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Advancing Deinstitutionalization

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ADVANCING DEINSTITUTIONALIZATION

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INTRODUCTION

For over a quarter century, the "deinstitutionalization movement"[1] has achieved the transfer of countless retarded persons from large, congregate-care facilities to family-style residences in the community.[2] Whether this movement is constitutionally required raises questions which the Supreme Court is likely to decide since the impact of deinstitutionalization on the administration of state mental retardation programs has been too great for the Court to avoid the issue much longer.[3] The theories which lower courts have previously used to support deinstitutionalization orders — least restrictive alternative analysis[4] and the inherent

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1. Note, *Group Homes and Deinstitutionalization: The Legislative Response To Exclusionary Zoning*, 6 VT. L. REV. 509 (Fall 1981). It was there noted that:

> In February 1963, President Kennedy sent a message to Congress urging establishment of a nationwide network of community-based health services. His hope was that "within a few years . . . [and with] . . . the redirection of state resources from state mental institutions . . . [we would] . . . achieve [the] goal of having community-centered mental health services readily accessible to all."

Id. at 509 & n.1.

For descriptions of the "Deinstitutionalization Movement" and its origins, see Costello and Preis, *Beyond Least Restrictive Alternative: A Constitutional Right to Treatment for Mentally Disabled Persons in the Community*, 20 LOY. L.A.L. REV. 1527, 1531 n.20 (1987); Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J., 375, 378-87 (1982). *See also* S. VITELLO & R. SOSKIN, MENTAL RETARDATION: ITS SOCIAL AND LEGAL CONTEXT 23-38 (1985).

2. *See, e.g.*, Homeward Bound, Inc. v. Hissom Memorial Center, No. 85-C-437-E (N.D. Okl. July 24, 1987)(WESTLAW, 1987 WL 27104, p. 55 of 110)(not reported in F. Supp.)(order to place residents of institution into appropriate community alternative at a rate of 125 persons per year); Garrity v. Gallen, 522 F. Supp. 171, 240-41 (D.N.H. 1981)(presumption against deinstitutionalization of severely and profoundly retarded residents shall cease, community placements shall be made on an individualized basis; defendants shall develop program of community residences and residential care); Halderman v. Pennhurst State School and Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd on other grounds*, 612 F.2d 84 (3rd Cir. 1979), *rev'd*, 451 U.S. 1 (1981)(federal district court enjoined Commonwealth of Pennsylvania to provide suitable community living arrangements for all retarded residents of Pennhurst State School and Hospital). *See also* S. VITELLO & R. SOSKIN, *supra* note 1, at 35 (*Halderman v. Pennhurst* decisions had a significant impact on the deinstitutionalization of mentally retarded persons).

3. *Cf.* Schwartz & Constanzo, *Compelling Treatment in the Community: Distorted Doctrines and Violated Values*, 20 LOY. L.A.L. REV. 1329, 1377-97 (1987)(judicial implementation of community treatment for the mentally ill is problematic due to legal, economic, and bureaucratic barriers).

4. *Halderman*, 446 F. Supp. at 1315-20: "Once admitted to a state [retardation] facility, the residents have a constitutional right to be provided with minimally adequate habilitation under the least restrictive conditions consistent with the purpose of commitment." *Id.* at 1319 (citations omitted). *See also* Shelton v. Tucker, 364 U.S. 479

untherapeutic nature of institutional confinement[5] — may well prove unpersuasive to the Supreme Court given its decision in *Youngberg v. Romeo*.[6] In addressing claims made against institutional conditions, the Court in *Romeo* prescribed a lax standard of judicial review which is potentially applicable to claims against institutionalization itself.[7]

It is difficult to predict how catastrophic a ruling against deinstitutionalization would actually be for the future of retarded persons. Although preference for community placement has recently increased among professionals,[8] this trend may falter without constitutional compulsion behind it. In the past, community training gave way to institutionalization,[9] and this development could again occur in times to come.[10]

This article will suggest an approach to deinstitutionalization more likely than past theories to be judicially persuasive because it is more consistent with the Court's view of its general role in enforcing the substantive due process and equal protection safeguards of the fourteenth amendment. This approach, similar to judicial review of agency action,[11] will seek simply to insure that professional judgment was in fact exercised without requiring the reviewing court to second-guess the propriety of any treatment prescribed.[12] First, however, the article will explain why the two

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(1960) (first amendment case in which Supreme Court struck down Arkansas statute requiring every teacher to file affidavit listing all organizations to which teacher belonged or contributed). The Court 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.

Id. at 488 (citations omitted).

5. *See Halderman*, 446 F. Supp. at 1318 (quoting Mason and Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124, 156-57 (1976)). " 'Institutions, by their very structure — a closed and segregated society founded on obsolete custodial models — can rarely normalize and habilitate the mentally retarded citizen to the extent of community programs created and modeled upon the normalization and developmental approach components of habilitation.' " *Id.*

6. 457 U.S. 307 (1982).

7. Youngberg v. Romeo, 457 U.S. 307 (1982). For a discussion of Youngberg v. Romeo, *see infra* notes 24 to 33 and accompanying text.

8. *Homeward Bound*, 1987 WL 27104 at pp.13, 37-39, 40-41; *Garrity*, 522 F. Supp. at 195; *Halderman*, 446 F. Supp. at 1311, 1313.

9. *See Halderman*, 446 F. Supp. at 1318. *See also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 462-63 (1985)(Marshall J., concurring in part and dissenting in part).

10. Costello and Preis, *supra* note 1, at 1532-33.

11. For a description of judicial review of agency action, *see infra* note 107.

12. Applying an analysis to treatment decisions, similar to judicial review of agency action, was first suggested by Chief Judge Bazelon in his seminal opinion in Rouse v. Cameron, 373 F.2d 451, 454-56 (1966). *See also* Bazelon, *Forward, the Right to Treatment*

current deinstitutionalization theories are in doubt.

I. CURRENT DEINSTITUTIONALIZATION THEORIES

A. LEAST RESTRICTIVE ALTERNATIVE ANALYSIS

One theory supporting deinstitutionalization rests on the premise that the "massive curtailment of liberty"[13] caused by institutionalization is justified only when no less drastic alternative is available to meet the state's commitment objectives.[14] Thus, where retarded persons can receive requisite care and treatment in community residences, such placements are required, if commitment is to continue, as a less restrictive environment to institutionalization.[15]

Least restrictive alternative analysis, upon which this first theory relies, is a familiar constitutional doctrine.[16] The Supreme Court has applied it in varied contexts, for example, to strike down state regulations which required teachers to disclose their organizational affiliations,[17] which forbade married couples from using contraceptives,[18] and which imposed a year's residency requirement for voting[19] and for public health benefits.[20] The concept may be viewed as a "principle of conservation:" a principle that the rights abridged are so important that the Court will overcome its usual reluctance to scrutinize the propriety of legislative means and require means which are not only effective but which will conserve as much of the abridged rights as possible.[21] It may also be viewed as an assurance of legislative good faith in that scrutiny of means is required to insure against a secondary legislative agenda of abridging rights for their own sake.[22] In either event, the prin-

Symposium, 57 G.D.L.J. 676, 678 (1969); Bazelon, *Preface, Symposium, Mentally Retarded People and the Law*, 31 STAN. L. REV. 541, 542-43 (1979).

13. Humphrey v. Cady, 405 U.S. 504, 509 (1972).

14. Halderman v. Pennhurst, 446 F. Supp. 1295, 1319-20 (E.D. Pa. 1977); *see also* Shelton v. Tucker, 364 U.S. 479, 488 (1960) (when fundamental personal liberties are threatened, state must employ less drastic means for achieving substantial governmental purpose).

15. *See Halderman*, 446 F. Supp. at 1319-20.

16. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960); G. GUNTHER, CONSTITUTIONAL LAW 1156 (11th Ed. 1985); J. NOWAK, R. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW 873 (2d ed. 1983)(least restrictive means test has been applied outside the area of personal rights, for example, to state regulation affecting interstate commerce).

17. *Shelton*, 364 U.S. 479.

18. Griswold v. Connecticut, 381 U.S. 479 (1965).

19. Dunn v. Blumstein, 405 U.S. 330 (1972).

20. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

21. *See Griswold*, 381 U.S. at 485; *Shelton*, 364 U.S. at 488.

22. Intensive "means scrutiny" has served as a judicial technique to flush out illicit secondary motives underlying legislative enactments. *See, e.g.*, Mississippi Univ. for

ciple represents the accommodation that the Court requires between individual freedom and the needs of an organized society, by concluding that some rights are so important that they are not removed from judicial concern merely because the government has made an initial showing of genuine need.[23]

The Supreme Court, however, has placed least restrictive alternative analysis aside in examining conditions of the institutional confinement of retarded persons. Apparently for the Court in *Youngberg v. Romeo*,[24] valid commitment has rendered these issues primarily medical, thus beyond judicial expertise.[25]

In *Romeo*, a retarded resident of a state institution claimed that he was subjected to excessive physical restraint.[26] Writing for the Court, Justice Powell observed that " '[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the due process clause. . . .' "[27] Furthermore, that right was not extinguished by valid commitment.[28] Yet, plaintiff's claim received far less scrutiny than afforded other important rights outside an institutional context.[29] Instead of permitting physical restraint only for use as a last resort, which least restrictive alternative analysis would require, Justice Powell instructed lower courts to defer substantially on these matters to the decisions of qualified professionals.[30]

Women v. Hogan, 458 U.S. 718, 724-25 (1982)(challenge to sex-discriminatory admissions policy of nursing school). *See also* Craig v. Boren, 429 U.S. 190, 197-98 (1976)(Stevens, J. concurring)(challenge to sex-discriminatory age restrictions on sale of 3.2% beer).

23. *Griswold*, 381 U.S. at 499-501 (Harlan, J., concurring)(challenge to state prohibition of use of contraceptive by married couples).

24. 457 U.S. 307 (1982).

25. Youngberg v. Romeo, 457 U.S. 307, 323 (1982).

26. 457 U.S. at 315-16. He also claimed that the state had not provided him with safe conditions and with the treatment required to lessen his harmful behavior and his need for restraints. *Id.* at 315.

27. *Id.* at 316 (citation omitted).

28. *Id.* at 315 (citing *Hutto v. Finney*, 437 U.S. 678 (1978)).

29. *Compare* the "substantial departure" test developed in *Romeo*, 457 U.S. at 323 (treatment decisions by appropriate professionals are presumed valid unless shown to be a substantial departure from accepted professional standards) with, for example, the tests adopted in other non-economic substantive due process cases, like *Griswold*, 381 U.S. 479, 485 (regulation infringing upon marital privacy must be narrowly drawn to advance compelling state interests).

30. *Romeo*, 457 U.S. at 322-323. Justice Powell, writing for the majority in *Romeo* explained the Court's approach as follows:

> [R]espondent is entitled to minimally adequate training. In this case, the 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. In determining what is "reasonable" — in this and in any case presenting a claim for training by a State — we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think

Physical freedom, as the core of liberty, surely merits no less scrutiny than other basic aspects of liberty which the Court has elsewhere recognized. Even where subject to compelling state interests, such fundamental rights remain protected from unnecessarily broad restraint.[31] Likewise, institutionalization may validly curtail physical freedom; but that fact alone does not remove the extent of restraint from close judicial review, unless, as Justice Powell seems to assume, valid commitment renders the matter primarily medical.[32] In short, least restrictive alternative analysis, with its emphasis on the constitutional importance of the rights involved, is inapplicable since the Court evidently views issues of institutional confinement as beyond judicial competence to scrutinize strictly.[33] Without more, the Court is not likely to regard questions of deinstitutionalization as any less medical or any more fitting for exacting review.

B. ADEQUATE TREATMENT

It has also been argued that deinstitutionalization is required to insure adequate treatment.[34] This second theory presumes a right to treatment,[35] usually to insure that institutionalization is

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judges or juries are better qualified than appropriate professionals in making such decisions. . . .

For these reasons, the decision, if made by a [qualified] professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 322-23 (citations and footnotes omitted). *See also DeShaney*, 108 S. Ct. at 1005 n.7 (1989).

31. *See Griswold*, 381 U.S. at 485.

32. *Romeo*, 457 U.S. at 322-23. For a pertinent quotation from Justice Powell's opinion, see *supra* note 30.

33. *See* S. HERR, RIGHTS AND ADVOCACY OF RETARDED PEOPLE 61-69 (1983)(Supreme Court deference to doctors pre- and post-commitment).

34. *See Homeward Bound*, 1987 WL 27104 at pp. 13, 37-39, 40-41 (evidence overwhelming that, regarding programs for retarded persons, small is better); *Halderman*, 446 F. Supp. at 1318 (institutions are antithetical to the proper habilitation of mentally retarded citizens).

35. Although the Court in *Romeo* did not reach whether a general right to treatment was enforceable under the due process clause, *Romeo*, 457 U.S. at 318. *But see id.* at 325-26 (Blackmun, J., concurring), it did recognize a more limited right where treatment was required to protect civilly committed persons' identifiable liberty interests, like freedom from harm or from unnecessary physical restraint:

> A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and circumstances of the case. A federal court, of course, must identify a constitutional predicate for the imposition of any affirmative duty on a State.

Id. at 319 n. 25. *See also* DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 998 (1989)(county social service agency not liable for the severe abuse of its minor

rationally related to the care and treatment purposes of commitment,[36] and that, for treatment to be constitutionally adequate, it must conform to present professional practice which includes "normalization,"[37] placing retarded persons in the most normal setting appropriate to their needs, as the generally accepted means for providing effective training.[38] Under this theory, institutionalization is considered inherently untherapeutic since it is antithetical to a normal environment.[39] As a general challenge to institutionalization, however, this approach appears more rigorous than the requirements of *Romeo* where the Supreme Court presumed that decisions made by qualified professionals were valid and thus beyond judicial scrutiny unless such a substantial departure from accepted practice as to show that they were not bona fide exercises of professional judgment.[40]

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client while in his father's custody). The Court in DeShaney reaffirmed that "the substantive component of the Fourteenth Amendment Due Process Clause requires the state to provide involuntarily committed mental patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others." *Id.* at 1005 (citations omitted). The Court further noted, without deciding, that "several courts of appeals have held, by analogy to . . . Youngberg, that the state may be held liable under the due process clause for failing to protect children in foster homes from mistreatment at the hand of their foster parents." *Id.* at 1006 n.9 (citations omitted). Arguably, deinstitutionalizing retarded persons to community residences is sufficiently analogous to placing children in foster homes to implicate the state's affirmative duty to provide needed services. *Id.*

36. *See Halderman*, 446 F. Supp. at 1315 (citing Jackson v. Indiana, 406 U.S. 715, 738 (1973)); Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1972)(failure to provide adequate treatment to person confined for purpose of therapy violates due process). *See also* Jackson v. Indiana, 406 U.S. 715, 738 (1973)(due process requires that commitment bear reasonable relation to purpose for which the individual is committed).

37. P. Roos, *Basic Facts About Mental Retardation*, in LEGAL RIGHTS OF MENTALLY DISABLED PERSONS, 23-24 (P.L.I., Mental Health Law Project, 1979)(footnote omitted). Dr. Philip Roos is a national expert on mental retardation who has testified extensively on the conditions of institutional confinement. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 387, 391 n.7 (M.D. Ala. 1972); *Halderman*, 446 F. Supp. at 1303. Describing "normalization," he wrote:

> Retarded persons should live like non-retarded persons to the greatest degree possible. Deviancy can be reduced by minimizing the degree to which persons are treated differently from "normal" persons. Conversely, to the degree that they are grouped together and segregated from others, they will tend to behave differently. Hence facilities which differ from culturally normative living arrangements will generate behavior which deviates from the cultural norm. This principle, referred to as NORMALIZATION has been defined . . . as: ". . . [u]tilization of means which are as culturally normative as possible, in order to establish and/or maintain personal behaviors and characteristics which are as culturally normative as possible."

P. Roos, *supra* at 23-24.

38. *See Halderman*, 446 F. Supp. at 1318 (citing Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124, 156-57 (1976)).

39. *Id. Cf. Jackson v. Indiana*, 406 U.S. at 734-35 (Court had substantial doubts whether institutional treatment would aid accused in attaining competency given the state of most mental institutions).

40. *Romeo*, 457 U.S. at 323. For a discussion of deference to professional judgments in post-*Romeo* decisions, see *Youngberg and Pennhurst II Revisited — Part II*, in 10 MENTAL AND PHYSICAL DISABILITY LAW REPORTER 258-60 (1986).

The Supreme Court's perception that an issue is primarily medical, however, should not necessarily place it beyond all meaningful judicial review. For instance, in the education context, "another area in which [the] Court's lack of specialized knowledge and experience counsels [restraint]"[41] and in which review typically resembles the *Romeo* standard,[42] the Court has, nonetheless, overcome its reluctance and carefully scrutinized matters where the constitutional issues were especially grave:

> [while] the responsibility for public education is primarily the concern of the States . . . such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action . . . [t]he right of a student not to be segregated on racial grounds . . . is . . . so fundamental and pervasive that it is embraced in the concept of due process of law.[43]

II. FREEDOM FROM SEGREGATION

It is beyond the scope of this article to chronicle the Supreme Court's approach to desegregation. It is sufficient to observe that, proceeding from the anti-caste objective[44] of the fourteenth amendment[45] the Court's position had evolved by the time of *Brown v. Board of Education*[46] into a justification for intense scrutiny of racial segregation in public schools. The Court in *Brown* held segregation of public education violative of equal protection, concluding that "separate but equal" was "inherently unequal"[47] since " '. . . the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.' "[48] The Court in *Bolling v. Sharpe*[49] also found racial segregation unconstitutional under the fifth amendment due process clause, ruling that "segregation in public education is not reasonably related to any proper

41. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973).

42. *Id.* ("[t]he very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect." (citations omitted)).

43. Cooper v. Aaron, 358 U.S. 1, 19 (1958).

44. *See Plyler v. Doe*, 457 U.S. 202, 218-19 (1982) (denial of public education to minor children of illegal aliens creates a permanent caste or subclass of illiterates). The Court in *Plyler* stated that "[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation." *Id.* at 213.

45. Strauder v. West Virginia, 100 U.S. 303, 306 (1880).

46. 347 U.S. 483 (1954).

47. Brown v. Board of Education, 347 U.S. 483, 495 (1954).

48. *Id.* at 494.

49. 347 U.S. 497 (1954).

governmental objective, and thus it imposes on Negro [public school] children . . . a burden that constitutes an arbitrary deprivation of their liberty in violation of the due process clause."[50]

Like the segregation of black school children, the institutionalization of retarded persons also involves constitutional considerations arguably justifying heightened judicial scrutiny. As Justice Marshall observed in his partial concurrence and dissent in *City of Cleburne v. Cleburne Living Center*:[51]

> [T]he mentally retarded have been subject to a "lengthy and tragic history" . . . of segregation and discrimination that can only be called grotesque. . . . A regime of state-mandated segregation and degradation [of retarded persons] . . . emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race."[52]

Admittedly, courts should not treat classifications based on race and those based on retardation identically.[53] Given our history of slavery, race prejudice in this country is unique; and race is rarely relevant[54] to any proper governmental objective.[55] Thus, disadvantaging racial classifications raise intense suspicion about government's underlying motives,[56] requiring clear evidence of its good faith. Such classifications are strictly scrutinized: they must further an overriding objective in order for government to prove that it acted in spite of and not because of the resulting harm to racial minorities.[57] In addition, such "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[58] In contrast, absent a reason to suspect government's motives, courts employ traditional rational basis analysis where

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50. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

51. 473 U.S. 432, 455 (1985)(Marshall, J., concurring in part and dissenting in part).

52. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 461-62 (1985)(Marshall, J., concurring in part and dissenting in part)(citations omitted).

53. Garrity v. Gallen, 522 F. Supp.. 171, 206, 207 (D.N.H. 1981)(racial discrimination model falters in developmentally disabled context). *But see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 455 (Marshall, J., concurring in part, dissenting in part)(identifying striking parallels between the treatment of blacks and of retarded persons).

54. *See, e.g.*, Lee v. Washington, 390 U.S. 333, 334 (1968)(Black, Harlan and Stewart, JJ., concurring).

55. *Id.*

56. Korematsu v. United States, 323 U.S. 214, 216 (1944).

57. *See* Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984); Loving v. Virginia, 388 U.S. 1, 11 (1967).

58. *Palmore*, 446 U.S. at 432-33; McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

they merely insure that classifications conceivably further some grant of lawful authority.[59]

Denials of community placement, however, warrant more than minimal scrutiny. The Supreme Court has not reserved all forms of heightened scrutiny for racial classifications.[60] Where government handicaps groups,[61] "saddled with . . . disabilities, or subjected to . . . a history of purposeful unequal treatment, or relegated to . . . a position of political powerlessness," the Court will provide some measure of "protection from the majoritarian political process."[62] Given the brutal treatment which institutionalized persons have suffered[63] and the disfavor in which segregation is constitutionally held,[64] some critical review should be required to insure that decisions to continue institutionalization actually further habilitation of and not animus towards retarded persons.

In his partial concurrence and dissent, Justice Marshall observed in *Cleburne* that "lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them."[65] Although Justice White, writing for the Court in *Cleburne*, did not share the intensity of this historical view,[66] it would be a mistake to conclude that the

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59. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955).

60. *See* Craig v. Boren, 429 U.S. 190 (1976)(sex discrimination); Trimble v. Gordon, 430 U.S. 762 (1977)(discrimination against illegitimate children).

61. *Id.*

62. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). The Court has fashioned an intermediate "standard of review, which is less demanding than 'strict scrutiny' but more demanding than the standard rational relation test," to address quasi-suspect classifications. Kadrmas v. Dickinson Public Schools, 100 S. Ct. 2481, 2487 (1988). This protection entails insuring that such classifications substantially further important governmental objectives. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)(gender); *Pickett v. Brown*, 462 U.S. 1, 8 (1983)(illegitimacy). The Court in *Kadrmas* observed that intermediate scrutiny "has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy." 108 S. Ct. at 2487. Nevertheless, although Justice White's majority opinion in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), stated that retarded persons were not a quasi-suspect class, *id.* at 442, a majority arguably agreed upon an approach approximating intermediate scrutiny. *See* text *infra* at 12. In any event, even Justice White applied a level of review in *Cleburne* more demanding than the "standard rational relation test." *See* text *infra* at 13-15.

63. *See, e.g.*, S. HERR, *supra* note 33, at 22-28 (during the eugenics movement, "prominent professionals identified the retarded as a social menace and urged their confinement for life").

64. The Supreme Court's concerns over segregation have continued in other than racial contexts. For example, in Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), the Court invalidated a single-sex admissions policy which served to perpetuate stereotypic career roles for women. *Id.* at 729.

65. *Cleburne*, 473 U.S. 432, 464 (1985) (footnote omitted).

66. *Id.* at 448. Although Justice Stevens joined Justice White's opinion, nonetheless, he filed a separate concurrence, joined by Chief Justice Burger, which advanced a distinct equal protection theory. *Id.* at 451.

case, therefore, precludes reliance on the Supreme Court's special judicial concern for segregation to justify some heightened scrutiny of deinstitutionalization decisions.

III. SCRUTINIZING CLEBURNE

In *Cleburne*, the application of a zoning ordinance resulting in denial of a special use permit for a group home housing several retarded persons was held unconstitutional under the equal protection clause by a unanimous Supreme Court, which, however, divided sharply on the appropriate standard for review.[67] Although denying retarded persons status as a quasi-suspect class,[68] Justice White, in an opinion for the Court joined by Chief Justice Burger and Justices Powell, Rehnquist, Stevens and O'Connor, nonetheless, held application of the ordinance invalid, purporting to rely on traditional rational basis analysis.[69] Justice Marshall's partial concurrence and dissent, joined by Justices Brennan and Blackmun, applied the intermediate scrutiny developed in the gender discrimination cases,[70] requiring classifications, which handicap retarded persons, substantially to further some important state objective.[71] Justice Stevens filed a separate concurrence, joined by Chief Justice Burger, rejecting any multi-tiered approach to equal protection and resorting instead to a unitary "rational" standard:

> The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational" — for me at least — includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.[72]

Application of Justice Stevens' standard, however, would in practice come far closer to intermediate scrutiny than to traditional rational basis analysis. Using this standard in the gender context, he has generally voted with the liberal wing of the

67. *Cleburne*, 473 U.S. at 448, 452, 460.
68. *Id.* at 442.
69. *Id.* at 448.
70. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-27 (1982); Craig v. Boren, 429 U.S. 190, 198-99 (1976).
71. *Cleburne*, 473 U.S. at 460.
72. *Id.* at 452 (footnote omitted).

Court.[73] Moreover, when the standard is applied to those who have suffered historic discrimination such as blacks, women, aliens, illegitimates and apparently mentally retarded persons, it is restated as whether ". . . a rational member of the disadvantaged class could ever approve of the discriminatory application. . . ."[74] Thus, to be convinced, a rational member of the disadvantaged class must be persuaded that the presumptions about his group which underlie the statute are generally valid and that the public good likely furthered outweighs the harm to class members, a train of thought quite similar to intermediate scrutiny.[75]

The opinions of Justice Marshall and Justice Stevens in *Cleburne* arguably constitute the majority position, which, in application, if not in form, approximates intermediate scrutiny. The predictive quality of this approach is uncertain, however, given the appointment of Justice Scalia to fill the vacancy caused by Chief Justice Burger's retirement, Justice Rehnquist's selection as Chief Justice, and the appointment of Justice Kennedy to replace Justice Powell.[76] It thus becomes necessary to meet Justice White's opinion on its own terms.

Justice White rejected intermediate scrutiny on the grounds that retarded persons now have meaningful access to political safeguards, rendering intense judicial concern unnecessary.[77] Even if, as he assumes, advocates can adequately protect the interests of retarded persons in the relatively open arena of zoning board hearings, the isolation of most institutions and the lack of regular oversight by family and friends[78] renders residents more in need

73. *See, e.g.*, Michael M. v. Superior Ct., 450 U.S. 464 (1981)(Brennan, J., filed a dissenting opinion, in which White and Marshall, JJ., joined. Stevens, J., filed a dissenting opinion); Craig v. Boren, 429 U.S. 190 (1976)(Brennan, J., delivered the opinion of the Court, in which White, Marshall, Powell and Stevens, J., filed a concurring opinion). *But see* Rostker v. Goldberg, 453 U.S. 57 (1981)(Rehnquist, J., delivered the opinion of the Court, in which Burger, C.J., and Stewart, Blackmun, Powell and Stevens, JJ., joined).

74. *Cleburne*, 473 U.S. at 455 (Stevens, J., concurring).

75. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-28 (1982).

76. *Cf. Kadrmas*, 108 S. Ct. at 2487.

77. *Cleburne*, 473 U.S. at 445.

78. *See Halderman*, 446 F. Supp. at 1302-03. *See also* S. HERR, *supra* note 33 at 4. Dr. Herr would not agree with Justice White's characterization of the status of retarded persons:

> Among all minorities suffering discriminations, the retarded are the least able to assert their rights. In practice, their rights are often abrogated without due process of law. They exercise little direct political power. Those who are in institutions have no jailhouse lawyers to file court petitions for freedom or correction of barbaric indignities. With training and support in making and expressing choices, many retarded persons can speak up for themselves. For the most part, however, those in congregate care rely on others to be their advocates and to assist them in claiming their rights and equal opportunities.

Id.

of judicial protection from arbitrary governmental decision-making.[79]

Perhaps, Justice White's basic concern was that intermediate scrutiny would force the Court to evaluate differences among retarded persons, a task for which it lacked expertise.[80] Although forestalling invocation of intermediate scrutiny, this concern was not sufficient to deter him from applying some measure of heightened review. This was clear from the two cases, *United States Department of Agriculture v. Moreno*[81] and *Zobel v. Williams*[82] which he cited in framing the applicable standard.[83]

In *Moreno*, the government was required to show that a Food Stamp Act amendment restricting eligibility to households of related persons was actually premised on legitimate purposes to offset a suspicion raised by the legislative record that it was intended to harm politically unpopular groups.[84] After concluding in *Zobel* that the Alaska scheme for distributing state oil profits among its citizens based on length of residence was actually perverse in relation to the proffered goal of encouraging new residents to remain,[85] the Supreme Court was unwilling to envision further justifications, rejecting the state's additional claim of rewarding long-time residence as an invalid penalty on recent interstate travel.[86] These decisions certainly involve higher scrutiny than found in cases, like *McGowan v. Maryland*,[87] applying traditional rational basis analysis, where any conceivably legitimate justification would preserve the statute unless the challenger could prove it wholly irrational.[88]

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79. *See* Jackson v. Indiana, 406 U.S. 715, 737 (1972)(considering number of persons committed to institutions, Court found remarkable the lack of litigation challenging the constitutional limits of civil commitment). Moreover, the Supreme Court in the past has shown more concern for formal (dejure) than effects (de facto) discrimination. *Compare Brown*, 347 U.S. 483, *with* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977). Since the zoning ordinance in *Cleburne* did not formally exclude retarded persons from the community (but plainly did so in effect by withholding from many their only realistic option for living outside an institution, *Cleburne*, 473 U.S. at 460-61, (Marshall, J., concurring in part and dissenting in part)), Justice White's opinion may not preclude heightened scrutiny where government formally segregates, for example, by deciding not to deinstitutionalize.

80. *Cleburne*, 473 U.S. at 442-43.

81. 413 U.S. 528 (1973)(amendment to Food Stamp Act which rendered ineligible any household containing an individual unrelated to any other member of the household violated the fifth amendment due process clause).

82. 457 U.S. 55 (1982)(Alaska's dividend distribution plan violated equal protection guarantees).

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

84. *Moreno*, 413 U.S. at 534-35.

85. Zobel v. Williams, 457 U.S. 55, 61-62, & n.9 (1982).

86. *Id.* at 63.

87. 366 U.S. 420 (1961).

88. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

In both *Moreno* and *Zobel*, the Court placed the burden on the government to make some factual showing of legitimacy. That requirement was carried forward in the standard actually applied by Justice White in *Cleburne*. Unlike traditional rational basis analysis where the Court conjures up possible justifications,[89] Justice White required that the record reveal some "rational basis for believing that the [group] home would pose any special threat"[90] before he would affirm defendant's denial of the use permit:

> [T]his record does not clarify how . . . the characteristics of the intended occupants of the [group] home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.[91]

Absent some factual showing by defendant justifying why the group home was denied while other uses, like nursing and boarding homes, were freely permitted, Justice White was willing to assume that "an irrational prejudice against the mentally retarded" had motivated defendant's actions.[92]

Although unwilling to regard retarded persons as a quasi-suspect class, Justice White was evidently not so persuaded that they lived free from prejudice[93] that he abandoned all meaningful scrutiny. He required that defendant set forth in the record a factual predicate justifying denial of the use permit to confirm that it had acted in good-faith. A like showing will now be advanced for other decisions affecting retarded persons, especially those denying deinstitutionalization.

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89. *Id. See also* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

90. *Cleburne*, 473 U.S. 432, 448 (1985).

91. *Id.* at 450.

92. *Id.*

93. The National Association for Retarded Citizens argued in *Cleburne* that:

> The animus that supported segregation of the "feeble-minded" bore unmistakable similarity to the animus that evoked Jim Crow. . . . Champions of life-long segregation for retarded people explicitly invoked the then-exploding prejudice against black people. For example, in 1903, Martin W. Barr, President of the American Association of Medical Officers for Institutions for Idiotic and Feeble-Minded Persons, addressed the virtues of "life-long custodial service" in retardation institutions in these terms:
>
> [T]hey partake of the industrial and manual training given in the antebellum days on the plantation, which were in fact — as the world is fast acknowledging — training schools for a backward race, many of whom are feeble-minded.

The recitation of the arguments supporting life-long institutional segregation of retarded people matched the recitation on behalf of Jim Crow . . . (footnote omitted). Amicus Curiae Brief for National Association for Retarded Citizens at 16-17, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)(No. 84-468).

IV. MEANINGFUL SCRUTINY

Under *Romeo*, treatment decisions are presumed valid if the treating professionals were qualified to make them.[94] This deference would not be undermined if plaintiffs were allowed in rebuttal to show that the treatment decisions lacked an adequate factual predicate.[95] A court may transgress concerns about judicial competency by second-guessing treatment prescriptions; but requiring that those decisions rest on an adequate factual basis seeks simply to prevent arbitrariness by insuring that professional judgment was in fact exercised.[96] This, after all, is what the substantial departure test in *Romeo* purports to do.

Parham v. J.R.[97] sheds light on what the Supreme Court would consider an adequate factual basis for the exercise of professional judgment. The Court in *Parham* reviewed the constitutionality of Georgia's procedures for civilly committing minors at their parents' request.[98]

Although holding that formal hearings were not required,[99] Chief Justice Burger, writing for the Court, nevertheless, discussed certain factors needed to make the minors' commitment constitutional.[100] Those factors directed that a valid commitment must

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94. Youngberg v. Romeo, 457 U.S. 307, 323 (1982).

95. *See* Thomas S. By Brooksv. Flaherty, 699 F. Supp. 1178, 1196 (W.D.N.C. 1988)(tendency among human service professionals in state psychiatric institutions to conform recommendations for habilitation to constraints imposed by state's inadequate service delivery system).

96. *Thomas S. v. Morrow*, 781 F.2d 367, 375 (4th Cir. 1986). In this case, the 4th Circuit found that the state had ignored the recommendations of professionals who had evaluated the plaintiff's training and treatment needs. *Id.* The trial court was found to have correctly followed the *Youngberg v. Romeo* "substantial departure" test by examining the facts and circumstances on which the professional's recommendations were based. *Id.* The 4th Circuit found that the placement of the mentally retarded plaintiff was not based upon professional judgment, but rather "based on expediency and a decision to save money." *Id.*

97. 442 U.S. 584 (1979).

98. Parham v. J.R., 442 U.S. 584, 587 (1979).

99. *Id.* at 607. The Court again deferred to the medical expertise of health professionals, nevertheless indicating that their judgments must have a basis in reviewable fact. *Id.* at 609.

100. *Id.* at 606-07. Summarizing those factors, the Chief Justice wrote:

> We conclude that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a "neutral factfinder" to determine whether the statutory requirements for admission are satisfied. That inquiry must carefully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies. Of course, the review must also include an interview with the child. It is necessary that the decisionmaker have the authority to refuse to admit any child who does not satisfy the medical standards for admission. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure.

Id. (citation and footnote omitted).

address the client's individual needs.[101] Thus, commitment decisions must rely on the type and sufficiency of information which mental health professionals generally consider adequate to identify those needs.[102] The decision must be made by a qualified professional authorized to reject commitment when not warranted.[103] Finally, there must be some form of periodic review to check the propriety of the initial commitment and its continued validity,[104] thus preserving the individualized focus of the treatment.

These factors were meant to insure that professional judgment was actually employed in making commitment decisions. They can also apply during post-commitment review in judging whether treatment decisions in fact reflect the exercise of professional judgment. Such decisions could thus be challenged by showing that they were not sufficiently client-based in their formulation, review, or in their execution. Challenges might proceed along the lines followed by the United States District Court in *Association for Retarded Citizens of North Dakota v. Olson*[105] in criticizing habilitation plans developed at a state institution for retarded persons in Grafton, North Dakota. The court found that:

* * *

> b. There is no provision for independent evaluation of the plans; and
> c. There are not adequate records to assist the professional staff to develop the plans; and
> d. There is not sufficient staff to develop and keep an adequate review of the plans; and
> e. There is not sufficient staff to execute, keep records on, and follow the plans; and
> f. There are not sufficient facilities to allow execution of the plans, for example, classrooms, support equipment, direct care staff, and supplies.[106]

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101. *Id.*

102. *Id.* at 608. Chief Justice Burger stated, "[T]he decision [whether to commit] should represent an independent judgment of what the child requires and that all sources of information that are traditionally relied on by physicians and behavioral specialists should be consulted." *Id.*

103. *Id.* at 607.

104. *Id.* Chief Justice Burger stated, "We . . . hold that a subsequent, independent review of the patient's condition provides a necessary check against possible arbitrariness in the initial admission decision." *Id.* at 607 n.15.

105. 561 F. Supp. 473 (D.N.D. 1982).

106. *Id.* at 479. The district court's first criticism (omitted from the text) states: "a. The plans are not reflective of the existent state of the science of habilitation." *Id.* If this means that plans must reflect the state of the art, it applies more scrutiny than authorized in *Romeo* for reviewing routine treatment decisions.

This approach, similar to judicial review of agency action, seeks simply to insure that professional judgment was in fact exercised without requiring the reviewing court to second-guess the propriety of any treatment prescribed.[107]

Denials of deinstitutionalization deserve no less scrutiny. The setting where treatment occurs can substantially affect its success.[108] Institutionalization itself, for example, can drastically alter the quality of any treatment provided.[109] Thus, denials of deinstitutionalization warrant scrutiny at least equal to other treatment decisions, especially since they implicate the Supreme Court's persistent hostility towards segregation.[110]

This scrutiny requires that decisions not to deinstitutionalize rest on an adequate exploration of the client's individual needs.[111] To further this inquiry, the facility must keep records detailing these needs[112] as well as records explaining why the decision denying deinstitutionalization was made to allow for periodic review.[113] Moreover, institutionalization, to continue, must be capable of addressing the client's identified needs.[114] Accordingly, should the abilities of an institutional resident regress, alternatives to institutional care must be sought.[115] Additionally, the decision

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107. E. GELLHORN & B. BOYER, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 73 (1981). The authors described judicial review of agency action as follows:

> [T]he reviewing court should determine whether the agency had an adequate factual basis for its decision. Some review of the facts may be essential if the judicial controls on discretion are to be meaningful. Otherwise, an agency might be able to protect itself from reversal merely by saying that it had taken account of the relevant factors, without really considering the evidence for and against its position.

Id. (footnote omitted)(citing Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) and Ethyl Corp. v. EPA, 541 F.2d 1, 34-35 n.74 (D.C. Cir.)(en banc), cert. denied, 426 U.S. 941 (1976)). *See supra* note 12.

108. As Dr. Philip Roos observed, institutions "which differ from culturally normative living arrangements will generate behavior which deviates from the cultural norm." P. Roos, *Basic Facts About Mental Retardation*, *supra* note 37 at 23.

109. *See supra* note 5 and accompanying text.

110. *See supra* notes 60-66 and 93 and accompanying text.

111. *See supra* notes 101 and 103 and accompanying text.

112. Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473, 479 (1982).

113. *See supra* note 104 and accompanying text.

114. *See supra* notes 100-104 and accompanying text.

115. Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295, 1311-12 (E.D. Pa. 1977); Homeward Bound, Inc. v. Hissom Memorial Center, No. 85-C-437-E (N.D. Okl. July 24, 1987)(WESTLAW, 1987 WL 27104, pp. 31-33 of 110). *See* S. HERR, *supra* note 33, at 3. Dr. Herr reports that regression is typical in large institutional settings:

> Regression and deterioration, physical as well as mental, have been repeatedly documented in these deprived environments. Because of insufficient training and activity, many residents develop stereotyped, bizarre, or even menacing behavior. They are thus condemned to a self-fulfilling prophecy of dependency and danger.

Id.

concerning deinstitutionalization should be made by a qualified professional authorized to reject institutionalization if no longer warranted.[116]

Furthermore, the Supreme Court in *Romeo* observed that, in reviewing treatment decisions "it is incumbent on courts to design procedures that protect the rights of the individual without unduly burdening the legitimate efforts of the states. . . ."[117] Thus, professionals can accordingly reject placement options found to be prohibitively expensive.[118] Where, however, a clearly superior option is rejected merely to save some expense, then cost rather than the client's needs becomes the decisive factor in treatment, thus negating the exercise of professional judgment which fundamentally must be client-based.[119]

The district court's order in *Association for Retarded Citizens of North Dakota v. Olson*[120] illustrates the foregoing approach. Defendants in *Olson* were enjoined to reduce the institutional population at Grafton from 850 to 450 by July 1, 1987 and to develop a plan for deinstitutionalizing at least 200 more residents before July 1, 1989.[121] Defendants appealed only the latter requirement, challenging it as an abuse of discretion.[122]

There was no significant disagreement among the parties' experts at trial that only 10 to 200 retarded persons in North Dakota required institutionalization.[123] Moreover, the district court found that the costs of community versus institutional care

116. *See supra* note 103 and accompanying text.

117. Youngberg v. Romeo, 457 U.S. 307, 322 & n.29 (1982)(quoting Parham, 442 U.S. at 608, n.16).

118. Thomas S. v. Morrow, 781 F.2d 367, 375 (4th Cir. 1986). The court of appeals in *Thomas S.* concluded that, although ". . . lack of funds is an absolute defense to an action for damages brought against a professional in his individual capacity . . ., the [Supreme] Court [in *Romeo*] did not apply this precept to prospective injunctive relief." *Id.* (citation omitted). It would not be fair to hold an institution's professionals personally liable for conditions beyond their control: ". . . in such a situation, good-faith immunity would bar liability." *Romeo*, 457 U.S. at 323 (citation omitted). The same considerations, however, would not apply to limit liability to suits for injunctive relief rather than damages against state officials with responsibility for funding the conditions in question. As the United States Court of Appeals for the Third Circuit observed, "[o]bviously 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." Scott v. Plante, 691 F.2d 634, 637 (1982)(citation omitted).

119. *Id.*

120. 561 F. Supp. 473 (D.N.D. 1982), *aff'd and remanded in part*, 713 F.2d 1384 (8th Cir. 1983).

121. Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473, 494-95 (D.N.D. 1982).

122. Association for Retarded Citizens of North Dakota v. Olson, 713 F.2d 1384, 1391 (8th Cir. 1983).

123. *Id.* at 1392.

were roughly equivalent.[124] This is sufficient to raise a presumption in favor of community placement, provided defendants have an opportunity to demonstrate that any given resident would be better served within the institution.[125] To argue merely that continued institutional care is not a substantial departure from accepted practice, like the argument that equal but racially separate instruction is not wholly devoid of educational benefit, misses the mark since it fails to explain why, absent animus, the lesser option would be chosen.

CONCLUSION

The foregoing analysis employs less scrutiny than in cases explicitly involving other fundamental rights[126] or where suspect classifications are at issue.[127] It provides a more meaningful review, however, than would ensue if the substantial departure test were construed merely as a specific application of traditional rational basis analysis.[128] Hopefully, this approach to reviewing denials of deinstitutionalization will afford appropriate deference to federalism and professional judgment while providing institutionalized persons a genuine measure of protection from the lingering vestiges of segregative intent.

124. *Olson*, 561 F. Supp. at 483. In addition, the district court found less than a dozen community home programs statewide, developed exclusively by non-profit organizations. *Id.* at 483 & n.11.

125. The Eighth Circuit affirmed the remedial order based in part on the district court's retaining jurisdiction to make any "necessary changes justice may require." *Olson*, 713 F.2d at 1392 (citation omitted). Thus, the district court could modify its reduction order if defendants demonstrate that more than 250 residents actually require institutional care.

126. *See* Griswold v. Connecticut, 381 U.S. 479, 497-98 (1965)(Goldberg, J., concurring); Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969).

127. *See* Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984); Loving v. Virginia, 388 U.S. 1, 11 (1966).

128. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955).