JUDICIAL REMEDIES AND INSTITUTIONAL STANDARDS*

by

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Within the judicial framework the traditional and usual manner of dealing with substandard institutions has been to challenge the initial commitment. In the mid-1960's, Clarence Rouse sought a discharge by writ of habeas corpus because the purpose of commitment was not being met, and Judge Bazelon of the Court of Appeals for the District of Columbia agreed with him.[1] There was actually nothing novel about the Rouse remedy as habeas corpus has always been available to challenge both original and admission procedure and propriety of continued confinement. A great deal of publicity ensued, however, due to the "right to treatment" language.

In 1971 in a federal district court in Alabama, Ricky Wyatt brought a class action on behalf of all involuntarily confined mentally ill and mentally retarded persons in the state's institutions rather than a writ seeking only his release. In an unusual court order, Judge Johnson outlined in considerable detail a treatment program which would satisfy minimum medical and constitutional standards.[2] Hoping to take advantage of the momentum, a similar suit shortly thereafter was filed in a

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federal district court in Georgia, but it was held that adequacy of treatment was not a judicial issue.[3] The matter is currently before the Court of Appeals for the Fifth Circuit, which covers both Alabama and Georgia.

In addition, during the past year, suits have been filed against various states seeking damages in contract or tort. These suits are an indirect attempt to compel improvement in standards on the theory that the cost to the state of damage awards could be more than the initial cost of providing the necessary services.

No matter what remedial remedy is employed the expectation is that the authority of the courts will cause the legislature to readjust their priorities. Dr. Stonewall Stickney, Alabama Commissioner of Mental Health, had welcomed and encouraged the Wyatt suit as a means of requiring the state to take action to improve its institutions. However, when he set out to comply with the standards established by Judge Johnson, the State Mental Health Board dismissed him from his job.

The division of governmental powers and the hand of history weigh heavily on the nature and scope of judicial powers. The framers of the Constitution sharply limited governmental power by dividing it among the executive, legislative and judicial branches, although in recent years the powers have been fusing. The judicial branch has always been the weakest of the three. The common law courts had no power to command that any act, other than an official act, be done or not be done, but could

only give judgment within certain categories of cases or writs by way of compensation for the wrong after it had been committed. There was no power to mold a judgment to the particular circumstances of each case or to make adjustments in keeping with particular rights and interests of the parties, and until the relatively recent waiver of governmental immunity, a state could not be held liable for damages in tort. Equity jurisprudence had its origin in the capacity and disposition of the chancellors to furnish a remedy when there was none or none adequate at law. The chancellors, of course, were not authorized to proceed solely upon their own notions of what was proper but could render an equitable remedy only if the remedy at law was inadequate. The principles of equity, inherited largely from England, operate with similar restrictions in both state and federal courts.

The desegregation cases, from which new remedies were developed, offer a model for the right-to-treatment cases. The class action law used in Wyatt dates back to 1966 and was originally designed to enforce civil rights legislation. Extraordinary court orders, including those requiring the state government to satisfy its financial obligations, have been entered in school desegregation cases. Characterizing the legislature's duty as ministerial rather than discretionary, mandamus has been invoked to compel an official to allocate funds. One thing in life that is certain, besides death and taxes, is the impossibility of operating an institution without money.

In a development paralleling that of the hospital cases, courts have begun to examine the internal operation of prisons. Just as care and treatment are designated the purpose of commitment, the law states that rehabilitation and corrections are the purpose of sentencing. Confinement may be called a "false imprisonment" when these purposes are not being met. The judiciary is exercising dominion, apart from entertaining writs of habeas corpus, over post-conviction matters which were once considered the sole domain of the executive department. A recent case in which the Supreme Court ruled that a prison inmate has the right to practice a religion of his own choice is illustrative of the judiciary's expanding role in this area. Justice Rehnquist, the lone dissenter, commented sardonically that the framers of the 14th Amendment "would doubtless be surprised to know" that convicts were included in those guaranteed equal protection of the laws and urged that the courts allow prison officials wide discretion to treat prisoners differently for reasons of discipline and administration.[4]

The prison inmate is customarily denied the right to vote, and to sign contracts, the right of freedom of speech and assembly, freedom of movement and the right of privacy. The first "jail suit" challenging the mode of detention was brought in 1968 in Chicago where Judge Julius Hoffman refused to dismiss the complaint, finding that if the allegations of jail conditions were proven, imprisonment would amount to cruel and unusual punishment. In the same year as Wyatt but shortly prior thereto, a class action was brought against the State of Maryland alleging

that Patuxent Institution, where inmates serve indeterminate sentences, had failed in its purpose as a correctional facility. The court ordered the state to accept standards formulated and sought by the staff of Patuxent but which they had been unable to implement.[5] Following an Arkansas prison scandal, a federal judge ruled that conditions in at least one of the prisons of that state were so bad that imprisonment there amounted to "banishment from civilized society to a dark and evil world" and violated the Eighth Amendment's prohibition of cruel and unusual punishment. He ordered the state to reform that prison or to close it down. In Florida, a judge after inspecting conditions in certain jails ordered that no more than 700 prisoners could be confined in those jails at any one time. Then most recently, in October 1972, having already taken the unusual step of ordering the state to improve its treatment of the mentally ill and retarded, Judge Johnson ordered a drastic reform of Alabama's prison health care services.[6]

It may be noted also that the courts have been looking at the internal administration of schools and universities. Like the mental hospital and prison, many universities have been located in remote and isolated parts of the state. These institutions have more in common than we may like to admit. A considerable body of law has been developed in the past few years dealing with civil rights of students, hearing procedures, proscribed conduct, and campus demonstrations. Ivan Illich, a proponent of "deschooling," contends that young people are forced into institutions which are more akin to slavery than to

education. If adequate learning is not taking place, it has been suggested that parents should sue the state and school officials in order to bring about quality education. It may be argued that compulsory attendance is a denial of liberty without due process; that the purpose of school is to instil learning and that when learning is inadequate, the state and its agents have insufficient cause to require attendance at that school; that the school board and its agents have breached an implied term of their contract with taxpayers; or that school officials have been negligent, causing irreparable damage to the ability and self-image of the children and should respond in damages or, as in Wyatt, proceed speedily to ameliorate the grievances.[7]

Closely related to the issue of the "right to treatment" is the developing right to refuse treatment notwithstanding commitment. The "right to treatment" implies a right to the "right treatment," which may be a different treatment. Unlike other specialties, psychiatry traditionally has had the social sanction and legal power, though not absolute, to coerce patients who have been committed to accept treatment. Moreover, testing new drugs on unsuspecting patients is likely to occur in institutional settings. In the past, the combining of incompetency hearings with commitment procedures, coupled with governmental immunity from suit, resulted in there being no litigation delineating the right to a different treatment or to refuse treatment. Now these barriers have been lowered.

According to opinions of various state attorneys-general, when a court sends a person to a hospital for the purpose of

diagnosis or observation, treatment cannot be administered over his objection. If the person is committed, however, theoretically it is for the purpose of treatment, not merely observation and testing, and the question arises: what treatment can the hospital administer without the informed consent of the patient--drugs, behavior therapy, electroshock, insulin shock, lobotomy, psychosurgery, sterilization? Mental health directors in various states interpret the commitment law to mean that patients can be treated as the need arises. "Hospitals are for treatment," they say. "If we can't treat patients sent to the hospital, why bother? Why not just have the courts return to the old practice of throwing patients in jail?"

The individual who is delusional and destructive or threatening, for whom psychotropic medication will provide calming and normalizing effect, and the individual for whom drugs or electroshock will reduce depression and suicidal drive present the most difficult dilemmas. The issue of coerced treatment will become more pressing as new drugs which have a wider range of indications become available, particularly those which may reduce aggressive behavior or modify sexual activity or procreation.

History indicates that as psychiatric treatments become more effective, the tendency is to widen the definition of mental illness. Many fear that "mental health" will become a euphemism whereby psychiatric treatment will be used as a form of social control. The suggestion of Kenneth Clark, president of the American Psychological Association, that drugs be used to control

violence in political leaders evoked a storm of criticism. "It's Orwell's 1984!" The suggestion also evoked despair as it relies on prescription rather than on institutional change to bring out the best in man.

Lobotomy and psychosurgery are placed in ill repute in such popular works as Ken Kesey's One Flew Over the Cuckoo's Nest and Michael Crichton's The Terminal Man. Lobotomies were widely performed during the 1940's and 1950's, and its use in mental hospitals as a disciplinary measure, vividly depicted in Kesey's novel, is an old scandal. As a treatment modality, though, psychosurgery has progressed beyond the day of the crude lobotomy, now being a much more refined procedure, but its psychophysiological and ethical rationale remains in dispute. In Crichton's novel, based on one of the cases reported in Mark and Ervin's study, Violence and the Brain, the man "in the hands of science" is a violent paranoid who has twice attempted to kill. A team of surgeons connect his brain to a computer that regulates his behavior. In recent years, psychiatrist Peter R. Breggin in a number of publications, some reprinted in the Congressional Record, has contended that there is a new wave of lobotomy and psychosurgery which is aimed at individuals who are relatively well functioning, the large majority of whom have the diagnosis of neurosis. He contends that it is meaningless to say that the psychosurgeon never operates without the permission of the patient or his family since such consent is readily obtained through subtle threats or promises. He argues that it is immoral to blunt out an individual's emotions and render him placid, for "that is

changing the way he wants to be." He finds no adequate rationale for a process that "destroys man's highest capacities," identifying it as "an abortion of the mind" that "partially kills the individual." He advocates the abolition of all forms of psychosurgery because "just as it is against the law to take a person's life, even with his consent, so it should be against the law to take part of a person's life, even with his consent."[8]

No operation is more fearsome than brain surgery, the invasion by cold steel of man's citadel of reason, his very "self." The brain is the "seat of the soul" and untouchable just as the penis is the locus of the passions and beyond the pale, necessitating a trip all the way to Sweden for sex-change surgery. "Leave your mind alone" -- James Thurber once quipped -- "it may not be much good, but it's all you've got to misunderstand with." The idea that nothing ought to be done to the brain is conservative but no one would argue today that removal of a tumor constitutes brain mutilation. Surgery, by removing the area of irritation and allowing the rest of the brain to function, may be the only alternative to locking a person up like a wild animal. An analogy can be found in the case of the family that is able to blossom upon the removal from the home of a child who had been a disruptive force.

Among the minimum constitutional standards set out by Judge Johnson in Wyatt are those which state:

> Patients have a right not to be subjected to treatment procedures such as lobotomy, electroconvulsive treatment adversive reinforcement conditioning or

> other unusual or hazardous treatment procedures without their express and informed consent after consultation with counsel or interested party of the patient's choice.
>
> Patients shall have a right not to be subjected to experimental research without the express and informed consent of the patient, if the patient is able to give such consent, and of his guardian or next of kin, after opportunities for consultation with the independent specialists and with legal counsel.
>
> Patients have a right to be free from unnecessary or excessive medication.

At the same time the standards provide that patients have a right to be free from physical restraint and isolation, except in emergency situations where it is likely that patients could harm themselves or others and less restrictive means of restraint are not feasible. The hospital thus has the right -- indeed the duty -- to deprive a suicidal patient of such things as belts or razor blades.

The legal basis for the forcible administration of medication to patients in nonemergency situations was questioned recently in New York. A Christian Scientist had been involuntarily admitted to a mental hospital for up to sixty days, based on the signed statement of two physicians who certified her need for care as provided by New York law. She was given medication both orally

and intramuscularly over continual objections based upon her religious beliefs. Noting that there had been no effort to secure a judicial determination of incompetency before treating the patient, the federal appellate court held that the complainant had stated a claim upon which she could recover for damages resulting from forced medication. The court said, "Absent a specific finding of incompetence, the mental patient retains the right to sue or defend in his own name, to sell or dispose of his property, to marry, draft a will, and, in general to manage his own affairs." Furthermore, the court said that a serious question was raised as to whether the woman's right to freedom of speech had been abridged as the evidence indicated that her religious views predated any allegations of mental illness and there was no contention that any current mental illness had altered those views.[9]

Although the authorities are not in complete accord, the courts generally have sustained legislation providing for the sterilization of certain types of convicted criminals, criminally insane and feebleminded persons. Those courts which have held sterilization statutes invalid have done so on the basis that the laws constitute cruel and unusual punishment, unconstitutional class legislation, or deny due process in failing to provide notice and hearing. One court has said that it could not authorize, even on a guardian's application, the sterilization of a mental retardate who had given birth to two illegitimate children. In this Texas case, the ward, age 34, had the mentality of about a six-year-old, was sexually promiscuous, and was unable to

support or take care of herself or her children. As a mentally incompetent person, the ward lacked the mental capacity to consent to the operation or to oppose it. Although the mother as guardian believed that the operation would be beneficial to all, the court said that the ward's "legal rights are to be carefully protected" and an operation which would render the ward sexually sterile would violate those rights. The court found, "There is no medical or physical necessity for the operation sought by the guardian; the application is based on social and economic grounds only."[10]

Just as "sticks and stones may break my bones but names will never hurt me," only the physical therapies -- never psychotherapy -- are challenged. In fact, however, wild psychotherapy can be as devastating as wild physical therapy. Words are rarely "mere." The very concept of "therapeutic communication" and the practice of mail censorship imply that words have consequences.

Among restrictions that may be considered in the best interest of the patient, the hospital may censor the patient's outgoing or incoming mail. The restriction is thought to be justified because a patient, for example, who sends threatening letters to the President or other high government official may as a consequence jeopardize his opportunity for employment following discharge. Some letters from families or friends may upset the patient. Not only the public hospital but also many highly regarded private institutions censor mail, control telephone calls, and in general highly structure the life-style of their patients, considering it vital to a treatment program. Dr. Thomas S. Szasz, though, terms

such tactics "degrading tyrannization." In Wyatt it was stated that patients have an unrestricted right to send sealed mail, and they have a right to receive sealed mail except to the extent that the qualified mental health professional responsible for formulation of the particular patient's treatment plan writes an order imposing special restrictions. Such an order must be renewed after each periodic review of his treatment plan.

It is recognized that a concerted, sustained, and broad-based effort is necessary if the condition of the mental patient is to be improved. Isolated cases have but a limited impact as a judicial decision binds only the parties to the case. The Rouse case -- which was hailed as a great advance -- is illustrative of this phenomenon. Despite its strong language, in the five years following the decision, there has been judicial recognition of the right to treatment in only a few other jurisdictions and little implementation of the right even there. The promulgation of a fancy phrase will not, by itself, bring about any change.

Seeing Rouse coming to naught, the vigorous counsel in the case -- Charles R. Halpern -- with Bruce J. Ennis and Paul R. Friedman in early 1972 established the National Council on the Rights of the Mentally Impaired under the sponsorship of the American Civil Liberties Union Foundation, the American Orthopsychiatric Association, and the Center for Law and Social Policy. The qualifications of these horsemen are noteworthy: Halpern, a law review graduate of Yale, served with leading law firms and was counsel to the American Psychological Association;

Ennis, a cum laude graduate of Dartmouth and a law review graduate of Chicago, served as staff attorney and director of the Civil Liberties and Mental Illness Project of the New York Civil Liberties Union and has recently published the book, Prisoners of Psychiatry; and Friedman, a law review graduate of Yale, is the first lawyer to be accepted for training by the Baltimore-District of Columbia Institute of Psychoanalysis. Halpern acknowledges the stimulation received in his law-psychiatry course taught at Yale by Anna Freud, Joseph Goldstein and Jay Katz.

In conjunction with attorneys from the National Legal Aid and Defender Association and private counsel, they entered an amicus appearance in Wyatt on behalf of the American Psychological Association, the American Orthopsychiatric Association, the American Civil Liberties Union, and the American Association on Mental Deficiency. Working with experts in various disciplines, they developed for Judge Johnson the concrete judicially-enforceable standards for adequate treatment.

It is considered that the necessary treatment programs can best be ensured for every patient, regardless of where committed or for what reason, through class action rather than individual habeas corpus petition. The latter, used in Rouse, is considered an inadequate procedure for reform because even successful litigation will limit relief to one individual -- either discharge or treatment -- and the institution would continue to function essentially unchanged. The underlying legal theory of Wyatt, where a class action was brought on behalf of all involuntarily

confined mentally ill and mentally retarded persons in the state's institutions, was that all such persons have a constitutional right to adequate treatment.[11]

To maximize its impact, the Council is developing a national litigation strategy modeled on the litigation programs initiated on behalf of blacks during the past twenty years. It will provide, upon invitation, technical information and advice to legislatures on problems of the mentally ill and will work with groups, such as the National Association for Mental Health, that are directly involved in the legislative process. The Center's educational program, which is based upon actual student participation in litigation and litigation-related research, currently has fourteen students from the law schools at Michigan, Pennsylvania, Stanford, UCLA and Yale.

From its inception the Council has joined in or initiated major test case litigation and has developed liaisons with several mental health professional organizations. Working with lawyers affiliated with the ACLU, legal assistance agencies, mental health groups, and other concerned lawyers around the country, the Council according to its recent report is currently participating in litigation involving the mentally retarded, institutional peonage, payment of costs of institutionalization, commitment procedures, liability to persons institutionalized without treatment, standards in state training schools, and psychosurgery.[12]

Current litigation includes:

1. Patterned after Wyatt, a suit has been filed challenging the adequacy of treatment afforded mentally retarded residents at the Willowbrook State School for the Mentally Retarded in New York.[13] It is alleged that residents regress rather than progress because the program is so inadequate and the environment so inhumane and psychologically destructive. Even marginal residents have not received beneficial therapy, and the number of resident deaths has increased. Following a television program focusing attention on the tragic conditions at the institution, Senator Javits introduced a lengthy bill "to provide for the humane care, treatment, habilitation and protection of the mentally retarded in residential facilities."[14] While much litigation accomplishes little more than to defuse public outrage, the exposé apparently caused the restoration of $5 million to the state budget.

2. The classification and placement of mentally retarded children, resulting in a denial of their right to education and training, has been challenged in a number of jurisdictions. In 1971, a federal district court in Pennsylvania ordered that every mentally retarded child be given access to a free public program of education and training appropriate to his capacity. The state, having undertaken to provide a free public program of education and training, is obliged to accord it to all children.[15] Among the current lawsuits is one in the District of Columbia which seeks to compel the school board to provide appropriate, free education for retarded, emotionally disturbed, and other

exceptional children.[16] The named plaintiffs, suing on behalf of all similar children resident in the District of Columbia, were denied schooling because of alleged mental, behavioral, physical or emotional handicaps or deficiencies. Failure to provide suitable education was attributed to a lack of fiscal resources by the defendants, who also suggested that while there may be a duty to educate all educable children, the training of severely retarded children is "care" and not "education." The plaintiffs, on the other hand, argue that the training of the severely retarded is an educational, not a welfare issue.

3. In the area of patient labor, a suit has been brought on behalf of a former mental patient with an I.Q. of 135 and a diagnosis of alcoholism seeking damages for back wages, pain and suffering, and violation of the constitutional ban on involuntary servitude. At a hearing before the Court of Claims, expert witnesses testified that the work performed during institutionalization in a New York State hospital over a period of sixteen years was extracted in order to operate the institution and not to provide therapy for the patient. The experts noted that the patient's work assignments in the kitchen, laundry and in various janitorial capacities were not formulated as part of an integrated treatment plan. If successful, the case will apparently be the first recovery of back wages for involuntary labor performed in a mental institution.[17]

In a recent Colorado case, a former state mental patient, who had refused to pay the hospital's charges for care and

maintenance, argued that payment due him for his services rendered to the hospital was larger than the hospital's claim. The court found that the services were optional, rendered without expectation of compensation and were part of the treatment program. The court said only where the work is mandatory and the amount and the conditions under which it must be performed are ruthless, and thus so devoid of therapeutic purpose, that it may be concluded that a patient had been subjected to involuntary servitude.[18]

With few exceptions, the 1966 amendments to the Fair Labor Standards Act require that a minimum wage be paid to all residents who do work for which the institution would otherwise have to hire a regular employee. Since the amendments became effective, however, no effort at enforcement has been made, the Department of Labor taking the position that it would be pointless since institutions could recover such wages by assessing their patients for room, board and treatment. Underlying this position are the assumptions that there will be no residuum after reasonable charges are deducted from the work payments and that involuntary patients constitutionally can be required to pay for their subsistence.

4. A suit pending in the Supreme Court of New York questions whether the state commitment function, conducted wholly or in part for an allegedly public benefit, may be assessed to one class in society. At issue also is whether, consistent with due process, a person can be committed involuntarily and then he or

his family be charged for room, board and treatment. An offer by the city to accept a modest, partial payment as settlement has been rejected.[19]

5. A suit in a federal district court in New York challenges the constitutionality of a short-cut procedure by which a person may be declared incompetent and his funds be entrusted to a "committee," without notice, hearing, or counsel. As a result of a favorable appeal, the case has been remanded for a trial on the merits.[20]

6. Another suit, which has survived a motion to dismiss, seeks money damages on behalf of a former patient deprived of his liberty without treatment. To date, with possibly one exception, only habeas corpus and injunctive relief have been granted.[21] The earlier case, Whitree v. State,[22] involved a claim based on false imprisonment, although a second cause of action was based essentially on the alleged malpractice of the state doctors. The claimant had been committed to a state hospital for over fourteen years, during which time he allegedly received negligent psychiatric and medical care. The court said, "We believe we understand the immense difficulties faced by the State in financing, staffing and administering as vast a complex as (state hospitals). However, society denominates these institutions as hospitals and they should be so conducted." Awarding damages of $300,000, the court based its decision upon the lack of psychiatric care, which was held to be the primary reason for the inordinate length of confinement with the resulting physical and mental effects.

7. A petition for a writ of certiorari has been filed with the United States Supreme Court arising out of a New York suit which challenges, among other things, the involuntary hospitalization of the nondangerous mentally ill; the assumption that a mental patient, by mere inaction, waives his right to counsel and a hearing to oppose involuntary hospitalization; the "two-physician" procedure for the commitment of the nondangerous mentally ill; and involuntary hospitalization.[23]

8. A class action suit seeks to protect youths, committed to Texas state training schools, from physical abuse, corporal punishment, indiscriminate administration of tranquilizers and other conditions of confinement. An affirmative right to programs and services needed for successful reintegration into the community upon their eventual release is also sought. Assuming the court finds that institutionalized juveniles have such rights, there will be an attempt, as in Wyatt, to draw up objective, enforceable standards with which the institutions can be ordered to conform.[24]

9. Litigation is now pending in an attempt to halt the psychosurgery being performed on hyperactive children at the University of Mississippi, one of about a dozen active psychosurgery projects around the country. The alleged purpose of the operation is to make mentally retarded children more manageable. This case affords an important opportunity for judicial scrutiny of the developing biomedical technology.

It remains to be seen whether this litigation will hasten widespread reform. Often too much is expected of courts, but

it is equally true that there is always the possibility of expecting too little. It is recognized, of course, that more satisfying solutions to the problems of the mentally impaired must lie in increased public awareness and concern, reflected ultimately in new fiscal priorities. The Council's test case campaign is designed to change public consciousness as well as the law.

A test case requires professional expert opinion. Partisan experts being called by both parties has resulted in the controversial "battle of the experts," alienating many professionals from the judicial process. However, the role of the expert in a test case or as amicus curiae is not to be neglected. In addition to testifying, professionals in the pertinent field can offer invaluable suggestions to an attorney preparing an amicus curiae brief on a point of law or of fact for the information of the judge. In recent decades, the role of amicus curiae brief has been expanded, and indeed, it is quite common now to see organizational presentation of a brief. Under this modified adversary system, the brief as a form of information gathering is the judicial counterpart of lobbying and congressional hearings in the legislative process. Fairly speaking, it is often a "political statement" or"lobbying before the court."[25]

However, it is recognized that permission to participate as a friend of the court is and always has been a matter of grace rather than right. The theory of trial by duel between two contestants precludes an unlimited right of third persons to

intervene or file a brief. "The fundamental principle underlying legal procedure," one court observed, "is that parties to a controversy shall have the right to litigate the same, free from the interference of strangers." Chief Justice Burger and many other judges tend to feel that the role of the court is not to decide broad social issues -- rather it is to decide a contest between two litigants -- and they want "friends" to remain outside the courtroom.

Access to the judicial process on the part of third-party individuals or organizations is an extension of the view that the law is a process of social choice and policy making. The outcome of litigation indirectly affects interests other than those formally represented. Groups organized to promote altruistic goals are likely, as amici, to represent important widespread public interests. Organizational participation in the judicial process focuses attention on the judge's decision, and as a consequence, he is particularly cautious and deliberate in these cases. The National Association for the Advancement of Colored People, almost from its inception, has participated as amicus curiae in litigation. The American Civil Liberties Union early found the amicus curiae brief a useful instrument in drawing widespread attention to its cause. The American Jewish Congress over the past years has been among the most active filers of amicus curiae briefs. Organizational activity in the legal process finds a broad new field with the recent development of the class action which allows representation of anyone and everyone in a similar position.

Moreover, while the party and not the court is responsible under the adversary system for gathering and presenting facts, there are many facts which need to be supplemented or cannot be established by formal proof. The doctrime of judicial notice recognizes the right or the necessity of the judge to "notice" evidence outside the record which is "a matter of general knowledge." The judicial notice apparatus, however, does not work well unless it is fed with information. Judge Frank of the Second Circuit once observed that "competently to inform ourselves, we should have a staff of investigators like those supplied to administrative agencies," but "we have no such staff." In the landmark case of Wolf v. Colorado,[26] Supreme Court Justice Murphy wrote to district attorneys of various cities to learn of police practices there and obtained from these letters the information he used to deal with the issue of use of illegally obtained evidence at trial.

Almost any case can be used to illustrate the need for, and the propriety of, supplying the court with information. A prominent case is United States v. Durham, [27] where Judge Bazelon, without support in the evidence developed at the trial, declared: "Medico-legal writers in large numbers . . . present convincing evidence that the right-and-wrong test is 'based on an entirely obsolete and misleading conception of the nature of insanity.'" The court had no hesitation in using this "convincing evidence" even though it was not in the record.

The American Medical Association, American Psychiatric Association, American Psychological Association, and the

American Orthopsychiatric Association at one time or another have entered as amici on various mental health issues. However, these associations have no rational scheme for submitting amici briefs or instituting suit, but do so when attention is called by its attorney, staff or interested member to a particular case judged directly relevant to its field, and if there is sufficient time and money. One or another of these associations -- in a happenstance, often fortuitous manner -- have submitted briefs on issues of criminal responsibility, admissibility of expert testimony by psychologists, psychological test validity in assessing employment placement, privileged confidential communication, services to the mentally retarded, adequacy of treatment in the mental hospital and mental retardation institution, capital punishment, unusual punishment in solitary confinement, denial of admission of candidate to medical school because of a prior mental hospital stay, imprisonment for possession of marijuana, and abortion. In addition, these associations on occasion have offered sundry proposals for model legislation, such as proposed legislation prohibiting corporal punishment in schools.[28]

The Supreme Court's 1972 rulings on competency to stand trial in Jackson v. Indiana[29] and the death penalty in Furman v. Georgia[30] draw heavily on the issues formulated and researched in the amicus briefs. In fact, most of the issues discussed by the Court in Jackson were not touched on by attorneys for the state or for the defendant but were raised only in Ortho's amicus brief. The brief called the Court's attention to the broad implications of

the procedure used in commitment for incompetency to stand trial, and the Court, although it did not permit filing of the brief, responded by addressing itself to these issues.

While it may encumber the judicial process, many courts are grateful for the participation of amicus curiae. The court's opinion often incorporates verbatim the amicus brief, which has come, in the style of the Brandeis brief, to represent the intersection of scholarship and advocacy. Amicus may enter at the trial or appellate level, but rarely is afforded the opportunity to participate on the trial level as it did in Wyatt where it participated fully in the proceeding and presented numerous witnesses on all aspects of the case. In helping to formulate minimum medical and constitutional standards in hospital treatment, the court expressed gratitude for exemplary service to the American Orthopsychiatric Association, the ACLU, the American Psychological Association, and the American Association on Mental Deficiency.

Today, individuals look to their organizations to represent and further their professional interests and concerns. As individuals, they have neither the time nor the inclination to pursue a matter that does not directly and immediately affect their pocketbook and have come to expect organizational representation in the courts on general professional matters. While there has been much criticism of the role of mental health professionals as expert witnesses in the adversary process, it is at the same time recognized that in some way their viewpoint should enter the judicial process.

Ortho is currently carrying out a part of its role in the developing use of legal approaches to critical mental health issues as a sponsor of the National Council on the Rights of the Mentally Impaired along with the ACLU Foundation and the Center for Law and Social Policy. At the same time, Ortho is focusing on the education of the mental health professional as to the issues in which law can be used as an instrument of mental health policy development.

Amici briefs are often published in the Congressional Record--any congressman can put anything in the Record, and on request he will usually do so, including almost anything except the kitchen stove -- for the purpose of distributing information at a low printing price. Each day, within thirteen hours of the close of debate, congressional presses turn out 49,000 copies of another thick edition of the Record. While production may be impressive, content unfortunately is not. In effect, the Record is a subsidiary xeroxing service for congressmen, producing by the thousands whatever item they choose. Nader's Study Group, which called the Record a big charade, says that shrewd doctors and dentists soon will learn to stock their waiting rooms with copies of the Record.[31] In any event, the Record is a means to heighten visibility and consciousness of an issue.

And increased visibility and public awareness is the point of much of the current test-case litigation. The wide reporting of the Wyatt case in the media has raised public consciousness about mental health issues and strongly suggests that judicial intervention can be an effective force for change.

NOTES

1. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

2. Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373, 387 (1972).

3. Burnham v. Department of Public Health, Civil Action No. 16385 (N.D. Ga. 1972).

4. Cruz v. Beto, 405 U.S. 319 (1972).

5. McCray v. Maryland, 40 U.S.L.W. 2309 (Md. Cir. Ct., Nov. 11, 1971).

6. Hollie, P.G., Judges Across the U.S. Campaign for Reforms in the Nation's Prisons, Wall Street Journal, Nov. 3, 1971, p. 1; Kwitney, J., Losers' Victories, Wall Street Journal, Oct. 10, 1972, p. 1; New York Times, Oct. 5, 1972, p. 25.

7. Saretsky, G., and Mecklenburger, J., See you in Court?, Saturday Review, Oct. 14, 1972, p. 50.

8. Hampton, J., Eerie Brain Surgery, National Observer, March 25, 1972, p. 1; 118 Cong. Rec. 26 (daily ed. Feb. 24, 1972).

9. Winters v. Miller, 446 F.2d Cir. 1971), cert. denied, 404 U.S. 985 (1971). Having decided that the patient has a cause of action, the appellate court has remanded the case to the lower court for a trial on the claim for damages.

10. Frazier v. Levi, 440 S.W.2d 393 (Tex. 1969).

11. In addition to the federal provision, practically all states have a class action statute in one form or another. To maintain a class action, plaintiffs must show that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a); Drake, J., Enforcing the Right to Treatment, Am. Crim. L. Rev. 10:487, 1972; Consumers in Court, Wall Street Journal, April 30, 1971, p. 1.

12. I am indebted to the Council for information on its pending litigation.

13. N.Y. State Assn. for Retarded Children v. Rockefeller (E.D.N.Y., filed March 17, 1972). A companion case expected to be consolidated, Paresi v. Rockefeller, No. 73 Civ. 357 (E.D.N.Y.), filed by the New York Legal Aid Society, was brought on behalf of parents of other children at Willowbrook.

14. S. Res. 3759, 92d Cong., 2d Sess., 118 Cong Rec. 106 (1972).

15. Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971).

16. Mills v. Board of Education (D.D.C., filed Sept. 17, 1971).

17. Dale v. New York, noted in Psychiat. News, Sept. 20, 1972, p. 4. Also in Barnes v. Hill, No. 1821 (W.D. Mo., filed April 27, 1972) brought by the Legal Aid Society of St. Louis, it is alleged that compulsory work assignments without compensation if violative of the constitution. Cain, S., "Pay to be Asked for Mental Patients," Detroit News, Nov. 15, 1972.

18. Estate of Buzzelle v. Colorado State Hospital, 491 P.2d 1369 (Colo. 1971).

19. Terranzio v. Kessler. See also Miller v. Michigan Dept of Treasury, 188 N.W. 2d 795 (Mich. 1971), in which suit was brought by parents of a mentally retarded child, who had been committed to a state institution, challenging the constitutionality of the statute requiring them to reimburse the state for costs of the child's care. The Michigan Supreme Court held the statute invalid for failure to provide for hearing on relatives' request for determination of liability, and failure to contain legislative standards to be applied.

20. Dale v. Hahn.

21. Donaldson v. O'Connor. Compensation for Civil detention is discussed in Frankel, L.H., Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future, Yale L.J. 78:229, at 266, 1969.

22. 56 Misc.2d 693, 290 N.Y.S.2d 486 (1968).

23. Fhagen v. Miller, petition for cert. filed, 40 U.S.L.W. 3595 (U.S., May 16, 1972). A three-judge federal court has struck down Wisconsin's commitment laws, calling them constitutionally defective for failing to provide notice and jury trial. Lessard v. Schmidt, 41 U.S.L.W. 2249 (E.D. Wis., Oct. 19, 1972).

24. Morales v. Turman (E.D. Tex., filed March 1971).

25. Harper, F.V. and Etherington, E.D., Lobbyists Before the Court, U. of Pa. L. Rev. 101:1172, 1953; Krislov, S., The Amicus Curiae Brief: From Friendship to Advocacy, Yale L.J. 72:694, 1963.

26. 338 U.S. 25 (1949).

27. 214 F.2d 862 (D.C. Cir. 1954).

28. These findings are the result of an investigation by the Committee on Legal Approaches to Mental Health Issues of the American Orthopsychiatric Association, consisting of Judge Luther Alverson, Mr. Bernard D. Fischman, Dr. Leila Foster, Mr. Charles R. Halpern, Dr. Jay Katz, Mr. Simon Rosenzweig, and the author as chairman.

29. 406 U.S. 715 (1972).

30. 92 S.Ct. 2726 (1972).

31. Green, M.J., Fallows, J.M., and Zwick, D.R., Who Runs Congress? New York: Bantam, 1972.