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THE AFTERMATH OF THE DD ACT: IS THERE LIFE AFTER *PENNHURST*?

*Penelope A. Boyd**

Handicapped persons have always suffered from the popular opinion that they are somehow lesser beings. Of the enormous varieties and types of handicapping conditions, "mental retardation" remains one of the surer tickets to relegation to subhuman status¹ and second-class citizenship. The monuments to this perception of the retarded exist throughout the United States in the form of large institutions,² often euphemistically termed "state schools" or "developmental centers." For the past decade, assaults on these permanent way-stations for the citizens of the United States labelled "mentally retarded"³ have been prevalent in the media and in the courts, seeking the improvement of the physical conditions of insti-

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1. See Wolfensburger, *The Origin and Nature of Our Institutional Models*, in *CHANGING PATTERNS IN RESIDENTIAL SERVICES TO MENTALLY RETARDED CITIZENS* 59 (R. Kugel & W. Wolfensburger, eds. 1976).

2. *Id.*

3. The concept of mental retardation is one that is fluid, being a label for individuals with difficulties in adaptive behavior and intellectual functioning. Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124, 124 n.1 (1977). For purposes of this article, the term will be used only as it is imposed by others, *i.e.*, when someone has labelled a person as retarded and has treated him/her as such. See P. FRIEDMAN, *THE RIGHTS OF MENTALLY RETARDED PERSONS* 14 (1976).

Mental retardation is a social construct, not a single clinical entity. The term has no precise or absolute meaning, and there is considerable disagreement as to its upper margin. 'Mental retardation', as defined by the American Association on Mental Deficiency, 'refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior' and appearing in the 'developmental period.' In plain English, a mechanistic interpretation reduces this definition to three elements: a label applied to a person who scores below 97% of the population on standardized intelligence tests, who *also* lacks the social skills to cope with his/her particular environment, and who *also* has been recognized as having had those problems of adaptive behavior since childhood or early adolescence. Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 STAN. L. REV. 553, 555 (1979) [hereinafter cited as *The New Clients*] (quoting AMERICAN ASS'N ON MENTAL DEFICIENCY, *MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION* 5 (rev. ed. H. Grossman 1977)).

tutions and the provision of services to enable personal development, *i.e.*, habilitation.⁴ Litigation has resulted in court orders for improvements in the institutions,⁵ as well as consent decrees for the creation of services for retarded citizens in their communities.⁶ On April 20, 1981, litigation as a means of bringing the lives of the retarded out of the nineteenth century was set back when the United States Supreme Court issued its opinion in *Pennhurst State School and Hospital v. Halderman*⁷ (hereinafter *Pennhurst*) which reversed an *en banc* Court of Appeals for the Third Circuit holding that the mentally retarded had a right to habilitation⁸ under the Developmentally Disabled Assistance and Bill of Rights Act⁹ (hereinafter the DD Act). While the full ramifications of the Court's narrow decision have yet to be realized, the potential for judicial depersonalization of the retarded through factual sterilization of lower court findings (which *Pennhurst* represents) needs to be explored in light of the history of the statute involved and the institution to which it was applied.

Pennhurst State School and Hospital opened its doors in the early 1900's, as the Eastern State School for the Feeble-Minded and Epileptic, for the purpose of segregating and training retarded and epileptic persons of eastern Pennsylvania.¹⁰ Conditions at the institution first spurred litigation to secure access to education for mentally retarded children in Pennsylvania,¹¹ and finally, in the instant case, to assure access to habilitation for all its residents (both children and adults).¹²

4. "Proper terminology would recognize that mental retardation is a highly varied, relative, and dynamic condition, and would classify people, if at all, in terms of resources or services they require." *The New Clients*, *supra* note 3, at 555.

5. *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, modified in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

6. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 438 F. Supp. 440 (E.D.N.Y. 1977).

7. 101 S. Ct. 1531 (1981).

8. *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84 (3rd Cir. 1979), *aff'g on other grounds, modifying in part*, 446 F. Supp. 1295 (E.D. Pa. 1977).

9. 42 U.S.C. §§ 6000-6081 (1977 & Supp. 1981).

10. 1913 Pa. Laws 328.

11. *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) (three judge court) (consent decree), *enforced*, 343 F. Supp. 279 (E.D. Pa. 1972). See generally *The New Clients*, *supra* note 3.

12. *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, modified and remanded in part*, 612 F.2d 84 (3rd Cir. 1979), *rev'd and remanded*, 101 S. Ct. 1531 (1981). The history of the case is discussed in detail in Ferleger & Boyd, *Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 STAN. L. REV. 717 (1979) [hereinafter cited as *Anti-Institutionalization*].

At the time of trial, the institution housed 1200 retarded persons in overcrowded and filthy wards, where residents suffered physical and psychological deterioration.¹³ Lack of needed services was constant.¹⁴ Residents of Pennhurst spent their lives as part of a ward or unit—eating, bathing, and dressing in group fashion.¹⁵ The remainder of their days was spent in enforced idleness—sitting in day rooms without activities or programs to develop individual potential.¹⁶ As a result, the residents of Pennhurst became progressively more handicapped.¹⁷ What is perhaps the saddest fact is that throughout the trial, experts and state officials unanimously testified that no one needed to be at Pennhurst, and, that given appropriate services, all could and should be served in the community.¹⁸ Therefore, the relief sought (and granted by the district court) was first, the replacement of the institution with the provision of services in the community,¹⁹ and second, the immediate improvement of the institution pending the development of necessary services.²⁰

Habilitation is a term of art not susceptible of easy definition without reference to the individual to be habilitated. Generally, it is described as “that education, training, and care required by retarded individuals to reach their maximum development.”²¹ The concept, like the concept of retardation, is fluid, requiring assessment of individual needs and strengths and the development or provision of means of meeting the needs.²² Two broad principles apply to the habilitative process: First, that all mentally retarded persons, given appropriate services, can grow and develop, thereby becoming more self-sufficient,²³ and second, that the development of the retarded is enhanced when they are treated as much like non-handicapped per-

13. The failures of Pennhurst as an institution are outlined in the district court opinion, 446 F. Supp. at 1302-11. *See also Anti-Institutionalization*, *supra* note 12, at 725-26.

14. *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1302 (E.D. Pa. 1977).

15. *Id.* at 1303.

16. *Id.* at 1304.

17. *Id.* at 1309.

18. *See id.* at 1313.

19. *Id.* at 1298.

20. 446 F. Supp. at 1328-29. *See also* Order of March 5, 1979, *as amended* April 24, 1980, ¶¶ 3.0-5.0.

21. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1298 (E.D. Pa. 1977).

22. *Supra* note 4.

23. *See generally* Mason & Menolascino, *supra* note 3; *The New Clients*, *supra* note 3, at 23-27.

sons as possible.²⁴

Large institutions, isolated from society, are antithetical to the habilitative process. Because of chronic underfunding (and consequent understaffing) these institutions simply fail to deal with their residents as individuals.²⁵ Contrary to popular assumption, this de-personalized environment is damaging to severely handicapped persons; it causes them to suffer physical and intellectual deterioration. Handicapped persons need an individualized environment,²⁶ one characterized by individual planning, individual programs, and individual goals. Without this individualized orientation, persons released from institutions will, in all likelihood, be reinstitutionalized,²⁷ or suffer similar privations in the community.

Long before the district court opinion in *Pennhurst*, individualized attention had been mandated by law in Pennsylvania.²⁸ By regulation, mentally retarded persons were entitled to individual assessments of needs and to the provision of services designed to meet those needs²⁹ to avoid "unnecessary and prolonged" institutionalization through the coordination and development of services in the community.³⁰ The promise of individual attention had not been kept for the persons confined at Pennhurst. For many residents of Pennhurst, the services needed to enable them to leave the institution were not identified,³¹ much less offered.

Following extensive findings of fact on the conditions of Pennhurst, the nature of mental retardation, and the opportunities offered by adequate habilitation, the district court entered its opinion, holding on alternative grounds that there was a right to habilitation under the Constitution, the Rehabilitation Act, and Pennsylvania law.³² Both the conditions at Pennhurst and the systemic deficien-

24. See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1312-13 (E.D. Pa. 1977). See also Nirje, *The Normalization Principle and its Human Management Implications*, in *CHANGING PATTERNS IN RESIDENTIAL SERVICES TO MENTALLY RETARDED CITIZENS* 129 (R. Kugel & W. Wolfensburger, eds. 1976).

25. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1304-05 (E.D. Pa. 1977).

26. Laski, *Right to Services in the Community: Implications of the Pennhurst Case*, *NORMALIZATION, SOCIAL INTEGRATION, AND COMMUNITY SERVICES* 167, 173 (Flynn & Nitsch, eds. 1980).

27. *Id.* at 174.

28. *Mental Retardation Regulations* § 5200, app. IV, 3 Pa. Bulletin 285 (Feb. 10, 1973).

29. 3 Pa. Bulletin at 285-86. See also *In re Schmidt*, 429 A.2d 631 (Pa. 1981).

30. 3 Pa. Bulletin at 285-86.

31. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1305 (E.D. Pa. 1977).

32. *Id.* at 1320-25. This relief was granted on the basis of constitutional rights to habili-

cies which caused persons to be placed there were addressed.

The remedial process was developed slowly and carefully by the district court. The original order laying the foundation for the process of developing community placements for the plaintiff class was entered on March 17, 1978, after the defendants had failed to propose a suitable remedial alternative.³³ This order enjoined the defendants to provide individual plans and programs for community services to class members and enjoined certain health and safety violations at the institution.³⁴ The order also provided for the appointment of a special master, with monitoring and planning functions, to assist the court in the implementation of the order, primarily by monitoring the defendants' compliance.³⁵ This order was appealed by the defendants.

The order of March 17, 1978, was made more specific by a subsequent order entered March 5, 1979, governing the interim operations of Pennhurst. This order began the establishment of specific requirements for orderly development of community services for the residents of the institution and set certain requirements for conditions at Pennhurst. The community placement process was begun with the order for the hiring of a number of case managers by the defendants to concentrate specifically on members of the plaintiff class.³⁶ Case managers, as the individuals responsible for the assessment of needs and the identification and securing of services, were central to the planning and service delivery process.³⁷ Thus, the ability to provide individualized assessments was augmented so that Pennhurst residents could be reintegrated into the service delivery system. That the class members would actually benefit from the system was assured, in part, by that portion of the order which required the development of an individual habilitation plan for any class

tation, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1976 & Supp. III 1979), and the Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969 & Supp. 1981-1982). These causes of action and the district court's opinion are analysed in *Anti-Institutionalization*, *supra* note 12.

33. The Commonwealth of Pennsylvania repeated its offer made at trial, to transfer 100 Pennhurst residents to other institutions, to place individuals in the community at a rate of 14 persons per month for 18 months and to invest \$2.4 million in improving the facility. This would have left 850 people at the institution. Laski, *supra* note 26, at 169.

34. Among the improvements ordered were the elimination of filth and vermin, the provision of necessary adaptive equipment (i.e., wheelchairs) a prohibition on the use of major tranquilizers and physical restraints to control Pennhurst residents, and the provision of adequate medical services. 446 F. Supp. at 1328-29.

35. *Id.* at 1326.

36. Order of March 5, 1979.

37. *See* Mental Retardation Regulations, § 5400, app. IV, *supra* note 28.

member, reviewed and approved by the Special Master, prior to his or her relocation.³⁸

On December 13, 1979, the court of appeals affirmed, with modifications, the opinion and order of the district court³⁹ on the basis of the Developmentally Disabled Assistance and Bill of Rights Act,⁴⁰ and the Pennsylvania Mental Health and Mental Retardation Act.⁴¹ The court of appeals held, *inter alia*, that the Bill of Rights section of the DD Act, section 6010, passed pursuant to section five of the fourteenth amendment, conferred upon the developmentally disabled, beneficiaries of the Act, here residents of Pennhurst, a right to habilitation in the least restrictive environment. The court held that Congress intended to create a presumption in favor of community living arrangements as the means of habilitation.⁴² The major modification in relief mandated by the court of appeals was a more formalized consideration of individual needs for institutionalization.⁴³ This was to be accomplished by assessments and planning with the presumption in favor of community living arrangements.⁴⁴

Reversing the court of appeals, the United States Supreme Court held that section 6010 alone created no substantive rights in the mentally retarded to appropriate treatment in the least restrictive environment.⁴⁵ The Court determined that the rights involved would impose affirmative (and financial) obligations upon the state, and that it thus could not be inferred that Congress was acting pursuant to its section five powers unless the intent to draw upon those powers was stated explicitly.⁴⁶ Nor could Congress have imposed such obligations under its spending power, the Court reasoned, in the absence of an unambiguous imposition of a condition in the statute.⁴⁷ Thus, it was held that Congress intended to create no substantive rights under section 6010 of the DD Act for the residents of Pennhurst. This decision must be examined in light of the extensive history and unique structure of the DD Act.

38. Order of March 5, 1979, ¶ 11.0. *See also* Office of the Special Master, Guidelines for Case Managers (August 1980, rev'd). Admissions to Pennhurst were enjoined by the district court. 446 F. Supp. at 1327.

39. Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3rd Cir. 1979).

40. 42 U.S.C. §§ 6000-6081 (1976 & Supp. III 1979).

41. PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969 & Supp. 1981-1982).

42. Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 96-97 (3d Cir. 1979).

43. *Id.* at 104-07.

44. *Id.* at 113-15.

45. Pennhurst State School & Hosp. v. Halderman, 101 S. Ct. 1531, 1540-45 (1981).

46. *Id.* at 1540-42.

47. *Id.* at 1542-44.

The Developmentally Disabled Assistance and Bill of Rights Act has a history which tracks congressional involvement on behalf of the mentally retarded with near precision. Federal action was initiated by President John F. Kennedy with the establishment of the first President's Panel on Mental Retardation in the early 1960's.⁴⁸ Congress responded to the work of this panel, finding that comprehensive services to retarded citizens were needed and that existing facilities were overcrowded, obsolete, and inappropriate.⁴⁹ The Mental Health Centers Construction Act of 1963⁵⁰ offered federal financial assistance to the states for the construction of new facilities and development of community services. This Act was revised and extended in 1967 to add a grant program to be used, first, to teach professionals in community retardation programs how to avoid institutionalization and, second, to continue fiscal support of community programs and comprehensive services for retarded persons.⁵¹ In 1970, the class of beneficiaries of the Act was expanded to include persons with developmental disabilities.⁵² Finally, in 1975, Congress added a Bill of Rights to its funding statute. The 1975 DD Act,⁵³ with its 1978 Amendments,⁵⁴ was the focus of the Supreme Court opinion. The Court focused particularly on section 6010, which enumerated congressional findings of the rights of developmentally disabled persons.

The format for receipt of funds has been unchanged since 1970.⁵⁵ A state wishing to participate submits a state plan,⁵⁶ which

48. See The President's Panel on Mental Retardation, *Report of the Task Force on Law*, 10-12, 41 (1963).

49. H.R. REP. NO. 694, 88th Cong., 1st. Sess., *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 1054, 1061-62. Preference for community services was apparent:

Sheltered workshops can be of great assistance as a part of a comprehensive center organized to restore the mentally retarded to the maximum degree of normal living in his community. In the absence of a coordinated program of services, the mentally retarded person is denied the opportunity to develop most fully his potential for contributing to our society.

Id. at 1061.

50. Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282.

51. Mental Retardation Amendments of 1967, Pub. L. No. 90-170, 81 Stat. 527.

52. Developmental Disabilities Services and Facilities Construction Amendments of 1970, Pub. L. No. 91-517, 84 Stat. 1316.

53. Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 89 Stat. 486.

54. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, title V, Pub. L. No. 95-602, 92 Stat. 2955.

55. Developmental Disabilities Services and Facilities Construction Amendments of 1970, Pub. L. No. 91-517, 84 Stat. 1316.

56. 42 U.S.C. § 6063 (1976 & Supp. III 1979).

must contain detailed plans of utilization of funds and assurances.⁵⁷ This plan, reviewed by the Department of Health and Human Services, if approved by the Secretary⁵⁸ in essence triggers the flow of DD Act money, to be used with other state and federal funds to provide needed services.

Section 6010, the "Bill of Rights," was the heart of the Supreme Court decision. It has its own legislative history. The addition of a "Bill of Rights" to the funding statute may be attributed to the failure of the grant program to significantly affect the lives of the developmentally disabled, particularly those in state institutions.⁵⁹ The Bill of Rights was first presented to the Senate in 1973, following media exposure of conditions at Willowbrook State School, the nation's largest institution for the retarded.⁶⁰ The proposed legislation was intended to insure habilitation by the establishment of detailed standards for residential facilities and minimization of inappropriate admissions to institutions.⁶¹

The bill was followed in 1974 by another⁶² which was substantially equivalent,⁶³ with congressional interest further heightened by a study by the General Accounting Office which revealed continuing serious gaps in services to the retarded, with disparities among the states and within the states.⁶⁴ Again, the purpose of the bill was to establish standards for habilitation and to discourage institutionalization.⁶⁵ This bill was reintroduced in 1975, setting forth detailed

57. *Id.* § 6063(b).

58. *Id.* § 6063(c)-(d).

59. See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1977).

60. The bill, S. 458, and its grant counterpart, S. 427, are reprinted in *Developmental Disabilities Act Extension and Rights of Mentally Retarded: Hearing on S. 427 and S. 458 Before Subcommittee on the Handicapped of the Committee on Labor and Public Welfare* (1973) [hereinafter cited as *1973 Hearing*]. See S. REP. NO. 94-160, 94th Cong., 1st Sess. 3-4 (1975).

61. *1973 Hearing*, *supra* note 60, at 229-30; 121 CONG. REC. 29820 (1975) (remarks of Sen. Javits); *Developmentally Disabled Assistance and Bill of Rights Act: Hearing on S. 3378 Before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare*, 93rd Cong., 2d Sess. 273 (1974) (statement of Sen. Kennedy) [hereinafter *1974 Hearing*]. The remedial process by the setting of standards is one that had been utilized by federal courts in the enforcement of the constitutional rights to habilitation. See *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, modified in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

62. S. 3378, reprinted in *1974 Hearings*, *supra* note 61.

63. S. REP. NO. 94-160, *supra* note 60, at 3-4. S. 3378 extended the standards of S. 459 to community facilities. *1974 Hearing*, *supra* note 61, at 273 (statement of Sen. Kennedy).

64. *1974 Hearing*, *supra* note 61, at 1-2; 121 CONG. REC. 29817 (1975) (remarks of Sen. Randolph).

65. See S. 3378, Title II, § 201, reprinted in *1974 Hearing*, *supra* note 61, at 44.

standards for residential and community placements.⁶⁶ The Act, in its present form, emerged.⁶⁷ Section 6010 states congressional findings on the rights of developmentally disabled persons,⁶⁸ emphasizes individual rights of disabled persons,⁶⁹ and sets standards for institutions and programs.⁷⁰ It reads, in pertinent part, as follows:

Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any . . . program . . . that (A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or (B) does not meet the following minimum standards⁷¹

The congressional factual findings are important here, and particularly enlightening given the factual findings by the district court.

While Pennhurst as an institution was not before Congress, the findings of the district court in *Pennhurst* and the findings of Congress which precipitated section 6010 were parallel and consistent. Both found that mental retardation was an educational handicap, not a disease, and that the retarded were not subhuman, eugenic misfits, or eternal children and should not be made the objects of pity.⁷² Further, they found that these myths and misconceptions had resulted in the segregation, sterilization, and stigmatization of

66. See H. R. REP. 94-473, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 943. See also S. REP. NO. 94-160, *supra* note 60, at 4.

67. Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486, title II (1975). In 1978, when the planning program of the "assistance" section of the Act, title I, was substantially revised (although not redirected), the Bill of Rights, title V, was unchanged, except for Congress' addition of special emphasis that the rights in this section were in addition to rights possessed by all persons. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, title V, § 507, 92 Stat. 3007.

68. 42 U.S.C. § 6010 (1976 & Supp. III 1979).

69. *Id.* § 6010(1)-(2).

70. *Id.* § 6010(3)-(4).

71. *Id.* § 6010 (1976 & Supp. III 1979) (quoted in *Pennhurst State School & Hosp. v. Halderman*, 101 S.Ct. 1531, 1537 (1981)).

72. S. REP. NO. 94-160, *supra* note 60, at 27-28; *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1298 (E.D. Pa. 1977).

retarded individuals.⁷³ Congress and the district court both adopted the developmental model of services to the retarded, finding that, with proper habilitation, every retarded person is capable of growth toward self-sufficiency,⁷⁴ and that simple custodial care⁷⁵ "must be rejected."⁷⁶ Both also found that normalization is integral to the habilitation of the retarded, and must therefore, by definition, occur in an environment that is least restrictive to the person.⁷⁷

The district court's findings of fact regarding Pennhurst coincided with congressional factual determinations regarding institutions. Both found that despite a decade of federal funding, conditions giving rise to litigation remained and that dramatic steps were needed.⁷⁸ Institutions, it was found, do not provide habilita-

73. S. REP. NO. 94-160, *supra* note 60, at 26-27; 1973 *Hearing, supra* note 60, at 253; 446 F. Supp. 1291-1300.

74. Such a view stresses that all developmentally disabled individuals have potential for learning and growth.

From this developmental model, it follows that custodial care—which is predicated on the assumption that certain individuals are essentially incapable of development—must be rejected. The newer developmental model emphasizes concrete program goals for individuals and therefore encourages evaluation based on specific outcomes.

S. REP. NO. 94-160, *supra* note 60, at 28. See [1967] U. S. CODE CONG. & AD. NEWS 2061, 2071; 124 CONG. REC. 15562 (1978) (remarks of Sen. Williams); 124 CONG. REC. 15571 (1978) (remarks of Sen. Dole).

75. Custodial care is simply life-maintenance activities with no training services. Such care is inappropriate for any retarded person. "No line divides mentally retarded persons who can benefit from habilitation from those who cannot; on the contrary, even the most profoundly retarded 'can and do profit from habilitation efforts.'" *The New Clients, supra* note 3, at 561.

76. S. REP. NO. 94-160, *supra* note 60, at 28; 446 F. Supp. at 1298.

77. A final, but critically important dimension of this new model is that developmentally disabled persons should live like non-developmentally disabled persons to the greatest degree possible. Every effort should be made to assist developmentally disabled persons to maximize their ability for self-care and to live normal lives. From this, it also follows that each developmentally disabled person should be allowed to live in the least restrictive environment conducive to his or her maximum development.

S. REP. NO. 94-160, *supra* note 60, at 28. See also 1973 *Hearing, supra* note 60, at 564; 446 F. Supp. at 1318; 612 F.2d at 93.

78. The last four years have seen a dramatic increase in public awareness of the needs of institutionalized mentally retarded or developmentally disabled persons. This has been highlighted by scandals in a number of institutions, by court cases, and by some excellent work done in the mass media. Testimony before this committee persuasively demonstrated that implementation and enforcement of minimum standards of care in institutions for the developmentally disabled are urgently needed and that the Federal government can and should play a significant role in upgrading the care and services provided to developmentally disabled persons in public and other facilities which operate with Federal funds.

S. REP. NO. 94-160, *supra* note 60, at 3.

tion,⁷⁹ are dangerous physically,⁸⁰ and cause further mental and physical handicaps.⁸¹ In both cases, state officials conceded that the institutions were inhumane and non-habilitative,⁸² and that many of them should be phased out.⁸³

Elimination of the institution, it was recognized, would not solve the problem; sufficient community services were needed.⁸⁴ As the "vast majority of persons now institutionalized should not be in these institutions at all,"⁸⁵ a determination of individual needs was required.⁸⁶ Institutionalization was permissible only when "absolutely necessary"⁸⁷ and when the person's needs could be met by the

79. S. REP. NO. 94-160, *supra* note 60, at 16, 28, 30, 32-33 ("It is not, however, the Committee's intent that enactment of this title should be construed in any way to constitute support of institutionalization of the mentally retarded." *Id.* at 33); 446 F. Supp. at 1318.

[M]ost large institutions for the [mentally retarded and] developmentally disabled in the U.S. lack individualized treatment plans and programs. That is, care is primarily custodial; and little attention is paid to the resident's potential for increased self care, ability to utilize education or training.

S. REP. NO. 94-160, *supra* note 60, at 30. Institutions "lack any commitment to change and have not accepted the developmental model described above." *Id.* at 28.

80. 1973 *Hearing*, *supra* note 60, at 567 (statement of Sen. Kennedy); S. REP. NO. 94-160, *supra* note 60, at 28, 30; 446 F. Supp. at 1304-10.

81. S. REP. NO. 94-160, *supra* note 60, at 28; 1973 *Hearing*, *supra* note 63, at 229-30; 446 F. Supp. at 1304-10.

82. "The inhumane and nonhabilitation aspects of these large institutions have unfortunately been graphically demonstrated over and over again. In a number of crucial court cases, for example, the defendants were only too willing to stipulate that the conditions described by the plaintiffs were accurate." S. REP. NO. 94-160, *supra* note 60, at 32; 446 F. Supp. at 1313; 612 F.2d at 92.

83. Efforts to assure proper treatment, education, and habilitation services in large institutions should not deflect attention from the fact that most of these institutions themselves are anachronisms, and that rapid steps should be taken to phase them out. Many of these institutions by their very nature, their size, their isolation, their impersonality, are unsuitable for treatment, education, and habilitation programs.

S. REP. NO. 94-160, *supra* note 60, at 32-33; 1973 *Hearing*, *supra* note 60, at 253; 446 F. Supp. at 1318. Many of the institutions can best be described as "hopeless places" dedicated to custodial care of lifelong residents. S. REP. NO. 94-160, *supra* note 60, at 28.

84. S. REP. NO. 94-160, *supra* note 60, at 30; 121 CONG. REC. 16516 (1975) (remarks of Sen. Williams); 1973 *Hearing*, *supra* note 60, at 563; 121 CONG. REC. 9965 (1975) (remarks of Rep. Young); *id.* at 9977 (1975) (remarks of Rep. Carter); 446 F. Supp. at 1312.

Congressional support for community services for severely handicapped people was reaffirmed in its funding of centers for independent living under the 1978 Amendments to the Rehabilitation Act, Pub. L. No. 95-602, 92 Stat. 3007.

85. S. REP. NO. 94-160, *supra* note 60, at 32.

86. 1973 *Hearing*, *supra* note 60, at 254, 563; H.R. REP. NO. 94-473, 94th Cong., 1st Sess. 32-33, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 943, 952; S. REP. NO. 94-160, *supra* note 60, at 30; 121 CONG. REC. 9977 (1975) (remarks of Rep. Carter); 446 F. Supp. at 1311-12; 612 F.2d at 115.

87. S. REP. NO. 94-160, *supra* note 60, at 16.

institution.⁸⁸

Congress was aware of its complicity in this situation. Despite prior programs, institutional conditions remained abominable⁸⁹ despite "[e]ncouraging, but limited progress . . . made under the present law."⁹⁰ Congress decided to strengthen the existing grant program⁹¹ by codifying the constitutional right to habilitation enunciated in cases decided by the federal courts:⁹²

Title II is designed to assist in the protection of human rights guaranteed under the Constitution of those mentally retarded and other developmentally disabled individuals who require institutional care or need community facilities and programs.⁹³

The Court failed to find the legislative history persuasive, preferring to emphasize the "assistance" language of the statute over its rights language.⁹⁴ In addition, the Court repeatedly alluded to the

88. *Id.* at 1, 33; 121 CONG. REC. 16520 (1975) (remarks of Sen. Javits). *See id.* at 16470, 16516-17 (remarks of Sen. Williams); *id.* at 16522 (remarks of Sen. Beall); *id.* (remarks of Sen. Schweiker); *id.* at 16520 (remarks of Sen. Cranston) ("Where institutional programs are appropriate . . . habilitation programs can be given residential patients to develop their full potential.")

89. 1973 *Hearing*, *supra* note 60, at 562-63.

90. S. REP. NO. 94-160, *supra* note 60, at 2. The "current law" was the federal-state grant program. Mental Retardation Amendments of 1967, Pub. L. No. 90-170, 81 Stat. 527.

91. 121 CONG. REC. 29821 (1975) (remarks of Sen. Williams).

92. S. REP. NO. 94-160, *supra* note 60, at 2-3, 30-33; 121 CONG. REC. 16515 (1975) (remarks of Sen. Randolph); *id.* at 16516 (remarks of Sen. Stafford); *id.* at 16516-17 (remarks of Sen. Williams); *id.* at 16519 (remarks of Sen. Javits); *id.* at 16522 (remarks of Sen. Beall); *id.* (remarks of Sen. Taft); 1973 *Hearing*, *supra* note 60, at 250. The standards set were considered the "absolute minimum" so as not to "violate the Constitutional rights of the individuals in those programs." S. REP. NO. 94-160, *supra* note 60, at 38. *E.g.*, *New York State Ass'n for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975); *Horacek v. Exon*, 357 F. Supp. 71 (D. Neb. 1973); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

93. S. REP. NO. 94-160, *supra* note 60, at 34. Title II, headed "Establishment and Protection of the Rights of Persons with Developmental Disabilities" opens with section 111, Congressional Findings Respecting Rights of the Developmentally Disabled (42 U.S.C. § 6010 (1976 & Supp. III 1979)). *See, e.g.*, 121 CONG. REC. 16510-20 (1975) (remarks of Sen. Javits); *id.* at 29309 (remarks of Rep. Rogers).

These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the condition for which they are institutionalized, and that this right should be protected and assured by Congress and the Courts.

H.R. REP. NO. 94-473, 94th Cong., 1st Sess. 41-52, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 943, 961-62. *See also* 121 CONG. REC. 29818 (1975) (remarks of Sen. Randolph); *id.* at 29821 (1975) (remarks of Sen. Williams); 124 CONG. REC. 15547 (1978) (remarks of Sen. Randolph).

94. *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 1536-43 (1981).

lack of congressional intent to create new, substantive rights.⁹⁵ While it is certainly true that Congress at no time believed it was creating a novel right to habilitation, and that Congress supplied funding to assist in alleviating the conditions under which developmentally disabled persons were forced to exist, neither of these facts precluded the result reached by the court of appeals, *i.e.*, that Congress was adopting, by statute, what it believed to be an existing constitutional right.⁹⁶

The lack of congressional intent to impose affirmative obligations to fund services upon the states as a result of section 6010 weighed heavily in the United States Supreme Court decision.⁹⁷ The legislative history of the right indicates no intention to obligate states to fund services; however, the nature of the right and the funding structure of the Act required neither the states nor the federal government to expend funds to assure the rights of the developmentally disabled beneficiaries.

The constitutional right to habilitation as determined by the district court (and referenced throughout the legislative history of the DD Act) relies initially upon the fourteenth amendment.⁹⁸ This right is predicated on a contractual theory of exchange: when a state accepts a retarded individual into its mental retardation system, the state must provide the habilitative services which the person requires in order to justify the deprivation of individual liberty.⁹⁹ As the district court noted, the Constitution does not require that the state initially undertake the obligation to provide for its retarded citizens.¹⁰⁰ Rather it requires that once the obligation is assumed, it must be fulfilled.

Contrary to the findings of the district court and the legislative history of the Act, the Supreme Court assumed that enforcement of

95. *Id.* at 1536-45.

96. The Senate report specifically refers to such litigation. S. REP. NO. 94-160, *supra* note 60, at 30-33 (citing *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974)).

97. *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 1542-44 (1981).

98. *Halderman v. Pennhurst State School & Hosp.*, 466 F. Supp. 1295, 1314-20 (E.D. Pa. 1977). The right, often stated as the right to habilitation in the least restrictive alternative, is redundant, since adequate habilitation requires normalization; special consideration of the least restrictive environment is not needed, but does serve to emphasize the normalization necessary.

99. 466 F. Supp. at 1317-18. See *Anti-Institutionalization*, *supra* note 12, at 733. This constitutional right is to be distinguished from the right to protection from harm discussed *infra*.

100. 446 F. Supp. at 1318. Most states have undertaken the obligation.

the right would entail massive fiscal expenditures by the states.¹⁰¹ The district court in its consideration of the financial repercussions of enforcement of the constitutional right, found that appropriate habilitative services would be significantly less expensive than the operation of Pennhurst.¹⁰² Nothing in the legislative history indicated an intention to impose a massive financial obligation under the DD Act, in large part because of the enormity of existing federal programs which could be used by the states to implement the right.¹⁰³ Billions of federal dollars were (and are) provided to the states for mental retardation services.¹⁰⁴ While the amounts specifically allocated under the DD Act are relatively small,¹⁰⁵ the DD Act assistance provisions were intended to leverage other federal monies for use in habilitative programs.¹⁰⁶

All in all, the Supreme Court's opinion, albeit narrow, presents some disturbing implications. At least when retarded citizens are concerned, the Court appears to be not only willing to make its own factual findings but also willing to do so, first, on the representation of parties in the face of congressional factual determinations, second, on an extensive record to the contrary, and, third, without regard for the fact that the defendants did not challenge the factual determinations of the trial court as being clearly erroneous.¹⁰⁷ As such, *Pennhurst* may be seen as a case in which the Court, rather than exercising its usual deference to a congressional enactment,¹⁰⁸ has acted in extraordinary deference to the states, by finding that

101. *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 1546-47 (1981).

102. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1312 (E.D. Pa. 1977). See also 101 S. Ct. 1531, 1552-55 (White, J., dissenting).

103. 121 CONG. REC. 16519 (1975). The sum for fiscal year 1970 was \$3.168 billion.

104. Brief of Respondents PARC, et al., at 28 (citing U.S. Dept. of Health, Education & Welfare, *Special Report: Mental Retardation in Hearings Before the Subcommittee on Departments of Labor, HEW, and Related Agencies of the Committee on Appropriations*, 96th Cong., 2d Sess., pt. 2 at 641-44, 673).

105. Commonwealth of Pennsylvania's State Plan.

106. 42 U.S.C. § 6063 (1976 & Supp. III 1979) (State plan must include non-duplication). See Developmental Disabilities Services and Facilities Construction Amendments of 1970; Pub. L. No. 91-517, 84 Stat. 1316.

For example, Pennsylvania received \$174,449,724 in fiscal year 1978 under title XIX of the Social Security Act for Intermediate Care Facilities for the Mentally Retarded, 42 U.S.C. § 1396(d) (1976 & Supp. III 1979). Center on Human Policy, *Title XIX and Deinstitutionalization: The Issue for the 80's* 13 (1981) [hereinafter cited as *Title XIX and Deinstitutionalization*]. The majority of this money is being poured into institutions. *Id.* at 20. The funds can be used for habilitative community facilities. 42 U.S.C. § 1396d(d) (1976 & Supp. III 1979).

107. *E.g.*, *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 274-75 (1949); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

108. *E.g.*, *Schwelker v. Wilson*, 101 S. Ct. 1074 (1981).

Congress was not serious enough in its enactment of a rights section in its legislation, thereby "mak[ing] nugatory actions so carefully undertaken."¹⁰⁹ The Court did not, however, consider several remaining causes of action which still may be used to support the relief ordered by the district court in *Pennhurst* and in other cases involving similar institutions.¹¹⁰ Two means of achieving the desired relief are possible: the right to protection from harm and state law.

Alternative constitutional grounds for the right to habilitation may be found in the eighth and fourteenth amendments.¹¹¹ Taken together, these amendments secure a person's right to protection from harm while the person is in the custody of governmental authorities.¹¹² The right was initially recognized in cases involving prison conditions, but courts have found that retarded persons were at least entitled to the minimum conditions of confinement constitutionally mandated for prisoners.¹¹³

A series of recent decisions by the United States Supreme Court concerning the eighth amendment suggests in the aggregate an inferential basis for a strengthened claim to a right of the institutionalized mentally retarded person to habilitation. While application of the eighth amendment is limited to formally adjudicated crimes,¹¹⁴ the Court has admitted possible eighth amendment scrutiny of mental institutions.¹¹⁵ The due process clause of the fourteenth amendment prohibits the punishment of innocent persons¹¹⁶ who have not been convicted of a crime. At the same time the eighth

109. *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 1549 (1981).

110. The Court remanded constitutional claims, claims under the Rehabilitation Act and claims under Pennsylvania law. Each of these claims had been the basis for the relief ordered by the district court, and with the exception of state law, had not been considered by the court of appeals.

111. *See, e.g., Anti-Institutionalization, supra* note 12, at 739-41.

112. *E.g., Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Anti-Institutionalization, supra* note 12, at 739.

113. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *modified*, 612 F.2d 84 (3rd Cir. 1979), *rev'd and remanded*, 101 S. Ct. 1531 (1981); *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973).

114. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Romeo v. Youngberg*, 644 F.2d 147, 156 (3rd Cir. 1980), *cert. granted*, 101 S. Ct. 2313 (1981).

115. *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977).

116. *Bell v. Wolfish*, 441 U.S. at 535 n.16. *See also Romeo v. Youngberg*, 644 F.2d 147, 156 (3rd Cir. 1980), *cert. granted*, 101 S. Ct. 2313 (1981). The Court did suggest in *Wolfish*, however, that the pretrial detainees involved had at least the rights of sentenced prisoners. 441 U.S. at 545.

amendment limits what may be defined and punished as a crime.¹¹⁷ Thus, the Constitution would forbid the use of mental retardation either as a criminal classification or to countenance institutionalization that was tantamount to punishment.

Although institutionalized, mentally retarded persons are outside the criminal process; they are nevertheless subjected to confinement for extended periods of time.¹¹⁸ They have a protected liberty interest and concomitantly a right to be free from confinement which is tantamount to punishment.¹¹⁹ At a minimum, governmental action toward the confined mentally retarded person cannot be arbitrary or purposeless.¹²⁰ There must be a reasonable relationship between the conditions of confinement and legitimate governmental objectives in order to fall outside of the realm of punishment.¹²¹

Governmental justification for the confinement of the retarded generally falls into one of three areas: protection of society from dangerous persons, protection of an individual who is dangerous to himself, or provision of needed services (*i.e.*, treatment or habilitation).¹²² Fulfillment of these nonpunitive purposes must be balanced against the fundamental interest of the mentally retarded citizen in his or her personal security.¹²³ This balancing process follows a continuum, depending on the nature and extent of the government intrusion.¹²⁴

Severe restrictions of bodily movement raise a "presumption of a punitive sanction."¹²⁵ Such restrictions include the use of restraints,¹²⁶ as well as the confinement of a person in unhealthy, unsanitary conditions.¹²⁷ The use of such measures may be justified only by compelling necessity, which requires the investigation of al-

117. *Rhodes v. Chapman*, 101 S. Ct. 2392, 2398 n.12 (1981) (citing *Robinson v. California*, 370 U.S. 660 (1962)); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

118. *Romeo v. Youngberg*, 644 F.2d at 158 n.15. See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. at 1302 (average length of stay at Pennhurst is 21 years). Cf. *Bell v. Wolfish*, 441 U.S. at 543 (length of stay averaged sixty days).

119. *Bell v. Wolfish*, 441 U.S. at 536-37.

120. *Id.* at 539.

121. *Id.*

122. *Romeo v. Youngberg*, 644 F.2d at 158. See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Anti-Institutionalization*, *supra* note 12.

123. *Ingraham v. Wright*, 430 U.S. 651, 673-75 (1977).

124. *Romeo v. Youngberg*, 644 F.2d at 158-59.

125. *Id.* at 159.

126. *Id.*

127. *Scott v. Plante*, 641 F.2d 117, 130 (3rd Cir. 1981), *appeal filed*, No. 80-1699 (April 10, 1981).

ternatives, in particular, alternatives which are least restrictive.¹²⁸

When institutionalization further results in multiple injuries from the attacks of others and from self-injury caused by a failure to offer habilitative services, the fundamental interest in liberty is likewise infringed upon¹²⁹ and is constitutionally protected in the absence of "substantial necessity."¹³⁰ Substantial necessity does not exist where the mentally retarded person is subjected to ongoing or consistent injury.

In and of themselves, each of the constitutional requirements could serve as the basis for relief ordered by the district court in *Pennhurst* and for similar institutions, such as those examined by Congress in its enactment of the DD Act. The gross deprivations inherent in continued confinement in such institutions is clearly punitive, particularly where the result is ongoing physical and intellectual deterioration. With the alternative of appropriate community settings, long-term institutionalization of the mentally retarded can be justified neither on the basis of substantial necessity (since it is a persistent disregard for the needs of the retarded individual) or as the least restrictive alternative (since institutionalization is inappropriate for any retarded person given individually designed community services).¹³¹ Considering the punitive nature of these institutions, a community services program is clearly the least restrictive alternative with an emphasis on individualized attention and the considerable capabilities of the retarded.

A right to habilitation under state law has been virtually ignored in *Pennhurst* and other cases. In Pennsylvania, just prior to the decision of the United States Supreme Court, the Pennsylvania Supreme Court recognized a right under state law¹³² to habilitation in an individualized fashion in the least restrictive environment.¹³³ This support for the right, independent of constitutional assertions, is currently the subject of the remand in *Pennhurst*.

Each state has some type of statute which supports the constitu-

128. *Romeo v. Youngberg*, 644 F.2d at 160-61.

129. *Id.* at 162.

130. *Id.* at 160-62.

131. This is not to suggest that the more positive right to habilitation not be asserted. *Romeo v. Youngberg*, 644 F.2d at 164-70.

132. PA. STAT. ANN. tit. 50, § 4201(1) (Purdon 1969) provides: "The department [of public welfare] shall have the power and its duty shall be: (1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them, regardless of religion, race, color, national origin, settlement, residence, or economic or social status."

133. *In re Joseph Schmidt*, 429 A.2d 631 (Pa. 1981).

tional and statutory rights found to have been violated by the operation of *Pennhurst*.¹³⁴ Many state statutes establish a state law right to habilitation or treatment.¹³⁵ Some speak to a state responsibility or policy to provide habilitation or treatment.¹³⁶ Supplementing or complementing the state law right to habilitation,¹³⁷ several states explicitly require the provision of habilitative services in the least restrictive environment,¹³⁸ and some specifically require an individual habilitation plan.¹³⁹ Each of these statutes may be considered as an alternative means of securing habilitative services in the community for mentally retarded citizens.

The Supreme Court decision in *Pennhurst* essentially struck down a congressional attempt to rectify a situation it had helped

134. In utilizing state law, state constitutions should not be overlooked. For example, the Pennsylvania constitution contains a provision which is similar to the fourteenth amendment and might be used to establish a state based constitutional right to habilitation. PA. CONST. art. I § 1. See *supra* notes 102-04 and accompanying text.

135. See, e.g., CAL. WELF. & INST. CODE § 4502 (West Supp. 1981); COLO. REV. STAT. § 27-10.5-115 (Supp. 1980); CONN. GEN. STAT. ANN. § 19-575a (West 1958); DEL. CODE, tit. 16, §§ 5502-5507, & tit. 9 § 2612 (Supp. 1980); FLA. STAT. ANN., tit. 28, § 394.459 (West Supp. 1981); IDAHO CODE § 56-238 (1947); ILL. ANN. STAT., ch. 91½, § 2-102(a) (Smith-Hurd Supp. 1981-1982); IND. CODE ANN. § 16-14-1.6-2 (Burns Supp. 1981); MASS. ANN. LAWS, ch. 123, § 2 (Michie/Law. Co-op Supp. 1981); MONT. REV. CODE ANN. § 38-1201 (Supp. 1977); NEB. REV. STAT. § 83-1,141 (1976); N.H. REV. STAT. ANN. § 171-A:13 (Supp. 1979); N.J. STAT. ANN. § 30:6D-9 (West 1981); N.M. STAT. ANN. § 43-1-8 (1978); N.C. GEN. STAT. § 122-55.6 (1981); OHIO REV. CODE ANN. § 5123.85 (Page 1981); S.D. CODIFIED LAWS ANN. § 27B-8-11 (1976); TEX. REV. CIV. STAT. ANN. art. 5547-300, §§ 7, 11 (Vernon Supp. 1980-1981); VT. STAT. ANN., tit. 33, § 3613 (Supp. 1981); WIS. STAT. ANN. § 51.61 (West Supp. 1980-1981).

136. E.g., ALA. CODE §§ 22-50-11, -52-51 (1975); ARK. STAT. ANN. §§ 59-1002(i), -1009(a) (1979); GA. CODE ANN. § 88-2502 (1979); HAWAII REV. STAT. §§ 333 E-1, E-2 (1976 & Supp. 1980); MD. ANN. CODE, art. 59A, § 2 (1979); MASS. ANN. LAWS, ch. 123, § 2 (Michie/Law. Co-op Supp. 1981) (in addition to state right); MICH. COMP. LAWS ANN. § 330.1116 (1980); N.Y. MENTAL HYG. LAW § 13.01 (McKinney 1978); OKLA. STAT. ANN., tit. 43A, §§ 50, 93 (West 1979); S.C. CODE § 44-21-20 (1976); TENN. CODE ANN. § 33-501 (1977); VA. CODE § 37.1-194 (Supp. 1976); WASH. REV. CODE ANN. § 71.20.010 (1975).

137. Since habilitation, by definition, encompasses normalization, notes 21-24 and accompanying text, specifically including a right to habilitation in the least restrictive environment should not be considered a precondition to community services over the institution.

138. ARIZ. REV. STAT. ANN. § 36-551.01 (West Supp. 1980-1981); FLA. STAT. ANN. § 394.459 (West Supp. 1981); ILL. ANN. STAT., ch. 91½, § 2-102(a) (Smith-Hurd Supp. 1981-1982); N.J. STAT. ANN. § 30:6D-9 (West 1981); N.M. STAT. ANN. § 43-1-8 (1978); OKLA. STAT. ANN., tit. 43A, §§ 50, 93 (West 1979); R.I. GEN. LAWS §§ 40.1-21-4, -22-6, -22-11 (Supp. 1979); S.C. CODE § 44-21-20 (1976); TEX. REV. CIV. STAT. ANN. art. 5547-300, §§ 7, 11 (Vernon Supp. 1980-1981); W. VA. CODE §§ 27-5-9, -5-4(j), -2-3 (1980); WIS. STAT. ANN. § 51.61 (West Supp. 1980-1981).

139. FLA. STAT. ANN. § 394.459 (West Supp. 1981); ILL. ANN. STAT., ch. 91½, § 2-102(a) (Smith-Hurd Supp. 1981-1982); N.M. STAT. ANN. § 43-1-8 (1978); N.C. GEN. STAT. § 122-55.6 (1981); OHIO REV. CODE ANN. § 5123.85 (Page 1981); S.D. CODIFIED LAWS ANN. § 27B-8-11 (1976); W. VA. CODE §§ 27-5-9, -5-4(j), -2-3 (1980).

support with federal funding. Congress recognized then what is known now, that federal programs have promoted rather than discouraged institutionalization of the mentally retarded.¹⁴⁰ Although the staff has increased at institutions, the quality of life for persons confined in them has not improved,¹⁴¹ and as a general matter federal standards, laudable as they may be, are not enforced by either the state or federal governments.¹⁴²

Individual enforcement of individually held rights is crucial to the realization of habilitation for retarded citizens. The embodiment of such rights in a federal statute has been reduced by the Supreme Court to mere precatory language. Because of the various grounds still remaining for affirmance of the original order of the district court, class members continue to leave Pennhurst for appropriate community settings. To date, the individually tailored relief for class members has been successful in Pennsylvania, in large measure because of the existence of monitoring and review systems created by the district court in the form of a special master.¹⁴³ While the Supreme Court has declined to recognize that individually held rights exist under the DD Act's Bill of Rights section, class and individual actions must continue to seek alternative grounds for the enforcement of rights of the citizens of the United States who have been promised services on the basis of their disability and denied them.

140. Center on Human Policy, *Title XIX and Deinstitutionalization: The Issue for the 80's* 19 (1981) ["Despite federal laws and court rulings endorsing the principle of least restrictive alternative, despite the deinstitutionalization thrust of Medicaid legislation and regulations, and despite a significant body of professional opinion opposing institutionalization, the ICF/MR program is contributing directly the perpetuation of segregated institutions for the developmentally disabled."]

141. *Id.* at 21.

142. *Id.* at 91.

143. Office of the Special Master, *Report to the Court: The Individuals Who Moved From Pennhurst* (February, 1981).