SOCIETAL PREJUDICE REFLECTED IN OUR COURTS: THE UNFAVORABLE TREATMENT OF THE MENTALLY RETARDED

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I. INTRODUCTION

The mentally retarded have been subjected to centuries of discrimination, from their treatment in the ancient civilizations of Greece and Rome to their treatment in the United States today.[1] People who are mentally retarded have been segregated from the rest of the population because of fear, ignorance and prejudice.[2] In this country's early years those with mental disabilities were treated no better than prostitutes and drunkards, and could be sold to anyone who volunteered to care for them in exchange for the lowest amount of public funds.[3] Later, due to growing humanitarian concern about retarded individuals combined with concern about the presence of retarded individuals in

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[1] *See* SAMUEL J. BRAKEL, THE MENTALLY DISABLED AND THE LAW 9-16 (1985).

[2] *See infra* notes 30-43 and accompanying text (discussing prejudice against the mentally handicapped in the United States).

[3] WOLF WOLFENSBERGER, THE ORIGIN AND NATURE OF OUR INSTITUTIONAL MODELS 3 (1975). Indeed, in 1722 Connecticut established its first house of correction; it was to contain rogues, vagabonds, the idle, beggars, fortune tellers, diviners, musicians, runaways, drunkards, prostitutes, pilferers, brawlers—and the mentally afflicted. *Id.* (citation omitted).

society, the institutionalization of retarded individuals became more and more commonplace.[4] Fear of the retarded led not only to their being institutionalized, but also to their being forcibly sterilized.[5]

Mental retardation is defined by the American Association on Mental Deficiency (A.A.M.D.) as involving below average intellectual functioning and deficits in adaptive behavior which are displayed during the developmental period.[6] Identification of a person with mental retardation is made when the person's behavior noticeably deviates from the accepted norm.[7] People with mental retardation are divided into four classes: mild retardation, moderate retardation, severe retardation, and profound retardation.[8] Placement in one of these classes is dependent upon the individual's performance on standard intelligence quotient ("IQ") tests.[9] Mildly retarded people have IQs between 50 and 70 and are considered "educable."[10] Moderately retarded people have IQs between 35 and 49 and are thought to be "trainable."[11] Severely retarded people have IQs between 20 and 34 and are not thought to benefit from vocational training.[12] Those with profound mental retardation have IQs below 20 and generally need to be supervised.[13]

The mentally retarded need the protection of our judicial system to guard against unfair treatment. In light of the rampant discrimination

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[4] Marie S. Crissey, *The Legacy Of The Residential Institution, in* INSTITUTIONS FOR THE MENTALLY RETARDED 1, 5 (Marie S. Crissey & Marvin Rosen eds., 1986). For a discussion of the nature of institutions for the retarded and their emergence, see WOLFENSBERGER, *supra* note 3.

[5] *See infra* notes 36-46 and accompanying text.

[6] PHILIP C. CHINN ET AL., MENTAL RETARDATION 4 (1975). A person's intellectual function is assessed by standardized tests. *Id.* at 21. Adaptive behavior is "the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group." *Id.* The deficits in behavior for the same individual will vary because expectations for different age groups vary. *Id.* The "development period" is defined as the period up to age 18. *Id.*

[7] *Id.* at 5. The age at which this identification is made depends largely on the degree of retardation; a severely retarded individual may be so identified shortly after birth, while a person with a lesser degree of retardation may not be diagnosed as such until he begins to talk or enters school. *Id.*

[8] BRAKEL, *supra* note 1, at 16 n.42 (citation omitted).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

these citizens have endured at the hand of a society which is often ignorant of their capabilities and uniqueness, the continued denial of special constitutional protection is wholly unreasonable. Society's prejudice against people with mental retardation may be attributed to fear of the unknown or to ignorance, but our judicial system cannot blind itself to such injustice and certainly cannot aid or condone it by refusing to recognize the mentally disabled as a suspect class.

This Comment will trace the manner in which the mentally retarded have historically been discriminated against and ostracized, and will explore the current societal attitude toward those with mental retardation. It will also discuss the development of community homes for the developmentally disabled, and address the means by which courts have considered and attempted to relieve the unique barriers faced by people with developmental disabilities.[14]

II. EARLY TREATMENT

In ancient Greece and Rome, those with mental disabilities were thought to be witches, or somehow evil and demonically possessed.[15] During this era, the "cure" often prescribed to individuals suffering from mental disabilities consisted of extremely tortuous acts such as removing

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[14] Although there are technical differences between the labels "mentally retarded," "mentally disabled" and "developmentally disabled," these labels have been used interchangeably by the courts and will be so used throughout this Comment to describe or refer to people with mental retardation. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 7 (1980); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1984); Mental Health Ass'n v. Elizabeth, 434 A.2d 688, 690 (N.J. Super. Ct. Law Div. 1981).

[15] THE COUNCIL OF STATE GOVERNMENTS, STATE RESPONSIBILITIES TO THE MENTALLY DISABLED at 2 (1976) [hereinafter STATE RESPONSIBILITIES TO THE MENTALLY DISABLED]. *See also* BRAKEL, *supra* note 1, at 9. The Puritans in early America, too, were suspicious of any deviation from normal behavior, and sought to explain such deviations in terms of the supernatural. WOLFENSBERGER, *supra*, note 3, at 3. Indeed, there is some belief that retarded persons were hanged and burned as suspected witches. *Id.* Another attitude toward the retarded is demonstrated by the writings in the Twelve Tables of Rome in 449 B.C., which provided "*Si furiosus escit, agnatum gentilumque in eo pecuniaque ejus potestas esto . . . est ei custos no escit* [if a person is a fool, let this person and his goods be under the protection of his family or his paternal relatives, if he is not under the care of anyone]." BRAKEL, *supra* note 1, at 2. (translation in original) (citation omitted).

parts of their skulls to permit the evil spirits to leave their bodies.[16] Similarly, in ancient Egypt, the mentally disabled were subjected to religious incantations and threats by priests.[17] Some improvement to the inhumane treatment of the mentally retarded, however, was later made when Hippocrates[18] and other Greek physicians recognized that mental retardation was a *medical*, rather than a *religious* condition.[19] Indeed, rather than professing misguided attempts to "cure" the mentally handicapped, Hippocrates hypothesized that the best treatment for mentally disabled individuals was for them to be confined in a clean and well-lit environment.[20]

In thirteenth century England, the mentally disabled were divided into two groups: "idiots"—persons who had "no understanding" from birth—and "lunatics"—people who once had understanding, but had lost the use of reason.[21] During this period, society undertook to protect the retarded—their property was protected by various laws, and they could not be convicted of felonies or murder because it was thought they could not have the intent to commit crime.[22] Four centuries later, in

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[16] BRAKEL, *supra* note 1, at 9. Another method used to drive out the spirits was crushing the body of the afflicted person. *Id.* Those classified with mental disabilities could also be deliberately abandoned, and were considered incapable of human feeling. STANLEY P. DAVIES, SOCIAL CONTROL OF THE MENTALLY DEFICIENT 15 (1930). Indeed, the laws in existence seemed more concerned about the protection of the goods of a mentally handicapped person and control of the person than with that individual's rights. BRAKEL, *supra* note 1, at 9.

[17] *Id.* The priests also would use herbs and oils in attempting to cure their patients. *Id.*

[18] Hippocrates was a Greek physician (460-377 B.C.) frequently referred to as the "father of medicine." 12 COLLIER'S ENCYCLOPEDIA 135 (William D. Halsey & Bernard Johnston eds., 1990). Hippocrates authored numerous writings about the practice of medicine, perhaps the most famous of which is the Hippocratic Oath, which established moral standards for the profession of medicine. *Id.* at 137. A version of the Hippocratic oath is still taken by physicians. *Id.*

[19] *Brakel, supra* note 1, at 9.

[20] *Id.* Until this development, the ancient Greeks believed that mental disabilities were supernaturally induced and accordingly the priests attempted to use religious means to effect a cure. *Id.*

[21] *Id.* at 10 (citation omitted). These two groups of individuals were treated differently in that the king would take custody of the land of idiots, after providing for the individual's needs, and would be allowed to retain all profits from the land. *Id.* However, the king only *held* the land of lunatics, and the profits from the land went to the maintenance of the individual and his household. *Id.* Thus, guardianship over an idiot was profitable, while guardianship over a lunatic was not. *Id.*

[22] *Id.* at 11.

Beverly's Case,[23] Lord Coke categorized the mentally disabled into four classes: (1) "[t]he idiot or natural fool"; (2) "[H]e who was of good and sound memory, and by the visitation of God has lost it"; (3) "[L]unatics, those who are sometimes lucid and sometimes non compos mentis"; and (4) "[T]hose who by their own acts deprive themselves of reason, as the drunkard."[24]

These classifications affected the contract, criminal, and legal rights of mentally disabled people. For example, a person classified as a lunatic was responsible only for actions taken during one of his lucid moments; actions taken when he was *non compos mentis* were void.[25] Similarly, those who by their own actions deprived themselves of reason could not attempt to use insanity as a defense to a civil or criminal suit.[26] Another result of the classification system was that a person classified as an idiot had to personally appear in court, while an underage person who had become *non compos mentis* had a guardian to represent him and a *non compos mentis* person who had reached majority was represented by an attorney.[27] Additionally, the different classifications affected the manner in which an individual's property was treated. An idiot's person and goods were in the king's custody and the king could void any action taken by the idiot.[28] By contrast, the king could void only those transactions made by a lunatic in a non-lucid moment; when the lunatic was lucid, the king was accountable to him.[29]

In colonial America, the mentally retarded were primarily cared for by their families.[30] In situations where the family of a mentally retarded person was unable to provide the necessary care for him or had refused to do so, that individual was either placed in an almshouse,[31]

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[23] 4 Coke Rep. 124, 76 Eng. Rep. 1118 (K.B. 1603).

[24] BRAKEL, *supra* note 1, at 10-11. For the original language of this decision, see *Beverly's Case*, 76 Eng. Rep. at 1122. Interestingly, Lord Coke's classifications are still somewhat in use today. *See, e.g., In re* Pickles' Petition, 170 So. 2d 603, 609-10 (Fla. Dist. Ct. App. 1965) (discussing Lord Coke's opinion in considering a sanity petition).

[25] BRAKEL, *supra* note 1, at 11.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] STATE RESPONSIBILITIES TO THE MENTALLY DISABLED, *supra* note 15, at 2; BRAKEL, *supra* note 1, at 12.

[31] An "almshouse" is a house for paupers who are either publicly or privately supported. BLACK'S LAW DICTIONARY 77 (6th ed. 1990).

or forced to drift from town to town.[32] It was not until the late 1700's that hospitals were established specifically for the treatment of those with mental disabilities.[33] These facilities were erected because of the evolving belief that confining all people with mental disabilities together under a common roof would more likely result in a cure.[34] Another reason for the institutionalization of the mentally disabled was the community's fear of being forced to associate with people suffering from any type of mental disability or handicap.[35] This societal apprehension arose from ignorant misconceptions about the mentally retarded's supposed propensity for criminal behavior and prolific reproductive tendencies, as well as from misplaced concerns that the mentally disabled could "undermine the American race."[36] In 1927, Justice Oliver

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[32] STATE RESPONSIBILITIES TO THE MENTALLY DISABLED, *supra* note 15, at 2; BRAKEL, *supra* note 1, at 12. The townspeople made no distinction between those who possessed mental disabilities which rendered them unable to work and those who simply did not want to work due to laziness; all were just "drifters" worthy of contempt. BRAKEL, *supra* note 1, at 12. The people of the time equated industry and work with moral worthiness, and designed laws and punishments to force individuals to labor. *Id.* The mentally handicapped thus endured treatment ranging from being ridiculed by village children to being whipped, and were forced to beg to survive. *Id.*

[33] BRAKEL, *supra* note 1, at 13. In 1751, the Pennsylvania General Assembly authorized a hospital to treat the mentally ill, and in 1773, Virginia built a hospital to treat the mentally disabled. *Id.* Thereafter, facilities were also built in Connecticut, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, South Carolina, Tennessee, and Vermont. STATE RESPONSIBILITIES TO THE MENTALLY DISABLED, *supra* note 15, at 2. For an in-depth discussion of American institutions for the mentally retarded see PETER L. TYOR & LELAND V. BELL, CARING FOR THE RETARDED IN AMERICA (1984).

[34] STATE RESPONSIBILITIES TO THE MENTALLY DISABLED, *supra* note 15, at 2. Indeed, during this period it was widely believed that since all medical resources would be housed in one location, and because mentally disabled individuals would be placed in a peaceful, quiet setting rather than a home which might be a very troubled one, people with these disabilities would have a much greater likelihood of being successfully treated and possibly cured. *Id.*

[35] *Id.* at 3. This fear arose from the perception that mentally handicapped people were a menace to society because they harbored disease and disability, and their dependency cost taxpayers millions of dollars. TYOR & BELL, *supra* note 33, at xiii. The mentally retarded were also thought to be alcoholics, criminals, and likely to bear illegitimate children. CRISSEY, *supra* note 4, at 5.

[36] Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 845 (1986).

Wendell Holmes articulated this view in *Buck v. Bell*.[37] Indeed, while considering whether an eighteen-year-old "feeble-minded" woman could be forcibly sterilized, Justice Holmes stated:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. *It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.*[38]

Further comparing the involuntary sterilization of mentally disabled women to compulsory vaccination, Justice Holmes declared the oft-quoted phrase: "[t]hree generations of imbeciles are enough."[39]

The *Buck* court's decision epitomized the theory expounded by the Eugenics Movement, whose proponents were concerned about an increasing "defective" population which, unless controlled, would deplete the country's limited supply of resources and "undermine the American race."[40] Moreover, Eugenicists encouraged the "best stock" to marry early and procreate, and sought to repress groups such as immigrants

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[37] 274 U.S. 200 (1927). For a more elaborate discussion of the *Buck* decision, see Robert L. Burgdorf, Jr. & Marcia P. Burgdorf, *The Wicked Witch Is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995 (1977); Robert J. Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981); Dudziak, *supra* note 36; Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30 (1985).

[38] *Buck*, 274 U.S. at 207 (emphasis added). Ironically, it was later suggested that neither the plaintiff in *Buck* nor her daughter were, in fact, mentally retarded. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1209-10 n.17 (1990) (citation omitted). *See also* Burgdorf *supra*, note 37, at 1006-07; Lombardo, *supra* note 37, at 61. Indeed, as an adult, Carrie Buck was able to converse intelligently and was an avid reader. *Id.* Moreover, Carrie's daughter Vivian, who attended school for two years before dying at the age of eight, earned good grades and even a place on the school's honor roll. *Id.*

[39] *Buck*, 274 U.S. at 207.

[40] Dudziak, *supra* note 36, at 842-45. For a sharp criticism of Justice Holmes' decision in *Buck*, see Burgdorf, *supra* note 37, at 1006 (discussing Justice Holmes' erroneous assumptions that the plaintiff and her child were mentally retarded and his reliance on Eugenic theories which later were discredited).

and the poor from bearing children.[41] In fact, supporters of the Eugenics Movement advocated segregation of the mentally retarded into state facilities and compulsory sterilization programs of the kind upheld by the court in *Buck*.[42] In writing the majority opinion in *Buck*, Justice Holmes used emotional rhetoric and appealed to the racism and fear of the mentally retarded plaguing society at the time to achieve his goal of advancing Eugenics.[43]

Eugenic sterilization is not now widely accepted in the United States, where geneticists maintain that it is probable that less than half of all mental retardation is due to genetic factors.[44] Although Eugenic

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[41] Dudziak, *supra* note 36, at 843-44. Other groups targeted for Eugenic sterilization were: the insane; criminals and delinquents; epileptics; drunkards; drug abusers; persons suffering from diseases such as tuberculosis, syphilis, leprosy and other infectious, chronic, and legally segregable diseases; the blind and seriously visually impaired; the crippled; orphans; the homeless; and tramps. George P. Smith, II, *Genetics, Eugenics, and Public Policy* 1985 S. ILL. U. L.J. 435, 439. A number of Eugenics supporters of believed that by 1980 only 1500 people out of every 100,000 would be feebleminded, and had the goal of building sufficient institutions to care for this number. *Id.*

It is important to note that there are two aspects to the Eugenics theory: positive Eugenics and negative Eugenics. Supporters of positive Eugenics sought to encourage those with traits they perceived as socially beneficial to marry individuals with likewise desirable traits and to procreate. *Id.* at 438. Proponents of negative Eugenics sought to eliminate socially inadequate traits through mandatory sterilization. *Id.* at 439.

[42] Dudziak, *supra* note 36, at 846. Eugenics caught on quite strongly among the superintendents of state institutions for 'feeble-minded' people. *Id.* at 845. These superintendents had a "sense of duty to protect American society from the danger posed by negative hereditary characteristics" and believed that "absent social control of the reproduction of feeble-minded people, American society would be swamped with incompetence." *Id.* (internal citations omitted). The mandatory sterilization expounded by the Eugenics Movement was primarily inflicted on mentally retarded people, along with the mentally ill, criminals and epileptics. Elizabeth S. Scott, *Sterilization Of Mentally Retarded Persons: Reproductive Rights And Family Privacy*, 1986 DUKE L.J. 806, 809 n. 11. For a review of more current sterilization laws, see *id.*

[43] Dudziak, *supra* note 36, at 865. *See also*, Hayman, *supra* note 38, at 1206-11 ("Justice Holmes' assertion begs the question, 'just what are three generations of imbeciles "enough" for?' His opinion provides no explicit answer, and although his rhetoric does not make him the best candidate for a purely syllogistic construction, both the text and the context seem to make the answer sufficiently obvious: three generations of imbeciles are enough for the social good, and a fourth, of course, would be too much.").

[44] Nicholas D. Kristof, *Chinese Region Uses New Law to Sterilize Mentally Retarded*, N.Y. TIMES, Nov. 21, 1989 at A1, A10. Indeed, according to one genetics expert, Dr. James F. Crow of the University of Wisconsin: "[t]here are many causes of mental disease and deficiency—some genetic, some environmental, some simple and some complex." *Id.* at A10.

sterilization is currently widely criticized in the United States, involuntary sterilization of the mentally disabled is still an accepted practice in some countries.[45] For example, Gansu, a province in northwestern China, recently ordered the sterilization of mentally retarded people desiring to marry, and required any mentally retarded woman who became pregnant to undergo an abortion.[46]

III. LEGISLATION

Although the number of facilities for the treatment of the mentally retarded increased in the United States during the Nineteenth century, these institutions, that originally were designed to provide treatment for and possibly cure those with mental disabilities, soon became overcrowded places for long-term custodial care instead.[47] Consequently, the government stepped in, albeit gradually, in an effort to enact legislation which would improve the quality of life for those with mental disabilities. Indeed, in 1963, Congress passed the Mental Retardation Facilities and Community Mental Health Centers Construction Act[48] to provide treatment and care for the mentally retarded in certain communities rather than in large, impersonal institutions.[49]

Eleven years later, the Developmentally Disabled Assistance and Bill of Rights Act of 1974[50] was passed for the purpose of assisting Americans with developmental disabilities.[51] Several years later,

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[45] Nicholas D. Kristof, *Some Chinese Provinces Forcing Sterilization of Retarded Couples*, N.Y. TIMES, Aug. 15, 1991 at A1, A8.

[46] *Id.* The law has not raised any concern in China, perhaps because the focus in China has historically been on the collective good, rather than on individual rights. *Id.* The attitude in China toward the mentally retarded is epitomized in a statement Prime Minister Li Peng made before a committee in 1990: "Mentally retarded people give birth to idiots. They can't take care of themselves, they and their parents will suffer, and they'll be detrimental to our aim of raising the quality of the people." *Id.*

[47] STATE RESPONSIBILITIES TO THE MENTALLY DISABLED, *supra* note 15, at 3.

[48] 42 U.S.C.A. § 2661 (West 1973).

[49] BRAKEL, *supra* note 1, at 607.

[50] 42 U.S.C.A. §§ 6000-83 (West 1983 & Supp. 1991).

[51] The first section of the Act states: "individuals with disabilities occurring during their developmental period are more vulnerable and less able to reach an independent level of existence than other handicapped individuals who generally have had a normal developmental period on which to draw during the rehabilitation process." *Id.* at § 6000. The Act defines a developmental disability as:

Congress enacted The Fair Housing Act,[52] which specifically helps those with mental disabilities to obtain equal access to housing.[53] Moreover, this Act prohibits any form of discrimination in the sale or rental of housing based on a person's handicaps.[54] This legislation was an attempt by Congress to protect those with handicaps[55] in the same manner that other minorities are protected from housing discrimination.[56]

> a severe, chronic disability of a person 5 years of age or older which (A) is attributable to a mental or physical impairment or combination of mental and physical impairments; (B) is manifested before the person attains age twenty-two; (C) is likely to continue indefinitely; (D) results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and, (vii) economic self-sufficiency; and, (E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated; except that such term when applied to infants and young children means individuals from birth to age 5, inclusive, who have substantial developmental delay or specific congenital or acquired conditions with a high probability of resulting in developmental disabilities if services are not provided.

Id. at § 6001 (West Supp. 1991).

[52] 42 U.S.C.A. §§ 3601-31 (West 1977 & Supp. 1991).

[53] *Id.*

[54] *Id.* at § 3604. The Fair Housing Act states in pertinent part:

> [I]t shall be unlawful . . . [t]o make, print, or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make such preference, limitation or discrimination.

Id.

[55] The Act states that a person has a handicap if he has "a physical or mental impairment which substantially limits one or more of . . . [his] major life activities," if he has a record of having such a limitation, or if he is "being regarded as having such an impairment." *Id.* at § 3602(h) (West Supp. 1991).

[56] The first section of the Act states: "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." *Id.* at § 3601 (West 1977). In addition to the laws promulgated in the United States, the United Nations, in 1973, issued the Declaration on the Rights of Mentally Retarded Persons. G.A. Res. 2856. The resolution declared:

IV. DEINSTITUTIONALIZATION AND THE RIGHT TO TREATMENT

A. CONSTITUTIONAL RIGHT TO TREATMENT

As a result of society's fear of people with mental retardation, an alarming number of mentally disabled individuals have been institutionalized, thereby resulting in the extreme overcrowding of state facilities.[57] Although these facilities managed to continue providing

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> The General Assembly . . . [p]roclaims this Declaration on the Rights of Mentally Retarded Persons and calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights: 1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings. 2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential. 3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities. 4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life. 5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests. 6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility. 7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.

Id.

[57] *See* Association for Retarded Citizens of N.D. v. Olson, 561 F. Supp. 473, 478 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1984). The state institution at issue in *Olson* had a patient capacity of 378 persons, but at the time of the suit had 799 people in residence. *Id.* For a discussion of the prejudice and fear which led to the institutionalization of the retarded, see Bruce G. Mason & Frank J. Menolascino, *The Right To Treatment For Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124, 130-36 (1976).

food and shelter for their residents, many institutions began to neglect the treatment and aid they once provided their patients as a direct result of massive overpopulation.[58] Consequently, the mentally retarded became "prisoners" in these institutions and forgotten by society.[59] Moreover, having no hope of learning the necessary skills to function independently in society, the mentally disabled were relegated to remaining in these institutions for the remainder of their lives.[60]

Wyatt v. Stickney,[61] decided in 1971, was one of the first cases to find a constitutionally protected right to treatment for the mentally retarded committed to state institutions. In *Wyatt*, the guardians of patients at Bryce Hospital in Alabama and some employees of the state's Mental Health Board assigned to the hospital sued Alabama state officials alleging that the hospital's planned dismissals of some employees constituted a denial of adequate treatment to patients at Bryce.[62] The plaintiffs alleged that the reduction in personnel made it impossible for the hospital to render suitable and adequate treatment to its patients.[63] The District Court for the Middle District of Alabama found that the treatment which had been provided at the hospital was both scientifically and medically inadequate.[64] The district court then determined that where a person is committed to a state institution for treatment and not provided with any, "the hospital is transformed 'into a penitentiary where

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[58] *See* Mason & Menolascino, *supra* note 57, at 132-37.

[59] *See generally* James T. Hogan, *Community Housing Rights For The Mentally Retarded*, 1987 DET. C.L. REV. 869, 870.

[60] *See generally* Mason & Menolascino, *supra* note 57, at 130-36.

[61] 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). For a detailed discussion of the *Wyatt* decision, see Jack Drake, *Judicial Implementation and* Wyatt v. Stickney, 32 ALA. L. REV. 299 (1981).

[62] *Wyatt*, 325 F. Supp. at 782; Drake, *supra* note 61, at 300. The officials sued were: the commissioner of Alabama's Department of Mental Health; the deputy commissioner of the Department of Mental Health; members of the Alabama Mental Health Board; the governor of Alabama; and the probate judges of Montgomery County, Alabama. *Wyatt*, 325 F. Supp. at 782. The named defendant, Dr. Stonewall B. Stickney, was the State Mental Health Officer. *Id.*

[63] *Wyatt*, 325 F. Supp. at 784. Bryce was primarily a mental hospital with the majority of its 5,000 patients having been involuntarily committed. *Id.* at 782. However, about 1,600 geriatric patients were confined at the hospital and were receiving only custodial care and no treatment. *Id.* at 784. Moreover, about 1,000 mentally retarded individuals were confined to Bryce; they too received no treatment but custodial care only. *Id.*

[64] *Id.* The hospital had recently changed to a new method of rendering treatment, known as the unit-team approach, but the court made no findings regarding the adequacy of treatment to be provided under that system. *Id.* at 784-85.

one could be held indefinitely for no convicted offense."[65] Accordingly, the court declared: "[t]o deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."[66]

Similarly, in *Welsch v. Likins*,[67] six mentally retarded residents of a state institution sued the Commissioner of Public Welfare of Minnesota contending that they were not being provided with proper "habilitation"[68] programs in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[69] In addition to the right to habilitation and treatment, the plaintiffs further maintained that the Due Process Clause entitled them to be placed in a less restrictive setting within the community.[70] In considering whether these rights did in fact exist for the mentally retarded, the District Court for the District of Minnesota began by discussing a prior decision

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[65] *Id.* at 784 (quoting Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960)).

[66] *Id.* at 785. The court of appeals in *Wyatt* further found that in addition to the lack of treatment provided at the hospital, the conditions in which the patients were forced to endure were horrendous. Hogan, *supra* note 59, at 877. In fact, the court of appeals went on to describe the total lack of privacy and sanitary practices in the institution: there were no partitions in the bathrooms, no place to store clothing or other personal items, the dining areas and kitchens were infested with insects, and feces and urine were not cleaned from the floors. *Wyatt*, 503 F.2d at 1310. The appellate court concluded its analysis by stating that the food came "closer to 'punishment by starvation' than nutrition." *Id.*

[67] 373 F. Supp. 487 (D. Minn. 1974), *aff'd*, 525 F.2d 987 (8th Cir. 1975).

[68] Although the court in *Welsch* did not explicitly define "habilitation," it did say that it included "individualized treatment, education and training." *Id.* at 490. Moreover, the American Psychiatric Association maintains that the prime purpose of habilitation "is training and development of needed skills." Youngberg v. Romeo, 457 U.S. 307, 309 n.1 (1981) (quoting Brief for American Psychiatric Association as *Amicus Curiae* at 4 n.1).

[69] *Welsch*, 373 F. Supp. at 490. The Due Process Clause of the Fourteenth Amendment provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The plaintiffs additionally claimed that certain conditions and restrictions at the institutions violated the Eighth Amendment's prohibition of cruel and unusual punishment. *Welsch*, 373 F. Supp. at 491. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[70] *Welsch*, 373 F. Supp. at 490-91. The plaintiffs in effect asserted that hospitalization should only be undertaken as a last resort, and that the defendants had an obligation to develop facilities within the community for mentally retarded persons. *Id.* at 501.

rendered in the District of Columbia Circuit Court which found that an involuntarily committed mentally ill person had a statutory right to treatment.[71] The *Welsch* court then noted, however, that states are not constitutionally obligated to provide institutions for the mentally retarded.[72] Nevertheless, the court declared that once a state undertakes to institutionalize its mentally disabled citizens—those who are not confined for criminal reasons—the state must provide adequate treatment.[73]

Eight years later, in *Youngberg v. Romeo*,[74] the United States Supreme Court finally addressed the issue of whether there is in fact a constitutionally protected right to habilitation for mentally retarded persons.[75] In *Romeo*, Nicholas Romeo, a thirty-three year old profoundly mentally retarded person, was a patient at Pennhurst State School and Hospital, a state institution for the mentally disabled.[76] After Romeo had been injured on numerous occasions while at the institution, his mother became concerned and objected to the treatment

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[71] *Id.* at 491-92 (citing Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966)). The plaintiff in *Rouse* had been committed involuntarily to a mental hospital after being acquitted on a misdemeanor charge by reason of insanity. *Id.* at 491. The plaintiff petitioned for a writ of habeas corpus alleging a right to be discharged because he was not receiving adequate treatment. *Id.* The district court denied the writ and the court of appeals reversed and remanded, finding that the 1964 Hospitalization of the Mentally Ill Act, D.C. CODE § 21-562 (Supp. V, 1966) created a right to treatment for mentally disabled individuals. *Id.* at 491-92.

[72] Welsch v. Linkins, 373 F. Supp. 487, 499 (D. Minn. 1974), *aff'd*, 525 F.2d 987 (8th Cir. 1975).

[73] *Id.* The court defined adequate treatment as treatment which would give the mentally handicapped individual "a realistic opportunity to be cured or to improve his or her mental condition." *Id.* (citation omitted).

[74] 457 U.S. 307 (1982). For a detailed discussion of the *Romeo* decision, see Peggy S. Hooker, *Non-Deterioration of Self-Care Skills In Institutionalized Mentally Retarded Persons:* Youngberg *And Its Progeny*, 14 LAW & PSYCHOL. REV. 239 (1990).

[75] *Romeo*, 457 U.S. at 307.

[76] *Id.* at 309-10. Romeo had an I.Q. of between 8 and 10 and was totally unable to care for himself. *Id.* at 309. Romeo lived with his parents until he was 26, when his father died and his mother was unable to care for him alone. *Id.* Romeo's mother had him temporarily admitted to a nearby hospital, and soon thereafter requested that Romeo be admitted to a state facility. *Id.* In her petition to the Philadelphia County Court Of Common Pleas, Romeo's mother stated that she was not able to care for Romeo and could not control his violence. *Id.* After examination, both a physician and a psychologist certified that Romeo was severely retarded, and accordingly the court committed Romeo to Pennhurst. *Id.* at 309-10.

that he was receiving.[77] Accordingly, his mother sued the institution's officials as his next friend,[78] alleging that on at least sixty-three occasions Romeo had suffered injuries while under the care of the state facility,[79] thereby violating Romeo's rights under the Eighth and Fourteenth Amendments.[80] The defendant conceded that the plaintiff had "a right to adequate food, shelter, clothing and medical care," but questioned whether a protected liberty interest in the training, freedom of movement, and safety of institutionalized mentally retarded patients was safeguarded by the Constitution.[81]

In a unanimous decision authored by Justice Powell,[82] the Supreme Court held that freedom from bodily restraint and the right to personal safety are interests protected by the Due Process Clause, and that because convicted criminals retain these interests, so must the involuntarily committed mentally retarded.[83] The *Romeo* court further concluded that mentally disabled institutionalized individuals are entitled to such training as would ensure their safety and help them function

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[77] *Id.* at 310. According to the complaint, Romeo had been injured at least 63 times. *Id.* at 310. Additionally, Romeo had suffered a broken arm. *Id.*

[78] A "next friend" is an officer of the court who acts for the benefit of a minor or a person who cannot manage his own lawsuit or look after his interests. BLACK'S LAW DICTIONARY 1043 (6th ed. 1990). A next friend has generally the same functions as a guardian *ad litem*. *Id.* at 1044.

[79] Youngberg v. Romeo, 457 U.S. 307, 310 (1982). The Court stated that the plaintiff occasionally became violent, and that some of his injuries resulted from his violence, while others were inflicted by other residents of the institution. *Id.* at 310. The plaintiff was also placed in restraints while confined in the hospital portion of the institution. *Id.*

[80] For the relevant text of the Eighth and 14th amendments, see *supra* note 69.

[81] *Romeo*, 451 U.S. at 315.

[82] Justices Brennan, White, Marshall, Blackmun, Rehnquist, Stevens, and O'Connor joined in the opinion. *Id.* at 308. Justice Blackmun wrote a concurring opinion, which Justices Brennan and O'Connor joined. *Id.* Chief Justice Burger wrote an opinion concurring in the judgment. *Id.*

[83] *Id.* at 315-16 (citations omitted). The Court stated: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Id.* The Court went on to note, however, that an institution could not afford its residents total safety from violence if it was to allow them any freedom of movement. *Id.* at 320. The right to be free from bodily restraint also is not absolute, the Court declared, because at times it would be necessary for the State to restrain individuals to protect that person and other residents, and to allow the resident to participate as well. *Id.* at 319-20.

without needing restraints to control aggressive behavior.[84]

Justice Powell's opinion failed to address the issue of whether the institutionalized mentally disabled are entitled only to treatment to control their aggressiveness, or whether they have an additional right to receive therapy designed to prevent the deterioration of their existing skills.[85] In his concurring opinion, however, Justice Blackmun addressed this issue and concluded that "it would be consistent with the Court's reasoning today to include within the 'minimally adequate training required by the Constitution,' . . . such training as is reasonably necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commitment."[86] The concurring Justice reasoned that if a person lost those skills which he had when he entered the institution, that individual would have experienced a loss of liberty as serious as the one found protectable by the majority—the loss of freedom from unreasonable restraint and the loss of safety.[87] Justice Blackmun explained that "[f]or many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they will ever know."[88]

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[84] *Id.* at 319-24. In articulating the test to determine whether the institutionalized individual's Due Process rights were infringed upon, the Court gave deference to a concurring opinion filed in the case below by Chief Judge Seitz of the Third Circuit Court of Appeals. *See id.* at 321. Judge Seitz stated: "the Constitution only requires that the courts make certain that professional judgment was in fact exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." *Id.* (citation omitted). The Court adopted Judge Seitz's reasoning and further stated that a professional's decision is presumptively valid and that liability could be imposed only when the decision was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323 (citation omitted).

[85] *Id.* at 318 n.23. The Court noted that Romeo had asserted such a claim at trial but did not assert the claim before it, and that such claim was expressly disavowed by Romeo's attorney at oral argument. *Id.* at 318 n. 23.

[86] *Id.* at 327 (Blackmun, J., concurring) (emphasis in original).

[87] *Id.*

[88] *Id.* Justice Blackmun further opined that if a state confines a person for both care and treatment, that state is then required to provide treatment and conditions which bear a reasonable relation to these purposes. *Id.* at 326 (Blackmun, J., concurring). Thereafter, Justice Blackmun agreed with the majority that the plaintiff had failed to assert a claim of entitlement to treatment beyond that necessary to provide for his safety and freedom from restraint. *Id.* at 327-28 (Blackmun, J., concurring). The concurring Justice stated, however, that if the plaintiff was in fact seeking habilitation to prevent the deterioration of basic self-care skills needed for personal autonomy, "I would be

Most significantly, Justice Blackmun's proffered analysis regarding the constitutional rights of the mentally retarded in *Romeo* has been adopted by several courts. For example, in *Association For Retarded Citizens of North Dakota v. Olson*,[89] the district court, adhering to Justice Blackmun's reasoning, stated: "[g]iven the great difference that *minimum* self-care skills make in the life of most mentally retarded persons, this court regards the acquisition and maintenance of those skills as essential to the exercise of basic liberties."[90] Likewise, in *Thomas S. by Brooks v. Flaherty*,[91] the district court found that mentally retarded people "have a constitutional right to habilitation which is minimally adequate to *maintain* basic self-care skills."[92]

Many courts have since extended the right to minimal treatment and habilitation[93] articulated by the Supreme Court in *Romeo* by requiring

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prepared to listen seriously to an argument that petitioners were constitutionally required to provide that training, even if [plaintiff's] safety and mobility were not immediately threatened by their failure to do so." *Id.* at 329 (Blackmun, J., concurring). But, Justice Blackmun did agree with the majority that if a mentally retarded person had *no* basic skills upon entering the institution, or if training would not have maintained his existing skills, due process would not have been violated if the state failed to provide training since the individual would not have suffered an additional loss of liberty. *Id.*

[89] 561 F. Supp. 473 (D.N.D. 1982).

[90] *Id.* at 487 (emphasis in original).

[91] 699 F.Supp. 1178 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir.), *cert. denied*, 111 S. Ct. 373 (1990). The plaintiff in *Thomas*, a mentally retarded person, sued his guardian, the Secretary of the North Carolina Department of Human Resources, and local agencies, alleging that they had failed to provide him with minimally adequate treatment and that his confinement in a state hospital unduly restrained his liberty. *Id.* at 1181. The district court held that mentally retarded patients have a right to minimally adequate training which would "tend to render unnecessary the use of chemical restraint, shackles, solitary confinement, locked wards, or prolonged isolation from one's normal community." *Id.* at 1201 (emphasis omitted).

[92] *Id.* (emphasis in original). The *Thomas* court further held that the conditions should be normal enough "to promote rather than detract from one's chances of living with fewer restrictions on one's movement." *Id. But see* Lelsz v. Kavanagh, 807 F.2d 1243, 1251 (5th Cir.), *cert. dismissed sub nom.* Association For Retarded Citizens v. Kavanagh, 483 U.S. 1057 (1987) (finding that mentally retarded people do not have a right to habilitation in a minimally restrictive environment).

[93] Although the term "treatment" is technically only applied to mental illnesses which can be cured, and the term "habilitation" applied to the education and training given to people with mental retardation, courts have generally used the two terms interchangeably. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 7 n.2 (1980).

that this treatment be given in the least restrictive environment.[94] The usual effect of this expanded interpretation of the *Romeo* decision by the judiciary is that rather than being institutionalized, the mentally retarded individual is placed into a community atmosphere, such as a group or a foster home.[95]

B. COMMUNITY HOMES FOR THE DEVELOPMENTALLY DISABLED

In *Pennhurst State School and Hospital v. Halderman*,[96] the United States Supreme Court considered whether the Developmentally Disabled Assistance and Bill of Rights Act of 1975[97] (the "Act") which provided that the developmentally disabled have a right to habilitation and that such habilitation should be provided in the least restrictive setting possible,[98] required that people with mental retardation be taken out of institutions and placed into group homes within the community.[99]

Pennhurst was a Pennsylvania state institution containing about 1200

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[94] *See, e.g.*, Clark v. Cohen, 794 F.2d 79 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986) (holding that plaintiff's right to minimally adequate treatment was violated because she remained institutionalized although it was the unanimous recommendation of the professionals who treated her that she be placed in a less restrictive environment); Kentucky Ass'n For Retarded Citizens v. Conn, 510 F. Supp. 1233 (W.D. Ky. 1980) (holding that involuntarily committed patients are entitled to the mode of treatment which is the least restrictive and that those who were voluntarily institutionalized are entitled to be released at their own request).

[95] Jan C. Costello & James J. Preis, *Beyond Least Restrictive Alternative: Mentally Disabled Persons In The Community*, 20 LOY. L.A. L.REV. 1527, 1528-29 (1987).

[96] 451 U.S. 1 (1981).

[97] 42 U.S.C.A. §§ 6000-81 (West 1983 & Supp. 1991).

[98] 42 U.S.C.A § 6010 (renumbered at 42 U.S.C.A. § 6009) (West 1983 & Supp. 1991). The statute provides in relevant part:

> (1) Persons with developmental disabilities have a right to appropriate treatment, services and habilitation for such disabilities. (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

Id.

[99] *Pennhurst*, 451 U.S. at 10-11. The plaintiffs had also alleged that the Rehabilitation Act of 1973, 29 U.S.C.A. § 701 (West 1985 & Supp. 1991), gave them rights to treatment in the least restrictive alternative, i.e., community housing. *Id.* at 6 (citing 29 U.S.C.A. §701). The Court, however, only analyzed the Developmentally Disabled Assistance Act, and never discussed the Rehabilitation Act. *See id.* at 11.

residents, the majority of whom were severely or profoundly retarded.[100] The plaintiff filed a suit on behalf of herself and a class comprised of other Pennhurst residents alleging that the conditions at Pennhurst were inhumane, unsanitary and dangerous.[101] The District Court for the Eastern District of Pennsylvania found that the conditions at the institution not only were inadequate for the treatment of the retarded, but also had caused the emotional, intellectual and physical skills of some residents to deteriorate.[102] The district court thus found that the conditions existing at Pennhurst violated the residents' constitutional rights to minimally adequate habilitation in an environment that is the least restrictive and ordered the eventual deinstitutionalization of all Pennhurst residents.[103]

On appeal, the Court of Appeals for the Third Circuit substantially affirmed the district court's holding and declared that the Developmentally Disabled Assistance and Bill of Rights Act alone provided the specified rights, and never reached the constitutional arguments.[104] The Supreme Court granted certiorari and reversed and remanded the court of appeals' decision.[105] The Court found that the bill of rights provision did not require community placement, but merely expressed the congressional intent "to encourage, rather than mandate, the provision of better services to the developmentally disabled."[106]

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[100] *Pennhurst*, 451 U.S. at 5. Additionally, some of the residents were physically handicapped. *Id.* at 5-6.

[101] *Id.* at 6.

[102] *Id.* at 7. Indeed, the court found that residents were often drugged by the institution's staff and sometimes were physically abused. *Id.*

[103] *Id.* Specifically, the court held that a right to "be free from harm" existed under the Eighth Amendment and that the Equal Protection Clause of the Fourteenth Amendment mandated that residents receive nondiscriminatory habilitation. *Id.* Additionally, the court found that § 201 of the Pennsylvania Mental Health And Mental Retardation Act of 1966, PA. STAT. ANN. TIT. 50, § 4201 (Purdon 1969) and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 established the right to minimally adequate habilitation in the least restrictive setting. *Id.*

[104] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 8 (1981). The court of appeals did not interpret the Act as requiring the closing of Pennhurst; rather, it remanded the case to the lower court for individualized determinations of each resident's suitability for deinstitutionalization. *Id.* at 9.

[105] *Id.* at 5.

[106] *Id.* at 20. The Court first noted that the Act's main purpose was to assist the states in providing services to the disabled. *Id.* at 11. The Court then stated: "[n]othing in either the 'overall' or 'specific' purposes of the Act reveals an intent to require the States to fund new, substantive rights." *Id.* at 18.

Accordingly, the Supreme Court held that the Act established "a national policy to provide better care and treatment to the retarded and created funding incentives to induce the States to do so. But the Act does no more than that."[107]

More recently, the United States Court of Appeals for the Fifth Circuit in *Lelsz v. Kavanagh*[108] held that the state has no duty to provide the best care or location to improve a mentally retarded person's condition.[109] In *Lelsz*, residents of three Texas state institutions for the retarded sued state officials alleging abuse of mentally retarded patients, and asserting that habilitation in the least restrictive setting possible was required.[110] In reviewing the district court's decision requiring that some residents be removed from institutions and placed into community settings, the United States Court of Appeals for the Fifth Circuit declared that no federal constitutional right to treatment in the least restrictive setting exists, and vacated and remanded the judgment of the lower court.[111]

Similarly, in *S.H. v. Edwards*,[112] the United States Court of Appeals for the Eleventh Circuit held that as long as the decision to keep the mentally retarded institutionalized comports with professionally accepted standards, the state is not required to deinstitutionalize patients and place them in community homes.[113] Despite the lack of federal

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[107] *Id.* at 31. In a strong concurrence, Justice Blackmun stated that Congress "intended to do more than merely set out politically self-serving but essentially meaningless language about what the developmentally disabled deserve at the hands of state and federal authorities." *Id.* at 32 (Blackmun, J., concurring in part and concurring in the judgment). The concurring Justice further opined that the intent of Congress in passing the Act was to establish standards which individual states would be required to meet before they could receive federal aid. *Id.* at 34-35 (Blackmun, J., concurring in part and concurring in the judgment).

[108] 807 F.2d 1243 (5th Cir.), *cert. dismissed sub nom.* Association For Retarded Citizens v. Kavanagh, 483 U.S. 1057 (1987).

[109] *Id.* at 1251. Although it followed the *Romeo* majority's reasoning, the court noted that *Romeo* "may eventually have to be squared with the duty of a state to prevent the deterioration of skills of the retarded committed to its institutions . . . ." *Id.*

[110] *Id.* at 1245.

[111] *Id.* at 1251, 1255. The district court had ordered the deinstitutionalization of all residents pursuant to a consent decree entered between the parties which required the state to use its "best efforts" to provide community treatment centers. *Id.* at 1245. The appellate court held that the lower court lacked jurisdiction to enforce the decree because no federal right to habilitation in the least restrictive alternative exists. *Id.* at 1251.

[112] 860 F.2d 1045 (11th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989).

[113] *Id.* at 1046.

regulations or judicial mandates *requiring* group homes, many states have passed legislation encouraging their establishment in various communities.[114] Consequently, conflicts often arise between state governments who want to establish community homes and neighborhoods which frequently oppose the location of these homes. A great deal of confusion, therefore, has developed from jurisdiction to jurisdiction with some permitting the establishment of group homes[115] and others refusing them.[116] Neighbors opposing the location of a

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[114] *See, e.g.*, ARK. CODE ANN. § 20-48-602 (Michie 1987 & Supp. 1991); CAL. HEALTH & SAFETY CODE § 436.41 (West 1991); DEL. CODE ANN. tit. 9, § 4923 (1989 & Supp. 1990); FLA. STAT. ANN. §§ 393.062-393.066 (West 1986 & Supp. 1992); HAW. REV. STAT. § 333F-2 (1988 & Supp. 1991); IDAHO CODE § 39-3304 (1948 & Supp. 1991); IOWA CODE ANN. § 358A.25 (West 1991 & Supp. 1992); KAN. STAT. ANN. § 12-736 (1990); KY. REV. STAT. ANN. § 194.245 (Michie/Bobbs-Merrill 1971 & 1991 Supp.); LA. REV. STAT. ANN. § 28.476 (West 1990); MONT. CODE ANN. § 53-20-301 (1978 & Supp. 1991); OKLA. STAT. ANN. tit. 60, § 863 (West 1992); W.VA. CODE § 49-4A-1 (1966 & Supp. 1992).

[115] *See, e.g.*, Costley v. Caromin House, Inc., 313 N.W.2d 21 (Minn. 1981) (holding group home for six mentally retarded adults not violative of restrictive covenants or of city zoning ordinance restricting area to one and two-family homes); Mongony v. Bevilacqua, 432 A.2d 661 (R.I. 1981) (finding six mentally retarded adults living in a group home to be a "family" within the meaning of a zoning ordinance restricting the area to single family homes); Region 10 Client Management v. Hampstead, 424 A.2d 207 (N.H. 1980) (holding that eight developmentally disabled adults and two staff members do not constitute a "family," but upholding group home's location for public policy reasons); Special Children's Village, Inc. v. Baton Rouge, 472 So. 2d 233 (La. App. 1985) (striking down as unconstitutional local zoning ordinance which gave surrounding neighbors power to prevent a group home from being located in their neighborhood); Northwest Residence Inc. v. Brooklyn Ctr., 352 N.W.2d 764 (Minn. App. 1984) (allowing a group home over city's objections that the group home had inadequate parking and insufficient recreational facilities, and would increase traffic dangers and lessen enjoyment of adjacent property); West Monroe v. Ouachita Ass'n for Retarded Children, Inc., 402 So.2d 259 (La. App. 1981) (finding six mentally retarded residents of a group home to be a "family" within meaning of city zoning ordinance); Mental Health Ass'n of Union County, Inc. v. City of Elizabeth, 434 A.2d 688 (N.J. Super. Ct. Law. Div. 1981) (striking down local zoning regulations which would prohibit construction of community homes for mentally retarded adults because they conflicted with intent of state legislature to establish group homes).

[116] *See, e.g.*, Garcia v. Siffrin Residential Ass'n., 407 N.E.2d 1369 (Ohio 1980), *cert. denied*, 450 U.S. 911 (1981) (holding that eight mentally retarded adults do not constitute a "family" for zoning purposes and striking down state statute which specifically permitted the establishment of group homes); Citivans Care, Inc. v. Board of Adjustment of Huntsville, 437 So. 2d 540 (Ala. Civ. App. 1983) (holding two group homes to house six mentally retarded adults each to be boarding houses and thus violative of single-family home only zoning ordinance); Penobscot Area Hous. Dev. Corp. v. Brewer, 434 A.2d 14 (Maine 1981) (holding that mentally retarded residents of a group home failed

group home in their community have argued that the home does not comply with local zoning regulations because their neighborhood is zoned for residential family use only, and that group home residents do not constitute a family but are excludable as boarders or tenants.[117] Fear that property values would decrease has also been advanced as a reason for neighborhood opposition to group homes.[118] Another method of successfully excluding group homes within a specific community is through the use of an alternative zoning ordinance which specifically classifies such a home as a school, a medical facility, a boarding house or a business, thus relegating group homes to nonresidential areas.[119] A third type of zoning ordinance used to prevent the opening of a group home in a certain area allows the establishment of group homes in residential areas, but requires the operator of the home to acquire a special use permit.[120]

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to show a "domestic bond" between them, and thus group home was not allowed in a single-family only area because residents did not constitute a "family").

[117] *See, e.g., Oachita Ass'n for Retarded Children Inc.*, 402 So.2d at 262. In *Oachita*, the city argued that a group home which would house six mildly-to-moderately retarded adults did not fit within the definition of a family residence, but was more like a convalescent home or a nursing home. *Id.* at 262-63. The zoning ordinance at issue in the case defined a family as "[o]ne (1) or more persons living together as a single housekeeping unit, which may include not more than four (4) lodgers or boarders." *Id.* at 263. The court concluded, however, that the residents of the group home did constitute a family for purposes of the ordinance. *Id.* at 266. *See, e.g., Citivans Care, Inc.*, 437 So. 2d at 541; *Penobscot Area Hous. Dev. Corp.*, 434 A.2d at 17; *Mongony*, 432 A.2d at 662; *Region 10 Client Management*, 424 A.2d at 208. *But cf. Region 10 Client Management Inc.*, 424 A.2d at 209. In *Region 10*, the court found that the proposed residents of a group home would not constitute a family for purposes of the zoning ordinance. *Id.* The court allowed the group home to be established, however, by finding that the state had meant to facilitate the establishment of such group homes, and that this legitimate government purpose could not "be frustrated by local zoning restrictions." *Id.*

[118] *See, e.g., Garcia*, 407 N.E.2d at 1380. Indeed, in deciding to disallow the establishment of a group home, the *Garcia* court considered testimony of a real estate broker and a city resident maintaining that property values had been diminished in other areas where group homes were established. *Id.* Although the court noted that the evidence given by the city resident "may not have been probative of the issue of the lowering of property values in this . . . neighborhood due to the placement of this facility," it found that the trial court had not erred in admitting this evidence. *Id.*

[119] Arlene S. Kanter, *Recent Zoning Cases Uphold Establishment of Group Homes for the Mentally Disabled*, 18 CLEARINGHOUSE REV. 515, 516 (1984).

[120] *Id.* To obtain this special use permit, the operator must show that the home meets certain elucidated requirements or restrictions on the maximum number of residents of the home. *Id.* But, these requirements are often quite stringent, and a special use

In 1984, the United States Court of Appeals for the Fifth Circuit decided the seminal case of *Cleburne Living Center, Inc. v. City of Cleburne*.[121] The *Cleburne* case arose when a woman purchased a home in the city of Cleburne, Texas, with the intent to lease it to an operator of group homes for the mentally retarded.[122] The city informed Cleburne Living Center, Inc. ("CLC"), who was to operate the proposed home, that a special permit was required and CLC accordingly submitted an application.[123] The city held a public hearing regarding the application, and the City Council denied the special use permit.[124] The CLC then sued the city and a number of officials alleging that the ordinance discriminated against mentally retarded people and was invalid both on its face and as applied.[125] The district court found that the ordinance was, in fact, constitutional, but the Court of Appeals for the Fifth Circuit reversed. Most significantly, the Fifth Circuit held that the mentally retarded are a quasi-suspect class—a finding crucial for Equal Protection analysis.[126]

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permit will usually only be granted following a public hearing at which community residents may voice their opposing views. *Id.*

[121] 726 F.2d 191 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).

[122] City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 435 (1985). The home was to house 13 retarded adults, and had four bedrooms and two baths.

[123] *Id.* at 436.

[124] *Id.* at 437. The vote was 3 to 1 to deny the application. *Id.*

[125] *Id.*

[126] The Equal Protection Clause of the Fourteenth Amendment states: "[n]o state shall make or enforce any law which shall . . . deny to any person the . . . equal protection of the laws." U.S. CONST. amend. XIV, § 21. This clause has been interpreted to require that persons similarly situated must be treated alike. *See* Plyler v. Doe, 457 U.S. 202, 216 (1982). To accomplish the ends of "equal protection," the Supreme Court has established several levels of review for particular scenarios.

The lowest level of scrutiny the Court will apply is deemed rational basis review. *See* Exxon Corp. v. Eagerton, 462 U.S. 176, 195-96 (1983); Western & Southern Life Ins. Co., v. Board of Equalization, 451 U.S. 648, 668 (1981). *See also* Gordon W. Johnson, *Equal Protection and the New Rational Basis Test: the Mentally Retarded are not Second Class Citizens in* Cleburne, 13 PEPP. L. REV. 333, 336-37 (1986). To be upheld under the rational basis test, a statute must merely have a rational relationship to a legitimate state purpose. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971); Turner v. Fouche, 396 U.S. 346, 362 (1970). *See also* David J. Berge, Comment, City of Cleburne, Texas v. Cleburne Living Center, Inc.: *The Mentally Retarded and the Demise of Intermediate Scrutiny*, 20 VAL. U. L. REV. 349, 356 (1986). Applying this test, most statutes will be upheld. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). This level of review is typically used for laws affecting economic rights, education, employment and taxes. *See, e.g.*, Railway Express Agency,

In *Cleburne*, the Fifth Circuit found that the mentally retarded had been historically mistreated, were subjected to discrimination which reflected deep-rooted prejudice, were politically powerless, and that the characteristics of mentally retarded people were immutable.[127] The court thus concluded that mental retardation is a suspect classification, making it the first United States Court of Appeals to classify mental retardation as such.[128] The appellate court applied an intermediate

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Inc. v. New York, 336 U.S. 106 (1949); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

By contrast, the highest level of scrutiny is reserved for statutes regulating a "suspect class" or impinging upon a "fundamental right." *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 375-76 (1971) (holding that alienage is a suspect class); Hernandez v. Texas, 347 U.S. 475, 479-80 (1954) (holding that national origin is a suspect class); Korematsu v. United States, 323 U.S. 214, 216 (1944) (finding race to be a suspect class). *See also* Timothy J. Moore, Note, *Shedding Tiers for the Mentally Retarded*: City of Cleburne v. Cleburne Living Center, 35 DEPAUL L. REV. 485, 492-93 (1985) (The Court has held that classifications based on race, national origin, and alienage are inherently suspect). *See also* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (finding that interstate travel is a fundamental right); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (deciding that voting is a fundamental right). Suspect classification depends upon whether a group is found to be "discrete and insular." United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938). In considering whether a group meets this criteria, the Supreme Court has focused on whether a group's characteristics are "immutable," whether the group has been subjected to historical prejudice, whether the group is politically powerless, and whether the classification likely reflects deep-seated prejudice. *See* Mississippi Univ. For Women v. Hogan, 458 U.S. 718, 729-30 (1982). *See also* Plyler v. Doe, 457 U.S. 202, 216, n.4, 220 (1982); Frontiero v. Richardson, 411 U.S. 677, 686 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). A statute subjected to strict scrutiny review must serve a compelling state interest and be narrowly tailored to serve that interest. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); Johnson, *supra* note 126, at 336.

In between the strict scrutiny and the rational basis tests is a middle level of scrutiny used to review legislation involving a "quasi-suspect" class. *See* Craig v. Boren, 429 U.S. 190 (1976) (striking down gender-based discrimination in sale of beer and finding that although state interest in public health was strong, there was not a sufficient link between gender and drunk driving); *Reed*, 404 U.S. at 71; Levy v. Louisiana, 391 U.S. 68 (1968) (While purporting to use a rational basis standard, the court struck down a statute which denied an illegitimate child the right to recover for the wrongful death of a parent). *See also* Johnson, *supra* note 126, at 339. *See generally* Note, *Quasi Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912 (1981). To survive this level of scrutiny, the legislation must substantially relate to a legitimate state interest. *Craig*, 429 U.S. at 210 (Powell, J., concurring).

[127] *Cleburne*, 726 F.2d at 197-98.

[128] *Id.* at 198. In 1974, the North Dakota Supreme Court suggested that severely handicapped people are a suspect class because they have certain immutable characteristics. In the Interest of G.H., 218 N.W.2d 441, 447 (N.D. 1974).

level of scrutiny and struck down the zoning ordinance because it did not further an important governmental interest.[129]

The United States Supreme Court granted certiorari and held the ordinance, which required a special use permit to be obtained for the construction of hospitals for the "feeble-minded," was indeed invalid, but found that mental retardation was neither a suspect nor a quasi-suspect classification.[130] In refusing to extend suspect or quasi-suspect classification to those with mental retardation, the Court reasoned that because the "mentally retarded have a reduced ability to cope with and function in the everyday world," the state's interest in legislating to provide for them was legitimate.[131] The majority averred that recently enacted federal legislation indicated that the antipathy and prejudice toward the retarded was abating, and therefore, there was no need for "more intrusive oversight by the judiciary."[132] It is somewhat ironic, however, that the Court partially grounded its opinion on the fact that the Developmentally Disabled Assistance and Bill of Rights Act gave those with mental retardation "the right to receive 'appropriate treatment, services and habilitation' in a setting that is 'least restrictive of [their] personal liberty,'"[133] when the Court had previously held that this provision of the Act granted no rights, but was merely a declaration of Congress' intent.[134]

The *Cleburne* Court further asserted that the mentally retarded could not be a suspect or quasi-suspect class because they were not "politically powerless in the sense that they have no ability to attract the attention of the lawmakers."[135] The majority then noted that although discrimination against the retarded is "invidious," application of the rational basis test would be sufficient to prevent discrimination toward those with mental retardation.[136] The Court found that the rational basis standard "affords government the latitude necessary both to pursue

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[129] *Cleburne*, 726 F.2d at 201.

[130] *Cleburne*, 473 U.S. at 435.

[131] *Id.* at 442.

[132] *Id.* at 443 (citing section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C.A. § 6010, and the Education of the Handicapped Act, 20 U.S.C.A. § 1412).

[133] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 443 (1985) (quoting the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010(1), (2)).

[134] *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 31 (1981). *See also supra* notes 96-107 (discussing the *Pennhurst* case).

[135] *Cleburne*, 473 U.S. at 445.

[136] *Id.* at 446.

policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner."[137]

In assessing the constitutionality of the City of Cleburne's zoning ordinance, however, the Supreme Court decided that the ordinance bore no rational relationship to any legitimate interest.[138] The Court concluded that a primary reason for the city's requirement of a special use permit for the group home, but not for other multiple dwelling facilities, was its concern about the negative reaction from nearby residents.[139] Accordingly, the majority declared:

> [M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. . . . "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[140]

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[137] *Id.*

[138] *Id.* at 447-48.

[139] *Id.* at 448.

[140] *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)). The Court also dismissed the city's other objections about the location of the group home. *Id.* at 449. The city contended that the proposed home posed a safety hazard because a junior high school was located across the street, and because the home was susceptible to floods because it was located on a "five-hundred year flood plain." *Id.* The city also suggested that the home might be dangerous because there could be too many residents living in it, and that the ordinance was necessary to avoid concentration of population and to lessen traffic congestion. *Id.* at 449-50.

Justice Stevens wrote a concurring opinion, objecting to the majority's use of three tiers of scrutiny. *See id.* at 451 (Stevens, J., concurring). Justice Stevens would have applied a rational basis test to every classification, but the rationality test that he would employ "includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." *Id.* at 452. (Stevens, J., concurring) (footnote omitted). Applying this test, Justice Stevens also found the Cleburne zoning ordinance invalid. *Id.* at 455 (Stevens, J., concurring).

Justice Marshall, joined by Justices Brennan and Blackmun, wrote an opinion in which he dissented in part from the majority's opinion. *See id.* (Marshall, J., concurring in the judgment in part and dissenting in part). Justice Marshall agreed with the majority's statement that mental retardation cannot be a ground for depriving a person of his constitutional rights. *Id.* at 455-56 (Marshall, J., concurring in the judgment in part and dissenting in part). The Justice asserted that the Court, claiming to have used rational basis analysis in striking down the ordinance, had in fact used a more rigorous approach. *Id.* at 456 (Marshall, J., concurring in part and dissenting in part). Justice Marshall maintained that the majority's discussion of the city's concerns about the group

Since the Supreme Court's pronouncement in *Cleburne*, many cases involving zoning prohibitions against group homes have arisen.[141] For

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home was not part of a rational basis test or "most assuredly not the rational-basis test" used in Williamson v. Lee Optical, 348 U.S. 483 (1955), or in Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959). City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 458 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part). The dissenting Justice emphasized that in traditional rational basis review, the Court does not examine records to ascertain whether a policy decision is rationally related to an espoused objective, as the majority had done in *Cleburne*. *Id.* According to Justice Marshall, the majority's insistence that only a rational review was being applied "creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching 'ordinary' rational-basis review." *Id.* at 460 (Marshall, J., concurring in the judgment in part and dissenting in part). Because the Court did not make clear when a more heightened rational basis test such as the one employed by the majority in *Cleburne* is to be used, the Justice maintained that "[l]ower courts are thus left in the dark on this important question . . . ." *Id.* The confusion that Justice Marshall predicted actually occurred in Familystyle of St. Paul, Inc. v. St. Paul, 728 F. Supp. 1396 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991), wherein the district court for the District of Minnesota employed a more rigorous standard of review, and on appeal, the United States Court of Appeals for the Eighth Circuit upheld the lower court's decision but stated that it should have used the standard enunciated by the Supreme Court in *Cleburne*. *Familystyle*, 923 F.2d at 94.

Justice Marshall noted that people with mental retardation have been subjected to a long pattern of discrimination. *Cleburne*, 473 U.S. at 461 (Marshall, J., concurring in the judgment in part and dissenting in part). The Justice emphasized that mentally retarded people have a strong interest in living in group homes because, frequently, living in such a facility is the only way a retarded person can interact with the community. *Id.* Justice Marshall maintained that a person's "right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause." *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

Justice Marshall also disagreed with the majority's refusal to find that the mentally retarded are a suspect class because they have distinguishing characteristics. *Id.* at 468 (Marshall, J., concurring in the judgment in part and dissenting in part). According to the dissenting Justice, if this reasoning were sound, "heightened scrutiny would have to await a day when people could be cut from a cookie mold." *Id.*

[141] *See, e.g.*, Burstyn v. City of Miami Beach, 663 F. Supp. 528 (S.D. Fla. 1987) (statute prohibiting group homes was not rationally related to a legitimate state purpose); Westwood Homeowners Ass'n v. Tenhoff, 745 P.2d 976 (Ariz. Ct. App. 1987) (restrictive covenant barring group home for the mentally retarded is void as against public policy); Adult Group Properties, Inc. v. Imler, 505 N.E.2d 459 (Ind. Ct. App. 1987) (holding that a group home was violative of a restrictive covenant); Zoning Bd. of Hammond v. Tangipahoa Ass'n For Retarded Citizens, 510 So. 2d 751 (La. Ct. App. 1987) (injunction prohibiting the operation of a group home upheld); Normal Life of La., Inc. v. Jefferson Parish Dep't. of Inspection & Code Enforcement, 483 So. 2d 1123 (La. Ct. App. 1986) (group home for the mentally retarded constructed in area zoned only for single family homes was not a permitted use); Blevins v. Barry Lawrence County Ass'n., 707 S.W.2d 407 (Mo. 1986) (en banc) (proposed group home for the mentally retarded was not violative of a restrictive covenant); Jalc Real Estate Corp. v. Zoning

example, in *City of Kenner v. Normal Life of Louisiana, Inc.*,[142] the Supreme Court of Louisiana held that a proposed group home violated a local zoning ordinance which permitted the construction of only single-family dwellings.[143] The court held that a group of mentally retarded adults would not constitute a family because the home was to house too many residents.[144] The *Kenner* court also considered the effect of a Louisiana statute which expressly stated that community homes containing less than six mentally retarded adults are single-family units, but declined to find that the language of the statute created any specific rights.[145] Instead, the Louisiana Supreme Court interpreted the statute as merely expressive of the intent of the Legislature to allow group homes in areas zoned for multi-family purposes.[146]

Similarly, in *Adult Group Properties, Ltd. v. Imler*,[147] the owners of property surrounding a proposed group home sought a permanent injunction prohibiting the construction of the home.[148] In *Adult Group Properties*, the plaintiffs had purchased a home subject to certain restrictive covenants and alleged that the placement of the home violated

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Hearing Bd., 522 A.2d 710 (Pa. Commw. Ct. 1987) (holding that four mentally retarded women constitute a "family" for purposes of local zoning ordinance).

[142] 483 So. 2d 903 (La. 1986).

[143] *Id.* Pursuant to the zoning ordinance, "family" was defined as

> "[a]n individual or two or more persons who are related by blood or marriage living together and occupying a single house-keeping unit with single culinary facilities, or a group of not more than four persons living together by joint agreement and occupying a single housekeeping unit with single culinary facilities on a non-profit, cost-sharing basis."

Id. at 904-05 (emphasis omitted).

[144] *Id.* at 906. Normal Life argued that a group home containing fewer than six residents was not economically feasible. *Id.* at 906 n. 4. The city had conceded that four unrelated persons could live in the same home in a single-family residential neighborhood. *Id.*

[145] *Id.* at 907. Normal Life argued that this statute superceded local zoning ordinances and that therefore the home should be permitted. *Id.* The Court found the statute did not override local zoning ordinances, although it did express public policy that group homes could be operated in multiple family zoning districts. *Id.* at 907-08. The Court stated, however, "that public policy cannot be extended to apply to single-family residential districts in the absence of express legislation." *Id.* at 908.

[146] *Id.* at 907-08.

[147] 505 N.E.2d 459 (Ind. Ct. App. 1987).

[148] *Id.* at 461-62.

the covenants.[149] The Court of Appeals of Indiana found that the prospective home did violate the covenants, and held that written approval was required for all architectural plans.[150]

In *Burstyn v. City of Miami Beach*,[151] however, the District Court for the Southern District of Florida considered the effect of the Supreme Court's decision in *Cleburne*[152] and found that a city ordinance which placed certain restrictions on the placement of group homes violated the Equal Protection Clause of the Fourteenth Amendment.[153] *Burstyn* involved a city ordinance which imposed height restrictions on buildings and banned any group home from being located on certain streets.[154] The city asserted that the street restrictions were designed to promote tourism, provide safe environments for residents of the group homes, and further the desire of group home residents who want to live in secluded and sedate areas.[155] The city further maintained that the height restrictions were rationally related to its goal of fire safety.[156] The court found that the city's restrictions were not rationally related to any of its professed goals and that the city had, in fact, acted with discriminatory intent.[157] Nevertheless, the court in *Burstyn*, like the

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[149] *Id.* The covenants provided:

> "1) LAND USE AND BUILDING TYPE: No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single family dwelling not to exceed two and one-half stories in height . . . .
> 2) ARCHITECTURAL CONTROL: No building shall be erected, placed, or altered on any lot in the subdivision until the building, plans specifications, and plot plans showing the location of such building have been approved in writing by the directors of the Board of Church Extension and Home Missions of the Church of God."

Id. at 461. (citation omitted).

[150] *Id.*

[151] 663 F. Supp. 528 (S.D. Fla. 1987).

[152] 473 U.S. 432 (1985).

[153] *Burstyn*, 663 F. Supp. at 537. For the text of the Equal Protection Clause, see *supra* note 69.

[154] *Burstyn*, 663 F. Supp. at 534.

[155] *Id.* at 534.

[156] *Id.* at 533.

[157] *Id.* at 536. The court found that the city had acted with discriminatory intent for several reasons: the Miami Beach City Commission, which was responsible for the ordinance, knew that its own staff thought the ordinance prohibiting the group homes

Supreme Court in *Cleburne*, announced that it was using the mere rationality standard in assessing the constitutional validity of the zoning ordinance.[158] The *Burstyn* Court then declared, however, that in determining whether an ordinance is rationally related to a legitimate state interest, it may examine the legislative and administrative history of that particular ordinance.[159] While refusing to admit that it was doing so, the *Burstyn* court applied the same more exacting "rational relationship" test as the *Cleburne* Court.[160] Moreover, when applying a rational basis test, generally the court will only look at the ordinance on its face and will not delve into its legislative history.[161] This type of analysis leaves to the court's discretion whether to apply the traditional rational basis test or the more exacting one enunciated in *Cleburne*.

Residents opposing the existence of a group home in their neighborhood use a variety of methods to keep them out.[162] These range from creative legal arguments to arson.[163] One argument which is infrequently cited, if ever, is fear of the retarded and bias toward them.[164] Perhaps, this is the most pervasive reason of all for

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was far too restrictive; staff recommendations were revised or ignored, a substantial departure from normal zoning practice; and, the Commissioners' failure to take into consideration that a number of retirement hotels, similar in use to the prohibited homes, already existed in the area. *Id.* at 537.

[158] *Id.* at 534. For an elaborate discussion of the three tiers of equal protection analysis, see *supra* note 126.

[159] Burstyn v. City of Miami Beach. 663 F. Supp. 528, 536 (S.D. Fla. 1987).

[160] *See supra* notes 130-40 and accompanying text.

[161] *See, e.g.,* Williamson v. Lee Optical, 348 U.S. 483 (1955); City of New Orleans v. Dukes, 427 U.S. 297 (1976).

[162] *See, e.g.,* Devereux Found. v. O'Donnell, 1991 WL 117394 (E.D. Pa. 1991) (after Foundation began efforts to locate a group home within a residential area, the town amended an existing ordinance to allow unrelated nonhandicapped people to locate in the neighborhood, but *not* unrelated handicapped people.); Shannon & Riordan v. Board of Zoning Appeals of Milwaukee, 451 N.W.2d 479 (Wis. Ct. App. 1989) (upholding statute prohibiting group homes from being built within 2500 feet of existing group homes).

[163] *See* Wayne King, *Neighbors Await Group Home, And Hire Lawyer*, N.Y. TIMES, Aug. 18, 1989, at B1. *See also* Michel Winerip, *L.I. Police Suspect Arson in Blaze At Site of a Proposed Group Home*, N.Y. TIMES, Feb. 22, 1989.

[164] For example, one man, at a hearing regarding a proposed group home stated, "[i]t would create a traffic problem of immense proportions. . . . There are small children on those streets who are used to—they have been programmed to play in the street. . . . What your (remodeling) plans envision is a square house." Michael Winerip, *Ordinary People: Retarded Adults Move Next Door*, N.Y. TIMES, March 29 1988, at B1. *See also* Warren Goldstein. *'These People' Are Ruining Are Lives?*, N.Y. TIMES, July 1, 1990, at

challenging the existence of a group home. In addition to the many legal methods used to oppose group homes, some opponents have threatened more violent protests, such as burning down the proposed group home.[165] While other communities have shunned the violent approach, they have nevertheless attempted to keep the retarded out by forming corporations and buying the group homes themselves.[166]

V. CONCLUSION

Given the long history of discrimination suffered by people with mental retardation, the United States Supreme Court's refusal to extend suspect or quasi-suspect classification to the mentally retarded is unreasonable.[167] Although most jurists probably are not intentionally biased against the retarded, they may rule against allowing the establishment of community homes in a misguided effort to "protect" the retarded. Most judges and lawyers are probably unfamiliar with the needs and abilities of mentally retarded people, and thus may accept whatever "rational" means a community zoning ordinance proposes to "protect" the mentally retarded from the dangers of community living, or to protect the community from the retarded.

The Supreme Court's decision in *Cleburne* is especially disturbing because it allows the lower courts almost complete discretion in deciding which rational basis test to employ. Moreover, radically different results could ensue because of differences in each judge's personal opinions and beliefs regarding the mentally retarded. Even though a more rigorous standard is used in *Cleburne*, many judges may decline to follow it and will instead use the more traditional rational basis test. The danger is that courts will be unsure which test is proper, and will have no guidance in their decision-making. This would result in vastly different rights being accorded to the mentally retarded, simply by virtue of where they happen to live. This situation would not be tolerated by the courts or

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L.I. 18 (discussing prejudice against group homes in one Long Island neighborhood, and quoting one neighbor as saying: "I don't care if they are green Martians or if they're swinging singles. We don't have group homes with 9 to 11 people in our neighborhood").

[165] Michael Winerip, *New Lives Start At Group Home: 'Feels Beautiful'*, N.Y. TIMES, Apr. 4, 1989, at B1. *See also* Michael Winerip, *L.I. Police Suspect Arson in Blaze At Site of a Proposed Group Home*, N.Y. TIMES, Feb. 22, 1989, at B2.

[166] Michael Winerip, *Ordinary People: Retarded Adults Move Next Door*, N.Y. TIMES, Mar. 29, 1991, at B1.

[167] *See supra* notes 30-42 and accompanying text (discussing society's historic prejudice against the mentally disabled).

the vast majority of society if it were effecting basic rights of racial or ethnic minorities, and it should not be allowed to continue when it effects the rights of retarded individuals. Just as society was content decades ago to allow the rights of minority citizens to be impinged upon and destroyed,[168] it probably will not recognize the rights of the mentally retarded today without a decisive push from our judicial system, such as protecting the mentally retarded from discriminatory action by use of strict scrutiny of laws effecting their rights.

If a more rigorous constitutional standard were employed, it is more likely that people with mental handicaps would be treated fairly and in a non-discriminatory way. Individual judges would not be able to blindly accept whatever questionable reasons a community presents in its zoning ordinance to keep out mentally retarded people. Instead, they would have to evaluate these laws and decide whether they are, in fact, designed not to discriminate. This leaves less to the private biases of the judge and helps ensure that the mentally retarded will be accorded fair treatment. Communities will also be less likely to attempt to enact unfair, discriminatory laws because they would be assured that these laws would be struck down.

Continued discrimination against those with mental retardation seems likely in light of society's long history of prejudice. The courts of this nation, however, should not aid and abet it by refusing to classify the retarded as a suspect or quasi-suspect class. As Justice Marshall stated in his dissent in *Cleburne*:

> For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; outdated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people. Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the retarded is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in

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[168] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (plaintiff was denied a seat in a section of a train reserved for whites only because he was partly of African descent. The Supreme Court upheld the segregation laws, finding that "separate but equal" accommodations for blacks and whites was constitutionally permissible); Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (Dred Scott, a slave, lived on "free soil" for five years and contended this made him a free man. The Supreme Court held that slaves were not citizens).

the Fourteenth Amendment.[169]

[169] Cleburne v. Cleburne Living Center, 473 U.S. 432, 467 (1984) (Marshall, J., concurring in the judgment in part and dissenting in part).