



1987

## The Least Restrictive Alternative: A Theory of Justice for the Mentally Retarded

Eric D. Paulsrud

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Disability Law Commons](#)

---

### Recommended Citation

Eric D. Paulsrud, *The Least Restrictive Alternative: A Theory of Justice for the Mentally Retarded*, 10 U. ARK. LITTLE ROCK L. REV. 465 (1988).

Available at: <https://lawrepository.ualr.edu/lawreview/vol10/iss3/3>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

# THE LEAST RESTRICTIVE ALTERNATIVE: A THEORY OF JUSTICE FOR THE MENTALLY RETARDED

Eric D. Paulsrud\*

## I. INTRODUCTION

The mentally retarded<sup>1</sup> have been present in society as far back as historical records can be traced. The treatment they have received has ranged from reverence to indifference to open hostility. The mentally retarded did not receive this treatment because of any sadistic or wantonly malicious attitude present in their community. Their treatment was primarily the result of ignorance: ignorance as to the nature of mental retardation. That ignorance is still present. People dislike seeing an individual who is different. They avoid the mentally retarded whenever possible and construct barriers within society that are almost impossible for the mentally retarded to break down. Recently, however, the courts have tested the validity of these barriers.

---

\* B.A., St. Olaf College, 1982; J.D., Hamline University School of Law, *cum laude*, 1985. Mr. Paulsrud is currently a judicial law clerk to the Honorable J. Smith Henley, Senior Circuit Judge, Eighth Circuit Court of Appeals.

1. Despite the pejorative connotations which have been attached to the term "mental retardation," see Williams, *The Right to Treatment for Developmentally Disabled Persons: Re-assessment of an Evolving Legal and Scientific Interface*, 63 N.D.L. REV. 7, 7 n.1 (1987), it will be used throughout this article because of its general recognition by both the public and the courts. Nevertheless, some minimal explication of the terms used to label this particular group of persons is in order.

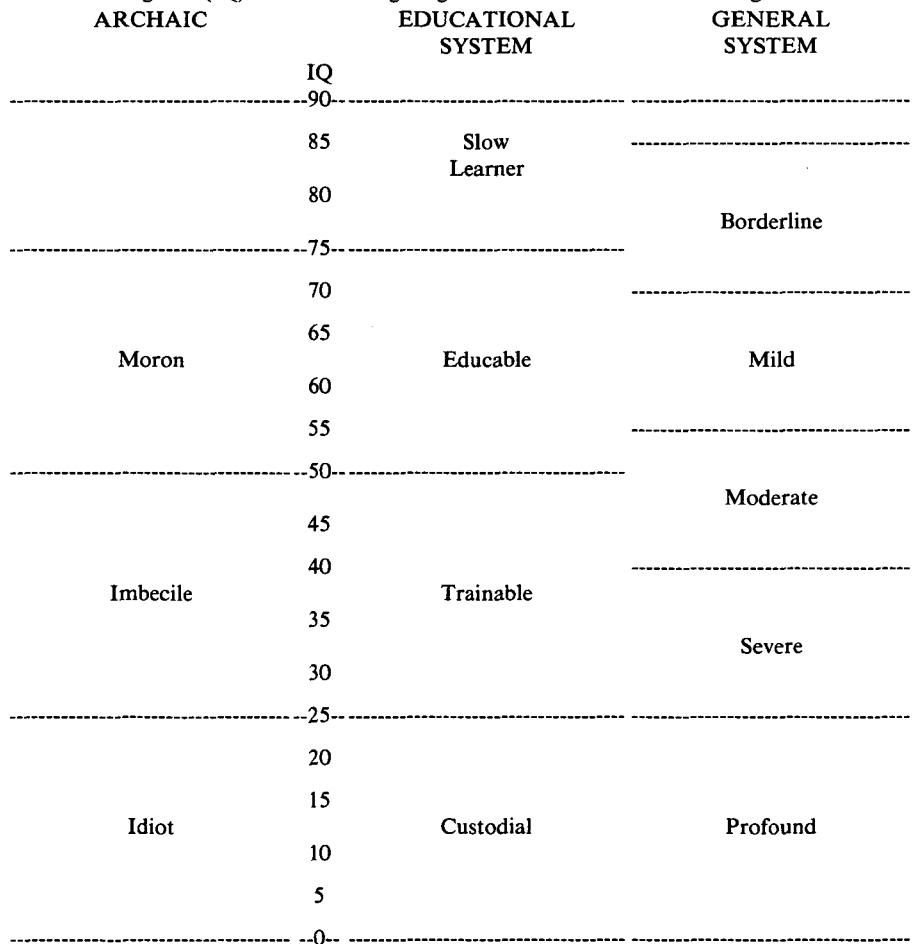
The term "mentally handicapped" includes both the mentally ill and the mentally retarded. The mentally ill are distinguished because their condition is not static, but in flux. Mental illness can often be totally or significantly cured by treatment or the passage of time. Mental retardation, however, refers to significantly "subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period." *Id.* at 7 n.1 (citing AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (1983)). Thus, mental retardation is a permanent condition although adaptive behavior can be improved through treatment.

Some organizations have proposed the term "developmentally disabled" as a substitute for mentally retarded. Although this terminology has been used in some state statutes, see, e.g., N.D. CENT. CODE § 25-01.2-01(1) (Supp. 1987), it is not widely employed. The World Health Organization has proposed that mental retardation should be divided into two different classifications: (1) mentally defective—which would apply to those with subnormal intelligence as a result of biological factors, and (2) mentally retarded—which would refer to those who were affected by cultural or environmental factors. R. MASLAND, S. SARASON & T. GLADWIN, MENTAL SUBNORMALITY: BIOLOGICAL, PSYCHOLOGICAL, AND CULTURAL FACTORS 5 (1958).

The first step in eliminating the obstacles which prevent the mentally retarded from joining the rest of society is the acknowledgment that the mentally retarded are citizens and are entitled to full protection of their constitutional rights. The recognition of the mentally retarded person's rights under the Constitution then requires that those rights be protected from encroachment by the states.

When the state does, however, have a compelling and legitimate interest in infringing on the rights of the mentally retarded, such infringement must occur in the least restrictive alternative. For example, if the state can show that it has a legitimate interest in preventing severely and profoundly<sup>2</sup> retarded persons from procreating, it may

2. Mental retardation is broken down into subcategories depending on the individual's level of intelligence (IQ). The following diagram illustrates the various categories:



The range given for each particular category is merely an approximation and the boundaries

enforce some type of preventive measures.<sup>3</sup> The state may not segregate the retarded persons from each other when sterilization would achieve the same result; and the state may not sterilize when birth control devices could be utilized. If the state chooses to act, and that action implicates a constitutional right held by the mentally retarded person, it must act only in the least restrictive manner.

The least restrictive alternative approach requires a two-step analysis when examining the validity of state action. First, a fundamental right must be implicated by the state action. Second, the state action must be no broader than necessary for achieving a legitimate goal. The least restrictive alternative analysis is of particular importance in the area of institutionalization of the mentally retarded, and that area will form the focus of this article.

Initially, the historical perspective of the treatment of the mentally retarded will be outlined to impress upon the reader the past neglectful treatment the mentally handicapped have suffered; this perspective demands a reassessment of society's attitudes toward this group of persons. From this base, the argument for the least restrictive alternative will be analyzed from a constitutional perspective.

## II. HISTORY

Early references to the mentally retarded appear in ancient Greek culture, particularly in Sparta.

The Spartans dealt with the severely retarded in the sternest eugenic fashion, and obviously defective children are said to have been cast into the river or left to perish on the mountainside. The laws of Lycurgus countenanced the deliberate abandonment of "idiots," a practice which was probably followed . . . throughout Greece, and according to Cicero, among the Romans also.<sup>4</sup>

This is the utilitarian approach articulated by those who are considered the founders of modern political thought.<sup>5</sup>

---

may range by about five IQ points. See Thompson, *History of Treatment and Misconceptions Concerning the Mentally Retarded*, in *BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED* 10 (T. Thompson & J. Grabowski 2d ed. 1977).

3. See *infra* notes 30 & 31 and accompanying text.

4. S. DAVIES, *THE MENTALLY RETARDED IN SOCIETY* 8 (1959).

5. Some might argue that Athens and Plato's Socrates are to be more rightly considered the modern world's intellectual predecessors and not the austere, militaristic Spartans. It should be noted, however, that in Plato's *Republic*, Socrates considered Sparta to be the model of the ideal society. Bloom, *Interpretative Essay*, in *THE REPUBLIC OF PLATO* 305, 380, 413 (1968). Indeed, Plato's ideal society encompassed an eugenic predilection. *PLATO, THE REPUBLIC* 94, 101, 136-39 (A. Bloom trans. 1968). The Supreme Court has found Plato's ideal

Throughout the Middle Ages the mentally retarded were sometimes fortunate enough to earn their support as jesters for the nobility. In other instances they were considered to be demons or *les enfants du bon Dieu*—holy infants.<sup>6</sup> “Tycho Brahe had for his close companion a fool whose mutterings the great astronomer listened as to a revelation.”<sup>7</sup> This treatment was the result of ignorance and superstition, not compassion for the plight of those less fortunate. Society sometimes allowed the individual a modicum of dignity, but more often than not it inflicted ridicule and scorn. In all cases, society made no attempt to treat the mentally retarded as individuals with developmental capabilities. The best that could be hoped for was the minimal care necessary for survival.

Society made little real progress in understanding the mentally retarded until the beginning of the nineteenth century.<sup>8</sup>

Before dawn on January 9, 1800, a remarkable creature came out of the woods near the village of Sain-Sernin in southern France. No one expected him. No one recognized him. He was human in bodily form and walked erect. Everything else about him suggested an animal. He was naked except for the tatters of a shirt and showed no modesty, no awareness of himself as a human person related in any way to the people who had captured him. He could not speak and made only weird, meaningless cries. Though very short, he appeared to be a boy of about eleven or twelve. . . .<sup>9</sup>

This was the discovery of the Wild Boy of Aveyron. It signaled the beginning of an educational and medical approach to the care of the mentally retarded. Initially Dr. Jean Marc Gaspard Itard believed that the boy was “fundamentally normal and merely uncivilized.”<sup>10</sup> Itard attempted through intensive training to bring the boy to the level of normal functioning. Itard finally conceded his inability to attain his goal, concluding, “[h]is ‘intellectual’ progress will never match that of children normally brought up in society.”<sup>11</sup>

Ironically, Itard won a victory out of his apparent defeat. Edouard Seguin, Itard’s student, believed that Itard had, in fact, improperly diagnosed the boy’s condition. Seguin believed that Itard

---

society to be perverse to that created by the Constitution. *Bowen v. Gilliard*, 107 S. Ct. 3008, 3033 (1987) (Brennan, J., dissenting); *Meyer v. Nebraska*, 262 U.S. 390, 401-03 (1923).

6. Noone, *Mental Retardation*, in *NEW CATHOLIC ENCYCLOPEDIA* 664 (1967).

7. S. DAVIES, *supra* note 4, at 9.

8. See Thompson, *supra* note 2, at 3; Williams, *supra* note 1, at 8 n.7.

9. R. SHATTUCK, *THE FORBIDDEN EXPERIMENT: THE STORY OF THE WILD BOY OF AVEYRON* 5 (1980).

10. S. DAVIES, *supra* note 4, at 13.

11. R. SHATTUCK, *supra* note 9, at 159.

had trained an "idiot" to adapt to society, contrary to Itard's belief that the boy was not a true "idiot," but only one due to isolation from society.<sup>12</sup> Itard's work with the Wild Boy led Seguin to establish a school for the mentally retarded employing Itard's methods. These methods proved effective in helping some mentally retarded individuals to adapt to society. Essentially, Itard treated the boy as a human being capable of development, contrary to all previous thought. Itard's mistake was in placing the possible level of achievement at that of a normal individual. In this respect, Seguin was much more realistic in later attempts directed at educating the mentally retarded. "[T]he Wild Boy achieved greatness in the less recognized form of an ordinary or even lowly person who responds to exceptional circumstances in a way that exceeds our predictions and expectations. Though handicapped, he outdid himself and reached his limits."<sup>13</sup>

The first institution for the mentally retarded in the United States was established in 1848,<sup>14</sup> two years before Seguin came to America. The institution, however, was established under the impact of Seguin's theories in an effort to teach the mentally retarded, not to serve merely as a custodial facility. In 1854 the first school building expressly for the education of the mentally retarded was built. Seguin, in an opening address at the ground laying ceremonies, expressed a new commitment to a "hitherto neglected" class of society—the mentally retarded.<sup>15</sup> Unfortunately this attitude of compassion would soon change.

All the early schools for the mentally retarded were aimed largely, if not completely, at "curing" the mentally retarded.<sup>16</sup> It soon became apparent that this was an unrealistic goal for many; and in the case of the severely retarded, the individual would never survive without some societal or, more often, institutional support.

---

12. *Id.* at 165.

13. *Id.* at 183.

14. Thompson, *supra* note 2, at 4.

15. In his speech Seguin said:

God has scattered among us—rare as the possessors of genius—the idiot, the blind, the deaf-mute, in order to bind the rich to the needy, the talented to the incapable, all men to each other, by a tie of indissoluble solidarity. The old bonds are dissolving; man is already unwilling to continue to contribute money or palaces for the support of the indolent nobility; but he is every day more ready to build palaces and give annuities for the indigent or infirm, the chosen friends of our Lord Jesus. See that cornerstone—the token of a new alliance between humanity and a class hitherto neglected—that, ladies and gentlemen, is your pride; it is the greatest joy of my life; for I, too, have labored for the poor idiot.

S. DAVIES, *supra* note 4, at 21.

16. Thompson, *supra* note 2, at 4-5.

Although it was not possible to cure the mentally retarded, it was possible to teach many of them skills within the limits of their intellectual abilities.<sup>17</sup> Theoretically, some of these students would return to society, to some degree self-sufficient.<sup>18</sup> The problem was that not nearly as many could return as active and independent members of society as was originally hoped. A small percentage could never return to society and would always rely on the care of institutions or others. Hence, the schools found themselves in a different position than that for which they had been established. They were faced with a dilemma. On the one hand there existed the ever present demand to admit new wards. Yet on the other hand the parents of those already at the schools who could not support themselves were unwilling to resume the burden of their care. Thus, the hope for an educational facility for the mentally retarded was abandoned, and the institution as a custodial facility took its place.<sup>19</sup>

The training schools (for the short time they did exist as such before becoming primarily custodial) surprisingly achieved some positive results. At the time, though, these results were far surpassed by the schools' conspicuous inability to ever cure a mentally retarded person. Consequently, the results were not immediately recognized as a sign of hope, but were ignored because they served to remind the researchers of how far they had missed their goal. Thus, the idealism of the first half of the nineteenth century gave way to "the rising tide of Social Darwinism, the 'science' of eugenics, and . . . extreme xenophobia"<sup>20</sup> which prevailed well into this century.

Dr. Goddard, a director of one facility for the mentally retarded and a leading medical figure of that day,<sup>21</sup> voiced the erroneous fears of an uninformed population when, after efforts to cure the mentally retarded failed, he concluded,

[h]ere is a child who has been most carefully guarded. She has been persistently trained since she was eight years old, and yet nothing has been accomplished in the direction of higher intelligence or general education. . . .

. . . The question is, "How do we account for this kind of

---

17. *Id.*

18. Eilbracht & Thompson, *Behavioral Intervention in a Sheltered Work Activity Setting for Retarded Adults*, in *BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED* 437 (T. Thompson & J. Grabowski 2d ed. 1977).

19. Thompson, *supra* note 2, at 5.

20. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

21. *Id.* at 462 n.8.

individual?" The answer is in a word "Heredity,"—bad stock. We must recognize that the human family shows varying stocks or strains that are as marked and that breed as true as anything in plant or animal life.<sup>22</sup>

This reasoning naturally led Goddard to advocate a treatment of the mentally retarded which presupposed that such persons were less than fully human. The mentally retarded were not to enjoy the same rights and privileges as the rest of the population. This gave birth to the eugenic alarms of the first half of this century.

"Eugenics (. . . good birth) is the science and the art of being well born."<sup>23</sup> Goddard and his contemporaries<sup>24</sup> firmly believed that mental retardation resulted almost wholly from heredity. According to Goddard, "if they were feeble-minded, then no amount of good environment could have made them anything else than feeble-minded."<sup>25</sup> Both Goddard and Merrill attributed sixty-five percent of mental retardation to heredity and the remaining thirty-five percent to such causes as injury and disease.<sup>26</sup> Further erroneous suppositions regarding the genetic nature of mental retardation<sup>27</sup> led to a general public fear of the retarded. According to Goddard,

[i]f all of the slum districts of our cities were removed tomorrow and model tenements built in their places, we would still have slums in a week's time, because we have these mentally defective people who can never be taught to live otherwise than as they have been living. . . .

. . . They are multiplying at twice the rate of the general population, and not until we recognize this fact, and work on this basis, will we begin to solve these social problems.<sup>28</sup>

Goddard's recommendations for the mentally retarded were not entirely humanitarian. Rather wistfully he remarked that the lethal

22. H. GODDARD, *THE KALLIKAK FAMILY* 12 (1931) (originally published in 1912).

23. D. JORDAN, *THE HEREDITY OF RICHARD ROE*, preface (1911).

24. See A. ROGERS & M. MERILL, *DWELLERS IN THE VALE OF SIDDEM* (1919); *Cleburne*, 473 U.S. at 462 n.8.

25. H. GODDARD, *supra* note 22, at 60.

26. A. ROGERS & M. MERILL, *supra* note 24, at 12-13.

27. Only about fifteen percent of the cases of mental retardation are genetic in nature. R. MEYERS, *LIKE NORMAL PEOPLE* 18 (1978). Consequently, two mentally retarded parents will not necessarily have a mentally retarded child. Therefore, the environmental factors should not be ignored, as Goddard and others ignored them, when considering the advisability of mentally retarded parents having children. Clearly, mentally retarded individuals do not procreate at a higher rate than the general population. See *generally*, Williams, *supra* note 1, at 9-10 (noting that it is a misconception that the mentally retarded are susceptible to "wanton" reproduction).

28. H. GODDARD, *supra* note 22, at 70-71.



chamber was no longer a possibility; therefore, he advised that "segregation through colonization seems in the present state of our knowledge to be the ideal and perfectly satisfactory method. Sterilization may be accepted as a makeshift, as a help to solve this problem because the conditions have become so intolerable."<sup>29</sup>

Despite the inaccuracy of Goddard's conclusions,<sup>30</sup> states took his advice seriously. By 1955, twenty-eight states had adopted sterilization laws concerning the mentally retarded,<sup>31</sup> and by January, 1955, 29,512 sterilizations had been performed on the mentally retarded.<sup>32</sup> There was also a strong surge during this same period toward increased institutionalization (or segregation) of the mentally retarded. Both of these attempts failed to eliminate mental retardation. They failed primarily because the majority of the mentally retarded are born of two nonretarded parents.<sup>33</sup> Absent a reversion to the Spartan concept of genocide or the expenditure of massive sums of money to warehouse the mentally retarded, society had to accept the mentally retarded.

After a rather bleak period in American history, the trend of thought has once more turned to Seguin and the premise that every individual has inherent worth and capabilities. During the first half of this century, the Children's Bureau was virtually the only group concerned with the rights and well-being of the mentally retarded. In 1950 a group of concerned parents of mentally retarded children formed the National Association for Retarded Children (later renamed the Association for Retarded Citizens (ARC)). This organization has a powerful influence in the battle for human and legal rights for the mentally retarded today.

In the 1960s interest mounted in the protection of the mentally retarded. On October 11, 1961, President John F. Kennedy declared,

---

29. *Id.* at 117.

30. *See supra* note 27.

31. S. DAVIES, *supra* note 4, at 52-69. The Supreme Court upheld a state sterilization law in *Buck v. Bell*, 274 U.S. 200 (1927). A discussion of the mentally retarded's right of procreation is beyond the scope of this article. *See* Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806; R.K. Sherlock & R.D. Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives*, 60 N.C.L. REV. 943 (1982); Starkman, *Sterilization of the Mentally Retarded Adult: The Eve Case*, 26 MCGILL L.J. 931 (1981); Comment, *Protection of the Mentally Retarded Individual's Right to Choose Sterilization: The Effect of the Clear and Convincing Evidence Standard*, 12 CAP. U.L. REV. 413 (1983); Comment, *Mental Health Law—Proposed Legislation: Involuntary Sterilization of the Mentally Incompetent in Illinois*, 1983 S. ILL. U.L.J. 227; Comment, *Procreation: A Choice for the Mentally Retarded*, 23 WASHBURN L.J. 359 (1984).

32. S. DAVIES, *supra* note 4, at 52-69.

33. *See supra* note 27.

“[w]e must provide for the retarded the same opportunity for full social development that is the birthright of every American.”<sup>34</sup> In 1972 a federal court decided *Wyatt v. Stickney*,<sup>35</sup> the first class action brought against a state institution for the mentally retarded. Finally, in the 1980s, the United States Supreme Court decided a series of cases recognizing the constitutional rights of the mentally retarded.<sup>36</sup>

### III. THE LAW

#### A. Constitutional Protection of the Mentally Retarded

Before further discussing the right of mentally retarded persons to the least restrictive alternative living conditions, it is first necessary to determine whether the mentally retarded are guaranteed protection under the language of the Constitution. Sweeping language from the Declaration of Independence evinces a broad concern for all people.<sup>37</sup> Likewise, the preamble to the Constitution provides:

We the *People* of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, *promote the general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>38</sup>

The Bill of Rights<sup>39</sup> does not speak in specifics but is also broad enough to cover all people. From this language several writers have noted that the mentally retarded are not expressly excluded, and “therefore, the mentally retarded . . . are entitled to the full and unquestionable benefits of their rights and to exercise them the same as any other individual.”<sup>40</sup> Such legal analysis is not correct and does

34. PRESIDENT’S PANEL ON MENTAL RETARDATION, A PROPOSED PROGRAM FOR NATIONAL ACTION TO COMBAT MENTAL RETARDATION (1962).

35. 344 F. Supp. 387 (M.D. Ala. 1972), *aff’d sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). In *Wyatt* the court held that civilly committed mentally retarded persons had a constitutional right to treatment. 503 F.2d at 1313-14.

36. *See infra* notes 37-179.

37. The preamble to the Declaration of Independence states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .

The Declaration of Independence para. 2 (U.S. 1776).

38. U.S. CONST. preamble (emphasis added).

39. U.S. CONST. amends. I-X.

40. I. AMARY, *THE RIGHTS OF THE MENTALLY RETARDED-DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION* 17 (1980). *See also* R. SCHEERENBERGER, *DEINSTITUTIONALIZATION AND INSTITUTIONAL REFORM* 65-68 (1976); Dowben, *Legal Rights of*

not properly locate the source of the mentally retarded's constitutional rights and standing as citizens of the United States.

The Constitution must be analyzed in terms of its historical perspective. Applying the analysis outlined above to blacks, a similar conclusion may be drawn—because the Constitution does not expressly exclude blacks, they are guaranteed rights under the Constitution. This is an incorrect conclusion in light of *Dred Scott v. Sandford*,<sup>41</sup> in which the Supreme Court held that no black, free or slave, could be a citizen.<sup>42</sup> In *Dred Scott* the court ignored the implicit distinction between “citizen,” as used in the body of the Constitution, and “person,” which is used throughout the Bill of Rights, concluding that the two terms were synonymous.<sup>43</sup> The Court also rejected the argument that the language in the Declaration of Independence extended to the entire human race.<sup>44</sup> Consequently, it is uncertain if the Constitution as it existed at the time of *Dred Scott* provided protection to the mentally retarded.

On the 28th of July, 1868, the Secretary of State issued a proclamation declaring the ratification of the fourteenth amendment.<sup>45</sup> This amendment reads in part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State . . . shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>46</sup>

The effect of the fourteenth amendment is to overturn *Dred Scott* and

---

*the Mentally Impaired*, 16 Hous. L. Rev. 833, 879 (1979); Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1 (1978).

41. 60 U.S. (19 How.) 393 (1857). *Dred Scott* produced nine separate opinions and encompassed over 200 pages in the reporter. For a brief discussion of the case see J. LIEBERMAN, *THE ENDURING CONSTITUTION* 188-93 (1987).

42. 60 U.S. at 454. Actually only three of the justices concluded that a black could not be a citizen. Zellmer, *The Dred Scott Case*, 34 St. Louis B.J. 7, 12 (1987). The basis of the majority decision was that the Missouri Compromise was unconstitutional, that Scott thus remained a slave, and that a slave could not be a citizen. *Id.*

43. 60 U.S. at 404.

44. “The general words . . . quoted [the opening paragraphs of the Declaration of Independence] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included. . . .” *Id.* at 410.

45. Proclamation 13, 15 Stat. 708 (1868). See also U.S.C.S. Constitution, Amend. 14, p.11 (Law Co-op. 1984).

46. U.S. CONST. amend. XIV, § 1.

its progeny.<sup>47</sup> Thus, while the chief aim of the amendment "was to establish the citizenship of the negro,"<sup>48</sup> it also extended citizenship to any person born in the United States.<sup>49</sup> As a result, mentally retarded persons born in the United States are citizens of the United States and entitled to the full protection of their constitutional rights—particularly their right to liberty.

## B. The Supreme Court Cases

In the past decade the Supreme Court has decided three cases interpreting the rights of the mentally retarded under the Constitution.<sup>50</sup> Indeed, the Court had not considered the rights of the mentally retarded under the fourteenth amendment prior to these cases. These cases provide an important backdrop for the remainder of this article and will be discussed with some detail before elaborating on the least restrictive alternative analysis as it applies to the mentally retarded.

### 1. *Youngberg v. Romeo*<sup>51</sup>

Nicholas Romeo was a thirty-three year old profoundly retarded person.<sup>52</sup> Following his father's death he was committed to the Pennhurst State School and Hospital because of his mother's inability to care for him.<sup>53</sup> While at Pennhurst, Nicholas suffered numerous physical injuries and was routinely subjected to physical restraints.<sup>54</sup> After several objections to Nicholas' treatment, his mother brought legal action in the United States District Court alleging violations of Nicholas' eighth and fourteenth amendment rights.<sup>55</sup> The jury returned a verdict for the defendant.<sup>56</sup> The Court of Appeals for the Third Circuit vacated the district court decision and remanded the

---

47. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872).

48. *Id.*

49. *See Perkins v. Elg*, 307 U.S. 325, 328-29 (1939).

50. Another case not discussed in this article is sometimes grouped with the Supreme Court cases on mental retardation, *Mills v. Rogers*, 457 U.S. 291 (1982). *Mills* deals with the right to refuse treatment (antipsychotic drugs). *See Brant, Pennhurst, Romeo and Rogers: The Burger Court and Mental Health Law Reform Litigation*, 4 J. LEGAL MED. 323 (1983); Note, *Involuntary Commitment and the Right to Refuse Treatment with Anti-psychotic Drugs*, 16 CREIGHTON L. REV. 719 (1982-83).

51. 457 U.S. 307 (1982) (*Youngberg II*).

52. *Id.* at 309.

53. *Id.*

54. *Id.* at 310.

55. *Id.* at 310-11.

56. *Id.* at 312.

case for a new trial.<sup>57</sup> The Supreme Court granted the defendant's petition for a writ of certiorari.<sup>58</sup>

In *Youngberg II* the Supreme Court for the first time considered the substantive rights of involuntarily committed mentally retarded persons under the fourteenth amendment.<sup>59</sup> The Court recognized that mentally retarded people retain the following liberty interests despite their confinement:

- (1) reasonable care and safety;<sup>60</sup>
- (2) adequate food, shelter, clothing and medical care;<sup>61</sup>
- (3) minimally adequate training;<sup>62</sup> and
- (4) reasonably nonrestrictive confinement conditions.<sup>63</sup>

The first two rights recognized are perhaps the minimum necessities for custodial care. The third right, the right to training (or treatment?),<sup>64</sup> is an area of considerable focus today. Commentators are chiefly concerned with the proper constitutional foundation and the extent of this right.<sup>65</sup> This article is primarily concerned with the implications of the fourth right—reasonably nonrestrictive confinement conditions—as it relates to the least restrictive alternative analysis.

57. *Romeo v. Youngberg*, 644 F.2d 147, 172 (3d Cir. 1980).

58. *Youngberg v. Romeo*, 451 U.S. 982 (1981) (*Youngberg I*).

59. *Youngberg II*, 457 U.S. at 314.

60. *Id.* at 324.

61. *Id.* This was conceded by the state, but the Court emphasized that "[t]hese are the essentials of the care that the State must provide." *Id.*

62. "[T]he minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints." *Id.* at 322.

63. *Id.* at 319. The Court was referring to freedom from physical restraints *within* the institution. *Id.* at 320. Whether this right may extend to a less restrictive confinement (*i.e.*, a community placement outside the institution) was not before the Court. Romeo's mental development most likely dictated that an institutional setting would be the least restrictive alternative for him.

64. While the Supreme Court's choice of the word "training" may be significant, many commentators equate this with the right to treatment. See *infra* note 65.

65. See Brant, *supra* note 50; Cook, *The Substantive Due Process Rights of Mentally Disabled Clients*, 7 MENTAL DIS. L. REV. 346 (1983); Rubin, *Generalizing the Trial Model of Procedural Due Process: A New Basis for the Right to Treatment*, 17 HARV. C.R.-C.L. L. REV. 61 (1982); Note, *Youngberg v. Romeo: The Right to Treatment Dilemma and the Mentally Retarded*, 47 ALB. L. REV. 179 (1982); Note, *Beyond Youngberg: Protecting the Fundamental Rights of the Mentally Retarded*, 51 FORDHAM L. REV. 1064 (1983); Note, *Youngberg v. Romeo: Moving Toward a Constitutional Right to Habilitation for the Mentally Retarded*, 62 N.C.L. REV. 162 (1983); Note, *Constitutional Law—Mental Health Law—Right to Treatment—Youngberg v. Romeo*, 29 N.Y.L. SCH. L. REV. 513 (1984); Comment, *Constitutional Rights of the Involuntarily Committed Mentally Retarded After Youngberg v. Romeo*, 14 ST. MARY'S L.J. 1113 (1983); Note, *Constitutional Law—the Rights of Involuntarily Committed Mentally Retarded Persons Under the Fourteenth Amendment—Youngberg v. Romeo*, 31 U. KAN. L. REV. 451 (1983).

## 2. Pennhurst State School & Hospital v. Halderman<sup>66</sup>

This class action suit was originally brought in 1974 by Terri Lee Halderman, a resident at Pennhurst, alleging that the conditions at Pennhurst violated the class members' eighth<sup>67</sup> and fourteenth amendment rights, and various state and federal statutes.<sup>68</sup> The district court found in favor of the plaintiffs on constitutional as well as federal and state statutory grounds.<sup>69</sup> On appeal, the Third Circuit Court of Appeals affirmed the decision solely on federal statutory grounds.<sup>70</sup> The Supreme Court reversed the court of appeals' decision and remanded the case for a determination of whether the decision could be supported on the basis of state law, the Constitution, or other federal statutory grounds.<sup>71</sup> On remand, the court of appeals affirmed its prior decision based on a state statutory provision.<sup>72</sup> The Supreme Court again granted certiorari to determine whether the court of appeals' decision was prohibited by the eleventh amendment.<sup>73</sup>

Previously, in order to avoid the problems of haling a state into federal court, plaintiffs would name officers of the state as defendants rather than the state itself.<sup>74</sup> The Supreme Court rejected this tactic in *Pennhurst II*, concluding that whenever the state was "the real,

---

66. 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part, modified and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd and remanded*, 451 U.S. 1 (1981) (*Pennhurst I*), *reaff'd on remand*, 673 F.2d 647 (3d Cir. 1982) (en banc), *rev'd and remanded*, 465 U.S. 89 (1984) (*Pennhurst II*).

67. The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. In *Ingraham v. Wright*, 430 U.S. 651 (1977) the Supreme Court determined that the eighth amendment protection against cruel and unusual punishment was limited to persons who had been formally adjudicated of a crime. *Id.* at 671-72 n.40; see *Bell v. Wolfish*, 441 U.S. 520 (1979).

68. *Pennhurst II*, 465 U.S. at 92; The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96 (1976 & Supp. III); The Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-81 (1976 & Supp. III); The Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-704 (Purdon 1969 & Supp. 1983-84).

69. *Pennhurst II*, 465 U.S. at 92-93; *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1314-26 (E.D. Pa. 1977).

70. *Pennhurst II*, 465 U.S. at 93-94; *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 82, 95-100, 104-07 (3d Cir. 1979) (en banc).

71. *Pennhurst II*, 465 U.S. at 95; *Pennhurst I*, 451 U.S. at 27-31.

72. *Pennhurst II*, 465 U.S. at 95-96.

73. *Pennhurst I*, 451 U.S. at 31. The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

74. See Pagan, *Eleventh Amendment Analysis*, 39 ARK. L. REV. 447, 462-63 (1986).

substantial party in interest,'<sup>75</sup> the eleventh amendment bars the suit, "regardless of whether it seeks damages or injunctive relief."<sup>76</sup> The important exception to this rule is when the suit challenges the constitutionality of a state's action.<sup>77</sup> The Supreme Court further determined that the eleventh amendment would also bar pendent claims brought against the state.<sup>78</sup> Thus, a federal court may not grant relief based on any pendent claim and must not consider those claims in reaching a decision. The court may, however, consider the underlying constitutional claim on which the pendent jurisdiction was hung.<sup>79</sup>

It is appropriate to discuss the significance of the *Pennhurst II* decision at this point because its importance is limited to statutory interpretation and the viability of state law claims in federal court. Consequently, *Pennhurst II* is distinct from the development of the least restrictive alternative analysis, but it does impact on claims that can be asserted in a suit challenging the conditions of confinement and the forum in which these suits may be brought.

Numerous states, in light of recent action taken by the federal courts focusing public attention on the plight of the mentally retarded, enacted statutes which codify the rights of institutionalized mentally retarded persons.<sup>80</sup> Many of these statutes provide that the

75. *Pennhurst II*, 465 U.S. at 101 (quoting *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945)).

76. *Pennhurst II*, 465 U.S. 102.

77. *Ex parte Young*, 209 U.S. 123 (1908). Under the *Young* exception a state official's unconstitutional action constitutes state action under the fourteenth amendment, but not under the eleventh amendment. *Florida Dep't. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

78. *Pennhurst II*, 465 U.S. at 121.

79. *Id.* at 125.

80. The following is a list of the states and their respective statutes dealing with the mentally retarded. If an asterisk (\*) appears before the state, it indicates that the statute explicitly provides for the least restrictive alternative. If a statute appears without an asterisk, the state has provided some substantive rights but not necessarily the least restrictive alternative. If no citation appears after a state name, that state has not provided any statutory codification of substantive rights. Those states may, however, have commitment statutes for institutionalizing the mentally retarded.

Alabama	—
Alaska	ALASKA STAT. § 47.30.655(2) (1985)
* Arizona	ARIZ. REV. STAT. ANN. § 36-551.01 (1986)
Arkansas	—
* California	CAL. WELF. & INST. CODE § 4502 (West 1984)
* Colorado	COLO. REV. STAT. § 27-10.5-101(b) (Supp. 1986)
Connecticut	CONN. GEN. STAT. ANN. §§ 17-206a to -206k (West Supp. 1987)
* Delaware	DEL. CODE ANN. tit. 16, § 5161 (1983)
* D.C.	D.C. CODE ANN. § 6-1962, -1963 (1981)

institutionalization must be the least restrictive alternative.<sup>81</sup> Thus, the focus of judicial action is likely to shift from the federal to the state courts<sup>82</sup> because of *Pennhurst's* eleventh amendment restriction on pendent claims based on a state statute.

Additionally, on the first appeal to the Supreme Court, the Court

---

* Florida	FLA. STAT. ANN. § 393.065(2)(c) (West 1986)
* Georgia	GA. CODE ANN. § 37-4-121, -122 (1982)
* Hawaii	HAW. REV. STAT. § 333-43.5 (1985)
* Idaho	IDAHO CODE § 66-412(3)(b) (Supp. 1987)
* Illinois	ILL. ANN. STAT. ch. 91½, § 2-102(a) (Smith-Hurd 1987)
Indiana	IND. CODE ANN. § 16-14-1.6-2, -6-3 (West 1985)
* Iowa	IOWA CODE ANN. § 225C.28(6) (West Supp. 1987)
Kansas	KAN. STAT. ANN. §§ 59-2927 to -2930 (1983)
* Kentucky	KY. REV. STAT. ANN. § 202B.060(12) (Baldwin 1982)
* Louisiana	LA. REV. STAT. ANN. § 28:390 B.(1) (West Supp. 1987)
Maine	ME. REV. STAT. ANN. tit. 34-B, § 5605 (Supp. 1986)
* Maryland	MD. HEALTH-GEN. CODE ANN. § 7-1002(b)(2) (Supp. 1987)
Massachusetts	MASS. REGS. CODE tit. 104, §§ 20.01, 22.01, 23.01 (1980)
Michigan	MICH. COMP. LAWS ANN. §§ 330.1704-.1754 (West 1980)
* Minnesota	MINN. STAT. ANN. § 253B.09 subd. 1 (West Supp. 1988)
Mississippi	MISS. CODE ANN. § 41-21-102(6) (Supp. 1987)
* Missouri	MO. ANN. STAT. § 630.115(10) (Vernon Supp. 1988)
* Montana	MONT. CODE ANN. § 53-20-101 (1985)
Nebraska	NEB. REV. STAT. §§ 83-1,141 to -1,146, 83-1101 to -1139 (1981)
* Nevada	NEV. REV. STAT. §§ 433.494(1), 435.128(1)(c) (1985)
* New Hampshire	N.H. REV. STAT. ANN. § 126-A: 39 (Supp. 1987)
* New Jersey	N.J. STAT. ANN. § 30:4-24.2(e)(2) (West 1981)
* New Mexico	N.M. STAT. ANN. §§ 43-1-6 to -1-9 (1986)
New York	N.Y. MENTAL HYG. LAW § 13.01 (McKinney 1978)
* North Carolina	N.C. GEN. STAT. § 122C-51 (1986)
* North Dakota	N.D. CENT. CODE § 25-01.2-02 (Supp. 1987)
* Ohio	OHIO REV. CODE ANN. § 5123.171 (Page Supp. 1986)
* Oklahoma	OKLA. STAT. ANN. tit. 43A, § 4-102 (West Supp. 1988)
* Oregon	OR. REV. STAT. § 427.031(3) (1985)
* Pennsylvania	PA. STAT. ANN. tit. 50, § 7102 (Purdon Supp. 1987)
Rhode Island	R.I. GEN. LAWS § 40.1-1-10 (1984)
* South Carolina	S.C. CODE ANN. § 44-21-20 (Law. Co-op. 1985)
* South Dakota	S.D. CODIFIED LAWS ANN. § 27B-8-14 (1984)
* Tennessee	TENN. CODE ANN. § 33-5-201 (1984)
* Texas	TEX. REV. CIV. STAT. ANN. § 5547-300 (C)(7), (D)(15) (Vernon Supp. 1988)
Utah	—
* Vermont	VT. STAT. ANN. tit. 18, §§ 8824, 8828 (Supp. 1986)
* Virginia	VA. CODE ANN. §§ 37.1-65.1(C3), -84.1(6) (1984)
Washington	WASH. REV. CODE ANN. § 71.30.030 (West 1987)
West Virginia	—
* Wisconsin	WIS. STAT. ANN. § 51.61(1)(e) (West Supp. 1987)
* Wyoming	WYO. STAT. § 25-5-115(a)(iii) (1986).

81. See *supra* note 80.

82. A survey of the annotations to the statutes listed in note 80 discloses virtually no cases decided on state statutory grounds.



rejected the plaintiff's claim based on federal statutory grounds.<sup>83</sup> The plaintiff relied on the Developmentally Disabled Assistance and Bill of Rights Act,<sup>84</sup> which provides in part:

Congress makes the following findings respecting the rights of persons with developmental disabilities [(mental retardation)]:

(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*.<sup>85</sup>

The Supreme Court determined that in enacting the legislation, Congress had not intended to secure the guarantees of the fourteenth amendment.<sup>86</sup> The Court concluded that the statute was a "mere" federal-state funding statute which expressed statements of federal policy, but that section 6010 did not establish any new rights.<sup>87</sup> Finally the Court said that the federal funds were not conditioned on a state's compliance with section 6010 because such conditioning was not explicit in that section of the act as it was elsewhere in the Act.<sup>88</sup>

The courts have been reluctant to extend the rights of the mentally retarded unless the statutory grounds for doing so are explicit and do not create constitutional jurisdiction problems. Such reluctance, however, does not foreclose an inquiry into the purely constitutional basis for the least restrictive alternative. Indeed, the language of section 6010 suggests that such a basis exists.<sup>89</sup> Following an in-

---

83. *Pennhurst I*, 451 U.S. 1, 31-32 (1981).

84. 42 U.S.C. §§ 6000-6081 (1976 & Supp. III).

85. 42 U.S.C. § 6010(1), (2) (1978) (emphasis added) *omitted and reenacted at* 42 U.S.C. § 6009 (Supp. III 1985).

86. *Pennhurst I*, 451 U.S. at 16-18.

87. *Id.* at 18-27. "[T]he provisions of § 6010 were intended to be hortatory, not mandatory." *Id.* at 24.

88. *Id.* at 23-27. The Supreme Court's decision in *Pennhurst I* reducing § 6010's bill of rights to mere precatory language has been the subject of considerable commentary. See Brown, *Pennhurst as a Source of Defenses for State and Local Governments*, 31 CATH. U.L. REV. 449 (1982); Boyd, *The Aftermath of the DD Act: Is There Life After Pennhurst?* 4 UALR L.J. 448 (1981); Note, *Mental Health Law—42 U.S.C. § 6010 Held Not to Create Substantive Rights in Favor of Mentally Retarded*, 65 MARQ. L. REV. 156 (1981); Note, *Pennhurst State School & Hospital v. Halderman: Back to the Drawing Board for the Developmentally Disabled*, 60 N.C.L. REV. 1115 (1982); Note, *The "Bill of Rights" of the Developmentally Disabled Assistance and Bill of Rights Act Did Not Create Substantive Rights for the Mentally Retarded to Appropriate Treatment in the Least Restrictive Environment*, 58 N.D.L. REV. 119 (1982); Note, *Pennhurst v. Halderman: A Bill of Rights in Name Only*, 13 U. TOL. L. REV. 214 (1981).

89. "The standards set were considered the 'absolute minimum' so as not to 'violate the

quiry into the Supreme Court's most recent pronouncement involving the mentally retarded, the constitutional source for a right to the least restrictive alternative will be examined.

### 3. City of Cleburne v. Cleburne Living Center<sup>90</sup>

In 1980 the Cleburne Living Center (CLC)<sup>91</sup> attempted to obtain a special use permit to allow it to operate a group home for the mentally retarded in a residential neighborhood.<sup>92</sup> The city's zoning ordinance prohibited the establishment of "[h]ospitals . . . or homes . . . for the . . . feeble minded" without such a permit.<sup>93</sup> The city council denied the permit application.<sup>94</sup> After exhausting its available administrative remedies, CLC brought suit against the city in the United States District Court.<sup>95</sup> Following a bench trial, the district court entered judgment in favor of the city.<sup>96</sup> CLC appealed.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit concluded that the mentally retarded were a quasi-suspect class and it applied heightened scrutiny<sup>97</sup> to invalidate the ordinance requiring a special use permit on equal protection grounds.<sup>98</sup> The full court, with six judges dissenting, denied a hearing en banc.<sup>99</sup> The Supreme Court granted certiorari<sup>100</sup> and affirmed in part and vacated in part the panel decision.<sup>101</sup>

---

Constitutional rights of the individuals in those programs.' " Boyd, *supra* note 88, at 459 n.92 (quoting S. REP. NO. 160, 94th Cong., 1st Sess. 38 (1975)).

90. 473 U.S. 432 (1985).

91. For ease of discussion, CLC will refer to all of the plaintiffs.

92. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 193-94 (5th Cir. 1984), *aff'd in part and vacated in part*, 473 U.S. 432 (1985).

93. *Id.*

94. *Id.* at 194. The reasons given for the denial were as follows:

1. the attitude of the majority of owners of property located within two hundred (200) feet of [the proposed group home] . . . ;
2. the location of a junior high school across the street . . . ;
3. concern for the fears of elderly residents of the neighborhood;
4. the size of the home and the number of people to be housed;
5. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;
6. the home's location on a five hundred (500) year flood plain; and
7. in general, the presentation made before the City Council.

*Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 197.

98. *Id.* at 202.

99. *Cleburne Living Center v. City of Cleburne*, 735 F.2d 832 (5th Cir. 1984).

100. *City of Cleburne v. Cleburne Living Center*, 469 U.S. 1016 (1984).

101. 473 U.S. 432, 450 (1984).

The Supreme Court vacated the portion of the panel's decision holding that the mentally retarded are a quasi-suspect class.<sup>102</sup> In addressing equal protection challenges to statutes, the Supreme Court applies a three-tiered system of review.<sup>103</sup> The Court determines first which level of judicial review to apply (strict scrutiny, somewhat heightened review, or rational basis test) depending on the group of people or the interest that is involved.<sup>104</sup> Strict scrutiny<sup>105</sup> is reserved for "classifications that disadvantage a 'suspect class,'<sup>106</sup> or that impinge upon a 'fundamental right.'"<sup>107</sup> Heightened review, sometimes referred to as intermediate scrutiny,<sup>108</sup> is employed when the "legislative classification, while not facially invidious, nonetheless give[s] rise to recurring constitutional difficulties."<sup>109</sup> This intermediate level of review is applied when the class affected is a quasi-suspect class.<sup>110</sup> Only gender<sup>111</sup> and illegitimacy<sup>112</sup> have been found by the Supreme Court to be quasi-suspect classes.<sup>113</sup> If the classification does not warrant either of these higher levels of review, the legislative action is

---

102. *Id.* at 446.

103. Comment, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in City of Cleburne v. Cleburne Living Center*, 72 IOWA L. REV. 241, 243 (1986).

104. *Id.* at 243-44; Note, *Zoning Ordinance for the Mentally Retarded Fails the Rational Basis Test*, 8 UALR L.J. 721, 725 (1985-86); see *Plyer v. Doe*, 457 U.S. 202, 216-20 (1982).

105. The strict scrutiny test requires "the State to demonstrate that its classification has been precisely tailored to serve a compelling government interest." *Plyer*, 457 U.S. at 217.

106. The Supreme Court has recognized three suspect classifications: *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (race); *Oyama v. California*, 332 U.S. 633, 646 (1948) (national origin); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage).

107. *Plyer*, 457 U.S. at 216-17.

108. In order to pass muster under heightened review, "the classification [must reflect] a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *Id.* at 217-18; see *Craig v. Boren*, 429 U.S. 190, 197 (1976).

109. *Plyer*, 457 U.S. at 217.

110. A quasi-suspect class is one which shares some, but not all, of the characteristics which make a class suspect. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1090 (1978). The indicia of a suspect class are several: (1) membership in the class must be immutable, *Parham v. Hughes*, 441 U.S. 347, 351 (1979), *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); (2) whether the class is a "discrete and insular minority," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938); (3) whether the class has been "subjected to . . . a history of purposeful unequal treatment," *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); and (4) whether the class has been "relegated to . . . a position of political powerlessness." *Id. Contra City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445 (1985).

111. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

112. *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

113. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (refusing to extend heightened review to differential treatment based on age).

reviewed for mere rationality.<sup>114</sup> In *Cleburne* the Supreme Court concluded that the mentally retarded were not a quasi-suspect class,<sup>115</sup> but nonetheless overturned the zoning ordinance as being based on "irrational prejudice against the mentally retarded."<sup>116</sup>

*Cleburne* evinces a determination by the Supreme Court to avoid a mechanical formulation of what constitutes a quasi-suspect class.<sup>117</sup> When the particular immutable characteristic which defines the minority group is one which the legislature may reasonably take into account, the Court will not presume discriminatory intent.<sup>118</sup> Essentially, the Court seems to find a qualitative difference between those attributes distinguishing already suspect and quasi-suspect classes<sup>119</sup> and the attribute distinguishing the class in *Cleburne*—mental retardation. "[C]lassifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that *those* characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes."<sup>120</sup>

Commentary on *Cleburne* and its unusually stringent application of the rational basis test is legion.<sup>121</sup> The Court's decision, while not explicitly granting the mentally retarded greater protection from legislative action, should give state legislators pause when they consider the enactment of legislation which may disadvantage the mentally retarded. As Justice Marshall points out in his dissent, the majority did

---

114. *Plyer v. Doe*, 457 U.S. 202, 216 (1982) ("[W]e thus seek only the assurance that the classification bears some fair relationship to a legitimate public purpose.").

115. *Cleburne*, 473 U.S. at 446.

116. *Id.* at 450.

117. See, e.g., Comment, *supra* note 103, at 247-53 (arguing that an application of the four indicia of suspectness, see *supra* note 110, requires a finding that the mentally retarded are a quasi-suspect class).

118. *Cleburne*, 473 U.S. at 446.

119. See *supra* notes 106, 111, 112 and accompanying text.

120. *Cleburne*, 473 U.S. 442-43 n.10 (quoting J. ELY, *DEMOCRACY AND DISTRUST* 150 (1980) (footnote omitted)).

121. See Mason, *Rights of the Mentally Disabled*, 1986 ANN. SUR. OF AM. L. 195; Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987); Note, *The City of Cleburne v. Cleburne Living Center and the Supreme Court: Two Minorities Move Toward Acceptance*, 63 DEN. U.L. REV. 697 (1986); Note, *City of Cleburne v. Cleburne Living Center, Inc.: Judicial Step or Stumble?* 6 N. ILL. U.L. REV. 409 (1986); Note, *Equal Protection and the New Rational Basis Test: The Mentally Retarded are not Second Class Citizens in Cleburne*, 13 PEPPERDINE L. REV. 333 (1986); Note, *City of Cleburne v. Cleburne Living Center: Rational Basis with a Bite?* 20 U.S.F.L. REV. 927 (1986); Note, *City of Cleburne v. Cleburne Living Center: Denial of Quasi-Suspect Status for the Mentally Retarded and its Effect on Exclusionary Zoning of Group Homes*, 17 U. TOL. L. REV. 1041 (1986).

not apply the traditional rational basis test in invalidating the ordinance; rather it engaged in somewhat heightened scrutiny or "second order" rational basis review.<sup>122</sup> The Court has taken a tentative step toward protecting these historically disadvantaged people by requiring that a statute discriminating against them actually be rational. *Cleburne* makes clear that any right the mentally retarded may have to the least restrictive alternative placement must be posited on a fundamental constitutional right, and not on any greater solicitude based on their class characteristic.

### C. The Least Restrictive Alternative

The Supreme Court has recognized that the mentally retarded have a fourteenth amendment liberty interest in reasonably non-restrictive confinement conditions within an institution.<sup>123</sup> The argument advanced here is that this liberty interest is a fundamental right—a right to be free from confinement. Any state encroachment on the mentally retarded person's liberty interest must, therefore, occur in the least restrictive alternative. Consequently, any institutionalized mentally retarded person who is capable of living outside the institution in an intermediate level of confinement must be so placed. Before discussing the constitutional analysis buttressing this position, several cases rejecting such a position will be discussed.

#### 1. *The Youngberg II Standard*

In *Society for Good Will to Retarded Children v. Cuomo*<sup>124</sup> the Second Circuit reversed a district court finding that residents of a state institution were entitled to the least restrictive environment, which, in some cases, mandated community placement rather than continued institutionalization.<sup>125</sup> The appellate court, basing its decision solely on constitutional grounds in light of *Pennhurst II*,<sup>126</sup> concluded that the proper standard of review, after *Youngberg II*, was "whether a particular decision has substantially met professionally accepted minimum standards."<sup>127</sup> Thus, "constitutional standards are met when the professional who made a decision exercised 'profes-

---

122. *Cleburne*, 437 U.S. at 458 (Marshall, J., dissenting). See Mason, *supra* note 121, at 200-01; Note, *supra* note 104, at 733-34.

123. See *supra* notes 50-65 and accompanying text.

124. 737 F.2d 1239 (2d Cir. 1984). See also Note, *The Right to Treatment: Society for Good Will to Retarded Children, Inc. v. Cuomo*, 80 Nw. U.L. REV. 1355 (1986).

125. *Society for Good Will*, 737 F.2d at 1248.

126. See *supra* notes 74-79 and accompanying text.

127. *Society for Good Will*, 737 F.2d at 1248.

sional judgment' at the time the decision was made."<sup>128</sup> Applying this interpretation of *Youngberg II*, the Second Circuit concluded:

Even if every expert testifying at trial agrees that another type of treatment or residence setting might be better, the federal courts may only decide whether the treatment or residence setting that actually was selected was a "substantial departure" from prevailing standards of practice.

Therefore, we may not look to whether the trial testimony established the superiority of a "least restrictive environment" in general or of community placement in particular. Instead, we may rule only on whether a decision to keep residents at [the institution] is a *rational decision* based on professional judgment.<sup>129</sup>

The Fifth<sup>130</sup> and Seventh<sup>131</sup> Circuits have reached similar results.

The court's decision in *Society for Good Will* is erroneous because it incorrectly applies the standard articulated in *Youngberg II*. The *Youngberg II* standard is *not* the proper standard for determining whether the mentally retarded have an entitlement to a least restrictive environment under the Constitution. The *Youngberg II* court adopted the standard enunciated by Chief Judge Seitz in his concurring opinion for the court of appeals.<sup>132</sup> This standard was not developed to determine whether the mentally retarded had a right to the least restrictive alternative when their liberty interest is infringed by the state, but rather it was utilized to determine whether the defendant was liable in a section 1983<sup>133</sup> civil rights action.<sup>134</sup> This conclusion is supported by the Supreme Court's language in *Youngberg II* that liability may be imposed only when the mentally retarded are confined contrary to a rational decision based on professional judg-

---

128. *Id.*

129. *Id.* at 1248-49 (citations omitted) (emphasis added).

130. *Lelsz v. Kavanagh*, 807 F.2d 1243, 1249-51 (5th Cir. 1987).

131. *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983). *See also* *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983) (in which the court abandoned the least intrusive means test in evaluating a mental patient's right to refuse treatment).

132. *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (Seitz, C.J., concurring)) (*Youngberg II*).

133. 42 U.S.C. § 1983 (1982). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." *Id.*

134. *See Romeo*, 644 F.2d at 154 (standard of proof required for § 1983 suit for damages). "[O]ur duty in this case is only to establish minimum constitutional standards to govern the individual claims of a Pennhurst resident against certain Pennhurst officials." *Id.* at 181 (Seitz, C.J., concurring).

ment.<sup>135</sup> The least restrictive alternative analysis provides an appropriate framework for answering the question of whether to place the mentally retarded. The professional judgment standard, on the other hand, is appropriate for determining whether state officials are liable under section 1983 for failing to place the mentally retarded individual in the least restrictive environment. At least one court has recognized this distinction between the *Youngberg II* standard and the least restrictive alternative approach.

*Youngberg v. Romeo* involved only a claim for money damages for past infringements . . . . The Court's decision does not inform at all as to the appropriate reach of injunctive relief for the protection of liberty interests established by state law, and the holding is not necessarily dispositive of the scope of prospective relief for the protection of the fourteenth amendment liberty interests which it recognized. Obviously the problem of hindsight interference with decisions made by hard-pressed professional staff members of state mental institutions is a more serious one than that of assisting them in directing prospective injunctive relief against appropriate state officials.<sup>136</sup>

The mentally retarded have a constitutionally derived right to the least restrictive alternative, although this right may not give rise to a civil action under section 1983 for past infringement.<sup>137</sup> The inability to maintain a civil action under section 1983 for damages arising out of a past infringement of a constitutional right does not foreclose an action based strictly on the fourteenth amendment for injunctive relief to prevent continuing infringement of the mentally retarded person's liberty.<sup>138</sup>

---

135. *Youngberg II*, 457 U.S. at 323.

136. *Scott v. Plante*, 691 F.2d 634, 637 (3d Cir. 1982). *Scott* involved a mentally ill person committed to a state psychiatric hospital.

137. *Cf. Popow v. City of Margate*, 476 F. Supp. 1237 (D.N.J. 1979). In *Popow* the plaintiff's decedent was deprived of his fourteenth amendment right to life, *id.* at 1242, but an action would only lie under 42 U.S.C. § 1983 if the defendant's action was at a level of culpability exceeding simple negligence. 476 F. Supp. at 1242. By analogy, an institutionalized mentally retarded individual may be deprived of his fourteenth amendment right to liberty. However, an action for damages could only be brought if the state's action in institutionalizing him exceeded simple negligence. Thus, the Supreme Court in *Youngberg* was developing a standard by which the defendant's conduct could be measured to determine if it exceeded the level of culpability necessary for the recovery of *damages* under § 1983.

138. *Scott*, 691 F.2d at 637. In fashioning a remedy for a constitutional violation, the court must "tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976) (quoting *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). An action for damages may be more intrusive on state sovereignty and the principle of comity counsels a higher standard for the award of such a remedy. Injunctive

## 2. *Liberty Interest of the Mentally Retarded*

The least restrictive alternative is not a constitutional right in and of itself. In order to trigger the least restrictive alternative analysis, some fundamental right within the Constitution must be implicated.<sup>139</sup> A person's liberty interest as found in the fourteenth amendment is such a right.<sup>140</sup>

Inherent in the fourteenth amendment is a right to be free from confinement.<sup>141</sup> No right is more vital to one's personhood. Consequently, the due process clause of the fourteenth amendment mandates elaborate safeguards before that right can be overborne. If proper due process constraints are followed, however, the right to be free from confinement can be extinguished.<sup>142</sup> In a criminal situation "a conviction curtails a defendant's right to freedom from confinement, but it does not extinguish this liberty interest completely."<sup>143</sup> Similarly, although a mentally retarded person has been committed under proper procedures, he still retains a substantive liberty interest under the fourteenth amendment.<sup>144</sup> Therefore, even following a valid<sup>145</sup> confinement in an institution, the mentally retarded individual still retains a liberty interest. It should be emphasized that the mentally retarded person's liberty interest is much greater than that of the convicted criminal. The criminal is incarcerated and his liberty significantly curtailed as punishment itself (although there are also other penological objectives). The mentally retarded person, however, is placed in an institution to provide for his care, not to punish him for his diminished mental capacity. Accordingly, the mentally retarded individual's retained liberty interest is much greater than that of the prisoner and the state must act responsively to maximize his liberty. Having established that the mentally retarded possess a fundamental constitutional right to their continued liberty, it is necessary to consider in what manner and to what extent a state may abridge this right.

---

relief against future constitutional violations, however, provides the state room in which to act to conform its conduct to the constraints of the federal Constitution.

139. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

140. *Harris v. McRae*, 448 U.S. 297, 312 (1980).

141. *Addington v. Texas*, 441 U.S. 418, 425 (1979).

142. *Id.* See *Vitek v. Jones*, 445 U.S. 480, 493 (1980).

143. *United States v. Schell*, 692 F.2d 672, 681 (10th Cir. 1982) (McKay, J., concurring and dissenting in part). See *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

144. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (*Youngberg II*).

145. Throughout this article it is assumed that the institutionalization procedure itself conforms to the due process requirements of the fourteenth amendment.



### 3. *The Least Restrictive Alternative*

The Supreme Court first recognized the least restrictive alternative analysis in *Shelton v. Tucker*.<sup>146</sup>

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.<sup>147</sup>

In applying the least restrictive alternative analysis several factors deserve consideration. First, one must consider whether the state action impinges upon a fundamental constitutional right. "Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative."<sup>148</sup> As has been discussed, the action of placing a person in an institution intrudes on his fundamental liberty interest.<sup>149</sup> Confinement may also infringe upon other fundamental rights.<sup>150</sup>

The second element is whether the state has a "legitimate and substantial" purpose to impinge upon the constitutional right.<sup>151</sup> Three reasons have been advanced for the institutionalization of the mentally retarded: (1) protection of others, (2) protection of the mentally retarded person, and (3) the mentally retarded person's need for treatment or habilitation.<sup>152</sup> Any or all of these reasons may be legitimate reasons for the state to take action. Because there have been no serious challenges to the state's power to institutionalize the mentally

146. 364 U.S. 479 (1960).

147. *Id.* at 488 (footnotes omitted). In *Shelton* the court was faced with an Arkansas statute that required school teachers to annually file an affidavit listing every organization to which they belonged or contributed to in the preceding five years. The court stated that there was no dispute that this statute impaired the teachers' right to freedom of association. *Id.* at 485-86.

148. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973).

149. *See supra* notes 139-45 and accompanying text.

150. For example: (1) freedom of association, *NAACP v. Alabama*, 357 U.S. 449, 466 (1958); (2) right to travel, *Kent v. Dulles*, 357 U.S. 116 (1958); (3) right to privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965), freedom of choice in marital relations, *Boddie v. Connecticut*, 401 U.S. 371 (1971), *Loving v. Virginia*, 388 U.S. 1 (1967); (4) control over one's appearance, *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); (5) locomotion, *Kent v. Dulles*, 357 U.S. 116 (1958), *William v. Fears*, 179 U.S. 270 (1900); and (6) freedom from excrement and urine while confined, *LaReau v. MacDougall*, 473 F.2d 974 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973), *Flakes v. Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981).

151. *Shelton*, 364 U.S. at 488.

152. *Dowben, Legal Rights of the Mentally Impaired*, 16 HOUS. L. REV. 833, 837 (1979).

retarded when they are unable to survive on their own, it will be assumed that these are legitimate reasons for state action. Thus, the pivotal issue posed is whether the state action in achieving legitimate goals is consistent with the principle of the least restrictive alternative.

In *Covington v. Harris*<sup>153</sup> the District of Columbia Circuit considered the least restrictive alternative as it relates to civil commitment.

[T]he principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty justifiable only when the respondent is "mentally ill to the extent that he is likely to injure himself or other persons if allowed to remain at liberty." A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law.<sup>154</sup>

The least restrictive alternative approach was later applied to the confinement of the mentally retarded. In *Welsch v. Likins*<sup>155</sup> the district court concluded that the due process clause of the fourteenth amendment imposed

a constitutional duty on the part of State officials to explore and provide the least stringent practicable alternatives to confinement of noncriminals. As applied to involuntary civil commitment these options [range] from placement of the committed person in the custody of a friend or relative to disposition within a private facility. . . .

. . . The due process clause does no more than require that State officials charged with obligations for the care and custody of civilly committed persons make good faith attempts to place such persons in settings that will be suitable and appropriate to their mental and physical conditions while least restrictive of their liberties.<sup>156</sup>

Numerous federal district courts follow this approach when determining the scope of a least restrictive alternative in confinement.<sup>157</sup> Difficulties arise, however, in determining the requirements imposed on

---

153. 419 F.2d 617 (D.C. Cir. 1969).

154. *Id.* at 623 (footnoted omitted).

155. 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part and vacated and remanded on other grounds*, 550 F.2d 1122 (8th Cir. 1977) (the Eighth Circuit only vacated the district court's order enjoining the enforcement of state constitutional and fiscal control provisions).

156. 373 F. Supp. at 502.

157. *Johnson v. Solomon*, 484 F. Supp. 278, 297-311 (D. Md. 1979); *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1216-22 (E.D. La. 1976); *Eubanks v. Clark*, 434 F. Supp. 1022, 1027-28

the states by the least restrictive alternative analysis, and how such a requirement should be enforced by the courts.

#### 4. *Applying the Least Restrictive Alternative*

The courts lack a uniform interpretation of what the least restrictive alternative entails.

Not only do courts differ with respect to the characterization of the least restrictive alternative requirement, they also do not share a uniform view of what such a requirement entails. One court has written in terms of subjective "good faith attempts" to place persons in appropriate settings. Another court has described a duty to "explore and provide . . . practicable alternatives to confinement." Still another court has asked whether a mode of treatment is "overly restrictive of liberty on a comparative basis." Finally, a more recent statement of the requirement, which takes into account a deference toward medical judgments in individual cases, probes into "which of two or more major treatment approaches is to be adopted" in regard to "initial environmental disposition, not to ongoing therapeutic regimens or medical prescriptions."<sup>158</sup>

"As a general matter, a State is under no constitutional duty to provide substantive services for those within its border."<sup>159</sup> The state's first alternative, then, is to close its institutions and turn out those residents currently therein. As Laurence Tribe concludes:

[I]f the state and federal governments were to wash their hands altogether of the sick, hungry, and poor, none of the interstitial doctrines sketched here could provide a remedy. But that is simply a reminder of the basic point suggested as long ago as 1827 by Chief Justice Marshall—that a government which wholly failed to discharge its duty to protect its citizens would be answerable primarily in the streets and at the polling booth, and only secondarily if at all in the courts. To say this is not to deny that government has affirmative duties to its citizens arising out of the basic necessities of bodily survival, but only to deny that all such duties are perfectly enforceable in the courts of law.<sup>160</sup>

The states, however, have shouldered the burden of providing services

---

(E.D. Pa. 1977); *Stamus v. Leonhardt*, 414 F. Supp. 439, 452-53 (S.D. Iowa 1976); *Lynch v. Baxley*, 386 F. Supp. 378, 392 (M.D. Ala. 1974).

158. *Philipp v. Carey*, 517 F. Supp. 513, 518 (N.D.N.Y. 1981) (citations omitted).

159. *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (*Youngberg II*).

160. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-9, at 920-21 (1978) (footnotes omitted).

to the mentally retarded and are not likely to suddenly abandon that responsibility.

Having chosen to provide services, the state is obligated to obey the mandates of the Constitution. Thus, for the mentally retarded person facing possible institutionalization, the state must provide the least restrictive alternative. Having chosen (or having been compelled by the court) to comply with this requirement, the state must address two further issues: (1) whether the least restrictive alternative requires the least restrictive alternative *available* or the least restrictive alternative *possible*, and (2) determine who is to make the decision concerning possible alternatives.

Requiring the state to provide no more than the least restrictive alternative available virtually emasculates the concept of the least restrictive alternative. The state might do no more than conform its present institutions to the minimal standards set out in *Youngberg II*<sup>161</sup> and make no effort to further reduce the restraint that institutional living places on the mentally retarded. On the other hand, to require the state to seek the least restrictive alternative possible would place an extreme financial burden on the state, often with little corresponding gain in liberty for the mentally retarded individual. Under the second alternative, the state would have to immediately make available and maintain a continuum of alternatives, including:

- (1) remaining in the natural home, or with a relative or inlaw,
- (2) foster homes,
- (3) group homes,
- (4) residential treatment centers,
- (5) private treatment centers,
- (6) semi-public or public treatment centers, [or]
- (7) restrictive centers.<sup>162</sup>

In *Johnson v. Solomon*<sup>163</sup> the court recognized the wide divergence between alternatives available and alternatives possible. The court determined that the state, while not required to make available the full panoply of alternatives, should commit itself to a policy of deinstitutionalization.<sup>164</sup> The court recognized that numerous practical and financial considerations constrained the state and that every individual could not immediately receive the benefit of a least restrictive alternative. Thus the state, when considering institutionalization of a

---

161. See *supra* notes 60-63 and accompanying text.

162. *Johnson*, 484 F. Supp. at 304.

163. *Id.*

164. *Id.* at 305.

mentally retarded person, should first determine whether institutionalization is the least restrictive alternative for that person.<sup>165</sup> If institutionalization is not the least restrictive alternative, the state should examine if there is a less restrictive alternative *currently* available.<sup>166</sup> If no such alternative is presently available the person may be institutionalized, but the state has an affirmative duty to seek out other alternatives and to establish such alternatives.

The state, having assumed the burden of providing care for the mentally retarded, must provide such care within the strictures of the Constitution, thus requiring creation of less restrictive alternatives to institutionalization. However, the state has numerous other obligations and would prefer to minimize its financial burden by maintaining the present status quo of institutions. Changing from the current centralized institutional system to a broader based support program for the mentally retarded which would provide less restrictive alternatives will probably result in some short-term duplication of services and a significant increase in cost. The long-term effect, however, may very well result in a financial savings for the state. As has been observed, "institutions [are] the most expensive, community homes less expensive, foster homes even less expensive, and family homes least expensive."<sup>167</sup> Thus, even from a purely financial standpoint, the state should seek to establish and maintain least restrictive alternatives.

Although the state is obligated to provide some services, it is not required to provide the best possible treatment and conditions without regard to cost. "Due process . . . does not guarantee the [mentally retarded] the right to be treated in the least restrictive environment that money can buy."<sup>168</sup> The limitations and practical considerations faced by the states must be recognized by the courts.

---

165. See *Kentucky Ass'n for Retarded Citizens, Inc. v. Conn.*, 674 F.2d 582, 585 (6th Cir. 1982) ("The least restrictive alternative for some severely and profoundly retarded persons may be institutionalization."), *cert. denied*, 459 U.S. 1041 (1982).

166. *Johnson*, 484 F. Supp. at 305; *Stammus*, 414 F. Supp. at 453. In *Welsch* the court declared that if the state "chooses to operate hospitals for the mentally retarded, the operation must meet minimal constitutional standards, and that obligation may not be permitted to yield to financial considerations." 500 F.2d at 1132. The court, however, was speaking of conditions *within* the institution. Thus, if a state chooses to maintain an institution it must meet the constitutional standards of *Youngberg II* without regard to cost. In meeting the constitutional standard of the least restrictive alternative, however, the state may receive more deference in light of the barriers it faces, so long as it makes some progress toward providing alternative services.

167. *Association for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473, 483 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1983).

168. *Johnson v. Brelje*, 701 F.2d 1201, 1210 (7th Cir. 1983).

[The mentally retarded do not have] a right to the *best* treatment available, any more than the right to counsel means the right to the nation's foremost trial lawyer. Logic, economics, and the scarcity of human resources make it impossible to supply the finest to everyone. Nor are courts, or child rehabilitation experts, however skilled, equipped to determine infallibly what is optimum.<sup>169</sup>

Accordingly, the courts are likely to give states considerable deference with regard to the planning and implementation of their institutional systems. Likewise, the courts will not require that each mentally retarded person be given the full panoply of procedural protections given to a criminal defendant before institutionalization.

[T]he imperative that least drastic means be considered does not imply a constitutional right on the part of every individual to a personal judicial determination that the means being employed to improve his condition are the best possible or the least restrictive conceivable. What is required is that the state give thoughtful consideration to the needs of the individual, treating him constructively and in accordance with his own situation, rather than automatically placing in institutions, perhaps far from home and perhaps forever, all for whom families cannot care and all who are rejected by family or society.<sup>170</sup>

When the state fails to give consideration to the individual and fails to offer legitimate alternatives to restrictive institutional settings, the federal courts may take action at the behest of the individual.

When the state has violated a constitutional principle, the federal courts have the power to order the state to take action to remedy the constitutional violation and to require the state to fund the necessary action.<sup>171</sup> The court's decision, however, will finally rest on a balancing of competing interests.

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.<sup>172</sup>

Thus, the decision of the court will of necessity be highly fact-oriented

---

169. *Johnson*, 484 F. Supp. at 302; *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1217-18 (E.D. La. 1976).

170. *Gary W.*, 437 F. Supp. at 1217.

171. *Milliken v. Bradley*, 433 U.S. 267, 280-81, 289 (1977).

172. *Poe v. Ullman*, 367 U.S. 497, 542 (Harlan, J., dissenting) *reh'g denied*, 368 U.S. 869 (1961).

and turn on the practicability of alternatives and the needs of society as a whole. Choosing a standard of practicability in requiring the state to seek out less restrictive alternatives for the placement of the mentally retarded is an accommodation of both the state's and the mentally retarded person's interests. In determining what choices a state should make available it is well to remember that the mentally retarded are not demanding a perfect environment, that they "do not seek to guarantee that all patients will receive all the treatment they need or that may be appropriate to them. They seek only to ensure that conditions in the state institutions will be such that the patients confined there will have a *chance* to receive adequate treatment."<sup>173</sup>

The state is obligated to inquire into less restrictive alternatives. The standard for such an inquiry, however, and who should make the ultimate decision, are not yet settled. The *Youngberg II* decision encourages the courts to show considerable deference to the judgment of a qualified professional.<sup>174</sup> Following *Youngberg II* the courts have been divided as to precisely how that decision affects the least restrictive alternative analysis. In *Society for Good Will to Retarded Children* the court denied the right to community placement (a less restrictive alternative) so long as the decision to continue institutionalization was a "rational decision based on professional judgment."<sup>175</sup> Consequently, when the experts from the two sides disagree, the state prevails. Such an approach misconstrues *Youngberg II*.

The *Youngberg II* decision only requires that deference be given to professional judgment, not that the courts abrogate their role in protecting a citizen's rights. The issue of least restrictive alternatives, as it applies to the mentally retarded, is not purely a question of law or medical judgment—it is a combination of the two.<sup>176</sup> The courts are entrusted with the obligation to preserve the delicate balance between the two concerns. To totally divorce themselves from the decision, as the *Society For Good Will to Retarded Children* court did, places too much discretion in the hands of professionals hired by the state. While these professionals presumably act in the best interest of the mentally retarded, such a presumption should not be absolute.

---

173. *Wyatt v. Aderholt*, 503 F.2d 1305, 1316 (5th Cir. 1974).

174. *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (*Youngberg II*).

175. *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1249 (1984); see also *Phillips v. Thompson*, 715 F.2d 365, 368 (7th Cir. 1983) ("[I]t must be determined whether professional judgment in fact was exercised in balancing the liberty interest of the class members against relevant State interests.").

176. Note, *Youngberg v. Romeo: The Right to Treatment Dilemma and the Mentally Retarded*, 47 ALB. L. REV. 179, 201-10 (1982).

Likewise, the *Youngberg* court correctly recognized that the courts should exercise appropriate restraint when dealing with placement decisions of state professionals. In applying this balancing approach, one court concluded that "a constitutional right to the least restrictive method of care or treatment exists only insofar as professional judgment determines that such alternatives would measurably enhance the resident's enjoyment of basic liberty interests."<sup>177</sup> Thus, while the court will give deference to state professionals, such deference would include weighing the opinion of a nonstate professional advocating a less restrictive placement. Indeed, the right to a least restrictive environment for the mentally retarded has been accepted as *professionally required*.<sup>178</sup> The importance of an entitlement to the least restrictive alternative for the mentally retarded, in human terms, is aptly put in the following lines from a district court opinion:

Some residents . . . are unduly physically restrained by living in the [institution]. They are capable of much freer and more productive activities in small group community based homes. For these individuals, the Constitution mandates placement in a group home, or in some other situation in the community, where they can effectively exercise their proven ability to live independently. As [one] resident . . . so poignantly put it:

I have been living in institutions, various institutions, for most of my life and I would like to go and see what it's like to live at somebody's house and be, like you know, once in a while, to get that kind of love that other kids get.<sup>179</sup>

#### IV. CONCLUSION

For many years institutionalization served as a form of forced isolation to remove the mentally retarded from society's view. American culture failed to accept the mentally retarded as equal members in society. Although the societal and legal values of the culture have prevented the wholesale extermination of the mentally retarded, the alternative was a not-so-benign neglect. The institutions into which they were placed became warehouses for unfit human beings, not because the mentally retarded were unable to learn and take part in society, but because society was unwilling to accept persons who could not meet its standard of normality.

---

177. *Association of Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473, 486 (D.N.D. 1982).

178. *Society for Good Will*, 572 F. Supp. at 1347.

179. *Id.* at 1346-47.



Recently, however, concerned individuals and organizations have given the mentally retarded a voice. People have been forced to consider the plight of the mentally retarded in relation to the constitutional principles upon which our nation was founded. The federal courts have recognized that the mentally retarded have an interest in maintaining their liberty. Because a person's liberty interest is a fundamental right guaranteed under the Constitution, state infringement on that liberty must be for a compelling reason and then only in the least restrictive alternative.

The state may no longer simply place the mentally retarded in an institution. The state is obligated to consider the mentally retarded as individuals and give deference to their needs. If the mentally retarded person can benefit from a less restrictive form of institutionalization, the state must inquire into the availability of such an alternative. If no such alternative exists, or no spaces are available in existing facilities, the state has not yet discharged its constitutional obligations. The state must seek to establish practicable alternatives to the institutionalization of the mentally retarded.

It is time that society accepted all members of the human race as equal partners, not simply those who are intellectually and cosmetically pleasing. A fundamental aspect of being human is interacting with the rest of society, not just those with similar attributes. The human race is a diverse one and that diversity is to be valued. Providing the mentally retarded with less restrictive community placements provides them the opportunity to interact with and become contributing members of society. By denying the mentally retarded person that opportunity, not only are the mentally retarded denied their place in society, but society also denies a portion of itself.