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## The Absence of Justice

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# The Absence of Justice

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## INTRODUCTION

At one time, the United States Department of Justice was in the forefront of the movement to protect the rights of persons institutionalized in mental hospitals, mental retardation centers and juvenile training schools. Congress, the courts, advocates for disabled people, and disabled people themselves looked to the Justice Department for its advocacy and leadership.<sup>1</sup> Few of the ma-

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1. This Article focuses on the Department of Justice's changing role in protecting the rights of mentally disabled people, primarily those in institutions. Many of the same points could be made about the Department's stance in prison reform litigation. See, e.g., *Gates v. Collier*, No. GC 71-6-K, order at 2-3 (N.D. Miss. Jan. 6, 1983), *quoted in* American Civil Liberties Union, *In Contempt of Congress and the Courts: The Reagan Civil Rights Record* 4 (Feb. 27, 1984) (order dismissing Department from portion of case because its "litigation interest was no longer in accord with court's orders or plaintiff class's interests") [hereinafter cited as ACLU Report]. Similar issues arise in litigation and issuance of regulations on behalf of non-institutionalized disabled persons. See *Enforcement of Section 504 of the Rehabilitation Act: Institutional Care and Services for Retarded Citizens: Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 121-28 (1983) (Memorandum of Resignation from the Department of Justice, Timothy M. Cook); *id.* at 163-64 (Statement of Timothy M. Cook) [hereinafter cited as *Senate Enforcement Hearing*]. Throughout this Article the terms "institutionalized persons" or "institutionalized disabled persons" will be used to refer to those persons institutionalized in so-

for cases in the area of institutional reform litigation proceeded without the active involvement and support of the Department. In serving as an advocate for institutionalized and non-institutionalized disabled people alike, the Justice Department upheld the noblest traditions of governmental commitment to the principles of due process and equal protection for all its citizens.

To be sure, not everyone supported the role of the Justice Department in institutional reform litigation. State and local officials responsible for operating institutions chafed at what they regarded as the Federal government's unwarranted intrusion into their affairs. As defendants they were naturally unhappy with being subjected to the blizzard of civil discovery techniques — such as depositions, interrogatories, and tours of their facilities by expert witnesses — that the Justice Department employed in preparing its cases. Many believed that if left to their own devices they would be able to improve institutional conditions to a constitutionally acceptable level. Some of these same officials were subsequently elected to the United States Senate, where they led the ultimately unsuccessful opposition to the Civil Rights of Institutionalized Persons Act (CRIPA),<sup>2</sup> a 1980 statute that provided legislative authority for the Justice Department to sue state and local officials to redress unconstitutional and illegal institutional conditions. CRIPA had become necessary because of the decisions in *United States v. Solomon*<sup>3</sup> and *United States v. Mattson*,<sup>4</sup> in which the respective courts had held that, absent a specific statute, the Justice Department did not have authority to sue state officials on behalf of institutionalized mentally disabled persons. After the enactment of CRIPA, however, advocates for disabled individuals had reason to believe that a new era was about to dawn: one in which the Justice Department could use its considerable resources to seek vindication of the rights of institutionalized individuals rather than expend them upholding its right to be in court at all.

With the election of the Reagan Administration, however, the historic position of the Justice Department as protector of the rights of institutionalized persons, and the promise represented by the passage of CRIPA, eroded substantially. As a result, the Department was caught in a seemingly endless barrage of criticism concerning its civil rights policies generally and its commitment to the rights of disabled people in particular. Critics charged that the Administration interpreted Supreme Court cases in the field in an

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called "treatment" institutions, such as mental retardation centers and mental hospitals.

2. 42 U.S.C. § 1997 (1982).

3. 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F.2d 1121 (4th Cir. 1977).

4. C.A. No. 74-138-BU (D. Mont. Sept. 29, 1976), *aff'd*, 600 F.2d 1295 (9th Cir. 1979).

unduly restrictive manner; reversed long-standing positions taken in pending cases to the detriment of institutionalized disabled persons; squandered the authority conferred on it by Congress by bringing virtually no new cases under CRIPA; caused the mass exodus of attorneys who had worked in its Special Litigation Section, thereby losing the institutional memory that was one reason for the Department's past effectiveness; and showed such solicitousness for the prerogatives of state officials that in some cases it was unwilling to be as protective of institutionalized persons' rights as the state officials themselves.<sup>5</sup>

The Administration has not stood silent in face of these criticisms, arguing that it is as committed to upholding the civil rights of the nation's institutionalized persons as previous administrations.<sup>6</sup> In essence, the Administration makes four broad points in its defense. It argues that the law has changed respecting the rights of institutionalized persons, and that to the extent the Justice Department's position has changed it has been in response to these changes in the legal landscape. Second, it asserts that its critics have distorted the Administration's record, in part because of their differences with it over the extent of the rights possessed by institutionalized persons and the degree to which it is appropriate for the Federal government to impose its views on the states. Third, it maintains that it is inappropriate to measure the Department's activity by the number of lawsuits filed. The Department argues that the passage of CRIPA demonstrated Congress's dissatisfaction with litigation on behalf of such persons and compels increasing resort to negotiation and conciliation. Thus, in order to demonstrate its commitment, the Department cites statistics on the number of CRIPA investigations it has initiated since the beginning of the Reagan Administration, and claims credit for changes supposedly made in response to those investigations. Finally, the Department points to its involvement in the "Baby Jane Doe" case<sup>7</sup> as further evidence of its activism on behalf of disabled

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5. See, e.g., *Senate Enforcement Hearing*, *supra* note 1, at 146-52 (transcript of television news report criticizing Justice Department); *The Wash. Post*, Sept. 29, 1982, at A2, col. 1; *The Washington Council of Lawyers*, *Reagan Civil Rights: The First Twenty Months*, 80-102 (June, 1982).

6. See, e.g., *Senate Enforcement Hearing*, *supra* note 1, at 3-39 (Testimony and Statement of William Bradford Reynolds); Department of Justice, Civil Rights Division, *Correcting the Record of Civil Rights Enforcement*, Jan. 20, 1981 to Sept. 30, 1982: A Response to the Report of the Washington Council of Lawyers 43-50 (Nov. 1982); Remarks of The Hon. William Bradford Reynolds, Ass. Att'y. Gen., Civil Rights Div., U.S. Dept. Justice, Before the Am. Bar Ass'n Comm'n on the Mentally Disabled (Nov. 5, 1982) [hereinafter cited as Reynolds Statement].

7. *United States v. University Hosp. of the State Univ. of N.Y.*, 729 F.2d 144 (2d Cir. 1984), *aff'g* 575 F. Supp. 607 (E.D.N.Y. 1983).

persons.

Who is right in all this, the Administration or its critics? In my view, the rationales advanced in defense of the current Administration's different approach to institutional reform litigation are unpersuasive. Far from compelled, its interpretations of recent cases are unduly narrow and, in some cases, plainly wrong. Its reversals of positions in landmark cases have been both symbolically and practically devastating. The Administration's philosophy of non-litigation is unfaithful to the spirit of CRIPA and the historical and legislative record on which the statute was based. The Administration's focus on the number of investigations initiated as a measure of its success belies the essential fact that there is little pressure on those being investigated to cooperate with the Department: in the four years since the passage of CRIPA the Reagan Administration has not litigated *any* case, and filed only *one* under the statute on behalf of institutionalized disabled people.

The Reagan Justice Department's positions on the rights of handicapped persons, as in other civil rights areas,<sup>8</sup> ultimately defy both history and sound (and previously indisputable) conceptions of policy. Sadly, few people today would even think of subscribing to a statement that seemed a truism when made by the Senate Judiciary Committee in 1979: "The inescapable conclusion is that in the foreseeable future, institutionalized individuals will continue to depend on the U.S. Justice Department as the primary enforcer of their constitutional and Federal statutory rights."<sup>9</sup>

## II. HISTORICAL BACKGROUND

The Justice Department's role in litigation on behalf of institutionalized mentally disabled persons began in 1971 when United States District Court Judge Frank M. Johnson, Jr. invited the involvement of the United States as "litigating" *amicus curiae*<sup>10</sup> in

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8. See *supra* note 5 and sources cited. See also Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984) (criticizing Administration policies in employment discrimination, school desegregation and voting rights).

9. S. Rep. No. 416, 96th Cong., 1st Sess. 19 n.54 (1979) [hereinafter cited as 1979 Senate Report].

10. The term "litigating" *amicus curiae* derives from the United States' participation as an *amicus curiae* with the rights of a party in racial discrimination suits filed in the 1960's. See O. FISS, INJUNCTIONS 618-19 (1972). In such cases, and in mental disability litigation, the Department of Justice fully participated in the case, presenting and cross-examining witnesses, conducting discovery, and so on. The role of the litigating *amicus curiae* is thus considerably broader than that traditionally implied by the term *amicus curiae*.

the landmark case of *Wyatt v. Stickney*.<sup>11</sup> In *Wyatt*, the court held that Alabama's involuntarily committed mentally ill patients had a constitutional due process right to receive minimally adequate treatment,<sup>12</sup> and that institutionalized mentally retarded persons had a correlative right to receive minimally adequate habilitation.<sup>13</sup> Assisted by the Justice Department's and other *amici's* presentation of expert testimony<sup>14</sup> and the parties' stipulations, the court issued detailed standards for treatment in Alabama's mental hospitals and mental retardation institutions.<sup>15</sup> Conditions in those institutions were horrifying,<sup>16</sup> but unfortunately not uniquely so. Subsequent to *Wyatt*, the Justice Department participated in almost every major case in the mental disability field, including broad-based attacks on conditions in New York's Willowbrook,<sup>17</sup> Pennsylvania's Pennhurst,<sup>18</sup> and Nebraska's Beatrice State Home.<sup>19</sup>

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11. 325 F. Supp. 781, 786 (M.D. Ala. 1971). This initial reported decision in *Wyatt* was followed by a number of others as the litigation progressed. Separate decisions were issued covering the court's findings regarding the respective rights of the mentally retarded and the mentally ill. See *infra* notes 12-16 and accompanying text. In addition, in 1971 President Nixon issued a statement on mental retardation in which he directed the Department of Justice to "strengthen the assurance of full legal rights for the retarded." President's Statement on Mental Retardation, 7 WEEKLY COMP. OF PRES. DOC. 1530 (Nov. 16, 1971).
  12. *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971).
  13. *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972).
  14. See *Wyatt v. Stickney*, 344 F. Supp. 373, 375, n.3 (M.D. Ala. 1972) (listing *amici* in mental illness action). See also *Wyatt v. Stickney*, 344 F. Supp. 387, 390 n.4 (M.D. Ala. 1972) (listing *amici* in mental retardation action).
  15. See, e.g., *Wyatt v. Stickney*, 344 F. Supp. 373, 379-86 (treatment standards for mental hospitals). See also *Wyatt v. Stickney*, 344 F. Supp. 387, 395-407 (M.D. Ala. 1972) (treatment standards for mental retardation institutions), *aff'd in relevant part, reserved in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).
  16. See, e.g., *Wyatt v. Stickney* 344 F. Supp. 391 n.7, 393-94 n.13 (M.D. Ala. 1972) (detailing conditions and abuse of residents).
  17. See, e.g., *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973) (while no constitutional right to treatment, institutionalized citizens have right to reasonable protection from harm). See also *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975) (approving consent decree). See *infra* notes 23-25 and accompanying text.
  18. See *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded*, 451 U.S. 1 (1981), *judgment reinstated on state law grounds*, 673 F.2d 647 (3d Cir. 1982) (en banc), *rev'd and remanded*, 104 S. Ct. 903 (1984).
  19. *Horacek v. Exon*, No. 72-L-299 (D. Neb. Oct. 31, 1975). *Horacek* proved to be a particularly difficult and frustrating example of protracted state opposition to the involvement of the Justice Department in institutional rights litigation. Officials from Nebraska were active and vocal opponents of CRIPA. See, e.g., *Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm.*

The theories underlying the various right-to-treatment or right-to-habilitation cases varied somewhat. Probably the most prevalent theory was that adopted by the court in *Wyatt*. There, the court held that if persons were committed to state institutions for the purpose of treatment (or habilitation), it would be a denial of due process to fail to provide such treatment. This theory derived from *Jackson v. Indiana*,<sup>20</sup> where, in another context, the Supreme Court determined that: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the person is committed."<sup>21</sup> Advocates argued that since the purpose of commitment, as defined in almost all state statutes, was the provision of treatment or habilitation, confinement of an individual without treatment would not bear a "reasonable relationship" to the statutory purpose and would thus violate due process. The cases in the mental disability field for the most part did not focus on the quality of treatment provided, or on the specific modalities used. Rather, they examined whether the institution had sufficient numbers of trained staff, an adequate physical and psychological environment, and plans for the provision of treatment such that institutional residents would have a *chance* to receive minimally adequate treatment or habilitation.<sup>22</sup>

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*on the Constitution of the Senate Comm. on the Judiciary*, 96 Cong., 1st Sess. 236-43 (1979) (testimony of Senator J.J. Exon, Neb.) [hereinafter cited as *1979 Senate Hearings*]; *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 572-80 (1977) (testimony of Mel Kammerlohr, Asst. Att'y Gen. Neb. & prepared statement of Paul L. Douglas, Att'y Gen. Neb.) [hereinafter cited as *1977 Senate Hearings*]. *But see* Prepared Statement of the Neb. Ass'n for Retarded Citizens, *1979 Senate Hearings, supra*, at 243-68 (detailed rebuttal of Exon testimony and history of state opposition to express terms of *Horacek* Consent Decree & Agreement). A detailed history of the *Horacek* case is beyond the scope of this Article. It is worth noting, however, that the district court eventually adopted a Plan of Implementation developed by state officials, in the face of strong opposition by the Justice Department. In an ironic twist, counsel for the original plaintiffs abandoned their earlier positions and supported the state's plan, leaving the Justice Department as the sole party advocating for the terms of the original Consent Decree & Agreement. *See generally* Post-Hearing Brief of the United States, *Horacek v. Exon*, No. 72-L-299 (D. Neb. Mar. 16, 1981). *Horacek* was one of the last cases in which the Administration, albeit possibly more through transitional neglect than conscious design, advocated vigorously the rights of institutional residents.

For a general discussion of the origins and early history of *Horacek*, see Frohboese & Sales, *Parental Opposition to Deinstitutionalization: A Challenge in Need of Attention and Resolution*, 4 *LAW & H. BEHAV.* 1, 17-34 (1980).

20. 406 U.S. 715 (1972).

21. *Id.* at 738.

22. *See, e.g.*, *Wyatt v. Aderholt*, 503 F.2d 1305, 1316 (5th Cir. 1974) (emphasis in original).

Another institutional reform theory was the right to protection from harm articulated by Judge Orrin Judd in the Willowbrook litigation.<sup>23</sup> In its first conception, the right to protection from harm appeared to be substantially narrower than the right to habilitation recognized in *Wyatt*. However, by 1975, in an opinion approving a proposed consent decree in the case, Judge Judd wrote that there was no bright line distinguishing the two theories, and that the programmatic steps necessary to prevent the harm of regression — that is, loss of essential skills — were coextensive with those required under a habilitation theory.<sup>24</sup> The Willowbrook case thus established the important principle that protection from harm meant more than protection from physical abuse.<sup>25</sup>

Institutional litigation shifted by the late 1970's from the *Wyatt* emphasis on detailed injunctive decrees mandating institutional improvement to the *Pennhurst* approach of replacement of existing state institutions totally or substantially with a network of community-based settings. Actually, *Wyatt* included provisions for placement of residents in community-based settings,<sup>26</sup> and the *Pennhurst* order included provisions for amelioration of some institutional conditions.<sup>27</sup> But the focus undeniably had changed. The change in legal approach, spurred on by statutory enactments such as Section 504 of the Rehabilitation Act,<sup>28</sup> the Education for the Handicapped Act,<sup>29</sup> and the Developmentally Disabled Assistance and Bill of Rights Act,<sup>30</sup> mirrored professional developments in the fields of mental retardation and mental health. Thus, where

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23. *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973).

24. *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715, 718-19 (E.D.N.Y. 1975).

25. Another right-to-treatment or habilitation theory was the *quid pro quo* theory, which held that treatment was the constitutionally required *quid pro quo* for denying institutionalized persons their liberty without the full panoply of due process protections available in the criminal justice context. *See, e.g., Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975). Relief was also sought under the eighth amendment theory that confinement without treatment or habilitation would amount to cruel and unusual punishment. *See, e.g., Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974). *See also Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1321-22 (E.D. Pa. 1977) (violation of equal protection). *See Halpern, The Right to Habilitation in THE MENTALLY RETARDED CITIZEN AND THE LAW* 385-406 (M. Kindred, J. Cohen, D. Penrod & T. Shaffer ed. 1976). *See also Burt, Beyond the Right to Habilitation*, *id.* at 418-36.

26. *Wyatt v. Stickney*, 344 F. Supp. 387, 396 (M.D. Ala. 1972) (Standard 3 (c)).

27. *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1328-29 (E.D. Pa. 1977).

28. 29 U.S.C. § 794 (1982).

29. 20 U.S.C. § 1401 (1982).

30. 42 U.S.C. § 6001 (1982). *See generally* 1979 Senate Report, *supra* note 9, at 18 (listing statutes protecting institutionalized persons).



mental health and mental retardation professionals talked about normalization,<sup>31</sup> lawyers translated this term into the legal requirement that disabled people be provided treatment or habilitation in the "least restrictive environment." Essentially, recognition that disabled people had to receive services in the least restrictive environment meant that such people could not be unnecessarily placed or kept in institutions if the services they needed could be adequately delivered in community-based settings. The lower federal courts were virtually unanimous in upholding this concept.<sup>32</sup>

Several considerations are significant when one attempts to place the Justice Department's role in these cases in perspective. First, these cases were all originally brought by private plaintiffs, with the Justice Department participating as either a litigating *amicus curiae* or plaintiff-intervenor. While the Department's role varied from case to case, it was frequently the only litigant with the economic and other resources to do the extensive discovery necessary to prove that the institution did not meet constitutional standards. Moreover, while private plaintiffs might be able to muster the wherewithal to file the case and prove liability, it was often the Justice Department that was the only "plaintiff" able to monitor defendants' compliance with the extensive court decrees. In addition, the early right-to-treatment and right-to-habilitation cases were often somewhat volatile mixtures of adversarial and cooperative approaches. Perhaps recognizing that conditions in the institutions were so inhumane as to be indefensible, defendants either consented to the entering of relief in whole or in part, or admitted that they shared plaintiffs' goals of institutional improvement or closure, while wishing to be allowed to set their own timetable for its accomplishment. Not infrequently, the lawyers for the states would litigate these cases aggressively, even while defendant offi-

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31. See *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1311 (E.D. Pa. 1977) (under principles of normalization, retarded individual is treated as much like non-retarded persons as possible; normalization stresses development of maximum potential in environment free of restrictive routines).

32. See, e.g., *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657, 661 (D.C. Cir. 1966); *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1319 (E.D. Pa. 1977); *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1225 (E.D. La. 1976); *Eubanks v. Clarke*, 434 F. Supp. 1022, 1028 (E.D. Pa. 1977); *Stamus v. Leonhardt*, 414 F. Supp. 439, 452 (S.D. Iowa 1976); *Welsch v. Likins*, 373 F. Supp. 487, 502 (D. Minn. 1974). Cf. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (state cannot constitutionally confine without more a nondangerous person who is capable of surviving safely in freedom either alone or with help); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("even though a governmental purpose be legitimate and substantial" it cannot be attained by stifling means "when the end can be more narrowly achieved").

cial themselves were not at all averse to having a court order them to make massive improvements in their facilities and/or place numerous of the facilities' residents in non-institutional community-based settings. For, having been ordered to bring their facilities up to minimal constitutional standards, these officials could then turn to their respective state legislatures and ask for badly needed additional funding, while avoiding criticism by themselves blaming the federal district judge. Those who litigated on behalf of institutionalized persons thus learned to take state officials' protests against federal involvement with a large grain of salt.

Another important facet of institutional reform litigation was the complexity involved when fashioning any meaningful relief for the constitutional and statutory violations found. In many of the cases courts appointed entities such as special masters, human rights committees, expert panels, and receivers to assist defendants in devising plans to achieve compliance.<sup>33</sup> While these measures were criticized by some, they were often undertaken only after defendants had demonstrated their inability or unwillingness to make necessary changes in their institutions or even submit plans to do so. Indeed, the ordering of injunctive relief in the first instance often came only after years of litigation and decades of official neglect, followed by belated and inadequate attempts to address the serious problems identified.<sup>34</sup>

The Justice Department was intimately involved in this burgeoning area of law, not only participating in but helping to shape the substantive developments that occurred. However, not wanting to be completely dependent on others to file lawsuits, and concerned that the worst institutions might very well be those that no one was in a position to challenge, the Department sought in sev-

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33. See, e.g., *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1326 (E.D. Pa. 1977) (special master); *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715, 717 (E.D.N.Y. 1975) (review panel); *Wyatt v. Stickney*, 344 F. Supp. 373, 378, 394 (M.D. Ala. 1972) (human rights committees).

34. For example, in *Wyatt*, Judge Johnson issued detailed standards only after giving the defendants time to submit their own plan to improve conditions in Alabama's facilities. *Wyatt v. Stickney*, 334 F. Supp. 1341, 1344, 1344 n.3. (M.D. Ala. 1971) (rejecting defendants' proposed standards); *Wyatt v. Stickney*, 325 F. Supp. 781, 785-86 (M.D. Ala. 1971) (90 days to prepare and file plan). The later appointment of a receiver, see *infra* text accompanying note 75, occurred only after finding substantial non-compliance with the court's orders seven years after their entry. Indeed, defendants conceded their non-compliance with the mental health orders. *Wyatt v. Ireland*, C.A. No. 3195-N, memorandum opinion at 2 (M.D. Ala. Oct. 25, 1979). In *Halderman*, Judge Broderick appointed a special master only after the defendants failed to submit an adequate plan to address the unconstitutional conditions found at Pennhurst. *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1325-26 (E.D. Pa. 1977).

eral cases to initiate its own litigation. Arguing that it possessed the inherent authority to sue to redress constitutional violations committed against its citizens, the Justice Department filed suit against officials responsible for the operation of two mental retardation institutions, Rosewood State Hospital<sup>35</sup> and Boulder River State Hospital.<sup>36</sup> The district courts in these cases, however, rejected the Department's theory, and these decisions were affirmed on appeal. Not only did the *Solomon* and *Mattson* decisions undercut the Department's efforts to initiate litigation, but defendants in existing cases in which the United States was a plaintiff-intervenor regularly filed motions to dismiss based on *Solomon* and *Mattson*, asserting that if the government did not have the authority to sue on its own it did not have the authority to intervene. Most courts rejected these arguments, but even when they did so the Department was required to spend much time and effort litigating its authority to sue. If nothing else, these tactics bought defendants time to make at least surface improvements in their facilities.

To remedy the uncertainty of its litigating status, the Justice Department sought passage of a "standing" statute that would allow it to bring on its own the very kinds of cases it had participated in as *amicus curiae* and plaintiff-intervenor. From 1977 to 1979, Congress held extensive hearings on what would become CRIPA.<sup>37</sup> It heard about the appalling conditions in this country's institutions. It heard also of the Justice Department's extensive role in the litigation designed to ameliorate those conditions. Advocates for disabled individuals testified that they were not in a position to bring that litigation on the needed scale without the presence of the Department.<sup>38</sup> Critics of the proposed statute were current or former state officials who railed against what they regarded as the Department's heavy-handed investigatory and litigation activities.<sup>39</sup> Some urged, no doubt disingenuously, that the statute was

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35. *United States v. Solomon*, 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F.2d 1121 (4th Cir. 1977).

36. *United States v. Mattson*, C.A. No. 74-138-BU (D. Mont. Sept. 29, 1976), *aff'd*, 600 F.2d 1295 (9th Cir. 1979).

37. See generally 1979 Senate Hearings, *supra* note 19; *Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); 1977 Senate Hearings, *supra* note 19; *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

38. 1977 Senate Hearings, *supra* note 19, at 179, 182 (testimony of Charles R. Halpern, Director Council for Pub. Interest Law & Member, A.B.A. Comm'n on the Mentally Disabled).

39. See, e.g., 1977 Senate Hearings *supra* note 19, at 556-69 (testimony of Francis B. Burch, Att'y Gen. Md.); *id.* at 572-80 (testimony of Mel Kammerlohr, Asst.

unnecessary because the Justice Department was already able to intervene in cases.<sup>40</sup>

But in passing CRIPA, the majority of Congress determined that the statute was necessary. Senator Birch Bayh, prime Senate sponsor of the Institutionalized Persons bill, stressed that it was a bill designed to protect the constitutional rights of the country's most vulnerable citizens.<sup>41</sup> The Senate Judiciary Committee praised the Department's role in institutional litigation.<sup>42</sup> It noted that while conditions had begun to improve in some state institutions, defendants would have little incentive to continue their improvements without a "real threat of litigation."<sup>43</sup> It further observed that because of their disabilities, isolation, poverty and fear of retaliation, institutional residents themselves were unable to bring lawsuits in their own behalf.<sup>44</sup> Nor did public interest centers and legal aid programs have the resources, manpower, or continuity to litigate a case as fully and extensively as necessary.<sup>45</sup> The Committee determined that it was appropriate for the Justice Department to be given statutory authority to sue because of its financial resources, its knowledge about experts in the field, its complement of highly skilled attorneys, its selectivity in case selection, and its stability and continuity.<sup>46</sup> The authority conferred on the Justice Department by the proposed statute paralleled existing authority in other civil rights statutes.<sup>47</sup>

CRIPA faced little opposition in the House, but was opposed strongly on the Senator floor by several conservative senators. These opponents attacked the Justice Department's role in existing cases, criticized the statute's resort to litigation to deal with institutional problems, and argued that the proposed statute trespassed upon state's rights.<sup>48</sup> Proponents responded by noting that the statute's emphasis on pre-suit negotiation and consultation satisfied legitimate federalism concerns and provided a basis

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Att'y Gen. Neb.); *id.* at 605-14 (testimony of C. Raymond Marvin, Counsel Nat'l Ass'n Att'y Gen.). See also 1979 Senate Hearings, *supra* note 19, at 270-94 (testimony of Thomas Rath, Att'y Gen. N.H.); *id.* at 372-81 (testimony of Otto P. Estes on behalf of Nat'l Ass'n State Mental Retardation Coordinators).

40. 1979 Senate Report, *supra* note 9, at 44 (Minority Views of Sens. Thurmond, Laxalt, Cochran & Simpson).

41. 1979 Senate Hearings, *supra* note 19, at 1-2.

42. 1979 Senate Report, *supra* note 9, at 1-2 & 13-15.

43. *Id.* at 17.

44. *Id.* at 19-21.

45. *Id.* at 21.

46. *Id.* at 22-24.

47. *Id.* at 28-29 (citing various civil rights statutes).

48. 126 Cong. Rec. 3717-18 (1980) (remarks of Sen. Thurmond); *id.* at 3726-28 (remarks of Sen. Morgan).

for the states to avoid extensive litigation, where appropriate. Moreover, they argued further that where conditions were especially egregious, and where the state or local response was inadequate, litigation would be necessary to vindicate the rights of institutionalized persons.<sup>49</sup> Litigation was not a panacea, but in the words of the Senate Committee on the Judiciary:

Experience has shown, however, that [litigation] is also the single most effective method for redressing systematic deprivations of institutionalized persons' constitutional and Federal statutory rights. Until such time as every State and political subdivision assumes full responsibility for protecting the fundamental rights of its institutionalized citizens, the need for Federal enforcement of those rights will continue.<sup>50</sup>

In CRIPA,<sup>51</sup> Congress gave the Justice Department authority to sue when a pattern or practice of "egregious or flagrant" conditions were found to exist in a state or local institution.<sup>52</sup> The statute provided the Department with authority both to initiate and intervene in pending cases. Congress also required the Attorney General to certify prior to filing suit that he had notified the appropriate state or local officials at least seven days in advance of his intent to commence an investigation, and that at least forty-nine days prior to filing suit he had advised these officials of: the alleged unconstitutional and illegal conditions existing at the institutions; the supporting facts; and the minimum measures which, if taken, would remedy those conditions.<sup>53</sup>

CRIPA's requirements that institutional conditions be egregious and flagrant and that the Attorney General certify that he has notified and consulted with state and local officials prior to filing suit are in addition to those required in traditional institutional litigation brought by private plaintiffs pursuant to 42 U.S.C. § 1983. But an examination of CRIPA's legislative history shows that the "egregious and flagrant" language was meant to describe the kinds of conditions uncovered in the Department's previous litigation.<sup>54</sup> And whether the notification language is viewed as a necessary legislative compromise, a response to legitimate concerns of state officials supposedly "surprised" by the existence of flagrantly unconstitutional conditions in their institutions, or an expression of Congress's concern over issues of federalism and comity,<sup>55</sup> it nevertheless is plain that such language was not the *raison d'être* of the statute but merely a procedural limitation on the Department's

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49. *Id.* at 3718-21 (remarks of Sen. Cranston).

50. 1979 Senate Report, *supra* note 9, at 27.

51. 42 U.S.C. § 1997 (1982).

52. 42 U.S.C. § 1997a (1982).

53. 42 U.S.C. § 1997b (1982).

54. 126 Cong. Rec. 3713 (1980) (remarks of Sen. Bayh).

55. *Id.*

ability to sue. Properly applied, those requirements should have added little to the Department's previously-derived procedures for entrance into litigation. Opponents of the statute made dire predictions that if the statute were enacted the Justice Department would run roughshod over the states and file numerous lawsuits. Few people — opponents or proponents — would have thought that four years after passage of CRIPA the Department would not be litigating *any* cases on behalf of institutionalized disabled persons.

### III. THE JUSTICE DEPARTMENT'S ACTIVITIES UNDER THE REAGAN ADMINISTRATION

The Reagan Administration's record of enforcing the rights of institutionalized disabled persons has been retrogressive and its policies misdirected. Yet unlike the Administration's highly publicized reversals in civil rights areas such as employment discrimination, racial discrimination in education and housing, and aid to racially discriminatory schools, the changes in the area of institutional reform litigation were, at first, more subtle, slower in coming, and less clearly defined. In recent months, even as publicity over the Justice Department's policies in this area has increased, the debate between the Administration and its critics has shed more heat than light. To some extent, perhaps inevitably, the controversy has focused more on personalities than policies. But an examination of those policies leaves no doubt that the current administration has retreated from *both* its Republican and Democratic predecessors' commitment to vindicating the rights of disabled persons.

One of the earliest indications of the Justice Department's new philosophy came not in a pending case or investigation but in its interpretation of a Supreme Court case, *Youngberg v. Romeo*.<sup>56</sup> In *Youngberg*, the Court, for the first time, held that involuntarily-committed mentally retarded persons had a substantive due process right to safety, freedom from bodily restraint, and such minimally adequate training as necessary to effectuate these rights. The Court also noted that defendants had conceded that institutionalized residents had a right to receive adequate food, clothing, shelter, and medical care. The Court did not decide whether such residents had a broad right to habilitation per se, concluding that the plaintiff did not pursue such a right and that a decision on the issue was thus unnecessary.<sup>57</sup> The Court also interpreted the record and plaintiff's counsel's oral argument to concede that plaintiff

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56. 457 U.S. 307 (1982).

57. *Id.* at 318 n.23.

was not seeking release from the institution, and "that no amount of training will make possible his release."<sup>58</sup> Thus, the Court had no occasion to consider whether institutionalized persons had a right to receive the training necessary to effectuate their release. In attempting to provide guidance to lower courts, Justice Powell, for the majority, noted that

A court may properly start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that *training which is reasonable in light of identifiable liberty interests and the circumstances of the case*<sup>59</sup>

Since, according to the Court, Nicholas Romeo was claiming only the limited liberty interests of safety and freedom from undue restraint, the nature of the training sought in his case was deemed to be relatively limited.

The Court went on to balance the institutionalized person's liberty interests against the state's interests in operating the institution. It determined that courts should defer presumptively to the judgments of institutional professionals regarding the appropriate course of treatment. If the institution's professionals in fact exercised professional judgment, the plaintiff's due process interests would be satisfied.<sup>60</sup> Thus, in keeping with decisions in the prison and procedural due process fields,<sup>61</sup> the Court provided recognition of a right and at the same time suggested limitation on its exercise by adopting a narrow standard of judicial review.

In his concurring opinion, Justice Blackmun, joined by Justices O'Connor and Brennan, suggested at least two areas in which he might have recognized a broader right to habilitation had the issue been clearly in the case. He noted that under the *Jackson* due process theory, it would have been a serious question whether a state could commit an individual for the purpose of treatment and then

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58. *Id.* at 317. There is some question about whether the Court properly characterized respondent's concession that Romeo's release was impossible. In the oral argument, counsel was asked whether he was arguing that his client was constitutionally entitled to release; he replied that his client could not care for himself by himself or with the help of friends, an obvious reference to the standard advanced in *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Tr. of Oral Arg. at 35, *Youngberg v. Romeo*, 457 U.S. 307 (1982). Counsel's concession that he was not challenging the state's commitment power, *id.*, is not equivalent to conceding that his client was too disabled to be released. In any event, Nicholas Romeo is now out of Pennhurst, living in a community-based program. Brief of PARC at 9n.\*; *Halderman v. Pennhurst State School and Hosp.*, Nos. 78-1490, 78-1564, 78-1602 (3d Cir., pending after remand from Supreme Court).

59. *Youngberg v. Romeo*, 457 U.S. 307, 319 n.25 (1982) (emphasis added).

60. *Id.* at 321-23.

61. *See id.* at 322 n.29.

fail to provide it.<sup>62</sup> Second, he wrote that he would seriously listen to the argument that a state's failure to preserve "those basic self care skills necessary to [a resident's] personal autonomy"<sup>63</sup> would entail an unconstitutional denial of the resident's liberty, irrespective of the effect of such lack of training on the resident's safety and mobility. Justice Blackmun agreed with the majority, however, that the plaintiff in *Youngberg* did not raise these issues clearly. Chief Justice Burger, concurring in the judgment, would have held that institutionalized persons had no right to habilitation per se;<sup>64</sup> he dismissed as "frivolous" the *Jackson* argument that a state statute could create rights entitled to substantive protection under the Due Process Clause.<sup>65</sup> In light of his opinion in *O'Connor v. Donaldson*,<sup>66</sup> the Chief Justice's opposition to a right to habilitation or treatment was not surprising.

*Youngberg* then was one of those decisions that provided something for everyone. Advocates for disabled people hailed it for its recognition of institutionalized persons' substantive due process rights. State administrators and institutional professionals cheered the Court's language regarding deference to professional judgment. The Court, for its part, seemingly went out of its way to issue as narrow a decision as possible, and virtually invited the lower courts and litigators to engage in a dialogue over how the balance of liberty and state interests would be struck in particular cases. It was, accordingly, reasonable to assume that the Justice Department would be part of that dialogue.

*Youngberg* was decided on June 18, 1982. Just six days later, William Bradford Reynolds, Assistant Attorney General of the Civil Rights Division, and the Administration official with primary responsibility for enforcing the rights of institutionalized disabled persons, issued a memorandum to his staff interpreting *Youngberg* and its effect on the Justice Department's litigation program.<sup>67</sup> He determined that henceforth the Department would seek enforcement of *only* those rights explicitly recognized in *Youngberg*, that is, food, clothing, shelter and medical care, reasonably safe conditions, freedom from undue bodily restraint, and training necessary to provided safety and freedom from undue restraint. No longer would the Department pursue matters such as adequacy of psychiatric or psychological care. Implicitly, the memorandum rejected

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62. *Id.* at 325-27 (Blackmun, J., concurring). For a brief examination of the *Jackson* theory, see *supra* notes 20-21 and accompanying text.

63. *Youngberg v. Romeo*, 457 U.S. 307, 328 (1982) (Blackmun, J., concurring).

64. *Id.* at 329 (Burger, C.J., concurring in the judgment).

65. *Id.* at 330 n.\*.

66. 422 U.S. 563, 578 (1975) (Burger, C.J., concurring).

67. See *The Wash. Post*, Sept. 29, 1982, at A2, col. 1 (noting the June 24, 1982 memo and the subsequent controversy).



the position of the Blackmun concurrence in *Youngberg*. For the Justice Department, the dialogue seemingly promised by *Youngberg* was over before the first word was spoken.

The Reagan Administration has read *Youngberg* as the limiting case rather than as the first step in an ongoing process of developing legal standards for the rights of institutionalized persons. It has ignored the post-*Youngberg* lower-court decisions that have attempted to flesh out the case's meaning and interpret it in a moderately expansive manner.<sup>68</sup> In particular, it has shown its insensitivity to existing conditions in state institutions by refusing to consider issues such as lack of habilitation programs, failure to train residents in self-care skills, and enforced resident idleness as subsumed within *Youngberg's* recognition of a right to training. It has failed to heed Judge Judd's insight in Willowbrook that "harm" is more than physical harm.

Moreover, while Mr. Reynolds has recently suggested that the Department now reads *Youngberg* more expansively than it did at first,<sup>69</sup> the record reflects continued rigid adherence to the most parsimonious interpretation of the decision. In letters written to state officials, pursuant to Section 4 of CRIPA,<sup>70</sup> the Justice Department has felt compelled to emphasize its narrow reading of *Youngberg*.<sup>71</sup> In the only mental disability case that the Justice Department has actually initiated under CRIPA, *United States v. State of Indiana*,<sup>72</sup> the settlement agreement jointly proposed by the Department and the state lists as general principles only those rights recognized explicitly by *Youngberg*. Even the more specific relief is limited by references to only the narrowest *Youngberg* rights. In fact, the settlement does not discuss a right to training at

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68. See, e.g., *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473, 485-89 (D.N.D. 1982) (due process requirement of minimally adequate training encompasses self-care skills as expressed by Justice Blackmun in *Youngberg*), *aff'd*, 713 F.2d 1384 (8th Cir. 1983); *Society for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1341-49 (E.D. N.Y. 1983) ("training in basic self-care skills [should] be provided as a constitutional right") *aff'd in part, rev'd in part, remanded in part*, *Society for Good Will to Retarded Children v. Cuomo*, Nos. 83-7621 & 83-7663, slip op. at 4,368-70 (2d Cir. June 13, 1984) (adopting Justice Blackmun concurrence on preservation of self-care skills despite repeating least restrictive alternative analysis). See also, Cook, *The Substantive Due Process Rights of Mentally Disabled Citizens*, 7 MENT. DIS. L. REP. 346 (1983); *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 77, 82-85 (1982) (reasoning that the "majority's liberty based rationale suggests that mental patients have a constitutional right to rehabilitation rather than merely protective treatment").

69. See Reynolds Statement, *supra* note 6, at 6-7.

70. 42 U.S.C. § 1997b (1982).

71. See *Senate Enforcement Hearing*, *supra* note 1, at 74, 80-82 (letters from the Justice Department).

72. C.A. No. IP 84 411C (S.D. Ind. Apr. 6, 1984).

all, but rather "daily medical and custodial care sufficient to guarantee" safety and freedom from restraint.<sup>73</sup>

Reading *Youngberg* narrowly has had another effect as well. State and local officials now know that the Justice Department's "bottom-line" is *Youngberg*. There is thus little incentive for them to improve institutional conditions beyond those mandated by *Youngberg*, narrowly applied. Given the intrinsic flexibility in concepts such as a safe environment, lack of restraint, and training, the Department's *Youngberg* interpretation inevitably stifles state experimentation and denies the heuristic value of the Department's positions.

The Administration's embrace of *Youngberg* has not been restricted to its CRIPA investigations. It has also improperly used *Youngberg* as an excuse to alter its long-standing positions in landmark cases. The clearest example of the Department's reversal of position has been in the *Wyatt* case, now styled *Wyatt v. Ireland*.<sup>74</sup> Over the years, defendants had made some progress in complying with the court's 1972 orders, but by 1979 the lack of compliance was so severe that Judge Johnson placed the state's Department of Mental Health in receivership, naming Governor Fob James as receiver.<sup>75</sup> Subsequently, plaintiffs continued to challenge defendants' compliance with the court orders and the plan of compliance they had submitted. They filed motions to require the provision of additional funding to the state's Department of Mental Health and to replace the Governor with a new receiver. Defendants countered with motions to terminate the receivership entirely and to modify the court's injunctive orders. Plaintiffs and defendants engaged in extensive discovery on compliance. The Justice Department essentially took no position on these matters, although it participated in the compliance discovery during the spring and summer of 1982.

During the mid-1982, while the above activities were occurring, Justice Department officials met a number of times with defendant officials and their lawyers, but not with plaintiffs, in an effort to "settle" the case. These negotiations culminated in a proposed "settlement decree," submitted to the court in late 1982.<sup>76</sup> In this document, the Justice Department agreed with defendants' proposal to modify the existing court orders by replacing them with Joint Commission on Accreditation of Hospitals (JCAH) standards and accreditation procedures for Alabama's mental health institu-

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73. *Id.*, Settlement Agreement at 6-7.

74. C.A. No. 3195-N (M.D. Ala.).

75. *Id.*, Orders of Oct. 25, 1979 & Jan. 15, 1980.

76. *See Wyatt v. Ireland*, C.A. No. 3195-N at 8 n.3 (M.D. Ala. Feb. 1, 1983).

tions and medicaid<sup>77</sup> standards and certification procedures for its mental retardation facilities. Significantly, the joint proposal would not merely substitute one set of professional standards for another, but rather would transfer the determination of compliance with the court's orders from the court itself to non-party JCAH officials and state medicaid surveyors. Achievement of accreditation or certification would "raise a strong but not irrebuttable presumption that the residents within these facilities are receiving constitutionally adequate care and treatment."<sup>78</sup> The standard for constitutional care and treatment would be the narrow *Youngberg* one. Furthermore, as of the date of the proposal, defendants were not in compliance with JCAH standards at their principal mental health facilities, and did not expect to be so for several years. Until compliance was achieved, defendants' facilities would essentially be subject to *no* standards at all, except that conditions could not deteriorate below their then-existing level, a level that plaintiffs' and the Justice Department's evidence showed to be below compliance with the court's orders. Finally, the agreement provided for the termination of court jurisdiction over the mental retardation facilities within one year, and over the mental health facilities within three years of initial JCAH accreditation. Plaintiffs opposed the settlement proposal and the court currently has taken it under advisement as the defendants' and Justice Department's joint proposal for relief.

I have dwelt on the *Wyatt* case at some length for a number of reasons. From 1978-1979 I was a trial attorney, and from 1979-1982 lead trial attorney for the Justice Department on the case, and am thus intimately familiar with the Department's positions and activities in it. More importantly, as noted,<sup>79</sup> *Wyatt* is the landmark right-to-treatment and habilitation case, and was the first case in which the Justice Department appeared as an advocate for the rights of institutionalized persons. *Wyatt* figured prominently in

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77. Title XIX of Social Security Act, 42 U.S.C. § 1396 (1982).

78. *Wyatt v. Ireland*, C.A. No. 3195-N, Proposed Settlement Agreement at 3 (M.D. Ala. 1983). Cf. *Woe v. Cuomo*, 729 F.2d 96, 106 (2d Cir. 1984) (JCAH compliance merely prima facie evidence of adequacy). In a recent statement submitted to two Senate Subcommittees, Secretary of Health and Human Services Margaret M. Heckler reported that a federal "look behind" survey of mental retardation institutions certified by states to be meeting medicaid standards revealed that the facilities had "a range of problems in a number of basic areas, including the provision of active treatment, the monitoring of drugs, and the provision of a safe and sanitary environment." Statement by Margaret M. Heckler, Sec'y of Health and Human Services, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Labor/HHS/Education of the Senate Comm. on Appropriations (July 31, 1984) [hereinafter cited as Heckler Statement].

79. See *supra* notes 10-16 and accompanying text.

Congress's consideration of CRIPA. The Department's reversal of position is, therefore, symbolically significant, both for the field of institutional reform litigation and for the Department itself. Substantively, the Department's recent actions show the extent to which it is willing to apply *Youngberg* unthinkingly and to ignore clear evidence of non-compliance with court orders. Essentially, the Department agreed to reward defendants for their non-compliance with court orders entered ten years previously. The case also reveals the Department's almost visceral reaction against the necessity for the extensive relief historically found to be necessary in institutional litigation. The proposed agreement appears to be nothing so much as a "quick fix" to resolve complex issues. It further shows the Department's willingness to modify existing court orders based on virtually no showing at all.<sup>80</sup> Finally, the Department's recent role in case shows its increasing sensitivity to political concerns.<sup>81</sup>

If *Wyatt* were the only example of the Reagan Justice Department's lack of commitment to the rights of institutionalized disabled persons it might be dismissed as an aberration. Unfortunately, the Department has changed its position in other cases as well. It has refused to support relief even where agreed to by defendants,<sup>82</sup> and in one case supported a proposed consent decree agreed to by defendants only because it determined it would be "unseemly" to oppose it.<sup>83</sup> It has resolutely refused to support any form of expert panel or special master in institutional disability litigation.<sup>84</sup> In a juvenile right-to-treatment case, the Department, prior to *Youngberg*, filed an extensive post-trial brief arguing strenuously for a right to treatment based on *Jackson*, only to reverse itself on appeal, finding that the institutionalized juveniles, many of whom were mentally retarded or emotionally disturbed, were not even entitled to *Youngberg* rights.<sup>85</sup> Recently, in the

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80. A willingness, it should be noted, that is at odds with established judicial doctrines. See *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (modification of decree requires "clear showing of grievous wrong evoked by new and unforeseen conditions"). Cf. *New York Assoc. for Retarded Children v. Carey*, 706 F.2d 956, 965-972 (2d Cir. 1983) (need for flexibility in institutional reform decrees makes modification on behalf of defendants appropriate, but only where proposed modification is in furtherance of purposes of decree).

81. See *The Ala. J.*, Nov. 30, 1982, at 1, col. 5 (charge by one of plaintiff's attorneys that agreement between Justice Department and state was "political deal").

82. See, e.g., *Gary W. v. Louisiana*, C.A. No. 74-2412 "C" (E.D. La.), discussed in *ACLU Report*, *supra* note 1, at 3.

83. *Connecticut Assoc. for Retarded Citizens v. Thorne*, discussed in *Senate Enforcement Hearing*, *supra* note 1, at 119. See also *id.* at 201-02.

84. See *Brief for the United States at 31-32, Pennhurst State School and Hosp. v. Halderman*, 104 S. Ct. 903 (1984).

85. *Santana v. Collazo*, 533 F. Supp. 966 (D.P.R. 1982), *aff'd in part, vacated and*

Eleventh Circuit, the Administration changed its position in a case concerning the rights of handicapped school children under Section 504.<sup>86</sup> In the related area of promulgating Section 504 regulations for federal programs, the Department's proposed regulations have been attached as well.<sup>87</sup>

But most troubling of all was the brief the Justice Department recently filed in the latest remand of *Halderman v. Pennhurst State School and Hospital*.<sup>88</sup> After the Supreme Court reversed<sup>89</sup> on Eleventh Amendment grounds the Third Circuit's decision upholding most of the district court's injunctive relief on the basis of state law, the issue on remand was whether there remained any federal constitutional or statutory basis to support the trial court's judgment. In its brief,<sup>90</sup> the Department withdrew its ten-year support for the plaintiffs' position and argued for reversal of the district court judgment. Once again, it hewed closely to the narrowly drawn *Youngberg* line, but this time with a new twist—the Department explicitly adopted the Chief Justice's "concurrence" in *Youngberg*: "Largely for the reasons articulated by Chief Justice Burger in his concurring opinion in *Romeo* (457 U.S. at 329-331), we believe that involuntarily committed mental health [sic] patients have no substantive constitutional right to habilitation beyond the limited right to training recognized in *Romeo*".<sup>91</sup>

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*remanded in part*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 104 S. Ct. 2352 (1984).

86. Georgia Assoc. of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1580 n.15 (11th Cir. 1983) ("The United States, invited to file a brief as amicus curiae has blown hot, cold and hot as to the coverage under Section 504.") See generally *Senate Enforcement Hearing*, *supra* note 1, at 163 n.16 (statement of Timothy M. Cook).
87. See *Senate Enforcement Hearing*, *supra* note 1, at 127, 164 & 164 n.17; ACLU Report, *supra* note 1, at 20 & 26. See also 48 Fed. Reg. 55,996, 56,003 (1983), 49 Fed. Reg. 7792-93 (1984). The Administration also ran into a firestorm of criticism when it attempted to propose amendments to regulations promulgated under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 (1982), and subsequently was forced to withdraw its proposals. See 47 Fed. Reg. 33,836 (1982) (notice of proposed rule-making); 47 Fed. Reg. 49,871 (1982) (withdrawing proposals).
88. 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded*, 451 U.S. 1 (1981), *judgment reinstated on state law grounds*, 673 F.2d 647 (3d Cir. 1982) (*en banc*), *rev'd and remanded*, 104 S.Ct. 903 (1984). Subsequent to the filing of briefs and oral argument, the parties agreed to a proposed settlement of the case. See proposed Final Settlement Agreement, *Halderman v. Pennhurst State School and Hosp.*, No. 74-1345 (E.D. Pa.) [hereinafter cited as Proposed Settlement Agreement].
89. 104 S. Ct. 903 (1984).
90. Fourth Brief for the United States, *Halderman v. Pennhurst State School and Hosp.*, Nos. 78-1490, 78-1564 & 78-1602 (3d Cir., pending after remand from Supreme Court).
91. *Id.* at 7-8.

The Department's *Pennhurst* brief thus demonstrates conclusively that the Reagan Administration is committed to an unwarrantedly narrow interpretation of *Youngberg*. The brief went on to argue that plaintiffs had no right to community placement, quoting selectively to support its position,<sup>92</sup> rejected (and showed it misunderstood) the *Jackson* treatment theory by adopting the Chief Justice's characterization of it,<sup>93</sup> and rejected use of Section 504 as a basis for creation of community-based services by extending *Southeastern Community College v. Davis*<sup>94</sup> well beyond its context.<sup>95</sup> As in *Wyatt*, the Department's role in *Pennhurst* had been transformed from enforcer of rights of institutionalized disabled people to their vigorous opponent.

These reversals of position have not only been problematic in the specific cases, but have undermined one of the primary sources of the Justice Department's previous strength in the field: the continuity it was able to bring to the often lengthy litigation and compliance processes. Continuity has further suffered in that the Special Litigation Section of the Civil Rights Division has experienced 100 percent personnel turnover in the last one and one-half years, turnover not unrelated to the Department's new policies. The Department's eagerness to change long-standing positions suggests a politicization of the litigation and enforcement processes that inevitably makes it a less credible participant in them. Its interpretation of *Youngberg* and its willingness to use it as a prism through which all matters arising in institutional litigation are viewed forces it into the ignoble position of rejecting all previous knowledge in the field and turning a deaf ear to new and important developments. Thus, the *Jackson* treatment theory is

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92. Compare *id.* at 9 n.3 (citing *New York Assoc. for Retarded Children v. Carey*, 706 F.2d 956, 971 n.19 (2d Cir. 1983), for the proposition that "placement in small community facilities is not appropriate for all mentally retarded persons") with *New York Assoc. for Retarded Children v. Carey*, 706 F.2d 956, 971 n.19 (2d Cir. 1983) ("In this connection we note that *defendants are by no means alone in contending that* placement in small community facilities is not appropriate for all mentally retarded persons.") (emphasis added). The Department, however, has signed the *Pennhurst* Proposed Settlement Agreement, see *supra* note 88, which calls for closure of *Pennhurst* by July 1, 1986, and placement of residents in community living arrangements.

93. Fourth Brief for the United States at 12, *Halderman v. Pennhurst State School and Hosp.*, Nos. 78-1490, 78-1564 & 78-1602 (3d Cir., pending after remand from Supreme Court).

94. 442 U.S. 397 (1979).

95. Fourth Brief for United States at 15-16 *Halderman v. Pennhurst State School and Hosp.*, Nos. 78-1490, 78-1564 & 78-1602 (3d Cir., pending after remand from Supreme Court). Cf. *Dopico v. Goldschmidt*, 687 F.2d 644, 649-53 (2d Cir. 1982) (*Davis* does not preclude relief under Section 504 where plaintiffs are otherwise qualified for a program and do not seek fundamental changes in its nature).

not viable, special masters are never appropriate, harm does not include regression, and community placement can never be constitutionally required, all because *Youngberg* did not explicitly sanction them. But, of course, these issues did not arise in *Youngberg*. The irony with respect to community placement is that the Department's retreat from the "least restrictive alternative" principle comes at a time when, through their policies and statutes, states are increasingly seeking to place institutionalized residents in community-based facilities pursuant to that principle.<sup>96</sup> Even

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96. The Department's reading of *Youngberg* as rejecting the least restrictive alternative principle finds support in some of the recent *Youngberg* lower-court cases, even though the Court clearly did not decide in *Youngberg* whether institutionalized residents had a right to placement in the least restrictive setting. See, e.g., *Society for Good Will to Retarded Children v. Cuomo*, Nos. 83-7621 & 83-7663, slip op. at 4,361-66 (2d Cir. June 13, 1984) (no federal constitutional entitlement to least restrictive alternative). The Second Circuit's decision reversed in relevant part and remanded the district court's finding that *Youngberg* does not necessarily preclude a least restrictive alternative analysis in a case in which the court found that it need not reach that abstract right because testimony and state law implied the desirability of community placement. *Society for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1347 (E.D.N.Y. 1983). Compare *Rennie v. Klein*, 720 F.2d 266, 269 (3d Cir. 1983) (Opinion of Garth, Aldisert & Hunter, J.J.) (*Youngberg's* failure to refer to "least inclusive means" analysis prevents court from using such analysis in instant case) and *id.* at 271 (opinion of Adams, J., concurring in the result) (Supreme Court rejected least intrusive means test) with *id.* at 274 (Weiss, J., dissenting) (*Youngberg* Court found least intrusive standard not relevant to case, but opinion does not purport to reject it). Other recent cases add to the confusion. See, e.g., *Johnson v. Brelje*, 701 F.2d 1201, 1208-10 (7th Cir. 1983) (due process does not include "the right to be treated in the least restrictive environment that money can buy," but does subsume state institution's failure to allow residents sufficient freedom of movement in institution and on grounds); *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473, 486 (D.N.D. 1982) (though *Youngberg* does not specifically address right to placement in least restrictive alternative, Court's analysis implies rejection of absolute right; nevertheless, right to least restrictive method of treatment exists "insofar as professional judgment determines that such alternatives would measurably enhance the resident's enjoyment of basic liberty interests"), *aff'd on other grounds*, 713 F.2d 1384 (8th Cir. 1983).

A full discussion of the least restrictive alternative principle, and an attempt to unsort the confusion that *Youngberg* has spawned, is beyond the scope of this Article. Nevertheless, there appear to be several approaches or theories under which community placement and the least restrictive alternative principle could survive *Youngberg*. For example, insofar as the professional judgments of institutional staff identify specific institutional residents' needs for community placement, the institution's failure to act on such exercises of professional judgment could be a violation of *Youngberg*. Second, to the extent state statutes define the purpose of institutional commitment as care or treatment in the least restrictive setting, a state's failure to transfer a resident to a less restrictive community-based setting would not accord with due process requirements under the *Jackson* theory, see *supra* notes 20-22 and accompanying text, that the nature and duration of commitment bear a

those cases that have questioned some aspects of the principle and its applicability have not gone so far as to remove community placement from the roster of permissible remedies for unconstitutional institutional conditions as the Reagan Administration seems to have done.<sup>97</sup> That numerous lower court cases have recognized the least restrictive alternative principle appears not to matter to Department officials. Unless and until the Supreme Court adopts it, other legal authority is of no moment.<sup>98</sup> Inevitably, one must conclude that the Department of Justice chooses to define and enforce rights selectively unless, as with a definitive Supreme Court decision, it has no choice but to enforce them.

Most of the debate concerning the role of the Reagan Justice

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reasonable relation to the state's statutorily articulated purpose. Third, *Youngberg* does not purport to overrule *O'Connor v. Donaldson*, 422 U.S. 563 (1975), where, as noted, *see supra* note 32, the Court held that a state could not confine without more a non-dangerous individual capable of surviving safely in freedom either alone or with the help of family or friends. At least for high-functioning mentally retarded and mentally ill individuals, placement in a community-based setting with some staff supervision might be analogized to survival with the help of family or friends, such that continued unnecessary confinement of such individuals would violate due process.

The murky state of the law on the least restrictive principle requires those advocating for the rights of institutionalized mentally disabled persons to conceptualize rights carefully, identify likely interests precisely, and develop factual records that demonstrate failure to exercise professional judgment, or to follow it where exercised. Prior to the advent of the Reagan Administration, the Justice Department had the resources, expertise, and will necessary for such analyses. Regretably, the Department's new attitude contributes to the likelihood that those analyses will not be forthcoming.

97. *See, e.g.*, the Nov. 19, 1981 order of the court in *Garrity v. Gallen*, 522 F. Supp. 171, 239 (D.N.H. 1981), *cited in* Post-Trial Memorandum of the United States at 18 n.70, *New York State Assoc. for Retarded Children v. Carey*, 551 F. Supp. 1165 (E.D.N.Y. 1982), in which the court rejected least restrictive alternative principle, but mandated community placement of 235 institutional residents. *But cf. Society for Good Will to Retarded Children v. Cuomo*, Nos. 83-7621 & 83-7663 (2d Cir. June 13, 1984) (reversing district court order requiring placement of 400 institutional residents, though implying that community placement order might be appropriate as remedy for unconstitutional institutional conditions after state officials had opportunity to remediate conditions). The 1982 Willowbrook compliance proceeding, *New York State Assoc. for Retarded Children v. Carey*, 551 F. Supp. 1165 (E.D. N.Y. 1982), *aff'd in part, rev'd in part and remanded*, 706 F.2d 956 (2d Cir. 1983), represents one of the only recent instances where the Justice Department stood with plaintiffs to support community placement relief (mandated by the consent decree in that case). The Department cites *Willowbrook* as one example of its commitment to disabled persons. *See Senate Enforcement Hearing, supra* note 1, at 7 (testimony of William Bradford Reynolds).
98. *Cf. N. Y. Times*, May 13, 1984, at 1, col. 3 (Social Security Administration officials practice policy of "non-acquiescence" in lower court decisions mandating payment of disability benefits, obeying only Supreme Court decisions as precedents).



Department has focused not on what the Department has done but on what it has not done, specifically on what it has not done under CRIPA. Quite simply, the Department has refused to exercise the authority conferred by Congress. It has not actively litigated any mental disability case under CRIPA, and has initiated only one case, *United States v. State of Indiana*.<sup>99</sup> The Reagan Administration has not intervened in any mental disability case under CRIPA. In fact, it rejected staff attorneys' recommendations to intervene in two cases. In one, Administration officials apparently determined that conditions in the institution were so atrocious that involvement of the Department was unnecessary.<sup>100</sup> In the other, the Department rejected a proposed intervention in a case brought against the St. Louis State School and Hospital.<sup>101</sup> In addition to seeking remediation of deleterious institutional conditions, plaintiffs argued that Missouri's placement of class members in community-based settings was unconstitutional because such settings were "*inherently* unable to provide" adequate habilitative services.<sup>102</sup> Mr. Reynolds rejected the proposed intervention because of the presence of competent counsel for plaintiffs and because he determined that the Department should not choose sides in a dispute between those advocating two different forms of relief — institutional improvement versus community placement — to remedy unconstitutional conditions.<sup>103</sup> But the reasoning misconstrued plaintiffs' argument that community placement was *inherently* unconstitutional. Given the Department's view that the state should have the primary say in determining the appropriateness of relief, the St. Louis case would have represented a golden opportunity to assert the legitimacy of the state's choice. The failure to intervene in the St. Louis case raises the Administration's antipathy to community placement to a new level.

The Administration's response to attacks on its lack of litigation activity is to call attention to the number of investigations it has initiated, and to stress that CRIPA favors a voluntary, non-adversarial approach to the amelioration of institutional problems.<sup>104</sup>

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99. C.A. No. IP 84 411C (S.D. Ind. Apr. 6, 1984) (consent decree).

100. See *Senate Enforcement Hearing, supra* note 1, at 117 (Cook Resignation Memorandum; Grafton State School, the subject of *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1983)).

101. *Parents Ass'n of the St. Louis State School and Hosp. v. Bond*, C.A. No. 82-0852-C(3) (E.D. Mo. filed May 28, 1982).

102. *Id.* Plaintiffs' Complaint for Declaratory, Injunctive and Other Relief, at 25 ¶ 76 (emphasis added).

103. See *Senate Enforcement Hearing, supra* note 1, at 106 (memorandum from William Bradford Reynolds to J. Harvie Wilkinson III).

104. *Id.* at 5-6 (testimony of William Bradford Reynolds).

The Administration and its critics have bandied figures about on the number of investigations actually initiated under the Reagan Administration. Taking the latest Administration figures as accurate,<sup>105</sup> the Administration has eighteen pending mental disability investigations. An analysis of those investigations demonstrates the transparency of the Department's arguments. The number of investigations is a statistic that by itself means little. Inevitably, some of the investigations fail to reveal serious problems, but are kept "on the books" to demonstrate apparent activity. Where conditions are seriously inadequate, many of the investigations have been pending for years without resolution, other than that the Department reports that "negotiations" or the "investigations" are continuing.<sup>106</sup> While some degree of negotiation is both appropriate and statutorily required, it is impossible to square negotiations over periods of years with the supposed presence of egregious, flagrant and life-threatening conditions. States have learned that as long as they appear to be cooperative and agree to submit a "plan" to remedy some of their institutional problems, they can put off the Justice Department for years.

In addition, states and localities under investigation are so unconcerned about the Reagan Justice Department, and so convinced that the Department is not serious about investigating, litigating, or enforcing the rights of disabled people, that they have increasingly simply refused to allow the Department's staff to gain access to their institutions or records. The Department's response in many of these investigations has been to keep negotiating.<sup>107</sup>

The Department has denied itself all the negotiation leverage that CRIPA provided. As discussed above,<sup>108</sup> under the statute, the Department must certify that at least forty-nine days prior to

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105. In the Senate Enforcement Hearing, Mr. Reynolds reported that 18 of 41 investigations instituted since the effective date of CRIPA involved mental health and mental retardation institutions. *Id.* at 6. Some of these investigations were begun by the Carter Administration. In its latest annual report to Congress pursuant to 42 U.S.C. § 1997f (1982), the Department reported that it initiated five mental health or mental retardation investigations in Fiscal Year 1983, and that it continued to investigate nine mental health, mental retardation or nursing home institutions pursuant to investigations begun prior to Oct. 1, 1982. Dept. Justice, 1983 Fiscal Year Rep. to Congress Pursuant to Civil Rights of Institutionalized Persons Act 2 (1984) [hereinafter cited as 1984 Report].

106. See 1984 Report, *supra* note 106, at 3, 5, 10-15; *Senate Enforcement Hearing, supra* note 1, at 23-26.

107. See 1984 Report, *supra* note 106, at 4, 6, 8, 11. In response to Hawaii's refusal to allow the Justice Department access to the state's prisons, the Department sued the state under CRIPA, only to have the suit dismissed for failing to comply with the statute's certification requirements. *United States v. Hawaii*, 564 F. Supp. 189, 195 (D. Haw. 1983).

108. See *supra* note 53 and accompanying text.

filing suit it has advised the relevant state or local officials of the unconstitutional or illegal conditions in the institution, the supporting facts, and the minimum measures necessary to remedy those conditions. A Justice Department serious about using its full authority would send such letters and, if it met with opposition or foot-dragging, file lawsuits at or soon after the forty-nine day deadline. But the Department's so called "49-day letters" do not cite to the relevant statutory section of CRIPA and do not mention the possibility that officials' failure to respond adequately to the Department's concerns will lead to litigation.<sup>109</sup> Rather, the letters provide dry, clinical descriptions of findings, vague statements about remedies (in keeping with the Department's resistance to proposing specific relief), and delicately stated requests for meetings at the convenience of the officials in question.<sup>110</sup> At times, the letters are more concerned with stating what the Department will not do than with what it will do.<sup>111</sup> The letters also fail to cite statutory authority such as Section 504 or the Education of the Handicapped Act as a basis for any relief, despite Congress's reference in CRIPA to remediation of conditions that violate federal statutes as well as the Constitution.<sup>112</sup>

Department officials regularly identify one investigation, that of the Dixon Developmental Center, an Illinois mental retardation institution, as an example of the effectiveness of its new approach.<sup>113</sup> They consistently assert that in the face of the Department's investigation, the Governor chose to close the institution. The problem with this example, however, is that it is not true. A local television station ran a series of shows critical of Dixon. At the same time, Governor Thompson was seeking to make Dixon into a prison in order to alleviate prison overcrowding in the state. The Department's investigation hardly began before the Governor announced his pre-emptive step of closing Dixon as a mental retardation facility and turning it into a prison. Thus, Mr. Reynold's claim that the investigation forced Dixon's closure is disingenuous at best. Moreover, given the Department's reluctance to pursue specific remedies in their cases or investigations, it defies belief to think that the

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109. *See, e.g.*, letters reproduced in *Senate Enforcement Hearing, supra* note 1, at 63-86.

110. *Id.*

111. *Id.* at 74, 80-81.

112. *Id.* at 160, 163 (statement of Timothy M. Cook). Reference to federal statutory sources for relief would be especially important in light of the Second Circuit's recent analysis in *Society for Good Will to Retarded Children v. Cuomo*, Nos. 83-7621 & 83-7663 (2d Cir. June 13, 1984), rejecting a federal constitutional right to least restrictive placement, but remanding for consideration of possible federal statutory support for the concept.

113. *Id.* at 6 (testimony of William Bradford Reynolds).

Department would ever seek the closure of a large mental retardation facility.

The Administration's claim that CRIPA demonstrated Congress's dissatisfaction with lengthy litigation<sup>114</sup> finds no support in the legislative history, except from a few officials or senators clearly antagonistic to the goals of the statute.<sup>115</sup> Insofar as the Department claims that the measure of its success should not be the number of cases filed but the number of instances in which "constitutionally intolerable situations have been remedied,"<sup>116</sup> it has failed to provide any indication that such a remediation process has occurred.<sup>117</sup> Discussions concerning agreements by officials to submit plans sometime in the future do not demonstrate the remediation of intolerable conditions. Nor is the Department's lackluster enforcement record faithful to CRIPA and its history. The Administration's focus on conciliation to the virtual total exclusion of litigation turns history on its head. Congress hardly needed to pass a statute empowering the Department to negotiate. Rather, it passed a statute designed to authorize the Department to *sue* recalcitrant state and local officials if unconstitutional institutional conditions went unremedied, and balanced that authority with a sensible and not unprecedented requirement that such suits be filed only after reasonable efforts to induce voluntary cooperation had failed. But as Congress so clearly foresaw, unless litigation remained a credible threat, the incentive to negotiate would be non-existent.

The Reagan Justice Department's approach to institutional reform litigation is symptomatic of its ahistorical approach to civil rights issues generally. In the *Bob Jones University* case,<sup>118</sup> the Administration looked at the legal issue of tax exemption for racially discriminatory schools as if the government's historic commitment to civil rights were non-existent and congressional interpretations of that commitment irrelevant. So too in the area

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114. *Id.* at 4-5.

115. See, e.g., *1979 Senate Hearings*, *supra* note 19, at 28 (Sen. Strom Thurmond).

116. *Senate Enforcement Hearing*, *supra* note 1, at 5 (testimony of William Bradford Reynolds).

117. In fact, several of the facilities recently reviewed and found wanting by Health and Human Services Secretary Heckler's staff are under Justice Department investigation. See *Senate Enforcement Hearing*, *supra* note 1, at 26; Heckler Statement, *supra* note 78. In addition, in response to information presented at the Senate Enforcement Hearing, Senator Weicker's staff recently completed site visits of several unnamed mental retardation institutions and found numerous problems regarding, *inter alia*, lack of privacy, abuse and neglect, and lack of treatment and habilitation. See generally, *Conditions in Intermediate Care Facilities for the Mentally Retarded*, Report to the Chairmen, Senate Subcomm. on the Handicapped (July, 1984).

118. *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983).

of institutional reform litigation, the Administration has reverted to a state's rights, "hands off" policy that blithely assumes, contrary to the historical record: that state and local officials are ready, willing, and able to correct unconstitutional conditions without the threat or fact of litigation; that such officials' protests about excessive federal involvement must always be taken at face value; and that mere *promises* to comply with the Constitution are sufficient to ensure the vindication of institutionalized persons' rights.

The essential question remains, however: is not the Justice Department entitled to act as it sees fit, and are not the disagreements between the Administration and its critics simply disagreements over legal philosophy, as Department officials contend? I would argue that the "choice" of the Department's role in institutional reform litigation has already been made through the previously-described activities of the legislative, executive, and judicial branches over the past thirteen years. These activities have reflected a growing societal recognition that institutionalized disabled persons are entitled to the same constitutional protections as other citizens, and that civil rights law enforcement properly extends to disabled individuals as well as to blacks and women. Mercifully, the doors of the institution have been pried open; they cannot now be closed. The Attorney General, as the government's chief law enforcement officer, and the Assistant Attorney General for Civil Rights, as the official primarily responsible for enforcement of the government's civil rights policies, are institutionally charged with enforcing the rights of all citizens, including disabled persons. And if there was any doubt about the nation's commitment to enforce the rights of institutionalized persons, the passage of CRIPA in 1980 removed it. For the Justice Department to ignore these responsibilities is to consign a group of the nation's citizenry to oblivion.

#### IV. CONCLUSION

The one case the Justice Department cites as indicative of its commitment to the rights of disabled people is the Baby Jane Doe case.<sup>119</sup> In that case, the Department advocated and litigated vigorously for the right of the Department of Health and Human Services to examine hospital records of Baby Jane Doe in order to ensure that she was not being denied medical care impermissibly because of her mental and physical handicaps.<sup>120</sup> I do not wish to

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119. *United States v. University Hosp. of the State Univ. of New York*, 729 F.2d 144 (2d Cir. 1984), *aff'd* 575 F. Supp. 607 (E.D.N.Y. 1983).

120. For a general discussion of that case, see Comment, *Baby Doe Decisions: Modern Society's Sins of Omission*, 63 NEB. L. REV. 888, 889-93 (1984).

argue the merits of the Department's involvement in the case. But the irony should not be lost on those who seek to assess the Justice Department's record in enforcing the rights of mentally disabled persons. The Department is prepared to litigate fully the important right of one handicapped infant to receive medical treatment on a non-discriminatory basis. But if Baby Jane Doe survives, the Reagan Administration's cuts in federal funding for social programs may make her placement in an institution inevitable, or certainly more likely. And once Baby Jane Doe was institutionalized the Department, in all likelihood, would, consistent with its current policies, refuse to look into the institutional conditions and treatment to which Baby Jane Doe and her fellow residents would be subjected because to do so would be too intrusive and inconsistent with its "hands-off" policy. A policy that leads simultaneously to such conclusions is nonsensical.

As a result of its misreading of *Youngberg*, its reversals in *Wyatt*, *Pennhurst*, and other cases, and its utter failure to enforce CRIPA, the Department Justice has manifestly failed to extend to institutionalized disabled persons the rights that are properly theirs. Where once there was the possibility of justice, there is now the absence of Justice.