably provide reimbursements. *See* 42 U.S.C. §§ 1396a(a)(13)(B), 1396a(a)(A)(17), 1396d(a)(i)-(v) (1976).

[26] 42 U.S.C. § 1396a(a)(16) (1976).

[27] The Supreme Court has noted that Title XIX does not require the funding of nontherapeutic abortions. *See* Beal v. Doe, 432 U.S. 446, 446 (1977); text accompanying notes 22 & 23 *supra*. However, the Court noted that the exclusion of necessary medical procedures from coverage might raise "a serious statutory question." Beal v. Doe, 432 U.S. at 444. Accordingly, several courts have expressly held that Title XIX requires the funding of medically necessary abortions. *See, e.g.*, Roe v. Casey, 464 F. Supp. 487, 500 (E.D. Pa. 1978); Emma G. v. Edwards, 434 F. Supp. 1048, 1050 (E.D. La. 1977); Right to Choose v. Byrne, 165 N.J. Super. 443, _, 398 A.2d 587, 592 (1979) (Title XIX requires funding abortions to protect woman's health). *But see* D_R_ v. Mitchell, 456 F. Supp. 609, 615 (D. Utah 1978) (life endangerment standard held to be entirely reasonable).

Title XIX's coverge of abortions has come into question recently because of annual HEW appropriation riders, commonly referred to as Hyde Amendments, which restrict federal abortion funding. *See* 1977 Hyde Amendment, Pub. L. 94-439, § 209, 90 Stat. 1434 (1976) (life endangerment standard); 1978 Hyde Amendment, Pub. L. 95-205, § 101, 91 Stat. 1460 (1977) (life endangerment, rape, incest, and severe and long lasting physical health damage standard). The effect of these appropriation riders on Medicaid funded abortions is unclear. *Compare* Preterm, Inc. v. Dukakis, 591 F.2d 121, 129 (1st Cir. 1979), *cert. denied*, 99 S. Ct. 2181 (1979) (hyde substantively changed Title XIX to restrict abortion funding); Zbaraz v. Quern, 596 F.2d 196, 198 (7th Cir. 1979), *cert. granted sub nom.*, Miller v. Zbaraz, 48 U.S.L.W. 3535 (1980) (now pending) *with* Right to Choose v. Byrne, 165 N.J. Super. 443, _, 398 A.2d 587, 591 (1979) (Hyde merely clarifies Title XIX). *See generally Medicaid Funding, supra* note 23. State standards for reimbursement, however, may not be more restrictive than the Hyde amendment provisions. *See* Committee to Defend Reproductive Rights v. Meyers, 93 Cal. 3d 462, ___, 156 Cal. Rptr. 73, 86 (1979). Twenty states have amended their Medicaid policies to conform to the more restrictive Hyde standards. *See Medicaid,* ABORTION L. RPTR. 1.08-1.030 (1979) (summarizing state standards). One commentator forsees devastating health consequences arising from the recent trend towards restrictive funding. *See* Benshoof, *Mobilizing for Abortion Rights*, 4 CIV. LIB. REV. 76 (1977).

tics.[28] Despite the Commonwealth's assurances that the standard should not be literally interpreted,[29] the court viewed the life endangerment criterion as too restrictive when measured against the program's objectives.[30] Accordingly, the court deemed the "substantial endangerment of health" standard more consistent with the policy of eliminating reimbursement only in the case of nontherapeutic abortions.[31]

The new "substantial endangerment of health" standard will undoubt-

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[28] Doe v. Kenley, 584 F.2d 1362, 1365-66 (4th Cir. 1978). In limiting the issue of the appeal, the court found no need to invoke the doctrine of abstention as urged by the Commonwealth. *Id.* at 1365. The federal judiciary defers adjudication of a controversy to the state courts when abstention is deemed appropriate. *Id.* Defendants in abortion cases often requested abstentions since a Supreme Court ruling that abstention is proper. *See* Bellotti v. Baird, 428 U.S. 132, 146-47 (1976). However, Bellotti is unique because that case involved interpretation of a state statute which hinged on the applicability of a local state rule. In the absence of such circumstances, the courts have rejected any abstention claims presented in abortion cases because the resultant delays could unfairly jeopardize the rights of women who are pregnant at the time of the suits. *See, e.g.*, Wynn v. Carey, 582 F.2d 1375, 1382 n.9 (7th Cir. 1978); Wynn v. Scott, 449 F. Supp. 1302, 1313 (N.D. Ill.), *appeal dismissed*, 439 U.S. 8 (1978); Montalvo v. Colon, 377 F. Supp. 1332, 1335 (D.P.R. 1974). *See generally Abstention*, ABORTION L. RPTR. 1.0 (1979).

In refusing to defer interpretation of the Board of Health policy to the Virginia courts, the Fourth Circuit observed that the revised standard could be subject to official legislative change. Doe v. Kenley, 584 F.2d 1362, 1363 (4th Cir. 1978).

[29] *Id.* at 1365. Appellees maintained that the Commonwealth had the intent and desire to fund abortions performed for good medical reasons and that the plaintiff simply misunderstood the policy standard. Brief for Appellees at 13, 41, Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978). *But see* Doe v. Bolton, 410 U.S. 179, 208 (1973) (refusing to condone arbitrary policy which depended on prosecutorial policy discretion for enforcement).

[30] Other courts have ruled on the ambiguity of legislative abortion standards. *See* Colautti v. Franklin, 439 U.S. 379 (1979); Zbaraz v. Quern, 572 F.2d 582 (7th Cir. 1978). *Colautti* involved a challenge to a criminal abortion statute requiring certain medical techniques to be employed if the fetus is or may be viable. In holding the statute ambiguous, the court rejected the state's contention that the words "viable" and "may be viable" conveyed essentially the same meaning. Colautti v. Franklin, 439 U.S. at ___.

In *Zbaraz*, two doctors sought to enjoin the enforcement of an Illinois statute prohibiting Medicaid reimbursement for abortions except those "medically necessary for the preservation of life" of the pregnant woman. The Seventh Circuit found the policy standard ambiguous since the statute lacked clarity as to which medical necessities were intended to be covered. Zbaraz v. Quern, 572 F.2d at 584.

[31] Doe v. Kenley, 584 F.2d 1362, 1366 (4th Cir. 1978). The wording of a funding standard can have a dramatic effect on the number of abortions performed. For example, New Jersey recently shifted from no statutory restrictions on Medicaid payments to a life endangerment standard. As a result, births to eligible Medicaid recipients increased thirty percent and funded abortions decreased from nine hundred to twenty-five per month. *See* Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587 (1979). A similar shift in California is projected to reduce reimbursement for abortion by ninety-five percent. *See* Committee to Defend Reproductive Rights v. Meyers, 93 Cal. 3d 462, 156 Cal. Rptr. 73 (1979).

The Fourth Circuit's decision reflects the judiciary's activism in the area of indigent rights since the revision of Commonwealth's policy standard will increase the number of Medicaid reimbursed abortions. This trend in the protection of underrepresented interests has developed in response to the legislatures neglect of the poor. *See* Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968); *The Abortion Funding Cases, supra* note 2, at 1240.

edly broaden the scope of Medicaid abortion coverage since doctors will be reimbursed for performing therapeutic abortions even when the pregnant woman's life is not endangered. Medicaid funds will now be available to women, previously precluded by the stricter "life endangerment" standard, who face substantial health consequences if forced to carry pregnancy to term. Nevertheless, the Fourth Circuit's holding may exclude many medically related and necessary abortions from reimbursement since the degree of medical necessity required to satisfy the "substantial endangerment of health" standard is unclear.[32]

Medical consequences that could be described as resulting in less than a substantial endangerment of health, such as varicose veins, hypertension, and diabetes, might not meet the court's standard for funding.[33] In addition, pregnancies which are the result of rape or incest as well as those with the potential of producing a deformed child might be excluded from Medicaid coverage.[34] Thus, the uncertainty of coverage leads to the conclusion that the revised standard will not be very helpful in reducing the medical community's hesitation to perform Medicaid-funded abortions.

The Fourth Circuit compromised between the Board of Health's strict standard, which effectively cut off substantial numbers of therapeutic abortions, and a standard which would provide abortions for any good medical reason. The compromise arose out of the court's concern that increased availability of abortion funding could jeopardize the fiscal structure of Virginia's Medicaid program and generate intense alienation on the part of anti-abortion groups.[35] The courts apprehension is understandable when considering that the adoption of a broader "medical ne-

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[32] *See* Zbaraz v. Quern, 572 F.2d 582, 584 (7th Cir. 1978) (per curiam) (noting ambiguity in both preservation of life and preservation of health standards). The ambiguity becomes evident when considering whether the plaintiff's medical claim of emotional physical difficulties satisfies the revised reimbursement standard. The plaintiff could be denied her request for funding by failing to satisfy the substantial endangerment of health standard even though she classified her reasons as therapeutic and consistent with the Commonwealth's policy objective.

[33] *See* Brief for Appellant at 5, Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978).

[34] *Id.*

[35] A large sector of the public is adamantly opposed to abortion. *See* 11 AKRON L. REV. 345, 357 (1977).

As a consequence, the government has attempted to maintain a neutral position on the issue so as to minimize the alienation of anti-abortion groups who are typically seen as one issue voters. With this in mind, the judiciary desires to preserve its own impartiality by ruling conservatively on the abortion issue. *See* note 2 *supra*, at 937.

The cost implications of the medical necessity standard also have had an effect on abortion rulings. *Id.* at 924. The adoption of a broader standard could place a strain on available Medicaid funds and medical resources. *Id.* at 938. However, the cost implications of increasing the availability of state funded abortions are not clear. In the instant case, the Board of Health maintained that the fiscal integrity of the Commonwealth's program would be jeopardized if a broad standard were adopted. Brief for Appellee at 15, 46, Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978). *But see* 123 CONG. REC. E4940 (daily ed. July 28, 1977) (remarks of Hon. Don Edwards) (citing cost and social implications of restrictive standard).