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Constitutional Rights of the Involuntarily Committed Mentally Retarded after Youngberg v. Romeo Symposium - Selected Topics on Constitutional Law - Comment.

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Constitutional Rights of the Involuntarily Committed Mentally Retarded After *Youngberg v. Romeo*

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I. Introduction

Mental retardation is a condition which occurs during the developmental period, involving subnormal intellectual functioning coupled with defects in adaptive behavior.[1] Although mental retardation is not a disease[2]

1. *See* American Association Of Mental Deficiency, Manual On Terminology And Classification In Mental Retardation 11 (H. Grossman rev. ed. 1977). Mental retardation refers to "significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the development period." *See id.* This defini-

or a form of mental illness,[3] institutionalization is often a necessary action.[4] Institutionalization begins with a commitment process either voluntary or involuntary,[5] which has been characterized as an extraordinary

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tion is the one most widely used. *See* R. EDGERTON, MENTAL RETARDATION 2 (1979). For a detailed analysis of this definition, see P. CHINN, C. DREW & D. LOGAN, MENTAL RETARDATION—A LIFE CYCLE APPROACH 33-34 (2d ed. 1979). The condition itself is divided into four major categories: mild, moderate, severe, and profound. *See* Page, *Mental Health and Developmental Disabilities*, in THE BOOK OF THE STATES 515, 519 (1982) (3% of all live births involve mental retardation: 89% are mildly retarded; 6% are moderately retarded; 3.5% are severely retarded; and 1.5% are profoundly retarded). Estimates of prevalence of mental retardation range from one to three percent of the general population. *See* P. CHINN, C. DREW & D. LOGAN, MENTAL RETARDATION—A LIFE CYCLE APPROACH 7 (2d ed. 1979) (three percent is most consistently quoted incident rate); Page, *Mental Health and Developmental Disabilities*, in THE BOOK OF THE STATES 515, 519 (1982) (mental retardation involves three percent of all live births each year). *But see* P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS—THE BASIC ACLU GUIDE FOR THE MENTALLY RETARDED PERSON'S RIGHTS 14-15 (1976) (figure of three percent inflated; more reasonable figure of one percent).

2. *See* C. CLELAND, MENTAL RETARDATION—A DEVELOPMENTAL APPROACH 11 (1978). Rather than being a disease, the major causes of mental retardation fall into the following nine categories: infections and intoxicants, trauma or physical agents, metabolism or nutritional disorders, gross brain defects, unknown prenatal influence, chromosomal abnormalities, gestational disorders, results of psychiatric disorders, and environmental influences or other conditions. *See id.* at 14 (categories of mental retardation); P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS—THE BASIC ACLU GUIDE FOR THE MENTALLY RETARDED PERSON'S RIGHTS 14 (1976) (mental retardation is label society applies to persons of subnormal intellectual functioning).

3. *See* Mason & Menolascino, *The Right To Treatment For Mentally Retarded Citizens: An Evolving Legal And Scientific Interface*, 10 CREIGHTON L. REV. 124, 147 n.72 (1976). Mental retardation and mental illness are not the same. Mental illness is described as one's inability to cope with his environment; subaverage intellectual functioning is not necessarily a component of mental illness. *See id.* at 147 n.72. The Supreme Court has emphasized the difference between mental retardation and mental illness and has directed courts to be cognizant of this distinction. *See* Kremens v. Bartley, 431 U.S. 119, 135-36 (1977); *see also* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1977), *aff'd in part and modified in part on other grounds*, 612 F.2d 84 (3d Cir. 1976), *rev'd and remanded on other grounds*, 451 U.S. 1 (1981).

4. *See* P. CHINN, C. DREW & D. LOGAN, MENTAL RETARDATION—A LIFE CYCLE APPROACH 459 (2d ed. 1979) (institutionalization proper course of action in some situations). In 1980, there were 148,195 mentally retarded persons in 388 residential facilities in the United States; this is contrasted to 158,682 people in 108 residential facilities in 1960. *See* STATISTICAL ABSTRACTS OF THE UNITED STATES 116 (1981). In Texas, as of June 30, 1980, there were 11,178 institutionalized mentally retarded persons. *See id.* at 117. Texas does not equate involuntary civil commitment with a finding of mental incompetence. *See* TEX. REV. CIV. STAT. ANN. art. 5547-300, § 37(q) (Vernon Supp. 1982-1983). The commitment process itself may have a significant impact on the individual and the family. *See generally* Garvey, *Children and the Idea of Liberty: A Comment on the Civil Commitment Cases*, 68 KY. L.J. 809 (1979) (discussion of impact of commitment process on individual and family).

5. *See* Murdock, *Civil Rights Of The Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 154-55 (1972). Voluntary admission occurs when the person to be ad-

curtailment of liberty,[6] requiring due process protections under the fourteenth amendment.[7] Procedural due process guarantees concerning the commitment process itself have been defined and established by the courts;[8] however, substantive due process rights, which prevent arbitrary

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mitted or his parents or guardian consent to the process; involuntary commitment is institutionalization resulting from a commitment process initiated by the state. *See id.* at 154-55. Entrance into a Texas residential facility is accomplished by one of two procedures. *Compare* TEX. REV. CIV. STAT. ANN. art. 5547-300, § 34(c) (Vernon Supp. 1982-1983) (voluntary admission is by application of one to be confined, of parents of minor, or of guardian of person) *with id.* § 37(o) (Vernon Supp. 1982-1983) (court orders commitment once determines residential care appropriate). A distinction between these two types of admission has been deemed indistinguishable. *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1311 (E.D. Pa. 1977) (concept that voluntary admission different from involuntary admission unsupported in reality of commitment process), *aff'd in part and modified in part on other grounds*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded on other grounds*, 451 U.S. 1 (1981); Murdock, *Civil Rights Of The Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 154-55 (1972) (voluntary admission not really "voluntary"). The Supreme Court in *Romeo* specifically addressed the rights of the involuntarily committed, thus implying a distinction. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2457, 73 L. Ed. 2d 28, 36 (1982).

6. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 425 (1979) (civil commitment "significant deprivation of liberty"); Humphrey v. Cady, 405 U.S. 504, 509 (1972) (civil commitment entails "massive curtailment of liberty"); Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974) (huge deprivation of liberty accompanies involuntary commitment process), *aff'd on other grounds*, 525 F.2d 987 (8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977).

7. *See* U.S. CONST. amend. XIV § 1. Civil commitment for any reason requires the state to comply with due process. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 600 (1979) (civil commitment must comply with due process); Addington v. Texas, 441 U.S. 418, 425 (1979) (civil commitment mandates due process procedures); O'Connor v. Donaldson, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) (civil commitment for any reason requires due process protections). For a guide to civil commitment procedures, see generally *Preparation and Trial of A Civil Commitment Case*, 5 MENTAL DISABILITY L. REP. 201, 281, 358 (1981) (role of counsel in commitment procedures; fact gathering for case and hearing procedures; disposition after commitment and criminal commitment process).

8. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 606 (1979) (due process requires inquiry by neutral tribunal before or after commitment process when parents seek to admit mentally ill children); *In re* Gault, 387 U.S. 1, 30-31 (1967) (due process required in juvenile delinquency proceedings); Specht v. Patterson, 386 U.S. 605, 610 (1967) (due process at very least demands fair proceedings, notice, chance to be heard, and right to counsel). Procedural due process requires the state to justify the commitment by some permissible and legitimate state interest. *See* O'Connor v. Donaldson, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring). Three interests usually asserted to justify commitment include the following: (1) danger to self, (2) danger to others, or (3) need for care or treatment. *See* Jackson v. Indiana, 406 U.S. 715, 737 (1972). Involuntary civil commitment of the mentally retarded rests on two distinct legal theories: the state's police power and the state's *parens patriae* power. *See* Gostin, *Current Legal Concepts in Mental Retardation in the United States: Emerging Constitutional Issues*, in TREDGOLD'S MENTAL RETARDATION 294 (M. Craft ed. 1979). The police power allows the state to confine those persons who threaten the general safety of the

deprivations of protected liberty interests[9] once the mentally retarded person has been properly committed to the institution, are not as clearly defined.[10] Over the last few years, the lower federal courts have begun to recognize certain substantive due process rights that should be accorded the institutionalized mentally retarded.[11] In *Youngberg v. Romeo*[12] the

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public; whereas, the *parens patriae* theory enables the state to protect those persons incapable of caring for themselves. *See id.* at 294-95 (compares police power with *parens patriae*); Dowben, *Legal Rights Of The Mentally Impaired*, 16 HOUS. L. REV. 833, 838 (1979) (justification of danger to self combines police power and *parens patriae* theories).

9. *See* Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956) (protection from arbitrary action essence of substantive due process). Protected liberty interests are difficult to define precisely; however, they are contemplated by the term "liberty" in the fourteenth amendment. *See* Paul v. Davis, 424 U.S. 693, 710 (1976). Interests become constitutionally protected when recognized and protected by state law or when guaranteed in a provision of the Bill of Rights, applicable to the states through the fourteenth amendment. *See id.* at 710-11 n.5.

10. *See* Dowben, *Legal Rights Of The Mentally Impaired*, 16 HOUS. L. REV. 833, 836-37 (1979). Continued confinement may later become unconstitutional. *See* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (continued custodial confinement of nondangerous mentally ill "without more" violates due process). Type and length of confinement must bear some reasonable relation to the purpose for which the person is committed. *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972). Confinement must end when the purpose for which the person was committed ceases to exist. *See* McNeil v. Director, Patuxent Inst., 407 U.S. 245, 249-50 (1972).

11. *See, e.g.*, Evans v. Washington, 459 F. Supp. 483, 484 (D.D.C. 1978) (constitutional right to safe conditions, least restrictive environment, and habilitation); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1318-19 (E.D. Pa. 1978) (constitutional right to habilitation, freedom from harm, and least intrusive means of confinement), *aff'd in part and modified in part on other grounds*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded on other grounds*, 451 U.S. 1 (1981); Gary W. v. Louisiana, 437 F. Supp. 1209, 1227-29 (E.D. La. 1976) (constitutional right to safe conditions of confinement, freedom from physical restraints, and habilitation), *aff'd*, 601 F.2d 240 (5th Cir. 1979). The United States Supreme Court has recognized a residuum of freedom that remains after a person has been properly confined to a prison. *See* Vitek v. Jones, 445 U.S. 480, 491 (1980) (due process protections required when prisoners transferred to mental institution); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country"). Although confinement of the mentally retarded is distinguishable from imprisonment because it is not based on wrongdoing, the mentally retarded also retain a residuum of liberty interests once institutionalized. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2458, 73 L. Ed. 2d 28, 36-37 (1982). For a discussion of various international theories regarding the rights of the mentally retarded, see Turnbull, *Law And The Mentally Retarded Citizen: American Responses To The Declaration Of Rights Of The United Nations And International League Of Societies For The Mentally Handicapped—Where We Have Been, Are, And Are Headed*, 30 SYRACUSE L. REV. 1093, 1102-43 (1979). The legal profession has just recently begun to consider the rights of the mentally retarded. *See* Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 STAN. L. REV. 553, 553-54 (1979). *See generally* Schoenfeld, *A Survey Of The Constitutional Rights Of The Mentally Retarded*, 32 SW. L.J. 605 (1978) (discussion of right to life, treatment, habilitation, education, and freedom from involuntary sterilization).

12. ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

United States Supreme Court has for the first time reviewed three such due process rights.[13] The plaintiff in *Romeo* alleged the following: unsafe conditions resulting in at least sixty-three injuries, improper physical restraints due to long periods of daily shackling, and lack of appropriate treatment or habilitation in regard to his mental retardation.[14] The Court's response to these claims, together with lower federal court decisions, serve as a basis for defining the scope of substantive due process rights of involuntarily committed mentally retarded persons. In addition to analyzing these emerging rights, this comment will examine relevant Texas statutes and Mental Health/Mental Retardation Commission rules in light of the constitutional protections discussed.

II. Constitutional Protections Found in the Due Process Clause of the Fourteenth Amendment

A. *Lower Court Decisions*

Historically, institutions for the mentally retarded, at the very least, had a duty to provide clients with basic custodial care such as food, shelter, clothing, and medical care.[15] The custodial nature of institutions for the mentally retarded went undisturbed until the landmark case of *Wyatt v. Stickney*[16] examined an institution for the mentally retarded and

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13. *See id.* at ___, 102 S. Ct. at 2457, 73 L. Ed. 2d at 36. The specific rights claimed to be protected liberty interests were the following: right to safe conditions, freedom from bodily restraint, and right to minimally adequate habilitation. *See id.* at ___, 102 S. Ct. at 2458-59, 73 L. Ed. 2d at 37. John Stewart Mill has defined the concept of right as follows: "When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it . . . . To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of." Szasz, *The Right To Health*, 57 Geo. L.J. 734, 746 (1969) (quoting J.S. Mill, Utilitarianism 78-79 (1863)).

14. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2455, 73 L. Ed. 2d 28, 33-34 (1982). Romeo's injuries were both self-inflicted and the results of retaliatory acts by other clients in response to his aggressive behavior. *See* Romeo v. Youngberg, 644 F.2d 147, 155 (3d Cir. 1980), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). The injuries were specifically "a broken arm, a fractured finger, injuries to sexual organs, human bite marks, lacerations, black eyes, and scratches." *Id.* at 155.

15. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2462, 73 L. Ed. 2d 28, 42 (1982) (historically institutions have supplied basic necessities of life); I. Amary, The Rights Of The Mentally Retarded—Developmentally Disabled To Treatment And Education 3 (1980) (institutions have historically supplied clients with minimal care of food, dress, and medical attention).

16. 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). The judicial intervention in *Wyatt* displayed the court's willingness to denounce the historic custodial nature of institutions for the mentally retarded. *See* Mason & Menolascino, *The Right To Treatment For Mentally*

found the conditions "deplorable" and "grossly substandard."[17] Constitutional minimums developed in *Wyatt* included humane living conditions, limited use of physical restraints, and individualized habilitation programs.[18] Since *Wyatt*, other federal courts,[19] especially the Third Circuit in *Romeo*,[20] have recognized constitutional rights of the involuntarily committed mentally retarded and have developed guidelines to guarantee the right to safe conditions, freedom from bodily restraint, and habilitation.

1. Right to Be Free from Bodily Restraints

Freedom from bodily restraint has been considered the essence of the liberty interest protected by the Due Process Clause of the fourteenth amendment.[21] In reviewing the liberty interests of institutionalized per-

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Retarded Citizens: An Evolving Legal And Scientific Interface, 10 CREIGHTON L. REV. 124, 149 (1976).

17. *See* Wyatt v. Stickney, 344 F. Supp. 387, 391 (M.D. Ala. 1972), *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). The residents received less than custodial care, were exposed to dangerous conditions, and were denied training and habilitation necessary to develop skills and capabilities. *See id.* at 391.

18. *See id.* at 395-404. The minimum constitutional standards were detailed guidelines for assuring the proper care and habilitation of the residents. *See id.* at 395-404. The guidelines for humane living conditions revolved around an environment designed to positively contribute to habilitation efforts. *See id.* at 404. Occupancy of rooms was limited, privacy walls and comfortable dining areas were ordered, and a private bed and closet were required for each resident. *See id.* at 404. Physical restraints were prohibited unless absolutely necessary to prevent residents from injuring themselves or others and were only to be used when less intrusive methods of behavior control failed. *See id.* at 401. Individualized habilitation plans, formulated by professionals, and reviewed annually, were required to be developed no later than fourteen days after admission to the institution and an annual review of the habilitation plan was ordered. *See id.* at 397-98.

19. *See, e.g.*, Evans v. Washington, 459 F. Supp. 483, 484 (D.D.C. 1978) (institutionalized accorded constitutional protections for safe conditions, habilitation, and least restrictive environment); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1318-19 (E.D. Pa. 1978) (constitutional right to habilitation, freedom from harm, and least instrusive means of confinement), *aff'd in part and modified in part on other grounds*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded on other grounds*, 451 U.S. 1 (1981); Gary W. v. Louisiana, 437 F. Supp. 1209, 1227-29 (E.D. La. 1976) (constitutional right to safe conditions of confinement, freedom from physical restraints, and habilitation), *aff'd*, 601 F.2d 240 (5th Cir. 1979).

20. *See* Romeo v. Youngberg, 644 F.2d 147, 159 (3d Cir. 1980), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); *see also* Note, *Liability of Health Care Providers—Appropriate Treatment—Fourteenth Amendment—Romeo v. Youngberg*, 7 AM. J.L. & MED. 201 (1981) (analysis of Third Circuit opinion).

21. *See, e.g.*, Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part, dissenting in part) (freedom from bodily restraint considered historically as primary liberty interest protected by due process clause); Ingraham v. Wright, 430 U.S. 651, 674 (1977) (fundamental that individual possess freedom from

sons to be free from bodily restraints,[22] federal courts have shifted from an eighth amendment[23] to a fourteenth amendment analysis.[24] Some courts have found the liberty interests of the mentally retarded are not violated so long as the physical restraints are "reasonable"[25] or "not ex-

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bodily restraint); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (liberty, at very minimum, means freedom from bodily restraint); *see also* Monaghan, *Of "Liberty" And "Property,"* 62 CORNELL L. REV. 405, 411 (1977) (historical early meaning of liberty is freedom from personal restraint). For a detailed early legal analysis of freedom from bodily restraint, see generally Shattuck, *The True Meaning Of The Term "Liberty" In Those Clauses In The Federal And State Constitutions Which Protect "Life, Liberty, And Property,"* 4 HARV. L. REV. 365 (1891). Physical restraints are not the only type of bodily restraints employed. Chemical restraints of the institutionalized mentally retarded is a growing area of concern. *See* Plotkin & Gill, *Invisible Manacles: Drugging Mentally Retarded People*, 31 STAN. L. REV. 637, 638 (1979).

22. *See* C. CLELAND, MENTAL RETARDATION—A DEVELOPMENTAL APPROACH 203-05 (1978) (physical restraints for mentally retarded have valuable indications for use). Various forms of physical restraints exist. Soft restraints are pieces of cloth or woven mesh wrapped around extremeties; they allow limited freedom of movement yet restrain to a particular range of motion. Cuffs, around the wrists or ankles, may be soft or metal. These limit freedom of movement to a greater extent. Jackets may be used to confine the client to a chair, while allowing full freedom of arm and leg movement. *See* M. BLACKWELL, CARE OF THE MENTALLY RETARDED 294-96 (1979). Justifications for the use of mechanical restraints have focused on three main areas. First, it is necessary to control extremely agitated behavior. *See* R. INGALLS, MENTAL RETARDATION—THE CHANGING OUTLOOK 416 (1978). Some of these behaviors are exhibited by hyperactivity or by assault on other clients. *See id.* at 416. Staff inability to manage a client's behavior is a reason asserted for restraints. *See* PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, SILENT MINORITY 9 (1976). Second, the person must be protected from habitual self-abuse. *See* M. BLACKWELL, CARE OF THE MENTALLY RETARDED 296 (1979) (physical restraint to halt self-abuse accomplished by tying hands and feet to stationary surface, such as bed or chair); R. INGALLS, MENTAL RETARDATION—THE CHANGING OUTLOOK 416 (1978) (examples of self-destructive behavior include chewing off fingers or banging head against hard surface). Third, restraints are sometimes used to discourage extreme antisocial traits. *See* C. CLELAND, MENTAL RETARDATION—A DEVELOPMENTAL APPROACH 203-04 (1978) (physical restraints to eliminate handling fecal matter).

23. *See* Wheeler v. Glass, 473 F.2d 983, 987 (7th Cir. 1973) (mentally retarded tied to bed considered violative of eighth amendment).

24. *See, e.g.*, Davis v. Hubbard, 506 F. Supp. 915, 942 (N.D. Ohio 1980) (improper use of physical restraints violates client's fourteenth amendment rights); Eckerhart v. Hensley, 475 F. Supp. 908, 927 (W.D. Mo. 1979) (liberty interest of fourteenth amendment protects against arbitrary seclusion or restraint); Rone v. Fireman, 473 F. Supp. 92, 120 (N.D. Ohio 1979) (fourteenth amendment violated if no freedom from restraint). This shift from eighth to fourteenth amendment analysis is attributable to an eventual recognition that the eighth amendment protections against cruel and unusual punishment were only for those convicted of crimes. *See* Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (eighth amendment inapplicable to confinement of pretrial detainees because no formal adjudication of guilt). This limitation was later interpreted to disqualify eighth amendment protection for institutionalized persons. *See* Philipp v. Carey, 517 F. Supp. 513, 517 (N.D.N.Y. 1981).

25. *See* Wheeler v. Glass, 473 F.2d 983, 987 (7th Cir. 1973). Restraint of mentally retarded clients would violate constitutionally protected interests if means of restraint were

cessive."[26] Other courts have attempted to limit the use of physical restraints by demanding either a documented failure of less restrictive measures[27] or compliance with detailed procedures for their use.[28] Identifying the freedom from bodily restraint as a fundamental liberty interest,[29] the Third Circuit in *Romeo* required a compelling necessity to justify the use of physical restraints, or alternatively, the use of restraints had to be shown to be the least restrictive method of care.[30]

2. Right to Safe Conditions

Federal courts have also interpreted the fourteenth amendment as establishing a constitutional right to safe living conditions.[31] Some courts,

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unusual in light of "the evolving standards of public decency." *See id.* at 987.

26. *See* Kentucky Ass'n for Retarded Citizens v. Conn, 510 F. Supp. 1233, 1239 (W.D. Ky. 1980) (excessive use of physical restraints or lack of adequate reasons for restraints may violate eighth or fourteenth amendments), *aff'd*, 674 F.2d 582 (6th Cir. 1982).

27. *See* Welsch v. Likins, 373 F. Supp. 487, 503 (D. Minn. 1974) (must first attempt less drastic measures before instituting physical restraints), *aff'd on other grounds*, 525 F.2d 987 (8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977).

28. *See* Eckerhart v. Hensley, 475 F. Supp. 908, 927 (W.D. Mo. 1979). Procedures developed by institutions in order to implement physical restraints should be adhered to and documented. *See id.* at 927. Among the procedures required are the following: all orders for restraints must be signed by physician, restraints are for emergency use and continue only as long as emergency exists, written orders for restraints must be renewed every 24 hours, and client must be checked every 15 minutes while in restraints. *See id.* at 927. Several courts have developed orders incorporating similar guidelines. *See, e.g.*, Evans v. Washington, 459 F. Supp. 483, 488 (D.D.C. 1978) (physical restraints allowed only when absolutely necessary to protect client or others from harm, frequent checks by staff, never used as convenience measure by staff); Gary W. v. Louisiana, 437 F. Supp. 1209, 1229 (E.D. La. 1976) (physical restraints only when absolutely necessary, only if less restrictive means have failed, frequent checks of those restrained), *aff'd*, 601 F.2d 240 (5th Cir. 1979); Wyatt v. Stickney, 344 F. Supp. 387, 401 (M.D. Ala. 1972) (physical restraint only after less severe measure failed, for limited time period, never for punishment or staff convenience, and properly documented use schedule), *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

29. *See* Romeo v. Youngberg, 644 F.2d 147, 158 (3d Cir. 1980), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). Fundamental interests may not be mentioned in the specific language of the Constitution, but they are rights which are regarded as inherent in the concept of liberty. *See* Shapiro v. Thompson, 394 U.S. 618, 630 (1969).

30. *See* Romeo v. Youngberg, 644 F.2d 147, 160-61 (3d Cir. 1980), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

31. *See, e.g.*, Eckerhart v. Hensley, 475 F. Supp. 908, 915-16 (W.D. Mo. 1979) (Due Process Clause of fourteenth amendment requires humane environment for physical and psychological care); Doyle v. Unicare Health Serv., Inc., 399 F. Supp. 69, 72 (N.D. Ill. 1975) (constitutional obligation to ensure safety); Welsch v. Likins, 373 F. Supp. 487, 502-03 (D. Minn. 1974) (right to safe and humane environment), *aff'd on other grounds*, 525 F.2d 987

however, have found the eighth amendment[32] or the Equal Protection Clause of the fourteenth amendment[33] equally applicable. The right to safe living conditions implies "humane and safe"[34] surroundings or something "more than a tolerable environment,"[35] thereby including protection from injury by other clients and staff.[36] The Third Circuit also viewed the right to physical safety as a fundamental liberty interest;[37]

(8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977). There are two aspects of humane living conditions, physical and psychological. The physical aspects include safe and non-threatening physical conditions of confinement; the psychological include aspects of privacy and self-esteem, for example, private bathing facilities. *See* Rone v. Fireman, 473 F. Supp. 92, 121 (N.D. Ohio 1979). The right to safe living conditions has been established for the mentally ill, another group of persons institutionalized by the state. *See, e.g.*, Goodman v. Parwatikar, 570 F.2d 801, 804 (8th Cir. 1978) (constitutional right to safe and humane conditions); Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974) (fourteenth amendment right to safe confinement); Knight v. Colorado, 496 F. Supp. 779, 780 (D. Colo. 1980) (institutionalized possess right to safe conditions).

32. *See* Evans v. Washington, 459 F. Supp. 483, 485, 488 (D.D.C. 1978) (eighth amendment protection to freedom from harm, bodily or mental abuse, and neglect).

33. *See* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 764 (E.D.N.Y. 1973), *final judgment on consent sub nom.* New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975). The court compared conditions and constitutional minimal safe environments required for prisoners and concluded that if the institutionalized mentally retarded were not afforded at least the same rights to secure and humane environments, a violation of the Equal Protection Clause would result. *See id.* at 764-65. This violation would lie because of the irrational differences in treating convicted persons better than innocent persons where both are institutionalized and under state control. *See id.* at 764.

34. *See* Welsch v. Likins, 373 F. Supp. 487, 502-03 (D. Minn. 1974) (safe living conditions), *aff'd on other grounds*, 525 F.2d 987 (8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977); *see also* Doyle v. Unicare Health Serv., Inc., 399 F. Supp. 69, 72 (N.D. Ill. 1975) (institutions must provide reasonable and necessary medical care).

35. *See* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 765 (E.D.N.Y. 1973), *final judgment on consent sub nom.* New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975). The standard "more than a tolerable environment" was equated with a standard that required "civilized standards of humane decency" or protection "from conditions which 'shock the conscience' of the court." *Id.* at 765.

36. *See* Kentucky Ass'n for Retarded Citizens v. Conn, 510 F. Supp. 1233, 1250 (W.D. Ky. 1980) (constitutional right to be free from injuries inflicted by other inmates or staff where result from failure of staff to exercise reasonable care), *aff'd*, 674 F.2d 582 (6th Cir. 1982); Welsch v. Likins, 373 F. Supp. 487, 502-03 (D. Minn. 1974) (safe conditions include right to be free from assaults by other clients or institution staff), *aff'd on other grounds*, 525 F.2d 987 (8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977).

37. *See* Romeo v. Youngberg, 644 F.2d 147, 163-64 (3d Cir. 1980), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). A fundamental liberty interest in personal safety has also been recognized. *See* Philipp v. Carey, 517 F. Supp. 513, 519

moreover, the court found that an institution's failure to protect a client from injury must be justified by a "substantial necessity" based on an "important state interest."[38] While acknowledging that not every injury can be prevented, the court developed such a standard to distinguish between isolated or infrequent accidents and consistent failure to guard a client's safety.[39]

3. Right to Habilitation

The third right of the institutionalized mentally retarded, the right to habilitation, was created by developments and changes in professional philosophies concerning the care of the mentally retarded.[40] As mental health professionals realized that mentally retarded persons are capable of learning and developing their social, intellectual, and physical capabilities,[41] the historic custodial nature of institutions became offensive.[42] In

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(N.D.N.Y. 1981).

38. *See* Romeo v. Youngberg, 644 F.2d 147, 164 (3d Cir. 1980), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). An example of an important governmental interest justifying failure to protect from all instances of harm is a program developed to promote interaction between clients even when the physical contact may occasionally result in injuries. *See id.* at 164 n.38.

39. *See id.* at 164.

40. *See* Mason & Menolascino, *The Right To Treatment For Mentally Retarded Citizens: An Evolving Legal And Scientific Interface*, 10 CREIGHTON L. REV. 124, 136-37 (1976). Habilitation has been described as:

> The process by which the staff of an institution assist the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes, but is not limited to, programs of formal, structured education and treatment.

Wyatt v. Stickney, 344 F. Supp. 387, 395 (M.D. Ala. 1972), *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). There is a technical difference between treatment and habilitation. Treatment implies a cure and is applicable to the mentally ill; whereas, habilitation is the care and education or training the mentally retarded receive. Despite this precise distinction, courts use the terms interchangeably. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 7 n.2 (1981). *See generally* Murdock, *Civil Rights Of The Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 153 (1972) (habilitation geared to developmentally disabled; treatment to mentally ill).

41. *See* Roos, *Mentally Retarded Citizens: Challenges For The 1970's*, 23 SYRACUSE L. REV. 1059, 1065 (1972) (approach to mental retardation embraces "developmental model"). The "developmental model" replaces the previously used "medical model," an approach which treated the mentally retarded as ill persons and attempted cures. *See* PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, MENTAL RETARDATION: PAST AND PRESENT 41 (M. Gray ed. 1977) (medical model no longer appropriate for mentally retarded). The developmental model stresses the potential of the mentally retarded to grow, learn, and develop through interaction with others and their environment. *See* Roos, *The Law and Mentally Retarded People: An Uncertain Future*, 31 STAN. L. REV. 613, 613 (1979). Maximum benefit of the developmental model requires "normalization," an orientation that treats the men-

its place, individualized and comprehensive training programs which embody the concept of habilitation were implemented.[43] Following this trend, federal courts found a constitutional right to habilitation by a variety of methods.[44] Some based their findings on a quid pro quo approach: where the state deprives a person of liberty for nonpenal purposes, habilitation must be supplied in exchange for the loss of freedom.[45] Other

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tally retarded as normal persons, exposing them to everyday life situations in order to develop behaviors consistent with the societal norm. *See id.* at 613-14; *see also In re* Schmidt, 429 A.2d 631, 636 (Pa. 1981) (normalization views mentally retarded living in environment as close as possible to that of non-retarded).

42. *See* R. INGALLS, MENTAL RETARDATION—THE CHANGING OUTLOOK 424 (1978) (custodial nature of institutions stifles mentally retarded person's ability to grow and learn). The historic custodial nature of institutions is no longer a proper or helpful approach for the involuntarily committed mentally retarded. *See* P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS—THE BASIC ACLU GUIDE FOR THE MENTALLY RETARDED PERSONS' RIGHTS 16-17 (1976). One court has found it unconstitutional to commit a mentally retarded person for purely custodial purposes. *See* Gary W. v. Louisiana, 437 F. Supp. 1209, 1222-23 (E.D. La. 1976), *aff'd*, 601 F.2d 240 (5th Cir. 1979).

43. *See* R. INGALLS, MENTAL RETARDATION—THE CHANGING OUTLOOK 419 (1978) (institutions have advantage of providing extremely specialized programming and therapy required by mentally retarded). Courts have been cognizant of the shift in mental health professionals' approach to the mentally retarded. *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1977) (habilitation required to maximize mentally retarded persons capabilities), *aff'd in part and modified in part on other grounds*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded on other grounds*, 451 U.S. 1 (1981); Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972) (habilitation constitutionally required for institutionalized mentally retarded), *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). Realization by the courts of the value of habilitation is necessary to decrease the number of custodial institutions. *See* Mason & Menolascino, *The Right To Treatment For Mentally Retarded Citizens: An Evolving Legal And Scientific Interface*, 10 CREIGHTON L. REV. 124, 149 (1976).

44. *See, e.g.*, Wyatt v. Aderholt, 503 F.2d 1305, 1312 (5th Cir. 1974) (habilitation quid pro quo for commitment process); Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1967) (commitment without habilitation of non-criminally responsible violative of eighth amendment); New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715, 719 (E.D.N.Y. 1975) (habilitation embodied within protection from harm guaranteed by Constitution). For a detailed discussion on the right to habilitation for the non-institutionalized, see Comment, *The Constitutional Right to Treatment Services for the Noncommitted Mentally Disabled*, 14 U.S.F.L. REV. 675, 695-704 (1980).

45. *See* Wyatt v. Aderholt, 503 F.2d 1305, 1312 (5th Cir. 1974) (habilitation is exchange offered person involuntarily committed by state); Gary W. v. Louisiana, 437 F. Supp. 1209, 1216-17 (E.D. La. 1976) (when state deprives person of liberty via civil commitment must offer habilitation in exchange), *aff'd*, 601 F.2d 240 (5th Cir. 1979). A court might consider the right to habilitation appropriate under the quid pro quo analysis because the procedural safeguards were considered less stringent in civil commitments than in criminal commitments. *See* Welsch v. Likins, 373 F. Supp. 487, 496 (D. Minn. 1974), *aff'd on other grounds*, 525 F.2d 987 (8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977). This application, however, has been questioned. *See* O'Connor v. Donaldson, 422 U.S. 563, 587 (1975) (Burger, C.J., concurring) (quid pro quo

courts have held the eighth amendment to be a basis for requiring habilitation;[46] however, this reasoning is questionable in light of the eighth amendment's limitation to a criminal context.[47] The right to habilitation has also been combined with the right to protection from harm found in the Due Process Clause of the fourteenth amendment.[48] In *Romeo,* the Third Circuit found a constitutional right to habilitation[49] immediately secured upon involuntary commitment.[50] The court examined the nature of habilitation and held that if habilitation involved instances of extraordinary procedures,[51] it must withstand a "least restrictive" analy-

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habilitation because of less stringent procedural safeguard surrounding civil commitment process questionable). For an in depth discussion of quid pro quo analysis, see Spece, *Preserving The Right To Treatment: A Critical Assessment And Constructive Development Of Constitutional Right To Treatment Theories,* 20 ARIZ. L. REV. 1, 4-15 (1978).

46. *See* Rouse v. Cameron, 373 F.2d 451, 455 (D.C. Cir. 1967) (involuntary commitment without habilitation "shocking"). One theory of support for the right to habilitation is based on a combination of the eighth amendment and the Supreme Court's decision in *Robinson v. California. See* Welsch v. Likins, 373 F. Supp. 487, 496 (D. Minn. 1974), *aff'd on other grounds,* 525 F.2d 987 (8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds,* 550 F.2d 1122 (8th Cir. 1977); *see also* Robinson v. California, 370 U.S. 660, 665-66 (1962) (criminal conviction and incarceration for status of drug addiction violative of cruel and unusual punishment clause of eighth amendment). In light of mentally retarded persons' being institutionalized for the status of "mentally retarded," a confinement without habilitation thus constitutes cruel and unusual punishment. *See* Welsch v. Likins, 373 F. Supp. 487, 496-97 (D. Minn. 1974), *aff'd on other grounds,* 525 F.2d 987 (8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds,* 550 F.2d 1122 (8th Cir. 1977).

47. *See, e.g.,* Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (eighth amendment inapplicable to confinement condition of pretrial detainees because no formal adjudication of guilt); Romeo v. Youngberg, 644 F.2d 147, 156 (3d Cir. 1980) (eighth amendment inappropriate in civil context), *vacated and remanded on other grounds,* ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); Philipp v. Carey, 517 F. Supp. 513, 517 (N.D.N.Y. 1981) (eighth amendment protections do not extend to institutionalized mentally retarded). *See generally* Spece, *Preserving The Right To Treatment: A Critical Assessment And Constructive Development Of Constitutional Right To Treatment Theories,* 20 ARIZ. L. REV. 1, 17-19 (1978) (extension of eighth amendment protections to conditions within institutions for mentally retarded improper).

48. *See* Eckerhart v. Hensley, 475 F. Supp. 908, 915 (W.D. Mo. 1979) (constitutional requirement of habilitation embodies safe and humane conditions of confinement); New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715, 719 (E.D.N.Y. 1975) (no distinction between concepts of right to habilitation, need of care, or protection from harm).

49. *See* Romeo v. Youngberg, 644 F.2d 147, 158 (3d Cir. 1980), *vacated and remanded,* ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (court alludes to quid pro quo rationale in determining presence of right to habilitation).

50. *See id.* at 165.

51. *See id.* at 166. Examples of some extraordinary habilitation measures include psychotropic drug administration or permanent and non-reversible surgical procedures, such as prefrontal lobotomies or vasectomies. *See id.* at 166.

sis;[52] whereas ordinary daily care,[53] when offered, need only be acceptable in light of "present medical or other scientific knowledge."[54]

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52. *See id.* at 166. The "least restrictive" language may be traced to a Supreme Court decision mandating the use of careful and closely drawn means to effect a legitimate and substantial governmental purpose when a fundamental liberty is affected. *See id.* at 167 n.46. "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). This analysis surfaced in a habeas corpus proceeding where the institution was challenged as not being the best alternative for care. *See* Lake v. Cameron, 364 F.2d 657, 659-61 (D.C. Cir. 1966). It was extended to include a guideline for choice of treatment or habilitation methods involving mentally deficient persons once committed to an institution. *See* Welsch v. Likins, 373 F. Supp. 487, 503 (D. Minn. 1974) (least restrictive means of physical restraint required), *aff'd on other grounds,* 525 F.2d 987 (8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds,* 550 F.2d 1122 (8th Cir. 1977). As one court noted, "[i]t makes little sense to guard zealously against the possibility of unwarranted deprivations prior to hospitalization, only to abandon the watch once the patient disappears behind hospital doors." Covington v. Harris, 419 F.2d 617, 623-24 (D.C. Cir. 1969). Courts have joined together the right to habilitation and the least restrictive analysis; thus, a mentally retarded person, once institutionalized, has a constitutional right to habilitation in the least restrictive setting. *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1319 (E.D. Pa. 1977), *aff'd in part and modified in part on other grounds,* 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded on other grounds,* 451 U.S. 1 (1981); *see also* Gary W. v. Louisiana, 437 F. Supp. 1209, 1217 (E.D. La. 1976) (least restrictive does not mean choice must be best possible; rather, choice should consider individual's needs and potential), *aff'd,* 601 F.2d 240 (5th Cir. 1979). For a detailed discussion of the least restrictive alternative doctrine, see generally Zlotnick, *First Do No Harm: Least Restrictive Alternative Analysis And The Right Of Mental Patients To Refuse Treatment,* 83 W. VA. L. REV. 375, 384-405 (1981).

53. *See* Romeo v. Youngberg, 644 F.2d 147, 168 (3d Cir. 1980), *vacated and remanded,* ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). Ordinary daily care was viewed as flexible habilitation measures structured according to the usual daily changes in the client's needs. *See id.* at 168. The court identified a potential issue when the habilitation plan adopted by the professional was a result of a choice between two or more common approaches to habilitation. *See id.* at 166. A standard of "least intrusive" analysis was advanced to determine due process violations. *See id.* at 166.

54. *See id.* at 169. Chief Judge Seitz, in a concurring opinion, advocated a different standard for determining due process violations. *Compare id.* at 169 (constitutionally infirm if not acceptable in light of current medical knowledge), *with id.* at 178 (Seitz, C.J., concurring) (due process violated when "substantial departure from accepted professional judgment" shown). Chief Judge Seitz found the majority's standard, that care be acceptable in light of current medical knowledge, to be indistinguishable from the common law tort standard of state medical malpractice and therefore objectionable because it elevated tort liability to constitutional dimensions. *See id.* at 177-78 (Seitz, C.J., concurring). In Texas, medical malpractice liability exists when a physician fails to exercise that amount of ordinary prudence and skill another physician would have exercised under the same circumstances. *See* Peterson v. Shields, 26 Tex. Sup. Ct. J. 400, 401 (May 21, 1983); *see also* TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1982-1983) (medical liability act).

B. *Supreme Court Decision—Youngberg v. Romeo*

The substantive due process rights of the institutionalized mentally retarded, developed by lower federal courts, were reviewed by the Supreme Court for the first time in *Youngberg v. Romeo*.[55] Romeo's first two claims—right to safe conditions and freedom from bodily restraint—were readily acknowledged as protected liberty interests intact after involuntary commitment.[56] The Supreme Court did not identify these two liberty interests as fundamental; rather, they were characterized as liberty interests in reasonably safe conditions and freedom from unreasonable restraint.[57] A per se[58] right to habilitation was not addressed, as the Court determined Romeo was seeking habilitation only in relation to his safety and freedom from undue restraint.[59] The Court recognized a constitu-

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55. ___U.S. ___, ___, 102 S. Ct. 2452, 2457, 73 L. Ed. 2d 28, 36 (1982). The Court began by emphasizing that a person does not forfeit all substantive due process liberty interests upon institutionalization. *See id.* at ___, 102 S. Ct. at 2458, 73 L. Ed. 2d at 36.

56. *See id.* at ___, 102 S. Ct. at 2458, 73 L. Ed. 2d at 37 (1982). The Court compared the asserted liberty interests of the institutionalized with the protected liberty interests of prisoners and found, at the very least, the involuntarily committed mentally retarded possess the same level of constitutional protection. *See id.* at ___, 102 S. Ct. at 2458, 73 L. Ed. 2d at 37. Prisoners possess constitutional guarantees to protect against additional infringements on their constitutional liberty interest of freedom from restraint. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 685 (1978) (solitary confinement must comply with constitutional guarantee against cruel and unusual punishment); Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (prisoners still retain due process protections against further deprivations of liberty); Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir.) (seclusion of prisoners in cell invokes constitutional due process protections), *cert. dismissed sub nom.* Ledbetter v. Jones, 453 U.S. 950 (1981). Prisoners also possess a right to safe conditions. *See* Withers v. Levine, 615 F.2d 158, 161 (4th Cir.) (prisoners have constitutional right to safe conditions of confinement and freedom from risk of harm by other inmates), *cert. denied*, 449 U.S. 849 (1980); Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (prisoners have constitutional right to be protected from attack by other inmates).

57. *Compare* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2460-61, 73 L. Ed. 2d 28, 40 (1982) ("liberty interest") *with* Romeo v. Youngberg, 644 F.2d 147, 158 (3d Cir. 1980) ("fundamental liberty interests"), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). State interference with fundamental liberty interests is more closely scrutinized than if non-fundamental liberty interests are involved. *Compare* Roe v. Wade, 410 U.S. 113, 155 (1973) (interference with fundamental liberty interests must be justified by compelling state interest) *with* Martinez v. California, 444 U.S. 277, 282-83 (1980) (state need only show rational relationship to justify intrusion on liberty interest).

58. *See* Shaw Cleaners & Dryers, Inc. v. Des Moines Dress Club, 245 N.W. 231, 233 (Iowa 1932) ("per se" means unconnected, unrelated to others, or by and in itself).

59. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2459, 73 L. Ed. 2d 28, 39 (1982). In a separate opinion concurring in the judgment, Chief Justice Burger stated his belief that a separate issue on the right to habilitation was presented because of the remarks in respondent's brief. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2465-66, 73 L. Ed. 2d 28, 46 (1982) (Burger, C.J., concurring); *see also* Brief for Respondent at 23, Youngberg v. Romeo, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) ("Quite apart from

tional right to minimally reasonable and adequate habilitation to the extent necessary to secure the two related liberty interests.[60] The constitutional standard developed to determine substantive due process violations for the liberty interests of safe conditions and freedom from bodily restraint was premised on a balance between the interests of the individual to reasonable conditions and the legitimate interests of the state.[61] The Court refused to require the state to show compelling or substantial reasons for intrusion;[62] rather, a showing "that professonal judgment in fact was exercised"[63] was considered appropriate.[64] Habilitation, to withstand

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its relationship to decent care, a right to habilitation arises directly under the Constitution . . .").

60. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982). The right to reasonable habilitation includes training that would be required to reduce the state's intrusion into the two identified liberty interest areas. *See id.* at ___, 102 S. Ct. at 2463, 73 L. Ed. 2d at 42. As evidenced in his concurring opinion, Justice Blackmun would extend this right to habilitation to preserve any skills a person possessed upon admission to an institution. *See id.* at ___, 102 S. Ct. at 2464, 73 L. Ed. 2d at 44 (1982) (Blackmun, J., concurring). Absence of habilitation, once institutionalized, may result in the mentally retarded person's loss of existing skills and capabilities. *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1318 (E.D. Pa. 1977) (lack of habilitation caused deterioration of existing skill), *aff'd on other grounds*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded on other grounds*, 451 U.S. 1 (1981); Wyatt v. Stickney, 344 F. Supp. 387, 391 n.7 (M.D. Ala. 1972) (statements by Dr. Philip Roos) (institutionalization without habilitation contributes to deterioration of physical and mental capabilities), *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). Besides contributing to loss of learned behaviors and developed skills, withdrawal of habilitation would have devastating results for the institutionalized mentally retarded client. Interview with Tom Deliganis, Ph.D., Director, San Antonio State School in San Antonio, Texas (Sept. 1, 1982). One theory has been advanced that institutionalization itself results in deterioration of skills. *See* Comment, *Postadmission Due Process For Mentally Ill And Mentally Retarded Children After Parham v. J.R. And Secretary Of Public Welfare v. Institutionalized Juveniles*, 29 CATH. U.L. REV. 129, 151 (1979). *See generally* Mitchell & Smeriglio, *Growth in Social Competence in Institutionalized Mentally Retarded Children*, 74 AM. J. MENTAL DEFICIENCY 666 (1970) (deterioration of skills after institutionalization).

61. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 40-41 (1982); *see also* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (test for substantive due process violation must necessarily balance "liberty of the individual" and "demands of organized society"), *quoted in* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2460, 73 L. Ed. 2d 28, 40 (1982).

62. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982). A due process standard requiring a showing of compelling or substantial necessity was found to be an unnecessary hardship on the administration of an institution. The strict standard was viewed as also imposing an undue restriction on the professional's decisions concerning the care of the institutionalized mentally retarded. *See id.* at ___, 102 S. Ct. at 2461, 73 L. Ed. 2d at 41.

63. Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980)(Seitz, C.J., concurring), *cited with approval in* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982). The Supreme Court found the standard, "that professional judgment in fact

constitutional scrutiny, need only be such care as deemed by a professional to be reasonably required in relationship to the other two interests.[65] The Court allowed a presumption of validity to attach to all decisions made by the professional[66] and warned that liability would be imposed only when the decision was a "substantial departure from accepted professional judgment."[67]

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was exercised," developed by Chief Judge Seitz of the Third Circuit, to be a useful tool in determining due process violations and providing a uniform standard to determine whether a state had adequately protected the needs of clients. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982).

64. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982). The Court envisioned this standard to be above the level of treatment required for prisoners, reasoning that the involuntarily committed mentally retarded deserved more considerate care than convicted criminals. *Compare* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (deliberate indifference is standard for review of claims by prisoner challenging care) *with* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982) (institutionalized mentally retarded entitled to more considerate care than prisoners) *and* Rennie v. Klein, 653 F.2d 836, 844 (3d Cir. 1981) (institutionalized mentally retarded entitled to more considerate care than convicted prisoners), *vacated and remanded on other grounds*, ___U.S. ___, 102 S. Ct. 3506, 73 L. Ed. 2d 1381 (1982). The deliberate indifference standard does not provide as much protection as the institutionalized mentally retarded deserve. *See* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 764 (E.D.N.Y. 1973) (some conditions tolerable in prisons would not be tolerable in nonpenal institutions), *final judgment on consent sub nom.* New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975).

65. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982). The courts were ordered to defer to the professional's judgment when reviewing the amount and reasonableness of habilitation rendered. *See id.* at ___, 102 S. Ct. at 2461, 73 L. Ed. 2d at 41. Minimally adequate training has been considered the appropriate constitutional minimum with regard to care of the institutionalized mentally ill. *See* Rone v. Fireman, 473 F. Supp. 92, 119 (N.D. Ohio 1979).

66. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2462, 73 L. Ed. 2d 28, 42 (1982). The presumption of correctness for professional decisions reflects the Court's recognition of the difficulties in reviewing constitutional claims that arise from responses of professional judgment in the institutional setting. *See id.* at ___, 102 S.Ct. at 2461-62, 73 L. Ed. 2d at 41-42. A presumption of correctness for professional decisions surrounding the commitment process has been suggested in prior opinions. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 608 (1979) (medical decision to institutionalize best left within physician's judgment); Addington v. Texas, 441 U.S. 418, 429 (1979) (court relies upon medical facts as interpreted by physicians); Doyle v. Unicare Health Serv., Inc., 399 F. Supp. 69, 72 (N.D. Ill. 1975) (court refrains from "second-guessing" appropriateness of professional care plan for mentally retarded).

67. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2462, 73 L. Ed. 2d 28, 42 (1982). In the Court's precise language, due process violations should occur only where "the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at ___, 102 S. Ct. at 2462, 73 L. Ed. 2d at 42.

III. Analysis of Current Constitutional Protections

In the aftermath of *Romeo*, the principle question that emerges is: What rights do the involuntarily committed mentally retarded possess under the Constitution? Furthermore, how are such rights to be protected? Do they differ significantly in characterization or protection from the rights established by the lower federal courts? If so, how are they different? The following discussion attempts to answer these and other questions arising as a result of *Romeo*.

A. *Perception of Litigants and Issues Presented*

Initially, one explanation for the conflicting *Romeo* decisions was the apparent difference in each court's perception of the litigants and issues presented.[68] Both courts were presented with a mentally retarded person who challenged the care he received after proper institutionalization procedures.[69] The Third Circuit focused on the alleged deprivations of the individual's liberty interests and an ultimate issue involving judicial responsibility to safeguard the constitutional rights of the institutionalized mentally retarded.[70] The orientation of the lower court centered on due process violations and, in the court's language, presented matters of "national import."[71] In contrast, the Supreme Court focused on the institution alleged to have violated liberty interests of clients and granted certiorari because of the significant impact on "the question presented to the administration of state institutions for the mentally retarded."[72] This po-

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68. *Compare id.* at ___, 102 S. Ct. at 2458, 73 L. Ed. 2d at 36 (issue presented addresses institution's failure to provide minimally adequate constitutional level of care) *with* Romeo v. Youngberg, 644 F.2d 147, 154 (3d Cir. 1980) (issue involved identification of liberty interests of institutionalized mentally retarded and implicated formulation of standard to protect interests), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). The Supreme Court's and the lower court's differing perception of litigants and issues is not limited to this instance. *Compare* Bell v. Wolfish, 441 U.S. 520, 546 (1979) (violations of constitutional guarantees of institutionalized persons measured in respect to institution's reasons and need for infringement) *with* Wolfish v. Levi, 573 F.2d 118, 124-25 (2d Cir. 1978) (pretrial detainees' liberty interests override prison administration interests), *rev'd and remanded sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979).

69. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2457, 73 L. Ed. 2d 28, 36 (1982); Romeo v. Youngberg, 644 F.2d 147, 174 n.2 (3d Cir. 1980) (Seitz, C.J., concurring), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

70. *See* Romeo v. Youngberg, 644 F.2d 147, 154 (3d Cir. 1980), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). The Third Circuit noted little case law was available pertaining to the constitutional protections concerning conditions of confinement for involuntarily committed mentally retarded. *See id.* at 154.

71. *See id.* at 170.

72. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2457, 73 L. Ed. 2d 28, 36 (1982).

larity naturally resulted in divergent opinions and different standards for evaluation of the constitutional claims.[73]

B. *Fundamental Versus Non-Fundamental Liberty Interests*

Reconcilation of the divergent approaches to *Romeo* is enhanced by an understanding of substantive due process analysis. The constitutional guarantee against arbitrary action embodied in substantive due process[74] begins with identification of the interest alleged to have been violated[75] as either an interest or a fundamental interest.[76] The distinction between an interest and a fundamental interest is critical, as the subsequent test to determine violations hinges on the nature of the threatened interest.[77] Deprivations of a non-fundamental interest merely require the state to show a rational reason for the instrusion;[78] whereas, interference with a fundamental interest mandates a showing of compelling interests by the state.[79] Likening the liberty interests of the involuntarily committed to

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73. *Compare id.* at ___, 102 S. Ct. at 2462-63, 73 L. Ed. 2d at 42-43 (interests of clients balanced with institution's constraints) *with* Romeo v. Youngberg, 644 F.2d 147, 154 (3d Cir. 1980) (duty of court to protect fundamental liberty interests of institutionalized mentally retarded), *vacated and remanded,* ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

74. *See* Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956) (protection from arbitrary action essence of substantive due process). *See generally* Carpenter, *Substantive Due Process at Issue: A Resume,* 5 U.C.L.A. L. REV. 47 (1958) (detailed discussion on early history and growth of substantive due process).

75. *See* Goss v. Lopez, 419 U.S. 565, 574-75 (1975) (court first looks to character of interest in reviewing alleged deprivations of protected interests); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71 (1972) (due process analysis begins with identification of "nature" of interest, not "weight" of alleged deprivation of interest).

76. *See* Bell v. Wolfish, 441 U.S. 520, 565 (1979). Fundamental interests may not be mentioned in the specific language of the Constitution, but they are rights which are regarded as inherent in the concept of liberty. *See* Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969) (fundamental interests implicit in meaning of liberty); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (due process protects liberties so rooted in the traditions and conscience as to be deemed fundamental). Fundamental liberties are special interests which "require particularly careful scrutiny of the state needs asserted to justify their abridgement." Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

77. *Compare* Martinez v. California, 444 U.S. 277, 281-82 (1980) (state need only show rational relationship to justify intrusion on liberty interest) *with* Roe v. Wade, 410 U.S. 113, 155 (1973) (interference with fundamental liberty interests must be justified by "compelling state interest"). This analysis of looking to interest or fundamental interests and then applying the appropriate test of reasonably related or compelling has been challenged as too simplistic. *See* Beller v. Middendorf, 632 F.2d 788, 807 n.19 (9th Cir. 1980), *cert. denied,* 452 U.S. 905 (1981).

78. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955) (regulation constitutional so long as rationally related to objective); Nebbia v. New York, 291 U.S. 502, 525 (1934) (law must be reasonable, not arbitrary or capricious, to comply with due process).

79. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (state must have "powerful counter-

those of non-committed persons,[80] the Third Circuit in *Romeo* found interests in safe conditions and freedom from bodily restraint to be historic fundamental interests and, consequently, embarked on a strict scrutiny analysis.[81] Differentiating the nature of liberty interests asserted by persons prior to commitment from those asserted by the institutionalized,[82] the Supreme Court tacitly rejected the fundamental determination and applied a less stringent standard of review.[83] The Supreme Court's refusal to elevate these rights to a fundamental status is supported by prior case law wherein the Court did not apply a fundamental interest approach to another institutionalized population asserting similar liberty interests.[84]

C. *Conceptualization of the Three Claims*

The Third Circuit and the Supreme Court differed in their conceptualization of the constitutional claims to safe conditions, freedom from bodily restraint, and habilitation.[85] The Third Circuit viewed each claim separately and found the first two, right to safe conditions and freedom from

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vailing interest" to interfere with unmarried father's right to child custody); Griswold v. Connecticut, 381 U.S. 479, 497-98 (1965) (Goldberg, J., concurring) (fundamental liberties require state to advance compelling interests). *See generally Developments in the Law—The Constitution And The Family*, 93 HARV. L. REV. 1156, 1166-82 (1980) (discussion of Supreme Court's analysis for substantive due process violations).

80. *Compare* Romeo v. Youngberg, 644 F.2d 147, 159 (3d Cir. 1980) (freedom from bodily restraint of institutionalized mentally retarded equal to same liberty interest of all persons to be free from restraint), *vacated and remanded on other grounds*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) *with* Parham v. J.R., 442 U.S. 584, 600-01 (1979) (all persons have "substantial" liberty interests in remaining free from commitment) *and* Addington v. Texas, 441 U.S. 418, 425 (1979) (involuntary civil commitment represents significant deprivation of liberty).

81. *See* Romeo v. Youngberg, 644 F.2d 147, 158 (3d Cir. 1980), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

82. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2458, 73 L. Ed. 2d 28, 36-37 (1982). The Supreme Court has distinguished the liberty interests asserted prior to confinement and liberty interests asserted after confinement with the latter being identified as a residual of that asserted prior to confinement. *See* Vitek v. Jones, 445 U.S. 480, 491-93 (1980).

83. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982).

84. *See* Bell v. Wolfish, 441 U.S. 520, 534-35 (1979). The Court found a pretrial detainee's liberty interest to comfortable conditions during confinement did not rise to the level of "fundamental." *See id.* at 534-35. The Court balanced the interest of the institution for security and administrative needs with the liberty interests of confined individuals. *See id.* at 538-39.

85. *Compare* Romeo v. Youngberg, 644 F.2d 147, 159 (3d Cir. 1980) (three rights separate and distinct), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) *with* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2460, 73 L. Ed. 2d 28, 39-40 (1982) (rights interrelated).

bodily restraint, to be pure legal concerns, and the third, habilitation, to be a mixed medical and legal issue.[86] Accordingly, the court developed detailed constitutional standards for assessing due process violations of each right[87] and only allowed judicial deference to professional judgment for habilitation questions.[88] The Supreme Court recognized the inherent interrelated nature of the three claims, as each of the interests were components of the professional care delivered to clients.[89] The Court articulated the inevitable conflict when satisfaction of one claim would operate to the detriment of the others, such as temporary bodily restraint of an agitated client in order to protect his own or other clients' safety.[90] Furthermore, the Court considered the mutual needs of the administration of the institution and the care providers to exercise professional judgment without undue restrictions.[91] Although professional judgments are not wholly nonjusticiable issues,[92] the Court's interdisciplinary approach,

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86. *See* Romeo v. Youngberg, 644 F.2d 147, 159 (3d Cir. 1980), *vacated and remanded*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

87. *See id.* at 170. Right to freedom from restraint was subject to strict scrutiny and justified by compelling reasons or a showing of least restrictive means. *See id.* at 160-61. Right to safe conditions was also subject to strict scrutiny and justified by "substantial necessity." *See id.* at 164. Right to habilitation exists once a person has been involuntarily committed. *See id.* at 165. When the habilitation involved a single, severe intrusion, the strict scrutiny and "least restrictive" means analysis had to be satisfied. *See id.* at 166. If the habilitation were a choice between two or more measures, then "least intrusive" had to be shown. *See id.* at 166. For daily, routine habilitation measures, the chosen means only need be appropriate in light of current medical knowledge. *See id.* at 169.

88. *See id.* at 164-65.

89. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2460, 73 L. Ed. 2d 28, 39-40 (1982).

90. *See id.* at ___, 102 S. Ct. at 2460, 73 L. Ed. 2d at 40.

91. *See id.* at ___, 102 S. Ct. at 2461, 73 L. Ed. 2d at 41; *see also* Welsch v. Likins, 373 F. Supp. 487, 495 (D. Minn. 1974) (courts should not become involved in routine affairs of administration of institutions for mentally retarded), *aff'd on other grounds*, 525 F.2d 987 (8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977); *cf.* Parham v. J.R., 442 U.S. 584, 608 n.16 (1979) (judicial intervention in treatment of mentally ill should not unduly burden administration of institutions). Judicial review of medical decisions within institutions has been presented as similar to those decisions made by administrative agencies. *See* Tribby v. Cameron, 379 F.2d 104, 105 (D.D.C. 1967) (judicial review of treatment modes equated to administrative agency review); Zlotnick, *First Do No Harm: Least Restrictive Alternative Analysis And The Right Of Mental Patients To Refuse Treatment*, 83 W. VA. L. REV. 375, 442 (1981) (judicial review of decisions made by professionals within institutions should be similar to review of administrative agencies).

92. *See* Vitek v. Jones, 445 U.S. 480, 495 (1980) (medical nature of commitment process does not justify noncompliance with due process); O'Connor v. Donaldson, 422 U.S. 563, 574 n.10 (1975) (medical judgment surrounding commitment process justiciable). The medical nature of the issue does not preclude legal protection. *See* Rennie v. Klein, 653 F.2d 836, 847 (3d Cir. 1981), *vacated and remanded on other grounds*, ___U.S. ___, 102 S. Ct. 3506, 73

mindful of both the legal and medical aspects, is appropriate[93] and supported by other instances of judicial deference to professional decisions.[94]

IV. Potential Constitutional Protections

A. *Future Development of a Per Se Right to Habilitation*

A discussion of the potential development of a per se constitutional right to habilitation for the involuntarily committed mentally retarded must be tempered by two established principles. First, a state is not constitutionally obligated to provide services to its residents;[95] and second, if states do choose to provide services, broad discretion will be afforded

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L. Ed. 2d 1381 (1982); *In re* the Mental Health of K.K.B., 609 P.2d 747, 751 (Okla. 1980) (administration of antipsychotic drugs should be reviewed by legal standard). *But see* Feldman, *The Legal Restraints On Psychiatric Care*, in Legal Medicine 221, 225 (C. Wecht ed. 1980) ("Good medical care cannot survive a situation in which medical discretion is replaced by judicial fiat").

93. *See* Kentucky Ass'n for Retarded Citizens v. Conn, 510 F. Supp. 1233, 1250 (W.D. Ky. 1980) (judicial review of care provided institutionalized persons should consider decisions made by professionals), *aff'd*, 674 F.2d 582 (6th Cir. 1982). Professionals from the medical field and the legal field need to educate each other since an understanding of both disciplines would ultimately result in better care and treatment of the institutionalized mentally retarded. *See* Turnbull, *Law And The Mentally Retarded Citizen: American Responses To The Declarations Of Rights Of The United Nations And International League Of Societies For The Mentally Handicapped—Where We Have Been, Are, And Are Headed*, 30 Syracuse L. Rev. 1093, 1142 (1979).

94. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461-62, 73 L. Ed. 2d 28, 41-42 (1982). Deference to administrators of institutions for the mentally retarded is supported by prior decisions involving other types of institutions. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 546-47 (1979) (conditions of confinement in pretrial detention centers subject to officials' ability to take appropriate administrative action); Procunier v. Martinez, 416 U.S. 396, 405 (1974) (proper to afford deference to prison authorities when conditions of confinement challenged); *In re* Jones, 338 F. Supp. 428, 429 (D.D.C. 1972) (discretion granted to hospital administrator when conditions of institution for mentally ill criticized). Deference to medical professionals follows the same discretion given to other medical judgments surrounding the commitment process. *See* Parham v. J.R., 442 U.S. 584, 607-08 (1979) (diagnostic procedures to evaluate mental stability is result of medical decision that should be within realm of physician judgment); Addington v. Texas, 441 U.S. 418, 429 (1979) (deference to psychiatric interpretation of mental health of client during civil commitment process).

95. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 318 (1980) (no affirmative obligation to provide publicly funded abortions); Maher v. Roe, 432 U.S. 464, 469 (1977) (no obligation to provide pregnancy-related medical care); Rone v. Fireman, 473 F. Supp. 92, 118 (N.D. Ohio 1979) (states have no affirmative constitutional mandate to provide services for citizens). This voluntary option of the state to provide institutions for the mentally retarded has also been recognized. *See* Saville v. Treadway, 404 F. Supp. 430, 432 (M.D. Tenn. 1974).

them.[96] The Supreme Court's hesitance to address a per se constitutional right to habilitation for the institutionalized mentally retarded was not unexpected due to a previous decision wherein the Court declined to decide if the institutionalized mentally ill possess the corresponding right to treatment.[97] Nevertheless, the *Romeo* decision displays a willingness of the Supreme Court to recognize a constitutional right to habilitation for the institutionalized mentally retarded.[98] Presently, the nature of the habilitation must be in relationship to identified liberty interests, such as safe conditions or freedom from bodily restraint.[99] A commentator has

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96. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 478 (1970) (states have wide discretion in dispensing monies); Rone v. Fireman, 473 F. Supp. 92, 118 (N.D. Ohio 1979) (when state provides services to residents, it "is essentially a matter of state concern"); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 764 (E.D.N.Y. 1973) (state expenditures within province of state government), *final judgment on consent sub nom.* New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975). Once the state has decided to establish institutions, they may not operate in a manner that would abridge constitutional guarantees. *See, e.g.*, Welsch v. Likins, 550 F.2d 1122, 1128 (8th Cir. 1977) (state may not operate institution in manner violative of constitutional standards); Wheeler v. Glass, 473 F.2d 983, 987 (7th Cir. 1973) (institutions for mentally retarded allowed discretion in managing internal affairs as long as within bounds of Constitution); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1318 (E.D. Pa. 1977) (state cannot deprive institutionalized mentally retarded of constitutional guarantees, particularly habilitation), *aff'd in part and modified in part on other grounds*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded on other grounds*, 451 U.S. 1 (1981).

97. *See* O'Connor v. Donaldson, 422 U.S. 563, 573 (1975). A state mental patient, who had been confined for 15 years, challenged the constitutionality of his confinement. *See id.* at 564-65. The lower federal court found a constitutional right to treatment present. *See* Donaldson v. O'Connor, 493 F.2d 507, 527 (5th Cir. 1974) *vacated and remanded*, 422 U.S. 563 (1975). The Supreme Court defined the issue and excluded consideration of whether a state may constitutionally confine nondangerous mentally ill persons without providing any treatment. *See* O'Connor v. Donaldson, 422 U.S. 563, 573 (1975). The Court, however, did find that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members . . . ." *Id.* at 576. Chief Justice Burger in a concurring opinion found no basis for placing an affirmative duty on states to provide treatment for the institutionalized mentally ill. *See id.* at 582-84 (Burger, C.J., concurring). The Supreme Court's narrow holding in *Donaldson* has been criticized as creating unnecessary confusion in the lower courts and as being injurious to the rights of the mentally retarded. *See* Schoenfeld, *A Survey Of The Constitutional Rights Of The Mentally Retarded*, 32 SW. L.J. 605, 622-23 (1978). For a discussion of the *Donaldson* opinion, see generally Comment, *O'Connor v. Donaldson: Due Process Rights Of Mental Patients In State Hospitals*, 6 N.Y.U. REV. L. & SOC. CHANGE 65 (1976).

98. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2460, 73 L. Ed. 2d 28, 39 (1982). Lower courts were instructed to begin legal analysis upon the premise that a right to minimally adequate habilitation exists. *See id.* at ___, 102 S. Ct. at 2460 n.25, 73 L. Ed. 2d at 39 n.25.

99. *See id.* at ___, 102 S. Ct. at 2461, 73 L. Ed. 2d at 41. An earlier court refused to find

suggested another liberty interest of the institutionalized, the right to be free from the institution.[100] Similarly, lower courts have instructed institutions to develop programs for teaching social, intellectual, and physical skills with a goal towards returning the client to the community.[101] Future litigation joining the right to habilitation and the suggested liberty interest of freedom from the institution may serve as a foundation for development of a per se right to habilitation for all institutionalized mentally retarded. Alternatively, Justice Blackmun's concurring opinion supports an independent right to habilitation in order to preserve self-care skills which can be shown to have existed prior to commitment.[102] Although this claim is presently available only to clients possessing skills prior to commitment and thereby inaccessible to clients with negligible levels of development, securing a right to habilitation for maintenance of skills may offer another framework for developing a per se right to habilitation for institutionalized mentally retarded.

B. *Shift from Reliance on Substantive Due Process to Development of Procedural Due Process Protections*

1. Inadequacy of Current Substantive Due Process Protections

The Supreme Court in *Romeo* found protected liberty interests to safe conditions, freedom from bodily restraint, and minimally adequate habili-

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an independent constitutional right to treatment for the committed mentally ill; rather, a right to treatment arose only by reason of and in relationship to the institutionalization process and the concurrent loss of liberty. *See* Rone v. Fireman, 473 F. Supp. 92, 119 (N.D. Ohio 1979).

100. *See* I. AMARY, THE RIGHTS OF THE MENTALLY RETARDED—DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION 19 (1980). The liberty interest of institutionalized mentally retarded extends to a right to be free from the institution and return to the community. *See id.* at 19.

101. *See* Evans v. Washington, 459 F. Supp. 483, 486 (D.D.C. 1978) (habilitation plan must include exit plan); Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972) (habilitation must include plan that contemplates a "more useful and meaningful life and to return to society"), *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). The ultimate goals of habilitation plans should be deinstitutionalization or, in other words, return to society. *See* R. INGALLS, MENTAL RETARDATION—THE CHANGING OUTLOOK 98 (1978). *See generally* Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions,* 66 MASS. L. REV. 125 (1981) (discussion of concept and application). Deinstitutionalization involves reducing the population within the institutions, as well as developing community placement and services. *See* Ewing, *Health Planning and Deinstitutionalization: Advocacy Within the Administrative Process,* 31 STAN. L. REV. 679, 683 (1979).

102. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2464, 73 L. Ed. 2d 28, 44-45 (1982) (Blackmun, J., concurring).

tation to secure the other two interests.[103] The Court's use of substantive due process to protect the interests was particularly noteworthy for two reasons. First, recent Supreme Court decisions have shown a decreasing use of substantive due process analysis[104] outside the realm of privacy interests to procreation, marriage, and family life.[105] The Supreme Court has cautiously restrained from creating new substantive due process protections[106] because of a fear of transforming the fourteenth amendment into a "font of tort law."[107] The extension of substantive due process protections in *Romeo* for the involuntarily committed mentally retarded interrupts the Court's trend of limiting substantive due proces protections; however, the nature of the new guarantees highlights the other noteworthy aspect of the Court's use of substantive due process. The liberty interests of the involuntarily committed mentally retarded were not found to be fundamental;[108] therefore, compelling state interests were not required to justify the state's intrusion.[109] The substantive due process standard developed in *Romeo,* that professional judgment be shown, is a

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103. *See id.* at ___, 102 S. Ct. at 2463, 73 L. Ed. 2d at 42-43.

104. *See* Moore v. East Cleveland, 431 U.S. 494, 502 (1977). For a discussion of substantive due process and its limitations, see generally Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). One commentator has suggested that the Supreme Court's effort to limit the extent of due process protection has resulted in the Court's strict reading of the word "liberty" found in the due process clause. *See* Monaghan, *Of "Liberty" And "Property,"* 62 CORNELL L. REV. 405, 420 (1977).

105. *See* Kelley v. Johnson, 425 U.S. 238, 244 (1976) (Supreme Court offers substantive due process protections for interests related to procreation, marriage, or family matters). The Supreme Court has found fundamental substantive due process liberty interests in matters relating to child bearing. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 155 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438, 448 (1972) (contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (contraceptives). Fundamental interests pertaining to marriage are recognized. *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (restrictions on remarriage); Loving v. Virginia, 388 U.S. 1, 12 (1967) (choice of partners). Interests pertaining to family life are also considered fundamental. *See, e.g.,* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (unmarried father's right to child custody); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (child rearing and education).

106. *See* Moore v. East Cleveland, 431 U.S. 494, 502 (1977). The Supreme Court particularly recognized a need for restraint in creating new substantive liberty interests for specific interests not contained in the language of the Bill of Rights. *See id.* at 502; *see also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) (not within scope of judicial review to create new substantive due process rights).

107. Paul v. Davis, 424 U.S. 693, 701 (1976).

108. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2460-61, 73 L. Ed. 2d 28, 40-41 (1982).

109. *See id.* at ___, 102 S. Ct. at 2461, 73 L. Ed. 2d at 41; Bell v. Wolfish, 441 U.S. 520, 534 (1979) (liberty interest of nonfundamental nature triggers less stringent standard than compelling necessity test).

much less stringent standard.[110] This new lenient standard for assessing substantive due process violations essentially only protects the involuntarily committed mentally retarded against arbitrary or capricious acts[111] and, therefore, affords little protection.

2. Advantageous Qualities of Procedural Due Process Protections

Procedural due process would perhaps allow for the development of more precise and meaningful standards to safeguard the liberty interests of the involuntarily committed mentally retarded.[112] The Supreme Court's reluctance to establish procedural due process protections in *Romeo* is possibly attributed to the Court's perception that formal proceedings would place too great a burden on the administration of institutions.[113] Procedural due process proceedings, however, are not strict or exacting,[114] need not be judicial in nature,[115] and are adaptable to an infi-

110. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982) (standard less than compelling or substantial necessity test).

111. *See* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (arbitrary action protection afforded by due process); Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956) (protection against arbitrary action primary purpose of substantive due process). Substantive due process has historically been used to combat arbitrary, extreme, or unreasonable action. *See* Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 69.

112. *See, e.g.*, Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 13 (1979) (procedural due process decreases erroneous deprivations); Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (deprivation of protected interest invokes procedural due process); Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (due process implicated when threat to deprivation of protected interest); *cf.* Romeo v. Youngberg, 644 F.2d 147, 160 n.26 (1980) (procedural protections may be equally appropriate when considering liberty interest of involuntarily committed mentally retarded), *vacated and remanded on other grounds*, ___U.S. ___, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). The right to treatment for institutionalized mentally ill, justified by a quid pro quo theory, erroneously transforms "a concern for essentially procedural safeguards into a new substantive constitutional right." O'Connor v. Donaldson, 422 U.S. 563, 587 (1975) (Burger, C.J., concurring).

113. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2457, 73 L. Ed. 2d 28, 36 (1982) (certiorari granted to address important issues regarding administration of institutions). A decrease in procedural due process protections afforded institutionalized persons has been attributed to the Supreme Court's reluctance to overburden the institution's administration. *See* G. GUNTHER, CONSTITUTIONAL LAW 665 (10th ed. 1980).

114. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (due process flexible as individual situation demands); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (procedural due process requirements consider "time, place, and circumstances"); Layton v. Swapp, 484 F. Supp. 958, 961 (D. Utah 1979) (due process proceedings not fixed concepts).

115. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 607 (1979) (due process proceedings need not be judicial in nature); Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 101-02 (1978) (due process not violated by nonjudicial proceedings); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 77 (1936) (judicial proceedings not mandated to satisfy due

nite number of situations.[116] The flexible nature of procedural due process proceedings is determined from consideration of three factors: (1) the threatened interest; (2) "the risk of an erroneous deprivation" from existing procedures and "probable value, if any, of additional or substitute procedural safeguards"; and (3) the state's reason for interference and monetary or administrative burdens that additional proceedings would require.[117] The involuntarily committed mentally retarded at least possess historic liberty interests to safe conditions and freedom from bodily restraint[118] which are subject to erroneous deprivation because institutions for the mentally retarded, unlike public schools, are not open for inspection or operated with significant community involvement.[119] The state's reason for interference is afforded latitude by the Court's deference to administrative and professional judgment,[120] but not all internal operations should be precluded from review.[121] Procedural due process pro-

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process).

116. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 571-72 (1975) (procedural due process inexact; depends on particular situations); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (procedural due process proceedings applicable to "every imaginable situation"); Hannah v. Larche, 363 U.S. 420, 442 (1960) (nature of proceedings depends on situation).

117. *See* Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976). The three factors of *Matthews* have been used to formulate procedural due process protections surrounding compulsory administration of psychotrophic drugs to institutionalized mentally ill persons. *See* Davis v. Hubbard, 506 F. Supp. 915, 938 (N.D. Ohio 1980).

118. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2458, 73 L. Ed. 2d 28, 37 (1982). The Supreme Court has recognized a historic liberty interest to personal security. *See* Ingraham v. Wright, 430 U.S. 651, 673 (1977) (concept of liberty protects bodily safety). Freedom from bodily restraint and personal safety are historic aspects of liberty. *See* Monaghan, *Of "Liberty" And "Property,"* 62 CORNELL L. REV. 405, 411-12 (1977). A historic liberty interest to freedom from bodily restraint has also been found. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (liberty embodied within fourteenth amendment at least means freedom from bodily restraint).

119. *Cf.* Ingraham v. Wright, 430 U.S. 651, 678 (1977) (no procedural due process protections necessary for corporal punishment of student since school open to community).

120. *See* Youngberg v. Romeo, ___U.S. ___, ___, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982). Deference to the judgment of medical professionals has been previously granted with regard to the commitment process. *See* Parham v. J.R., 442 U.S. 584, 607-08 (1979) (deference to medical judgments to determine appropriateness of commitment); Addington v. Texas, 441 U.S. 418, 429 (1979) (deference to professional and medical judgment for need of continued confinement).

121. *See* Covington v. Harris, 419 F.2d 617, 624 (D.C. Cir. 1969). Additional infringement on liberty interests of involuntarily committed should be afforded due process protections. *See id.* at 624. Routine daily institutional procedures have been distinguished from specialized programs of care. The latter are susceptible to judicial review; the former are within the province of the institution's administrator or professional manager. *See* Welsch v. Likins, 373 F. Supp. 487, 495 (D. Minn. 1974), *aff'd on other grounds*, 525 F.2d 987 (8th Cir. 1975), *aff'd in part and vacated and remanded in part on other grounds*, 550 F.2d 1122

ceedings would protect the involuntarily committed mentally retarded after the initial commitment process and assure continuing guarantees for the protected liberty interests of safe conditions, freedom from bodily restraint, and habilitation.

One example of an available procedural due process proceeding could evolve from an existing protection offered the institutionalized mentally retarded. The Supreme Court has previously approved of periodic evaluations in order to determine the continued need for institutionalization.[122] Expanding the periodic evaluation of each client to include a regular review to assess developmental progress and identify new problems would increase due process protection, as well as enhance the professional's efforts to provide optimum care. Another procedural safeguard, proposed in an earlier lower court decision, is a client's rights committee composed of various professionals from the institution, lawyers, and members of the community.[123] The nonpartisan committee, cognizant of the constitutional rights of the involuntarily committed would regularly review the care delivered the institutionalized mentally retarded[124] in order to promote early detection of potential constitutional violations.[125] These two

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(8th Cir. 1977). Judicial restraint cannot excuse a court from failing to act on valid constitutional claims arising in institutions. *See* Procunier v. Martinez, 416 U.S. 396, 405 (1974). An early court, mandating changes within an institution for the mentally retarded, has refused to excuse constitutional violations because of budgetary reasons. *See* Wyatt v. Aderholt, 503 F.2d 1305, 1315 (5th Cir. 1974).

122. *See* Secretary of Pub. Welfare of Pa. v. Institutionalized Juveniles, 442 U.S. 640, 650 (1979). Procedural due process for the institutionalized mentally retarded includes a requirement for periodic review to determine the continuing need for institutionalization. *See id.* at 642. This procedural due process was also required for the mentally ill. *See* Parham v. J.R., 442 U.S. 584, 607 (1979). *See generally* Comment, *Postadmission Due Process For Mentally Ill And Mentally Retarded Children After Parham v. J.R. And Secretary Of Public Welfare v. Institutionalized Juveniles*, 29 CATH. U.L. REV. 129, 149-51 (1979) (procedural due process required after commitment to institution).

123. *See* Wyatt v. Stickney, 344 F. Supp. 387, 392 (M.D. Ala. 1972) (human rights committee reviews habilitation programs and care of institutionalized mentally retarded), *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); *see also* Evans v. Washington, 459 F. Supp. 483, 486-87 (D.D.C. 1978) (committee oversees court orders and implementation of constitutional minimums by institutions).

124. *See* Wyatt v. Stickney, 344 F. Supp. 387, 392 (M.D. Ala. 1972) *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). The committee also inspects records of clients and interviews clients and staff. *See id.* at 392.

125. *See id.* at 392 (committee would investigate alleged violations, as well as institute advocacy programs for institutionalized mentally retarded). Legal advocacy within the institutions for the mentally retarded is a growing area of law practice. Legal advocacy would ensure constitutional rights of the institutionalized, as well as implement deinstitutionalization measures. *See* Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 STAN. L. REV. 553, 565-67 (1979). *See generally* PROCEEDINGS OF A NATIONAL DEVELOPMENTAL DISABILITIES CONFERENCE, IMPLEMENTING PROTECTION AND ADVOCACY SYSTEMS (C.

suggested procedural due process proceedings, together with the substantive due process rights established in *Romeo*, could guarantee maximum constitutional protection for the involuntarily committed mentally retarded.

V. Additional State Statutory and Administrative Protections Afforded the Mentally Retarded Beyond the Constitutional Minimum Established in Romeo

A state may provide additional or alternative protections for its citizens beyond those which are required by due process.[126] Accordingly, individual states have provided statutory protections for the involuntarily committed mentally retarded.[127] In Texas, statutory protections are found in the Texas Mental Health and Retardation Act[128] and the Mentally Retarded Persons Act of 1977.[129] The Texas Mental Health and Retardation Act created the Texas Department of Health and Mental Retardation[130] which is directed by a Commissioner[131] who is granted virtually all administrative and rule-making powers.[132] The Mentally Retarded Persons

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Rude & L. Baucom eds. 1978).

126. *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 853 (1977) (no constitutional violation when state supplies more than constitutional minimum). An enlighted public policy may demand higher standards than what is minimally acceptable under the Constitution. *See* Lassiter v. Department of Social Serv., 452 U.S. 18, 33 (1981).

127. *See* New Jersey Ass'n for Retarded Citizens, Inc. v. New Jersey Dep't of Human Serv., 445 A.2d 704, 708 (N.J. 1982) (state statutory right of institutionalized mentally retarded to habilitation, care, and safe conditions); Kentucky Ass'n for Retarded Citizens, Inc. v. Conn, 674 F.2d 582, 585 (6th Cir. 1982) (institutionalized mentally retarded have state statutory right to habilitation). Some courts have found the state statutory right to habilitation for the institutionalized to include the least restrictive environment concept. *See In re* Schmidt, 429 A.2d 631, 636-37 (Pa. 1981) (state statute requires habilitation in least restrictive environment); *In re* Stover, 443 A.2d 327, 329 (Pa. Super Ct. 1982) (state statutory right to habilitation in least restrictive environment). Texas has found the same statutory right for the institutionalized mentally retarded. *See* Carter v. State, 611 S.W.2d 165, 166 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.). For a precise, detailed table on each state's statutory protections for the committed mentally ill and mentally retarded, see Lyon, Levine, & Zusman, *Patients' Bills of Rights: A Survey of State Statutes*, 6 Mental Disability L. Rep. 178, 181-200 (1982).

128. Tex. Rev. Civ. Stat. Ann. arts. 5547-201 to -203 (Vernon Supp. 1982-1983).

129. *Id.* art. 5547-300.

130. *See id.* art. 5547-201, § 1.01. A purpose of the Act was "to provide, coordinate, develop, and improve services" for mentally retarded persons. *See id.* § 1.01(a).

131. *See id.* art. 5547-202, § 2.01. The entire Department consists of a Board, Commissioner, Deputy Commissioner of Mental Health, Deputy Commissioner of Mental Retardation, staff of the Commissioner and both Deputies, and 27 facilities or institutions. *See id.*

132. *See id.* § 2.11(b). These powers are subject to certain policies formulated by the Board. *See id.*

Act of 1977 specifically addresses the rights of the mentally retarded.[133] Statutory rights of the institutionalized include the following: individual habilitation programs;[134] "least restrictive" environments with "least intrusive" means of habilitation;[135] freedom from "mistreatment, neglect, and abuse";[136] and periodic review of developed habilitation plans.[137] A Public Responsibility Committee responsible for assuring the legal rights of the institutionalized is also created by statute.[138]

The Commissioner, pursuant to his rule-making powers,[139] has promulgated detailed regulations to ensure compliance. Initially, the Commissioner's rules concerning the institutionalized mentally retarded reinforce the statutory protections.[140] Beyond the basic statutory protections, safe conditions of confinement are mandated in the client abuse[141] and neglect provisions.[142] Freedom from bodily restraint is carefully assured in the restraint and seclusion provision.[143] Furthermore, the use of bodily re-

133. *See id.* art. 5547-300, §§ 4-25 (Vernon Supp. 1982-1983). The Act first delineates a "Basic Bill of Rights." *See id.* §§ 4-13. Then additional rights of clients are defined. *See id.* §§ 14-25.

134. *See id.* § 16. The plan is to be developed within 30 days of admission to the institution. *See id.*

135. *See id.* § 15.

136. *See id.* § 20.

137. *See id.* § 17. Each client has the right to review the habilitation plan; otherwise, a review is made at least once a year for institutionalized clients. *See id.*

138. *See id.* §§ 50-56. The seven-member committee consists of members from the community, parents, guardians, and legal advocates, but does not extend membership to employees of the institution. *See id.* § 52. Another duty of the committee is to investigate any alleged violations. *See id.* § 56(a)(2). The investigation may include unannounced inspections of institutions. *See id.* § 56(b).

139. *See id.* arts. 5547-202, § 2.11(b), 5547-300, § 60.

140. *See* TEX. MH/MR COMM'N, 25 TEX. ADMIN. CODE § 405.624 (Shepard's May 1, 1982) (rights of mentally retarded); *id.* § 405.625 (rights of mentally retarded clients); *id.* § 405.626 (rights of mentally retarded residents).

141. *See id.* 405.364. Client abuse is divided into three categories. Class I is any act or omission, intentionally, knowingly, or recklessly done that caused or might have caused serious physical injury to a client. Class II client abuse is the same as Class I except it might or did cause non-serious physical injury to the client. Class III abuse is any use of verbal or non-verbal communication or any act to defile, disgrace, or degrade a client or threaten with physical or emotional injury. *See id.* § 405.364(a)-(c). Client abuse does not include the proper use of physical restraints or proper interventions for behavior modification techniques. *See id.* § 405.364(e)(1).

142. *See id.* § 405.364(d). Neglect is employee negligence which results in physical or emotional harm to the client. *See id.* Each facility has a client abuse and neglect committee, responsible for investigating alleged incidents. The five-member committee includes representatives of the institution's professional, administrative, and direct care staff. *See id.* § 405.365(c).

143. *See id.* § 405.841(a).

straints is prohibited[144] unless absolutely necessary to prevent the client from injuring himself or others.[145] Nevertheless, certain approved exceptions to the prohibition exist, such as physical restraints pursuant to a planned behavior modification program,[146] protective devices to prevent involuntary self-injury[147] or promote healing of self-inflicted wounds,[148] and orthopedic devices to increase physical capabilities.[149] The statutory right to habilitation for the institutionalized mentally retarded is guaranteed in the Commissioner's rules.[150] One particular method of habilitation provided is a behavior modification program,[151] a therapy program defined as a structured set of training techniques to establish, alter, or eliminate certain responses.[152] The programs are reviewed and approved by a committee within the institution,[153] as well as a Department of Mental Health and Mental Retardation committee.[154] The Commissioner's rules extend the statutory protection afforded the involuntarily committed mentally retarded and establish detailed uniform guidelines to assure safe conditions, freedom from bodily restraint, and habilitation.

The minimum constitutional requirements established in *Romeo* are

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144. *See id.* § 405.844(a).

145. *See id.* § 405.844(b). The use of restraints requires a physician's order. *See id.* § 405.846(a). No single order may extend past 12 hours. *See id.* § 405.846(c). While emergency use of restraints is recognized, within 24 hours a physician must sign a written order. *See id.* § 405.846(g)(5). Some approved mechanical restraints include the following: soft ties to secure extremeties; mittens, wristlets or anklets to immobilize wrist or ankle; camisoles or vest-like jackets with ties in the back to secure client to a stationary object; and restraining sheets to secure client in bed. *See id.* § 405.846(i) (reprint of Exhibit A, "Acceptable Mechanical Restraints" available from Department).

146. *See id.* § 405.845(a)(1).

147. *See id.* § 405.845(c)(1). An example of such a device is a helmet to protect against possible head trauma for a client with seizure disorders. *See id.*

148. *See id.* § 405.845(d). The protective device needs a weekly physician's order to maintain its application. *See id.* § 405.845(d)(2).

149. *See id.* § 405.845(e). The devices must be ordered by a physician and monitored by a physical therapist. *See id.* § 405.845(e)(1).

150. *See* TEX. REV. CIV. STAT. ANN. art. 5547-300, § 16 (Vernon Supp. 1982-1983) (right to individualized habilitation plan); TEX. MH/MR COMM'N, 25 TEX. ADMIN. CODE § 405.625(2) (Shepard's May 1, 1982).

151. *See id.* § 405.144(a). The Department of Mental Health and Mental Retardation recognizes behavior therapy modification techniques as a valuable intervention to promote the development of the mentally retarded. *See id.*

152. *See id.* § 405.143.

153. *See id.* § 405.146(h)(1). Each facility has a three to five member committee. *See id.* § 405.146(b). The committee is responsible for developing guidelines for the facility's use of behavior modification programs. *See id.* § 405.146(h)(1).

154. *See id.* § 405.145. The Department committee consists of seven members, including persons from the Department and from the state schools and hospitals. *See id.* § 405.145(a).

satisfied when a professional, exercising a judgment which is not a substantial departure from accepted professional practices, allows for reasonably safe conditions, freedom from unreasonable bodily restraint, and minimally adequate habilitation as necessary to secure the other two interests; however, Texas statutes and Mental Health/Mental Retardation Commission rules offer more protection in that they augment the constitutional minimum guarantees and promise more comprehensive care for the involuntarily committed mentally retarded. This protection reflects Texas' commitment to safeguard the rights of the institutionalized mentally retarded. "One measure of a nation's civilization is the quality of treatment it provides persons entrusted to its care. The past decade has borne testimony to the growing civilization of this country through its commitment to the adequate care of its institutionalized citizens."[155]

155. S. REP. No. 416, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 787, 788.