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We Have Met the Imbeciles and They Are Us: The Courts and Citizens with Mental Retardation

Mark R. Killenbeck
University of Nebraska College of Law, mkillenb@uark.edu

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I. INTRODUCTION

On November 17, 1983, the Senate Subcommittee on the Handicapped convened to determine if the United States Department of Justice was meeting its statutory responsibility to protect the rights of citizens who were confined in this nation’s institutions. During the hearing, Senator Lowell Weicker questioned William Bradford Reynolds, Assistant Attorney General, Civil Rights Division:

Senator Weicker: If indeed one of these persons’ life could be snuffed out in the next hour, and you know about it, do you have the power to go in there and make sure that that life will not be snuffed out? Do you have the authority right now to save that life?
Mr Reynolds: I think that if you know in advance that somebody is going to—your situation is, if you know in advance that somebody is going to snuff out a life, in the next hour? I would—I am not sure what—I would have to look into that, whether the Federal Government is in a position to go in in advance on that.¹

These statements make harsh reading. An Assistant Attorney General of the United States found himself unable, or unwilling, to declare that this nation would come to the assistance of a citizen whose life was in peril.² For those present—or who heard the re-

² Mr. Reynolds attempted to rationalize his response by stressing that he felt it was
broadcast that evening on National Public Radio—the dialogue presented a scene that was nothing less than incredible. Mr. Reynolds required a protracted period of time to formulate even this inadequate response, and during the lengthy silences that punctuated his remarks, one was compelled to question the sincerity of this nation's commitment to the rights and interests of citizens with mental disabilities.

Senator Weicker and his colleagues called Mr. Reynolds to task for effectively eviscerating an important federal civil rights statute. There were political implications in the hearing, and the issues posed are admittedly complex. Nevertheless, in the face of a clear Congressional mandate to protect the rights of citizens confined to institutions, a question of "authority." *Id.* (noting possible recourse under criminal statutes). But when presented with a hypothetical that placed a human life at risk, one would expect an official sworn to uphold the Constitution and laws of this nation to at least respond that he would definitely do something, even if it were only call the local authorities.

3. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997 (1982)). CRIPA, as the Act is known, was proposed and passed in response to court decisions holding that the federal government lacked the authority to bring actions on its own to protect the rights of institutional residents. See, e.g., S. Rep. No. 416, 96th Cong., 1st Sess. 2 (1979) ("Despite the proven effectiveness of the Department's efforts, its litigation program stands threatened by two recent Federal court decisions."). See infra note 5.

4. Senator Weicker, a liberal Republican and Watergate veteran, was clearly predisposed to be at odds with the administration. Any attempt to use this to color his hostility toward Departmental efforts under CRIPA would be a mistake. Senator Weicker has consistently been an articulate and compassionate spokesman for the rights of the disabled. Senator Weicker was, of course, not alone in his criticisms of the Department and Mr. Reynolds. See, e.g., Cook, The Substantive Due Process Rights of Mentally Disabled Clients, 7 MENTAL DISABILITY L. REP. 346 (1983); Thornton, New Policy on Mental Patient Rights Upsets Lawyers, Health Community, Wash. Post, Sept. 28, 1982, at A2, col 1; Washington Council of Lawyers, Reagan Civil Rights: The First Twenty Months 80-102 (1982). For a detailed critique of the administration's civil rights posture in the area of employment discrimination, school desegregation, and voting rights, see Days, Turning Back the Clock: The Reagan Administration and Civil Rights, 19 HARV. C.R.-C.L. L. REV. 309 (1984).

5. For example, during the protracted life of the *Pennhurst* case the courts addressed questions involving the spending power, see Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) [*Pennhurst I*], and the eleventh amendment, see Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) [*Pennhurst II*]. Important jurisdictional issues were also raised as a result of the Justice Department's involvement in litigation concerning institutional conditions. The Department's presence in the *Wyatt* litigation was at the invitation of the court. See Wyatt v. Stickney, 325 F. Supp. 781, 786 (M.D. Ala. 1971). In subsequent cases, however, the Department initiated action on its own, and state challenges of its authority to do so were sustained. See United States v. Mattson, C.A. No. 74-138 BU (D. Mont. Sept. 29, 1976), *aff'd*, 600 F.2d 1285 (9th Cir. 1979); United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F.2d 1121 (4th Cir. 1977).
the record of the administration was then and remains now one of reluctant and sporadic activity.  

This is perhaps to be expected; "states' rights" overtones arise when questions are posed about conditions in public institutions. But for those familiar with the manner in which the law has recently treated citizens with mental disabilities, the results are far from surprising. The courts—and presumably the society whose values they mirror—have found it increasingly difficult to accommodate the assertion of a right to basic human dignity by those whom many are prone to dismiss as "morons," "retardates," or "imbeciles."  

This was not always the case. In a series of landmark decisions, federal courts recognized a variety of constitutional and statutory claims. In Alabama, New York, and Pennsylvania, for example,


7. Citizens with mental retardation and their advocates react to these words in much the same way that blacks respond to the term "nigger." Yet the use of these and similar derogatory labels persists. See, e.g., C. LeBaron, *Gentle Vengeance: An Account of the First Year at Harvard Medical School* (1981). Mr. LeBaron, in an ill-fated attempt to make much of his "humane and caring nature," stresses his work with retarded citizens at one of the institutions that received individuals placed from the infamous Willowbrook. Yet he persisted in referring to these individuals as "retardates." The courts also continue to use this terminology. See, e.g., Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984) ("we conclude that...mental retardates are not a suspect class"), aff'd in part & vacated in part, 105 S. Ct. 3249 (1985).


district and appellate courts found that citizens with mental retardation had judicially cognizable rights and fashioned sweeping relief designed to protect those entitlements. Indeed, in the pre-Youngberg era, only one reported decision failed to recognize one of the cornerstones of this emerging body of law, a constitutional right to treatment, and it was reversed.11

Recently, however, the Supreme Court has cut back or qualified to the point of extinction many of these hard fought victories. The situation is one of compelling irony. The Court has acknowledged that the “mere presence” of a mental disability does not justify deprivation of basic constitutional rights.12 Yet time and again this same Court has, either directly or by implication, denied to citizens with mental retardation the means to overcome the barriers that society has imposed between them and a full and productive life.13

This is understandable, at least in one very narrow sense. Institutional reform litigation has had a positive impact; institutional populations have declined, and conditions at many institutions have improved. Unfortunately, this progress has tended to exacerbate rather than ameliorate the situation. Both judicial and social outrage have diminished as the conditions litigated became less heinous. More significantly, many of the so-called “higher functioning” individuals, generally those categorized as individuals with “mild” or “moderate”


11. See Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (institutional resident has judicially cognizable liberty interests only in physical safety and freedom from unnecessary restraint). The solitary pre-Youngberg case was Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), rev'd, 503 F.2d 1319 (5th Cir. 1974), cert. denied, 422 U.S. 1057 (1975). An argument can be made that the right to treatment was rejected in New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973). That court did, however, find an alternate ground for vindicating the claims raised (eighth amendment protection from harm), and subsequently indicated that “no bright line” separated that standard from the right to treatment. New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715, 719 (E.D.N.Y. 1975). Since Youngberg, however, a number of courts have either rejected the doctrine outright or have taken a crabbed approach to the rights of citizens with retardation. See, e.g., Phillips v. Thompson, 715 F.2d 365, 368 (7th Cir. 1983) (“Youngberg teaches that, at the most, the class members were entitled to minimally adequate training”); Doe by Roe v. Gaughan, 617 F. Supp. 1477, 1486 (D. Mass. 1985) (no per se constitutional right to treatment; entitled only to minimally adequate care and freedom from restraint). The parsing of Youngberg has not, however, always been an exercise in clarity. See, e.g., Rennie v. Klein, 720 F.2d 266 (3d Cir. 1983) (plurality opinion and three concurring opinions with different interpretations).


13. The major decisions are Pennhurst I & II, Youngberg, and City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). For a discussion of these cases, see infra text accompanying notes 31-91.
mental retardation, have been placed in community settings.\textsuperscript{14} Those remaining in institutions tend, accordingly, to be individuals with “severe” or “profound” mental retardation, often complicated by the presence of other disabling conditions. As a result, the dialogue has undergone a subtle but significant transformation. The issue is no longer whether citizens with mental retardation, as a broad class, have judicially cognizable rights. Rather, the question in a very real sense is whether society is willing to recognize the very humanity of those individuals that it characterizes as having “severe” or “profound” mental retardation.

The immediate results have been both predictable and distressing. A growing conflict between good intentions and judicial restraint has become evident as lower courts struggle with challenges to institutional conditions and public prejudices. Citizens with mental retardation and their advocates argue that they are simply seeking to secure those rights and privileges that inhere in their status as citizens. State officials, in turn, espouse fidelity to this precept, even as they gaze with alarm upon the political, economic, and social implications that meaningful vindication of these rights would entail. Caught in the middle, many courts now fashion decisions that are both compelled by the current state of the law and tragic in their implications. Citizens with mental retardation are, for example, entitled to “safe conditions and freedom from undue restraint.”\textsuperscript{15} What the courts seem reluctant to provide is any indication that the lives thus “protected” can ultimately be made meaningful.

The characterizations and approaches employed are invariably positive, particularly when citizens with mental retardation challenge either the fact or the circumstances of their commitment to public institutions. A typical defense of institutionalization will, for example, assert that “[a]n institution of over a thousand residents can be an impersonal, overcrowded, inhuman place, but it also can be a happy community with the pulsing life of a prosperous village, where everybody can find what he needs.”\textsuperscript{16} Proponents of similar treatment of blacks

\textsuperscript{14} The terms “mild,” “moderate,” “severe,” and “profound” are the most widely used, and abused, means of describing individuals with mental retardation. This “level of retardation” approach is, however, of very limited value, and has been either abandoned or integrated into a more comprehensive system in many states. See infra text accompanying notes 166-205.

\textsuperscript{15} Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1245 (2d Cir. 1984). For a detailed discussion of this case, see infra text accompanying notes 131-46.

would, of course, be immediately decried as insensitive racists. Indeed, even the most hardened states' rights activists would hesitate to defend actions impinging on the rights of blacks, women, or other disadvantaged groups on the basis of creating a "pulsing village." These arguments are, however, routinely tolerated—even applauded—when it is a citizen with severe or profound mental retardation who is being segregated from society.

In his colloquy with Senator Weicker, Mr. Reynolds espoused the position of a Department of "Justice" that is each day moving farther away from its historic role as an advocate for the rights of citizens with mental retardation. The Department has gone to great lengths to cloak its revised approach in intellectually respectable terms: the question becomes one of federal "power," rather than of a particular vision of the rights and characteristics of citizens with mental retardation. The problem is that there was a time when the government did not feel compelled to seek refuge behind this transparent veneer of federalism and states' rights. Individuals confined to this nation's institutions were, whatever else might be said, citizens who merited the compassion and protection of their government.

When presented in the stark terms posed by Senator Weicker, the full implications of what Mr. Reynolds and his colleagues now espouse strike us, justifiably, as intolerable. As will become evident, however, the Department's position is an increasingly popular one. The purpose of this Article is to ask how it is that we have reached this juncture, and to frame the choices that we now face.

The manner in which institutional proponents view citizens with mental retardation, see infra text accompanying notes 166-210.

17. The obvious exception is for those who somehow believe that we should either tolerate or support, "constructively" or otherwise, South Africa and apartheid.

18. Compare Brief for the United States at 11, Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (Developmental Disabilities Act a "clear statement of individual rights"), and Brief for the United States at 46-47, Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979) (under equal protection clause, state must provide services in least restrictive environment), with Brief for the United States at 32, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (arguing for Youngberg "deference to professional judgments" standard "for the review of statutory challenges to such decisions"), and Fourth Brief for the United States at 7-8, Halderman v. Pennhurst State School & Hosp., Nos. 78-1490, 78-1564 & 78-1602 (3d Cir., on remand from Supreme Court) ("involuntarily committed mental health patients have no substantive constitutional right to habilitation beyond the limited right to training recognized in Romeo"), and id. at 9 n.3 ("We agree with the observation . . . that placement in small community facilities is not appropriate for all mentally retarded persons.") (citation omitted).
II. THE SUPREME COURT AND CITIZENS WITH MENTAL RETARDATION: LAW OR INDISCRETION?

As a society, we like to believe that we have long since passed the point where the eugenics movement typifies our thinking about citizens with mental disabilities. As one facet of this “caring and compassionate” community, our courts in particular strive to banish the spectres of an age within which Justice Holmes’ strident and ill-fated decree in Buck v. Bell served as the legal touchstone for assessing programs and services for citizens with mental retardation.

Our national posture regarding the rights and capabilities of citizens with mental retardation is, arguably, straightforward and sympathetic. Congress has declared that “[o]ne measure of a nation’s civilization is the quality of treatment it provides persons entrusted to its care.” Unfortunately, a majority of the current members of the Supreme Court apparently harbor a constricted view of both the capabilities of citizens with mental retardation and their rights. Over the last six years, the Court has decided four cases directly implicating the rights of citizens with mental retardation. In each instance, the Court has issued opinions within which a superficial empathy for the rights of citizens with retardation is belied by the practical implications of the Court’s ultimate disposition of the case.

19. For a general history of the eugenics movement, see S. Gould, The Mismeasure of Man (1981); D. Pickens, Eugenics and the Progressives (1988). For an excellent discussion of the manner in which this society has treated citizens with mental disabilities, see D. Rothman, Conscience and Convenience: The Asylum and Its Alternatives in Progressive America (1980); D. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic (1971). Past views were not, however, abandoned because society simply saw the error of its ways. See, e.g., S. Gould, supra, at 22 (“death knell of the old eugenics in America ... sounded more by Hitler’s particular use of once-favored arguments for sterilization and racial purification than by advances in genetic knowledge”).

20. The reference is obviously to the ill-fated statement that “[t]hree generations of imbeciles are enough.” Buck v. Bell, 274 U.S. 200, 207 (1927). In an interesting recent article on this judicial lowpoint, Professor Lombardo establishes that the “true goal” of the attorney for Carrie Buck “was to help secure legislative and judicial endorsement for a practice he had long supported.” Lombardo, Three Generations, No Imbeciles: New Light on Buck v. Bell, 60 N.Y.U. L. Rev. 30, 62 (1985). It would, however, be a mistake to assume that either the Court or Justice Holmes would have reached any other result. See Dudziak, Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law, 71 Iowa L. Rev. 833, 856, 859 (1986) (Holmes “knew which side was right,” and “asserted the truth of his position and called upon his reader to believe him”).


22. The Court has also limited the scope of the protections incorporated in federal legislation guaranteeing the right to a “free appropriate public education” to all citizens with disabilities. See, e.g., Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982) (if individual receives “some educational benefit,” intent
In three of these cases, the Court dealt with conditions and practices at the Pennhurst State School and Hospital in Pennsylvania, an institution that even the state defendants "admitted . . . does not presently meet minimum standards for the habilitation of its residents." The environment was, at best, appalling:

the living areas do not meet minimal professional standards for cleanliness. . . . Outbreaks of pinworms and infectious disease are common. . . . [M]ost toilet areas do not have towels, soap, or toilet paper, and the bathroom facilities are often filthy and in a state of disrepair. Obnoxious odors and excessive noise permeate the atmosphere. . . . Moreover, the noise level in the dayrooms is often so high that many residents simply stop speaking. . . . Diet control . . . is almost impossible. . . . Injuries to residents by other residents, and through self-abuse, are common.

Physical restraints were "used as control measures in lieu of adequate staffing," and there was "some staff abuse of residents." In the case of Nicholas Romeo, whose "treatment" consisted principally of prolonged periods during which he was "shackled to a bed or chair," it was not contested that, while confined at Pennhurst, he was injured on over seventy occasions. These injuries were both self-inflicted and the result of attacks by other residents, some in retaliation against Romeo's aggressive behavior. The injuries included a broken arm, a fractured finger, injuries to the sexual organs, human bite marks, lacerations, black eyes, and scratches. Moreover, some of Romeo's injuries became infected, either from inadequate medical attention or from contact with human excrement that the Pennhurst staff failed to clean up.

In its Pennhurst decisions then, the Court dealt with an environment that was far removed from the "pulsing village" that institutional proponents defend with such vigor. The distinction is critical, for even though the Court itself found the conditions at Pennhurst distressing, it nevertheless strove mightily to avoid addressing many of the fundamental questions that led the district court to conclude that "minimally adequate habilitation cannot be provided in an institution such as Pennhurst."

In Pennhurst I, the Court assessed the impact of a federal statute that arguably established a federal substantive right to "appropriate

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24. Id. at 1308 (footnote and citations omitted).
25. Id. at 1306 (citation omitted).
26. Id. at 1309.
27. Romeo v. Youngberg, 644 F.2d 147, 159 n.22 (3d Cir. 1980).
28. Id. at 155.
29. See infra note 38 and text accompanying notes 195-96.
treatment" in the “least restrictive environment.”31 The Developmentally Disabled Assistance and Bill of Rights Act included a series of Congressional “findings,”32 among which was the declaration that these citizens have a right to “treatment, services, and habilitation . . . designed to maximize the developmental potential of the person and . . . provided in the setting that is least restrictive of the person’s personal liberty.”33 The Court agreed that the Act “establishes a national policy to provide better care and treatment to the retarded and creates funding incentives to induce the States to do so.”34 But the Court found no basis for imposing that obligation on the states. Concluding that the Act was passed by Congress pursuant to its spending power, the Court found that the purpose of the Act was to “‘assist’” the states,35 and that it “would be attributing far too much to Congress if we held that [the Act] required the States, at their own expense, to provide certain kinds of treatment.”36

On remand, the Court of Appeals for the Third Circuit found a substantive right to treatment grounded in state law.37 Once again, the state appealed; once again, the Court reversed.38 In this instance, however, the Court’s decision was arguably divorced from a considera-

33. Id. (codified at 42 U.S.C. § 6010(2) (1982)).
35. Id. at 18 (quoting 42 U.S.C. § 6000(b) (1976 & Supp. III 1979)). While it is beyond the scope of this Article to do so, a strong case can be made that the Act was more than a simple exercise of the spending power.
36. Id. at 51-32. There is a certain irony in the fact that the 1975 amendments to the statute, supra note 32, both added the Congressional findings and, by shifting the overall focus of the Act from planning and advocacy to categorical aid, ultimately provided the basis for the Court’s determination that “nothing suggests that Congress intended the Act to be something other than a typical funding statute.” Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 22 (1981) (footnote omitted). Prior to 1975, the Act did contain provisions for categorical grants. See 42 U.S.C. § 6061 (1976). But the major emphasis was on coordinated planning and advocacy efforts designed to protect the rights of the disabled. See Developmental Disabilities Services and Facilities Construction Amendments of 1970, Pub. L. No. 91-517, 84 Stat. 1323 (1970). Dissatisfied with the diversion of funds to these purposes and away from their own programs, groups representing the disabled (including the National Association for Retarded Citizens) actively supported the changes. See, e.g., Developmentally Disabled Assistance and Bill of Rights Act, 1974: Hearings on S. 3378 Before the Subcomm. on the Handicapped, Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess. 383 (1974) (prepared statement of Nat. Ass’n for Retarded Citizens).
38. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). Whatever else might be said about this decision and Pennhurst I, the Court recognized that “[c]onditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the “ha-
tion of the actual rights of retarded citizens. Neither the particular needs and interests of Terri Lee Halderman, nor the conditions at Pennhurst itself were at issue. Rather, the question presented was whether the federal courts could "enjoin petitioner state institutions and state officials on the basis of this state law." 39

This formulation of the issues was not achieved without objection. In his dissenting opinion, Justice Stevens noted pointedly that "[t]his case has illuminated the character of an institution," 40 one within which "at every stage . . . petitioners have conceded . . . fails to provide even minimally adequate habilitation for its residents." 41 Justice Stevens also stressed that the court of appeals had examined the state law issue at the express command of the Supreme Court, 42 and that "[r]espondents do not complain about the conduct of the State of Pennsylvania—it is Pennsylvania's commands which they seek to enforce. Respondents seek only to have Pennhurst run the way Pennsylvania envisioned that it be run." 43 The majority remained unconvinced. As it tacitly conceded, every court that considered the issues found conditions at Pennhurst inadequate. 44 Nevertheless, the majority narrowed the question, and found only that, pursuant to the eleventh amendment, "federal courts lacked jurisdiction" to entertain suits of this nature. 45

The third Pennhurst case, which actually preceded Pennhurst II, did deal directly with the conditions at that troubled institution. In Youngberg v. Romeo 46 the Court considered a liability claim filed against three administrators. The issue was whether Nicholas Romeo had "substantive rights under the Due Process Clause of the Fourteenth Amendment to (i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or 'habilitation.'" 47 Drawing on established principles, the Court quickly affirmed the first two claims. 48 It found the third claim "more troubling," 49 however, and in

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39. Id. at 92-93 (quoting Pennhurst I, 451 U.S. 1, 7 (1981)).
40. Id. at 126 (Stevens, J., dissenting). Justices Brennan, Marshall, and Blackmun joined this dissent.
41. Id. at 128 (Stevens, J., dissenting) (citations omitted).
42. Id. at 130 (Stevens, J. dissenting) (the court of appeals "merely obeyed the instructions of this Court").
43. Id. at 163-64 (Stevens, J., dissenting).
44. Id. at 92-96 (tracing the history of the case and noting the lower court findings).
45. Id. at 124-25. For a criticism of the majority's treatment of the eleventh amendment issues, see Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 HARV. L. REV. 61 (1984).
47. Id. at 309 (footnote omitted).
48. Id. at 315-16 (liberty interests similar to those of convicted criminals "survive involuntary commitment").
a very real sense it ultimately avoided the underlying issues. The Court determined that Romeo "enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." It emphasized, however, that "[b]ecause the facts in cases of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of the case before a court." Since Romeo appeared to seek only training that would reduce his aggressive behaviors, "[i]n view of the kinds of treatment sought . . . and the evidence of record, we need go no further in this case."

The Court then considered the liability issue. Stressing that the liberty interests involved "are not absolute," the Court attempted to strike a balance between the interests of the institutional resident and those of the state. In determining what constituted "reasonable" conditions and training, the Court articulated a "professional judgment" standard:

"[T]he decision, if made by a 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."

This "presumption of correctness" was, however, clearly predicated upon and influenced by the question of liability. The Court accepted as given that institutions for citizens with mental retardation would, albeit "unfortunately," be "overcrowded and understaffed." Having done so, it then attempted to fashion a standard that would insulate all but the most egregious professional decisions from judicial scrutiny. The logic of the Court's position was simple: if institutions like Pennhurst were to "continue to function," then their "administrators, and particularly professional personnel, should not be required to make each decision in the shadow of an action for damages."

The Court's most recent foray into the realm of state treatment of...
citizens with mental retardation came when it explored the constitutionality of a Cleburne, Texas zoning ordinance. The court of appeals for the fifth circuit had determined that while citizens with mental retardation "are not a suspect class, they do share enough of the characteristics of a suspect class to warrant heightened scrutiny." The ordinance, both on its face and as applied, did not in the court's opinion "further any important governmental interest." Accordingly, it failed to pass constitutional muster.

In a plurality opinion, the Supreme Court rejected the notion that citizens with mental retardation constituted a "quasi-suspect class." It stressed that these individuals are "different, immutably so, in relevant respects, and the states' interest in dealing with and providing for them is plainly a legitimate one." Accordingly, some distinctions were both appropriate and constitutional. The Court also found that the variety of state and federal laws passed to protect and assist citizens with mental retardation "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." It also asserted that this "legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." Finally, the plurality observed that if this "large and amorphous class" were deemed suspect, it would be "difficult to find a principled way to distinguish" them from a "variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and

57. Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984). The plaintiffs-appellants were represented by Advocacy, Inc., an agency established by and partially funded through the Developmental Disabilities Act, which conditions receipt of the state formula grant funds on the establishment of state "protection and advocacy agency" with "the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of . . . persons who are receiving treatment, services, or habilitation within the State . . . ." 42 U.S.C. § 6012(a)(1) & (2)(A) (1982). The statutory grant is to protect the rights of all developmentally disabled persons in the state, not simply those receiving assistance in programs funded under the Act. This is of particular interest given the Court's narrow construction of the Act in Pennhurst I.

58. Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 200 (5th Cir. 1984).

59. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3255-56 (1985). The plurality opinion was written by Justice White and joined by Justices Rehnquist, Powell, and O'Connor. Justice Stevens, joined by Chief Justice Burger, filed a concurring opinion, arguing against the assumption that cases such as this could fit the "well-defined standards" implied by a three-tiered analysis. Justice Marshall, joined by Justices Brennan and Blackmun, filed an opinion concurring in the judgment in part and dissenting in part.

60. Id. at 3256.

61. Id.

62. Id. at 3257.
who can claim some degree of prejudice from at least part of the public at large."63

Citizens with mental retardation were not, however, "entirely un-proected from invidious discrimination."64 Employing the less exacting rational relationship test, the Court found that the ordinance, "as applied," failed to pass constitutional muster. The record revealed that the city required a special use permit for group homes but not for "apartment houses, fraternity and sorority houses, hospitals and the like."65 These other congregate living facilities were indistinguishable from group homes for citizens with mental retardation, and the various rationales advanced by the city, which included such weighty matters as "mere negative attitudes" and location of the home on a five hundred year flood plain, were found wanting.66 The denial of the permit in this instance "appears to us to rest on an irrational prejudice against the mentally retarded,"67 and could not be countenanced.

Certain initial conclusions about the Court's treatment of these cases seem inescapable. A substantial argument can be made that the Court misread both the express language and history of the Developmental Disabilities Act in Pennhurst I,68 and the strong dissenting opinions in Pennhurst II attest to significant differences of opinion

63. Id. at 3257-58. For a critique of these rationales, see infra text accompanying notes 120-22.
65. Id. at 3260.
66. Id. at 3259-60.
67. Id. at 3260.
68. For example, the Court stressed that the Act was designed to "assist" the states. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 18 (1981) (quoting 42 U.S.C. § 6000(b) (1976 & Supp. III 1979)). That language deals, however, only with the overall purpose of the Act. See 42 U.S.C. § 6000(b)(1) (1982). The "specific purpose" of the formula grant program, id. at § 6000(b)(2), is to "make grants . . . to establish model programs, to demonstrate innovative habilitation techniques, and to train . . . personnel . . .." Id. at § 6000(b)(2)(C). As the House Committee on Interstate and Foreign Commerce stressed, "[t]he developmental disabilities program itself provides only approximately 1 percent of all the funds available from Federal, state, and local sources for services of various kinds to the developmentally disabled." H.R. Rep. No. 94-58, 94th Cong., 1st Sess. 6, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 919, 924. Accordingly, the "program . . . must have its impact through improving the effectiveness and efficiency of the use of the rest of the available funds." Id. (emphasis added). The Act may or may not have been merely "hortatory"; Congress clearly contemplated, however, that it would redirect and focus the allocation of both federal and state resources in line with the overarching purposes of the Act, presumably expressed in the Bill of Rights provisions. The states themselves were aware of this fact. See, e.g., Brief for State of Conn. as Amicus Curiae at 16, Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (noting the "1 percent" language from H.R. Rep. 94-58).
within the Court on the eleventh amendment issue.\textsuperscript{69} In addition, the Court's decisions are occasionally confusing and inconsistent. For example, in \textit{Pennhurst I} the Court emphasized that the declaration of rights in the Developmental Disabilities Act was "hortatory, not mandatory."\textsuperscript{70} In \textit{Pennhurst II}, however, the Court indicated that on remand the court of appeals might wish to look to that same Act as a possible basis for relief.\textsuperscript{71} If there had been any reason to believe that Pennhurst was receiving funds through the Act, then this guidance might have been warranted. In \textit{Pennhurst I}, however, the Court clearly recognized that this was not the case.\textsuperscript{72} More astoundingly, the plurality opinion in \textit{Cleburne} characterized the Act as creating a federal "right to receive 'appropriate treatment, services, and habilitation' in a setting that is 'least restrictive of [their] personal liberty,'"\textsuperscript{73} a reading that is hardly in keeping with its earlier reticence to find a "mandate" where Congress had only meant to "encourage."

These and other disagreements with the reasoning of the various decisions are important. Of far greater significance, however, is what the decisions appear to be saying about the manner in which large numbers of our citizens continue to view individuals with mental retardation.

In a certain sense, the claims presented in each of these cases were narrow ones, and the resulting opinions—statements to the contrary notwithstanding—say very little about the rights of citizens with mental retardation. \textit{Pennhurst I & II} posed no questions regarding fundamental rights and expressed no judgments regarding the needs or characteristics of that institution's residents. In \textit{Youngberg}, the substantive liberty interest discerned was tied closely to the particular facts of the case, and the standard for assessing state actions spoke expressly in terms of striking balances for the purposes of determining professional liability. Even in \textit{Cleburne}, within which the Court found state actions predicated upon "irrational prejudices," the Court clung to the particular record before it, and "avoid[ed] making unnecessarily broad constitutional judgments."\textsuperscript{74}

This is not to say that the Court has been silent in this regard. There is some room to believe that it is basically in accord with those


\textsuperscript{72} Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 28 (1981) ("Because Pennhurst does not receive federal funds under the Act, it is arguably not a 'program assisted'.").


\textsuperscript{74} Id. at 3258.
who challenge many of the more odious state practices that precipitated these lawsuits. In *O'Connor*,75 Youngberg, and now *Cleburne*, the Court has recognized rights that the states had persistently, even adamantly, refused to protect. And, as the Court stressed repeatedly, it clearly believed that “[c]onditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the “habilitation” of the retarded.”76 Arguably then, the Court has abandoned the prejudices and fears that impelled Justice Holmes to issue his now discredited proclamation that “[t]hree generations of imbeciles are enough.”77

Nevertheless, there are compelling reasons to believe that the Court is deeply troubled by the claims raised in these cases, and that its unease is predicated upon a continuing inability to reach beyond labels and assess claims raised by citizens with mental retardation as questions involving the rights of coequal citizens. *Cleburne* in particular appears to perpetuate the assumption that it is permissible and appropriate for the state to draw broad distinctions between individuals with mental retardation and “normal” citizens. The plurality opinion made it clear that it was not reaching the underlying and far more troubling question, “whether the special use permit provision is facially invalid where the mentally retarded are involved.”78 Even Justice Marshall, who spoke eloquently of the plight of citizens with mental retardation, nevertheless intimated that a “narrow sub-class” of these individuals might be excluded from the community altogether.79

If and when the Court does directly address these issues, it will be forced to confront a question that permeates each of its decisions to date: is the Court’s overall position regarding the rights of citizens with mental retardation consonant with the protections that this nation generally extends to vulnerable or disadvantaged segments of its population? A strong case can be made that the treatment of these individuals is in keeping with pervasive social views, but is at the same time at odds with the manner in which the Court has historically assessed “artificial and invidious constraint[s] on human potential and freedom.”80

A close reading of the Pennhurst trilogy and *Cleburne* suggests

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79. *Id.* at 3273 (Marshall, J., concurring in the judgment in part and dissenting in part).
80. *Id.* at 3268 (Marshall, J., concurring in the judgment in part and dissenting in part).
that there were two principal reasons for the Court's holdings. The first is the traditional doctrine that "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border." 81 Under this approach, the refusal of a state to offer anything other than safe confinement—and of the Court to order more—reflects deference to the State's "considerable discretion in determining the nature and scope of its responsibilities." 82

If—as the state of Pennsylvania asserted in Youngberg—the choice is simply between limited state actions designed to keep citizens with mental retardation from "freezing and starving," or no state action at all, 83 then the Court's reliance upon this now overworked doctrine might make limited sense. The difficulty is that almost all levels of government now promise far more than just a safe place to live. State legislatures and state executives routinely espouse higher purposes when they fashion programs and services for citizens with mental retardation. For example, as the Supreme Court of Pennsylvania made clear in In re Schmidt, 84 the legislature in that state has declared that "[i]t is the policy of the Commonwealth . . . to seek to assure the availability of adequate treatment to persons who are mentally ill, . . . and in every case, the least restrictions consistent with adequate treatment shall be employed." 85 This broad declaration of purpose is (perhaps) susceptible to the sort of narrow parsing that some courts have given the Youngberg "professional judgment" doctrine. Standing on its own, however, it articulates a positive state commitment that tracks closely the language employed by numerous federal courts as they fashioned sweeping substantive rights. 86

Pennhurst II, of course, instructs that the federal courts are powerless when claims of state mistreatment are predicated upon state statutes. In defending its holding, the majority in that case argued that

82. Id.
83. Transcript of Oral Argument at 20, Youngberg v. Romeo, 457 U.S. 307 (1982) (state should not be "faced with choice" between "habilitation" and "simply act[ing] to prevent the mentally retarded who are unable to care from themselves from freezing or starving to death").
86. A typical formulation of the constitutional right to treatment states, for example, that "a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such treatment as will give him a realistic opportunity to be cured or to improve his mental condition." O'Connor v. Donaldson, 422 U.S. 563, 570 n.6 (1974) (quoting district court jury instruction) (emphasis in original).
"[t]o the extent there was a violation of state law in this case, it is a case of the State itself not fulfilling its legislative promises."87 The end result is clearly anomalous, for even as it stressed that chronic refusals by state officials to fund institutions adequately had created "widespread deplorable conditions," the Pennhurst II majority nevertheless concluded that the responsibility to correct these conditions "rested on the State itself."88

The resulting dilemma for citizens with mental retardation and their advocates is both elegant and insoluble. They may petition the same state officials who have to date refused to act, a course of action unlikely to produce satisfying results.89 Or they may turn to the courts, only to learn that (according to the Pennhurst II majority) sovereign immunity had not been waived.90 If sovereign immunity is indeed a "fiction . . . that never properly stands in the way of ultimate vindication of the rights of the individual against the state,"91 then the lesson of the cases arising from Pennhurst is clear: try as they might, citizens with mental retardation challenging their conditions of confinement will find no meaningful redress in federal court.

The emphasis here is clearly on redress that will be meaningful. Even O'Connor v. Donaldson, arguably the most positive of the

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88. Id. at 108 n.16 (emphasis in original). In a comment that carries interesting implications in light of Youngberg's "professional judgment" standard, the Court also noted that "[i]t is not easy to persuade competent people to work in these institutions, particularly well-trained professionals." Id.
89. The Pennhurst litigation provides a perfect example of this. At various points in time, the state of Pennsylvania was found to be in violation of the federal constitution, various federal statutes, and various state statutes. At no point was the state's conduct found to be consistent with the applicable legal standards. Yet, each time the state appealed and contested vigorously its obligation to act in the manner that its own laws and the laws of the land required. See generally Halderman v. Pennhurst State School & Hosp., 610 F. Supp. 1221 (E.D. Pa. 1985) (general overview of the case to the point at which the final settlement agreement was approved). The treatment of the state law issue is particularly revealing. State law claims were raised in Pennhurst I, but because the Court found its parsing of the Developmental Disabilities Act dispositive, it did not reach them. It is worth noting, however, that in its brief the state simply asserted that "state law provides no right to treatment to the mentally retarded." Brief for Petitioners at 39-43, Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981). The eleventh amendment was never mentioned, and it was only after the state lost (yet again) on remand in the court of appeals that it rose up in righteous indignation to assert that a federal court could not impose upon it the duty to obey its own laws.
90. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 103 n.12 (1984). Professor Shapiro argues that the Court was incorrect both as to its theory of waiver and the precise state of the doctrine at the time that the Pennhurst suit was filed. Shapiro, supra note 45, at 76-78.
91. Shapiro, supra note 45, at 85.
Court's decisions in the area of institutional treatment, conveys the sense of a Court avoiding the real issues and charting the least difficult course in a case in which the state's actions were totally indefensible. O'Connor dealt with issues arising from mental illness, rather than the presence of mental retardation. The manner in which the Court disposed of the case is, nevertheless, consistent with its approach in the Pennhurst and Cleburne cases.

Kenneth Donaldson was committed for treatment, but received only "milieu therapy," a euphemism for custodial care. Each time he fulfilled the conditions set for his release the institutional staff found new reasons to keep him confined. Dr. O'Connor defended his actions on the grounds that state law "authorized indefinite custodial confinement of the 'sick,' even if they were not given treatment and their release could harm no one." Since the jury found that "none of the . . . grounds for continued confinement was present," the Court declared that "the difficult issues of constitutional law . . . are not presented by this case in its present posture." Accordingly, it simply declared that Donaldson's "right to freedom" had been violated and held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." Thus, as was the case in the Pennhurst decisions, the broad question of how this nation should deal with institutional abuse and neglect was eschewed in favor of a narrow rule tied to particular facts and circumstances.

All of this suggests that there is a second factor at work in these cases, one that flows from the nature of the citizens seeking protection. Simply put, these individuals are "retarded"; they cannot be "cured," and no amount of "therapeutic" intervention will alter their basic condition. Thus, in the Pennhurst trilogy and in Cleburne

93. Id. at 570.
94. Id. at 574.
95. Id. at 573.
96. Id. at 576.
97. Id.
98. The notion that mental retardation is a disease and that a "medical model" should be employed is professionally outmoded but remains, socially pervasive. See, e.g., Society for Good Will to Retarded Children v. Cuomo, 572 F. Supp. 1300, 1306 (E.D.N.Y. 1983) (mental retardation "no longer regarded as a disease, curable or otherwise"); "medical model of treatment by passive care is generally being replaced . . . by the developmental model"). Some professionals in the area are now seeking a "cure." See, e.g., CURATIVE ASPECTS OF MENTAL RETARDATION: BIOMEDICAL AND BEHAVIORAL ADVANCES (F. Menolascino, R. Neman & J. Stark eds. 1983). This is a quest permeated by good intentions that, nevertheless, runs the risk of reviving unfortunate stereotypes.
there seems to be an implicit belief that citizens with mental retardation are not and perhaps can never be "equal."

This is in keeping with a national fixation on intelligence quotients and with the pervasive—but false—assumption that individuals with "profound" or "severe" retardation have no hope for meaningful life.99 The Youngberg Court stressed, for example, that Nicholas Romeo had "the mental capacity of an 18-month-old child, with an I.Q. between 8 and 10,"100 and that "[r]espondent, in light of the severe character of his retardation, concedes that no amount of training will make possible his release."101 Noting that "[p]rofessionals in the habilitation of the mentally retarded disagree strongly on the question whether effective training of all severely or profoundly retarded individuals is even possible,"102 the Court defended its refusal to address the broader claims raised in the case by declaring that "there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions."103

There are at least two things wrong with this approach. The first and most obvious is that the Court has clearly not so circumscribed its discretion in other contexts. Numerous cases involving other disadvantaged groups provide evidence that the Court believed itself better qualified to make binding determinations when "communal bonds are adamantly denied."104 For example, footnote eleven in Brown reflected a considered judgment that it was both necessary and appropriate for the Court to sanction a particular professional judgment.105 Similarly, in Frontiero v. Richardson106 the plurality turned to social science evidence to bolster its judgment that the "immutable characteristic" of sex could not justify invidious discrimination.107

Clearly, state imposed distinctions based upon race and sex have provoked the Court into both the recognition that there has been impermissible discrimination and the imposition of positive modes of conduct that clearly impinge upon the "considered discretion" of the

99. See infra text accompanying notes 166-205.
101. Id. at 317. There is some dispute about whether the Court correctly characterized the position taken before the Court. See Dinerstein, supra note 6, at 693 ("Counsel's concession that he was not challenging the commitment power . . . is not equivalent to conceding that his client was too disabled to be released.") (citation omitted). There is no dispute that Nicholas Romeo was eventually placed in a community program. See Brief of Pa. Ass'n for Retarded Citizens at 9 n.*, Halderman v. Pennhurst State School & Hosp., Nos. 78-1490, 78-1564 & 78-1602 (3d Cir., on remand from Supreme Court).
103. Id. at 322-33.
104. Burt, supra note 56, at 463.
107. Id. at 686. For a sampling of the sources employed, see id. at 685 n.15.
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states. In the apportionment decisions, the initial education cases, and in particular the busing cases, constitutional violations led to Court-imposed actions. The education cases are especially revealing. It was, for example, not enough for the state to simply provide black children with an educational environment within which they received "personalized instruction . . . with sufficient supportive services to permit the child to benefit from the instruction . . . ." A school was not just a building; education not mere "exposure." Children by their very nature required an environment that offered more.

Frontiero, of course, recognized that characteristics such as "intelligence or physical disability" were "nonsuspect." It differentiated

108. Many of these precedents were promulgated by the Warren Court, and the current Court has proven less willing to preserve, much less expand individual rights. Compare Roe v. Wade, 410 U.S. 113 (1973), and City of Akron v. Akron Center for Reproductive Health, 482 U.S. 416 (1987), with Thornburgh v. American College Obstetricians & Gynecologists, 106 S. Ct. 2169 (1986). In many instances, the Court has been pressed toward these rulings by the current administration. As Professor Days notes, "in the face of a national consensus to eliminate discrimination . . . the Reagan Administration has inadequately enforced and otherwise undermined, if not violated outright, settled law in the field of civil rights." Days, supra note 4, at 309. A number of scholars have, however, argued that the record of the Burger Court is not as bad as some might have us believe. In certain instances, the Burger Court has stood firm and even altered prior rulings of its own that were protective of state rights. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985), rev'd National League of Cities v. Usery, 426 U.S. 833 (1976). For an overview of the Burger Court's work, see THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983).


110. See, e.g., Griffin v. County School Bd., 377 U.S. 218 (1964) (compelling reopening of public schools closed to avoid desegregation). Although the Court moved slowly, it ultimately imposed positive obligations on state officials. Compare Brown v. Board of Educ., 347 U.S. 483, 495-96 (1954) (postponing decision as to how desegregation was to be accomplished), and Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (proceed with "all deliberate speed"), with Green v. County School Bd., 391 U.S. 430, 439 (1968) ("The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.").


112. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982). In Rowley, the Court construed the "free appropriate public education" provisions of 20 U.S.C. § 1401(c) (1982). It held that the requirement to provide "related services," id. at § 1401(17), did not include a sign-language interpreter for a deaf child.

113. Compare Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982) (statute merely guarantees "access" to education), with Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

between these factors and sex, however, because “the sex characteristic frequently bears no relation to ability to perform or contribute to society."115 The evil thus wrought was to “invidiously relegat[e] the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”116 By way of contrast, the Cleburne Court appeared to believe that certain restrictions on the rights of citizens with mental retardation were permissible precisely because retardation had a bearing on actual capabilities.117 Unfortunately, as the Court’s treatment of Nicholas Romeo reveals, its approach to these cases is colored by its willingness to extrapolate legal doctrines from simplistic diagnostic labels. As will become evident, this propensity to rely upon a classification system based on intelligence quotients wreaks the same havoc upon citizens with mental retardation that sexual classifications once imposed on women: labels are exalted at the expense of individual rights and needs.118

Even if this were not the case, however, the inconsistencies in the Court’s approach become particularly evident when the Cleburne analysis regarding suspect class status is examined closely. As the Cleburne dissent makes clear, the Court has “never before treated an equal protection challenge to a statute on an as applied basis. When statutes rest on impermissibly overbroad generalizations, our cases have invalidated the presumption on its face.”119 The willingness of the Court to do so in a case involving the rights of citizens with mental retardation thus apparently reflects a belief that this particular group merits the creation of a unique analytic framework.

As indicated, the Cleburne Court basically argued that citizens with mental retardation were not politically powerless, and that some distinctions between these individuals and “normal” citizens were useful. It posited four reasons for doing so. The first, that “substantive” judicial judgments should be avoided where the classification deals with mental retardation, was clearly repudiated by its own holding that the Court must act in the face of the community’s “irrational

115. Id. (footnote omitted).
116. Id. at 687.
117. See supra text accompanying notes 78-79 and infra note 164.
118. One of the common habits of courts is to note the IQ of a retarded citizen and then translate that into a statement that this individual is the functional equivalent of a child of age X. In almost every institutional rights case, the residents are described exclusively in terms of IQ and corresponding “level of retardation.” See, e.g., Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1242 (2d Cir. 1984). This was the manner in which the Court described Nicholas Romeo, see supra notes 100-01 and accompanying text. See generally S. GOULD, supra note 19, at 146-233.
The second and third rationales were in essence variations on the same theme: legislative enactments demonstrated that citizens with mental retardation were no longer the victims of prejudice, and had the power to protect themselves. As Justice Marshall stressed, however, "[t]he Court . . . has never suggested that race-based classifications become any less suspect once extensive legislation has been enacted on the subject."121 Finally, the Court argued that it would be difficult to draw distinctions between a "suspect" class of citizens with mental retardation and "other groups" that might have similar claims. The Court was "reluctant to set out on that course,"122 and declined to do so. That is clearly its prerogative. Nevertheless, it is difficult to understand how the fact that others might also be the victims of prejudice justifies denying judicial protections to the group whose claims are actually before the Court. It stretches the imagination to believe that the Court would have reached a similar result if this same argument had been advanced to deny suspect status to blacks.

The point is not that citizens with mental retardation are not in some ways "different." They are, and there are undoubtedly some individuals with mental retardation who can never lead a meaningful life, at least as the majority of our citizenry might define it. The problem, of course, is that the Court should not tolerate the segregation of any citizens, or a denial of their rights, simply because the majority is ill-disposed toward them.123 The results are even more insidious when one realizes that the courts seem to focus almost exclusively on IQ, and that decisions predicated on the capabilities of the "profoundly retarded" deny basic rights to all institutional residents.124 Cases of

120. Id. at 3260.
121. Id. at 3269 (Marshall, J., concurring in the judgment in part and dissenting in part).
122. Id. at 3258.
124. The Youngberg Court held that "[r]espondent thus enjoys constitutionally protected interests," Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (emphasis added), and made it clear that the decision was tied closely to the particular facts of the case. Id. at 319 & 319 n.25. One court, while acknowledging that the "Youngberg . . . Court recognized that it is not feasible to specify the type of training for every case," still found "principles that are broad enough to govern diverse factual situations." Thomas S. v. Morrow, 781 F.2d 367, 374 (4th Cir. 1986), cert. denied sub nom. Kirk v. Thomas S., 106 S. Ct. 1992 (1986). The court also acknowledged that Youngberg was an action for damages, but dismissed that factor, stating "[t]he principles undergirding the Court's decision in the action for damages afford a
this sort are seldom crystal-clear: reaching agreement regarding the appropriate course of action for particular individuals with severe or profound mental retardation is often difficult if not impossible. But what is it about these particular citizens that justifies the belief that the decision of a professional or a parent is presumptively correct and immune from judicial scrutiny? As Judge Winter observed in dissent in the "Baby Jane Doe" case, "[a] judgment not to perform certain surgery because a person is black is not a bona fide medical judgment. . . . A denial of medical treatment to an infant because the infant is black is not legitimated by parental consent." 125

Admittedly, the Court has indicated that it will defer to professional judgments in other contexts. Prison officials 126 and the military, 127 for example, are given considerable leeway in the exercise of their discretion. But those cases involve the "rights" of individuals who have made deliberate choices and were responsible for at least initiating the situations within which they found themselves: convicted criminals have (hopefully) committed crimes, and in the post-draft era everyone enlists. This is clearly not the situation when courts examine distinctions predicated upon race, sex, or the presence of a disabling condition. Within these particular subsets of society, however, it appears that professional and parental decisions will prove determinative only as to citizens with mental retardation. What we must now determine is why this is the case, and whether this studied deference is justified.

III. LAWYERS, COURTS, AND PROFESSIONALS:
STRANGERS IN A STRANGE LAND

The judicial response to the Court's holdings in the retardation cases has been mixed, 128 with parsing of Youngberg in particular hav-
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ing been anything but an exercise in clarity.\textsuperscript{129} Under normal circumstances, this would be perhaps both expected and appropriate. The judicial slate in this area was, however, far from clean. Before \textit{Youngberg}, citizens with mental retardation and their advocates achieved almost universal acceptance of their claims to broad constitutional and statutory entitlements.\textsuperscript{130} Accordingly, the recurring failure of previously sympathetic courts to invalidate or otherwise restrict state practices is cause for substantial alarm. This becomes particularly evident when one examines carefully the manner in which the courts have characterized citizens with retardation, and in particular the realities that underly the “states’ rights” issues and “professional disagreements” that have (at least in theory) driven the Court away from any definitive pronouncements in this area.

The problems that have arisen as a result of the Court’s actions are starkly illustrated in the ironically titled case of \textit{Society for Good Will to Retarded Children v. Cuomo}.\textsuperscript{131} \textit{Society for Good Will} was a class action brought on behalf of the residents of the Suffolk Developmental Center (SDC), a state operated “school” on Long Island for citizens with mental retardation. In a broadly framed complaint, the plaintiffs sought to improve conditions at SDC, expand community resources and support services for citizens with mental retardation and their families, and transfer \textit{most} of the individuals at the Center to small community residences.\textsuperscript{132} In its careful and exhaustively detailed opinion, the district court determined that conditions at the Center were “harmful to many of the residents,”\textsuperscript{133} and that “staffing and other factors endemic to the management of a large facility make it an environment that fails to protect the safety of its residents, to prevent their regression, and to provide an opportunity to acquire those skills

\begin{itemize}
  \item \textsuperscript{129} In Rennie v. Klein, 720 F.2d 266 (3d Cir. 1983), for example, a badly divided court issued four opinions, none of which commanded a majority and each of which adopted a somewhat different view of \textit{Youngberg}.
  \item \textsuperscript{130} See \textit{supra} note 11 and accompanying text.
  \item \textsuperscript{131} 737 F.2d 1239 (2d Cir. 1984).
  \item \textsuperscript{132} It is important to note that the claim was never that \textit{all} of the institution’s residents were to be placed in less restrictive environments. The rights asserted were, in this context, not absolute. Individuals characteristics and needs were to be considered.
\end{itemize}
Accordingly, the court fashioned relief on the assumption that it must both protect the residents at the Center and, ultimately, through "habilitation," provide a means by which these individuals might eventually be placed in less restrictive environments. Mindful of the fact that the Supreme Court had itself "not decide[d] whether the Due Process Clause embraces a general right to habilitation," the court attempted to bolster its opinion by stating that "[i]n the case before us we need not find any abstract constitutional right to a least restrictive environment. That entitlement is accepted and professionally required by the testimony and is implied in the explicit right to care and treatment provided by state law."

The court of appeals did not agree. It accepted the conclusion that conditions at the Center violated the rights of the residents, finding that "[i]t cannot be disputed that SDC residents have a constitutional right to adequate food, shelter, clothing and medical care." The court also determined that the residents "are entitled to safe conditions and freedom from undue restraint." The panel believed, however, that "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 SDC is a rational decision based on professional judgment." Because the Supreme Court had not expressly acknowledged a right to habilitation and placement in the least restrictive environment, and because "[e]xperts appear to disagree on the appropriateness of institutionalization and we cannot say that it is professionally unacceptable," the residents of SDC were granted only limited relief. New York was obliged to keep these indi-
individuals safe and free from restraint, but it neither needed to improve their skills nor offer them a prospect of life outside the confines of the Center.

The court apparently believed that it was constrained by Youngberg to ask only whether there was "a rational decision based on professional judgment,"143 and felt that it could assess only the constitutionality of the conditions at the Center. Anything more, and in particular a claim that residents should receive habilitation and eventual placement, went too far:

We do not find a due process right to a specific type of treatment or training beyond that geared toward safeguarding basic liberty interests. The Due Process Clause only forbids deprivations of liberty without due process of law. Where the state does not provide treatment designed to improve a mentally retarded individual's condition, it deprives the individual of nothing guaranteed by the Constitution; it simply fails to grant a benefit of optimal treatment that it is under no constitutional obligation to grant.144

This position can be made consistent with Youngberg only by ignoring the Court's emphasis on the facts of that case and, in particular, disregarding its fixation on professional liability. As indicated, the Youngberg Court actually did not go that far. Deeply troubled by the liability issue, it stated expressly that it was assessing the constitutionality of the conditions in one institution as they pertained to one individual.145 The Court refused to proceed further, and in particular did not explore the question of a positive right to habilitation. This hardly constituted a definitive rejection of that doctrine, especially in light of the reservations expressed in Justice Blackmun's concurring opinion.146

The willingness of lower courts to read Youngberg so broadly results from numerous factors. Perhaps the most important is the need to preserve a facade of civility, even as the courts attempt to compel recalcitrant states to live up to their promises to provide treatment and habilitation. This is not a recent phenomenon. The Pennhurst litigation in particular provides an example of protracted state resistance to institutional reform litigation, even in the face of conditions

143. Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1249 (2d Cir. 1984).
144. Id. at 1250.
146. See Youngberg v. Romeo, 457 U.S. 307, 325-29 (1982) (Blackmun, J., concurring) (arguing Court has left unresolved questions posed where total failure to treat and where resident loses basic self-care skills). But see id. at 329-31 (Burger, C.J., concurring) (would hold flatly that there is no constitutional right to treatment or habilitation per se); O'Connor v. Donaldson, 422 U.S. 563, 587-88 (1975) (Burger, C.J., concurring) (refusing to equate "right not to be confined without due process of law with a constitutional right to treatment") (emphasis in original).
and practices that it cannot or will not defend. Nor is this uncommon. State and local officials, their protestations to the contrary notwithstanding, have frequently displayed at best an ambivalence toward citizens with mental retardation, and have exhibited a pervasive reluctance to make hard choices when the rights and even the lives of these individuals are at stake. Indeed, many federal court decisions protecting the rights of disabled citizens have been criticized severely by state and local officials. Judge Johnson in Alabama, for example, was excoriated for his "activist" posture in the \textit{Wyatt} litigation. He defended his actions by stressing that "when a state fails to meet constitutionally mandated requirements, it is the solemn duty of the courts to assure compliance with the Constitution." He also provided a series of telling observations on state claims that inhumane conditions result from a dearth of funds rather than a lack of good faith, noting, among other things, state prison purchases of caviar to entertain legislators and of geldings for breeding purposes.

Nevertheless, the courts continue to indulge state declarations of good faith and limited resources. The prefatory language employed by the court of appeals in \textit{Society for Good Will} provides a perfect example of this. In the court's estimation, that case focused upon the welfare of a few of the more than seven million retarded individuals in this country. It also concerns the constitutional powers and constraints of federal courts that are asked to grant relief when state political branches of government are perceived as too slow in improving individual welfare. . . . While the changes embodied in the district court's decree may be commendable, we hold that some of those changes were requested of the wrong branch of government and some of them are beyond the court's constitutional power to order.

The true implications of this studied deference to the state political branches becomes apparent when one looks at the manner in which state officials have responded to the odious choices "imposed" by limited budgets. There is a substantial body of authority that suggests that a lack of funds will not excuse a violation of constitutional

147. A full history of the Pennhurst litigation is beyond the scope of this Article, but as indicated, see supra note 89, the state vigorously contested the suit throughout and was at various times held in contempt of court for refusing to comply with then binding orders.

148. Johnson, supra note 8, at 915.

149. \textit{Id.} at 913. \textit{See also} Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 \textit{Harv. L. Rev.} 1281 (1976) (concluding that judicial involvement is appropriate and workable); \textit{Special Project, The Remedial Process in Institutional Reform Litigation}, 78 \textit{Colum. L. Rev.} 784, 929 (1978) (federal courts "not well suited for the design and implementation of institutional reform," but "absent legislative or administrative action, the identification of system wide violations of federal rights may require the involvement of federal courts in system wide reform").

In spite of this, states routinely raise the question of funding as an objection to meeting the obligations imposed if the rights asserted are vindicated by the courts. In *Pennhurst II*, eleven states observed pointedly that “[t]he fiscal implications of the Third Circuit’s decision on the states are of great concern to Amici.”\(^{152}\) The courts seem willing to either accept these “reservations” at face value, or, when pressed, to confront them only indirectly, if at all. In *Society for Good Will*, for example, Judge Weinstein took great pains to stress the “substantial efforts on behalf of these disabled people [that] remind us that ours is fundamentally a compassionate and caring community.”\(^{153}\) At the same time, he made it clear—albeit inferentially—that the record in that case did not support these declarations, at least insofar as the compassion upon which the judge focused was that evidenced by New York’s elected and appointed officials. Judge Weinstein cited data indicating that community care was *less* expensive than continued institutionalization.\(^{154}\) More significantly, the record indicated that New York essentially provided *no* funds for in home placements,\(^{155}\) and that it had not exploited federal options providing substantial matching funds supporting placement in less restrictive residential environments.\(^{156}\)

151. See, e.g., *Society for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1351 (E.D.N.Y. 1983) (citing cases). Commentators are fond of noting that it was Judge, now Justice Blackmun, who wrote in *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), that “[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations.” *Id.* at 580. The intent was, in many if not all instances, to “twist the tail” of one half of the “Minnesota Twins.” Justice Blackmun’s “evolution” as a jurist, see, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 325-29 (1982) (Blackmun, J., concurring), renders this device unnecessary.


154. *Id.* at 1339 (per annum costs from high of $53,200 in state institutions to low of $14,200 in family care homes).

155. *Id.* at 1337 (“the state provides almost no funds to maintain clients in their own homes”).

156. *Id.* at 1337 (state had not applied for funds under 42 U.S.C. § 1396n(c) waiver that would provide 50% federal funding match for community services). The same is true in Nebraska, which has applied for the Title XIX waiver, but has not employed it. Interview with David Powell, Exec. Dir., Neb. Ass'n Retarded Citizens (May, 1986). In spite of having perhaps the most sophisticated system of community programs in the world, Nebraska continues to invest heavily in institutional
Of course, the fact that a state refuses to pursue policy choices that make economic sense is of no independent legal significance. The Constitution does not guarantee that elected officials will be intelligent stewards of the public fisc. Nevertheless, state choices are matters for judicial scrutiny when they impinge on individual rights. In Society for Good Will, the "right" in question was one of community placement. Utilizing the Youngberg professional judgment standard as a substantive rule of law, the court of appeals found no such right. The court acknowledged that "all experts, both defendants' and plaintiffs', agreed that many clients... could be safer, happier and more productive outside the institution in small community residences." It believed, however, that Youngberg "did not hold that constitutional norms are to be determined by the 'professional judgment' of experts at trial. Rather, it held that constitutional standards are met when the professional who made a decision exercised 'professional judgment' at the time the decision was made."

This implies that any professional decision is valid, even though all experts subsequently disagree with it. Youngberg, of course, did not establish "absolute professional immunity"; the Court expressly declared that expert testimony was in fact "relevant to whether... decisions were a substantial departure from the requisite professional judgment." Moreover, it is difficult to see how decisions with which "all" experts disagree—even those mustered by the state—can be anything other than a "substantial departure." In an attempt to find solace, the Society for Good Will panel cited the testimony of one individual. How this solitary opinion became a refutation of "all experts" regarding the needs and interests of the specific residents of SDC is a mystery. Certainly, the court provided no justification for this calculus, and while it probably did not know this, the individual's own staff, in another context, apparently disagreed with his conclusion.

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157. Society for Good Will to Retarded Children v. Cuomo, 572 F. Supp. 1300, 1347 (E.D.N.Y. 1983) (all residents referred for community placement; failure to provide "precludes exercise of basic liberties").


159. Id. at 1248.


161. Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1249 (2d Cir. 1984) (citing testimony of Dr. Hugh Sage). Dr. Sage is the Director of the Beatrice State Developmental Center (BSDC) in Nebraska.

162. One of the impediments to community placement frequently cited in Nebraska is options that are substantially more expensive than community placements. Id. The problem, according to Mr. Powell, is that if appropriate client movement were allowed, the institutions would eventually collapse under their own economic weight.
CITIZENS WITH MENTAL RETARDATION

Society for Good Will, therefore, clearly frames the division of opinion between those who harbor a limited estimation of the skills and abilities of citizens with severe and profound retardation, and those who believe that a more expansive view is warranted. The debate is a long-standing one, and the courts have come down on both sides of the issue. In theory, the courts have consistently adhered to the general proposition that they will negate only “unprincipled” denials of the basic rights of citizens with mental retardation. For example, in Cleburne all of the Justices reserved judgment on whether it would be permissible for a state or locality to discriminate against a particular “sub-class” of citizens with mental retardation. This appears consistent with the general rule that a classification will be sustained if it is “rationally related to a legitimate state interest.” In many instances, however, the superficial appeal of the classification scheme is belied by reality, and one group of individuals—those society has historically labeled as “severely” or “profoundly” retarded—has been placed in great jeopardy by these recent decisions.

The typical image of an individual with profound retardation is one of a person for whom there will rarely be any intelligible speech even at adulthood except for a few individuals who may say “mama” or “da-da.” Often, sensory defects, skeletal anomalies, or other disabilities co-exist in profoundly retarded persons. Therefore, total life support is essential to their survival, and up to 40% of the profoundly retarded are either bedfast or semi-ambulatory.

Such an individual is, according to this school of thought, so “defective” that if “[l]eft to his own resources, even in a grocery store, the


164. See, e.g., City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3262 (1985) (Stevens, J., concurring) (“Restrictions on . . . right to drive cars or to operate hazardous equipment might well seem rational even though they [deprive] employment opportunities and the kind of freedom of travel enjoyed by other citizens.”).

165. Id. at 3254 (citations omitted).

profoundly retarded person dies within a matter of days of starvation if he does not meet with accidental death before that.”

These characterizations are predicated on an inappropriate classification system and the implications that flow from them are, in large part, incorrect. Knowledgeable professionals have long since abandoned reliance upon IQ as a single or determinative factor in fashioning appropriate programs for individuals with retardation. Rather, they now employ a variety of measures that more accurately reflect both the true characteristics and actual needs of the individual. In Nebraska, for instance, individuals in the community based programs are classified as “high,” “moderate,” or “low” need, an approach that more truly gauges individual skills. Level of retardation is still considered. It is, however, only one of at least ten different classification factors that include negative and positive behaviors, physical needs and characteristics, and self-help skills.

The importance of this development is illustrated by the record in many states, which indicates that even citizens with severe or profound mental retardation can develop their adaptive skills and live either in the community or in environments that closely approximate a normal residential setting. These are not new developments, and this information has been made available to the courts. For example, in an amicus curiae brief filed in Pennhurst I it was noted that recent data support the assertion that there are cost-efficient, community based, culturally normative alternatives ... [and] that large numbers of individuals have been placed in them over the past 10 years. Success of the placement was seen to depend primarily on the quality of the community support system rather than on characteristics of the individuals themselves ... There appears to be very little empirical support for restricting placement on the basis of age or IQ, except that demands for community service and environmental supports appear to correlate with these variables.

The closely related argument that medical complications preclude placement in less restrictive settings is equally unavailing. A state commissioned study in Nebraska noted that “of the approximately 335 [Beatrice State Developmental Center] clients identified with special needs..."
medical needs, in the opinion of the BSDC medical staff only 8 require intense medical services not typically provided in the [community based mental retardation] residential programs. In a similar vein, a detailed study of programs in Michigan revealed that sixty percent of the persons in group homes and community residences were citizens with severe or profound mental retardation, and that seventy percent of this population had serious secondary handicaps or were medically fragile. Even in Pennsylvania, the home state of Pennhurst, the service system is predicated upon the assumption that community living arrangement programs are “structured to meet the needs of all mentally retarded individuals, no matter what the . . . severity of handicap.”

In the face of this and other evidence that even the most “fragile” citizens with retardation can be placed in least restrictive environments, proponents of institutional care commonly raise three objections. The first is the simple assertion that citizens with severe and profound retardation simply cannot survive without the “total life support” found in institutions. The tenacity with which this position is advanced is intriguing. For example, in 1978 the Partlow Review Committee, a group of professionals who had surveyed that institution for the state of Alabama in connection with the Wyatt litigation, argued that “[r]esidents who fail to improve with extensive education and training efforts will not be subjected to further training or education per se.” Instead, they would “receive a full program of enriching activities . . .” The suggestion was, however, summarily rejected:

The evidence does not persuade the Court, however, that the minimum constitutional standards should be modified to allow defendants to cease providing habilitation programming and to provide instead an “enriched environment.” The constitutional right of each resident to a habilitation program which will maximize his human abilities and enhance his ability to cope with his environment would be threatened by this modification proposed by defendants. The Court will therefore deny defendants’ motion to modify the 1972 order in this respect.

173. Touche-Ross Study, supra note 162, at 41 (emphasis added).
176. Seë, e.g., supra text accompanying notes 171-72.
177. See supra note 8.
179. Id.
Judge Johnson's affirmation of his original findings did not, however, end the matter. The debate over the Partlow Committee's recommendations continued both in the literature and the professional community. The Committee's position was, for instance, correctly characterized as declaring in effect that "some mentally retarded citizens are subtrainable and hence need to reside in enriched institutional settings for the rest of their lives," an "archaic [posture] contradicted by major ideological and programmatic developments of the last two decades." These critics were from Nebraska, and cited extensive data regarding both actual placements in Nebraska and the substantially lower costs associated with community living arrangements.

In response, the Partlow Committee declared that

[s]elective demonstrations do not constitute generalizable research. Most would agree that community living is desirable, especially for higher level clients, but this is a matter of faith, not research. As for the severely/profoundly mentally retarded being successfully served in the community, it would be more accurate to say that some are seemingly being well served in the community.

This desire to elevate "research" over "faith" is (perhaps) academically commendable. The findings in Nebraska, at least as presented at that time, may not have constituted scientific research. They were, nevertheless, demonstrable facts. The record clearly indicated that large numbers of citizens with severe and profound mental retardation were living in the community, and that the medical staff of Nebraska's only state institution believed that only eight of the institution's residents could not have their medical needs met in the community. The Partlow Committee did not find these realities persuasive. This might, under normal circumstances, have been dismissed as a somewhat petty internecine dispute. But the argument was not confined to the dry pages of academic or professional journals. It has clearly spilled over into the courts, and the Partlow Committee's statements have caused certain groups to limit their efforts on behalf of citizens with mental retardation.

Fortunately, subsequent research in Nebraska and Pennsylvania now provides compelling evidence that many of the Partlow Commit-
tee's basic tenets are incorrect. For instance, one member of the Partlow Committee noted that for Partlow residents "[o]ne comparison of adaptive behavior scores on a representative sample of clients over a one-year period found no significant change; actually, the later scores were slightly lower." Since this was "research," the findings, according to the logic of the Committee, merit the utmost respect. The message that this evidence conveys, however, is at odds with the direction in which the Partlow Committee wishes the courts to proceed. These findings were from an institution that was "in substantial and serious noncompliance with . . . orders" to provide "adequate habilitation programming" and "[sufficiently] trained staff." In a more recent study, longitudinal comparisons were made between individuals in Nebraska's community programs and those residing at an institution with "strong capabilities in staff development and programming [and] a sophisticated system of daily training and data collection." The study concluded that "the trend toward increased functioning level in the community is clear." More importantly, it indicated "the likelihood of a decline in functioning level over time in the institution." The population surveyed included individuals with severe and profound mental retardation, with the data showing both an increase in functioning level and that "greater needs should dictate smaller settings in which effective training, environmental stimulation, and life-style management can be ensured." In a similar vein, detailed studies of former residents of Pennhurst demonstrate that they "have made significant behavioral strides while in the community," a development that "stands in stark contrast to the finding in this record that an overwhelming number of the retarded at Pennhurst experienced a regression in life skills while at the institution." Clearly, "scientific research" has now verified what professionals in Nebraska, Michigan, Pennsylvania, and other states already knew: labels should not dictate placement, and the skills of individuals with severe or profound mental retardation both improve

186. Ellis, supra note 178, at 19.
189. Id. at 28.
190. Id. at 29 (emphasis added).
191. Id. (emphasis in original). The authors stressed that where proper programming is present, the "goal of keeping virtually all members of future generations in their home communities is not only possible, but is also likely to be effective in enhancing their intellectual and social capabilities." Id.
193. Id.
and do so at a higher rate when quality community programming is provided.

The second common justification for institutionalization is that while "a small group home for six retarded persons can be a pleasant family-like place, . . . it can also be a ghetto, where handicapped persons live out their lives without the necessary special services and without the sympathy of their neighbors."194 This simply points out, however, that bad services are bad, and good services are good. Certainly, the same individuals that advance this argument would dispute vigorously an anti-institution posture predicated upon the Supreme Court's pointed observation that institutions like Pennhurst are "not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded."195 Indeed, at least one member of the Partlow Committee visited Pennhurst during the pendency of the lawsuit and declared that while "it is entirely possible that a particular facility . . . might be so inadequate in terms of quality of care that it should be closed . . .," Pennhurst is a "generally adequate facility" whose closure he would not recommend.196 Thus, a member of the Partlow Committee found himself in the anomalous position of defending an institution that the state, as part of the final settlement agreement, agreed to close.197

The final major argument in favor of institutions is simply that many of them are "good places to live." One rather idyllic description stressed that

[among the activities that were introduced were such things as developing a garden plot, raising plants in the building, playing shuffleboard and pool, setting up large rolls of paper across dayroom walls for coloring and art work, going for walks in small groups, going fishing at a nearby stream, riding bicycles, repairing furniture, polishing stones, and even such things as taking groups of residents out of doors late at night to observe the sky and to see what the world looks like to normal persons who are free and able anytime to walk out of doors and see the sky and the stars. Likewise, we have introduced boy-girl activities, dances, parties, and boys and girls going on walks together accompanied by staff.198

This is perhaps the most difficult of the pro-institution arguments to deal with. Without a doubt, some institutions are safe and clean, and many institutional staffs make good-faith attempts to provide an environment conducive to individual growth and habilitation. Never-

194. Egg-Benes, supra note 17, at 352.
theless, as a general matter, the very idea of an institution should strike us as antithetical to our basic beliefs, assuming of course that we attribute to citizens with retardation those characteristics that are commonly associated with membership in the human race. In almost any context other than services for individuals with mental retardation, the dominant belief is that "[i]nstitutionalization is contrary to the American value system. . . . The family is viewed as a primary socializing agent, and the removal of a member of the family to an institution means that the individual will cease to function as a sociological member of the family."¹⁹⁹

More significantly, "generalizable research" indicates that even good institutions may cause the skills of their residents to regress,²⁰⁰ and that even when skills increase in institutions, the rate of increase is higher for individuals in the community.²⁰¹ This evidence is particularly important in light of Justice Blackmun's concurring opinion in Youngberg, which stresses that

[i]f a person could demonstrate that he entered a state institution with minimal self-care skills, but lost those skills after commitment because of the State's unreasonable refusal to provide him training, then, it seems to me, he has alleged a loss of liberty quite distinct from—and as serious as—the loss of safety and freedom from unreasonable restraints.²⁰²

Justice Blackmun did not address directly the independent question of community placement, and he would continue to "defer to the judgment of professionals as to whether or not, and to what extent, institutional training would preserve . . . pre-existing skills."²⁰³ Nevertheless, the Court was apparently mistaken both as to Nicholas Romeo's claims and his ability to be placed in the community,²⁰⁴ and acknowledged that professional judgments may indeed be balanced.²⁰⁵ Since substantial evidence exists documenting the fact that those regarded as having "severe" or "profound" retardation can benefit from habilitation, and indeed will often achieve more substantial gains in community settings, continued adherence to many of the underlying rationales in the Pennhurst cases and Cleburne makes little sense.

Accepting all of this as true, at least for the sake of argument, why is it then that many cling so stubbornly to a medical-institutional model when assessing the needs and rights of citizens with retardation? The answer seems relatively simple: certain parents, profes-

²⁰⁰. See, e.g., Keith & Ferndinand, supra note 188.
²⁰³. Id. at 328-29 (Blackmun, J., concurring) (citation omitted).
²⁰⁴. See supra notes 100-01 and accompanying text.
²⁰⁵. See supra note 160 and accompanying text.
tionals, government officials, lawyers, and judges simply do not believe that citizens with retardation are human beings who merit our assistance and, when necessary, the protection of our laws. The fact that Judge Harold Stump would authorize the secret sterilization of Linda Sparkman, who was allegedly only “somewhat retarded,” speaks volumes about the continuing prevalence of stereotypes and mistaken beliefs in our society.\textsuperscript{206} Hopefully, these attitudes are slowly being eradicated. But the musings of the Partlow Committee, and the argument that an individual with profound retardation would die if left on his own in a grocery store, demonstrate that attitudes not far removed from those of the eugenicists remain with us.

The Court, of course, is aware of these facts. In \textit{Pennhurst I}, one group of “concerned” parents contended that “there is nothing about institutions which makes them inherently incompatible with the concept of ‘normal’ life for the retarded.”\textsuperscript{207} The group conceded that community living arrangements were appropriate for “some” individuals.\textsuperscript{208} It argued strenuously, however, that those individuals classified as having “severe” or “profound” mental retardation could not and should not be placed in the community, and bolstered its case with selections from the “professional” literature.\textsuperscript{209} These views would, under the \textit{Youngberg} rationale, be deemed “presumptively valid.” In that same case, however, the Court was provided with extensive information indicating that the traditional classification schemes are outmoded and that less restrictive placements are both the preferred professional approach and entirely appropriate for even the most complicated cases.\textsuperscript{210}

The information presented to the \textit{Pennhurst} Court was strikingly similar to that proferred in \textit{Brown} and \textit{Frontiero}, in which stereotypes were assessed and rejected. Nevertheless, in \textit{Pennhurst I} the Court focused on the narrow question of the true force of the “rights” embodied in the Developmental Disabilities Act, and avoided the broader question of whether institutions in and of themselves are unconstitutional. In a similar vein, it refused in \textit{Youngberg} to address the real issues, even as it formulated a standard that some parties now use in their attempts to shield state actions from judicial scrutiny. Clearly, the Court’s continuing struggle to identify the narrowest possible grounds for each of its decisions in this area is the product of calculated assessment rather than ignorance or naivete.

\textsuperscript{207} C.A.R. Brief, \textit{supra} note 17, at 12,
\textsuperscript{208} Id. at 4,
\textsuperscript{209} Id. at 4-5. The Brief quoted, for example, the characterizations of citizens with severe or profound mental retardation advanced by Cleland, \textit{supra} text accompanying note 166, and Bowman, \textit{supra} text accompanying note 167.
\textsuperscript{210} See generally N.C.L.H. Brief, \textit{supra} note 162.
As a result, we are left with cases like Society for Good Will, in which the "expert" testimony so important for the Second Circuit was provided by an individual whose own staff apparently disagreed with his judgments. More importantly, in that case the district court established clearly that reliance upon cost considerations—a cornerstone of the states' rights perspective—was illusory. Presumably then, until the Court tells us otherwise, under the logic of the Parham, Youngberg, and Pennhurst II, demonstrably incorrect professional assessments and illogical, even illegal state actions are "presumptively valid" and immune from federal judicial scrutiny. This would occur in spite of the fact that in many instances both professionals and parents espouse positions that make a mockery of the Court's assumption that it is appropriate to defer to their judgments, and that subsequent events have demonstrated that individuals like Nicholas Romeo can be placed successfully in a less restrictive community residence.

The problems faced by many parents of citizens with mental retardation are real and the debate within the professional community regarding appropriate placement of citizens with mental retardation is intense. But the Court in these cases seems to have gone to extraordinary lengths to preserve parental prerogatives and professional judgments, often at the expense of individual rights. Obviously, where appropriate community services are not available, placement simply for its own sake should not occur. Where adequate, and often even superior options are present, however, continued adherence to outmoded beliefs makes little sense.

The ultimate irony is that a change in posture by the Court may ultimately prove to be a Pyrrhic victory. As Professor Burt notes:

> These cases appear to reflect a wish on the part of normal people to dissociate themselves from retarded people, and thus they also mirror the emergence of so-called "white backlash" since Brown. But more than this, the Court's majorities in these cases repeatedly rely on a constitutional norm of "state autonomy." The invocation of that norm signifies the rising dominance of narrowly individualistic, secessionist impulses for all manner of social relations.

The Court has not, of course, declared that citizens with mental retardation are not to be treated "equally" with others who are "similarly situated." A convincing case can be made, however, that "[e]qual
protection must have substantive content." Characterized as an "equality of respect interpretation of equal protection," this approach stresses three objectives:

First, the state must recognize the fundamental nature of people's right to participate in a political process that chooses and attempts to implement the group's conception of the good society—a political participation principle. Second, the state must not pursue purposes, and the political process must not further individuals' preferences, to subordinate or to denigrate the inherent worth of any category of citizens. Third, the state must guarantee to everyone those resources and opportunities that the existing community treats as necessary for full life and participation in that community.

The Pennhurst trilogy and Cleburne are arguably consistent with the first principle. But the lurking sense within the decisions that citizens with mental retardation are second-class citizens violates the second, and the failure to guarantee more than simple maintenance care in an institutional setting shatters the third. It is then one thing to argue that citizens with mental retardation merit the same constitutional protections as other disadvantaged groups. It is clearly quite another to believe that society will eventually respond with understanding, much less acceptance.

IV. CONCLUSION

This Article in no way exhausts the complex legal and social issues that arise when federal courts assess the needs and interests of citizens with mental retardation, and in particular when these same courts require state executive and legislative entities to allocate their tax funds in particular ways. It is not a definitive treatise on the nature of those conditions we have come to characterize as "mental retardation," or on the proper means for a caring society to respond to the needs of citizens with what we should now recognize as unfortunate but by no means crippling limitations. Rather, my purpose has been to question the logic of continued adherence to outmoded beliefs, and in particular to challenge rote acceptance by the federal courts of both false images of citizens with mental retardation and disingenuous state explanations regarding the manner in which they "treat" these individuals. Sixty years ago, Justice Holmes used Buck v. Bell to "throw the authority of the Court and the morality of patriotism behind his appeal, legitimating race- and class-based fears as well as the policy those fears generated." Hopefully, the Court will never

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216. Baker, supra note 123, at 933.
217. Id. at 959 (footnote omitted).
218. But see Comment, City of Cleburne v. Cleburne Living Center: Equal Protection for the Mentally Retarded?, 9 HARV. J.L. & POL'Y 231, 242 (1986) ("growing belief that society should create exceptions to [equal protection] for members of disadvantaged groups suffering from mental and physical handicaps").
219. Dudziak, supra note 20, at 865.
again go so far. Accordingly, it is now incumbent upon us to see that such false impressions rest forever in the past, consigned to those decades where ignorance and fear, rather than factual inquiry and true compassion, ruled the day.

The conclusion is inescapable that many attorneys and the judges before whom they practice remain mesmerized by our national fixation on IQ as an indicator of human worth, and are paralyzed by a Supreme Court no longer willing to ask "but is it right." As a result, there is reason to believe that courts are "running from that part of themselves which suggest[s] a common identity with handicapped people." There was a time when the Court appeared to be willing to do more, even for those citizens with mental disabilities. Unfortunately, the Court's attitude appears to be changing. Perhaps those Justices who have fashioned these more recent decisions truly believe that the Constitution so dictates. However, unless and until the Court confronts directly the issues it has so assiduously avoided, it is just as reasonable to believe that it is either reflecting or responding to a hostility toward citizens with mental retardation that is perhaps more subtle than that enshrined in Buck v. Bell, but no less insidious.

If the purpose of the law is to shield society from unpleasant individuals and uncomfortable decisions, then there is some room to argue that these results are justified. If, however, our ultimate objective is to retain the law as a touchstone for human decency and as a moral force, then we have lost a great deal, and in return have gained very little.

Mark R. Killenbeck, '87