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BEYOND YOUNGBERG: PROTECTING THE FUNDAMENTAL RIGHTS OF THE MENTALLY RETARDED

INTRODUCTION

In Youngberg v. Romeo, the Supreme Court held that the institutionalized mentally retarded have constitutionally based liberty interests in "conditions of reasonable care and safety, reasonably non-restrictive confinement conditions," and the right to such training as may be required to ensure the protection of those interests. Justice Blackmun, in his concurring opinion, maintained that a right to the training necessary to prevent unreasonable loss of liberty as a result of confinement must include such training as is reasonably necessary to preserve the basic self-care skills that the person possessed when he entered the institution. He noted that "for many mentally retarded people, the . . . capacity to do things for themselves . . . is as much liberty as they will ever know."

This Note contends that the right to treatment advocated by Justice Blackmun exceeds the boundaries of the right established by the majority. Nonetheless, courts should recognize a substantive right to the training necessary to preserve basic self-care skills. Institutions often act as mere custodians of the severely retarded. Without minimal

1. 102 S. Ct. 2452 (1982).
2. Id. at 2463.
3. Id.
4. Justice Blackmun was joined by Justices Brennan and O'Connor. 102 S. Ct. at 2463.
5. Id. at 2464 (Blackmun, J., concurring). Justice Blackmun felt that a loss of skills resulting from the state's unreasonable refusal to train was a loss of liberty "distinct from—and as serious as—the loss" of liberty which the majority sought to remedy. Id. (Blackmun, J., concurring).
6. Id. (Blackmun, J., concurring).
7. See G. Dybwad, Challenges in Mental Retardation 209 (1964). The more severely retarded have often been warehoused because traditional prejudgments have left their potential unrecognized. Id. at 102-03. Even today many severely retarded persons are placed in remote state institutions where they receive mere custodial care. Herr, The New Clients: Legal Services for Mentally Retarded Persons, 31 Stan. L. Rev. 553, 557 (1979); see R. Scheerenberger, Deinstitutionalization and Institutional Reform 12 (1976) (the severely or profoundly retarded are custodial cases, requiring almost complete care and supervision). According to the most frequently quoted estimate, the severely and profoundly retarded comprise about five percent of all retarded people. Id. at 12-13. The American Association on Mental Deficiency categorizes the severely and profoundly retarded as those persons with I.Q.'s ranging from 0 to 35. Kentucky Ass'n for Retarded Citizens v. Conn, 510 F. Supp. 1233, 1237 (W.D. Ky. 1980), aff'd in part, vacated and remanded in part on other grounds, 550 F.2d 1122 (6th Cir. 1977). There has been growing acceptance, however, of the possibility of training even the most severely retarded. See Welsh v. Likins, 373 F. Supp. 487, 495 (D. Minn. 1974), aff'd in part, vacated and remanded in part on other grounds, 550 F.2d 1122 (8th Cir. 1977); R. Scheerenberger, supra, at 12; Vogel, Effects of Environmental
train these individuals often regress, losing the ability to attend to their most basic needs.  

Part I of this Note examines the Youngberg decision to determine the scope of the right to training recognized by the majority. It then considers the historical development of constitutional substantive rights in order to determine whether recognition of the broader right recognized by Justice Blackmun is consistent with this development. Part II discusses the various theories that lower courts have developed to support a general right to habilitation. Concluding that the Court is unlikely to employ these theories to establish such a general habilitative right, Part III maintains that the training required to preserve basic self-care skills is necessary to protect recognized constitutional rights. This Note contends, therefore, that the institutionalized mentally retarded have a substantive right to that training—a right not to regress—that can only be denied if the state has a substantial justification.

I. A Foundation for the Right to Training

A. The Youngberg Analysis

The Supreme Court approached the question of a substantive right to training for the first time in *Youngberg v. Romeo*. Relying on its recognition in penal cases that personal security and freedom from bodily restraint are basic rights that survive confinement, the Court held that the institutionalized mentally retarded are entitled to the training required to avoid unnecessary infringement of those rights. It ruled that an institution is not justified in physically restraining an individual because of his violent or aggressive tendencies when training would eliminate the need for such restraint.

The Court held that the right to be free from bodily restraint was derived from a basic liberty interest cognizable under the due process clause of the fourteenth amendment. It further stated that the mere use of proper procedures in confining a person does not justify the
deprivation of all liberty interests. Consequently, a state must provide additional procedural safeguards for the liberty interests of the institutionalized mentally retarded. Only when no other way is available to protect the individual may the state justifiably deprive the institutionalized individual of his right to personal security and freedom from physical restraint. Arguably, providing training is itself the procedure the state must undertake.

Requiring training as a procedure to protect fundamental rights suggests that a broader habilitative right may exist. The Court did not address this broader right, however, noting that the issue before it did not involve training apart from that necessary to protect recognized interests in safety and freedom from physical restraints.


15. See 102 S. Ct. at 2458; cf. Vitek v. Jones, 445 U.S. 480, 494 (1980) (prisoner entitled to procedural protection before being classified as mentally ill and subjected to treatment). According to the Youngberg Court, involuntarily committed individuals retain more rights than the imprisoned. See 102 S. Ct. at 2458; accord Romeo v. Youngberg, 644 F.2d 147, 159 (3d Cir. 1980) (en banc) (shackling, unless for protection and treatment of patient, violates the liberty right of a retarded person who has committed no crime), vacated and remanded on other grounds, 102 S. Ct. 2452 (1982).

16. The Youngberg majority held that the Constitution requires such minimally adequate training as is reasonable in light of the individual’s rights to safety and freedom from restraint. 102 S. Ct. at 2461. It appears, therefore, that only if the state has already attempted such reasonable training is it justified in depriving institutionalized retarded persons of their rights. See id. Due process is a flexible concept, and the procedural protections called for vary depending upon the demands of the particular situation. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); see Ingraham v. Wright, 430 U.S. 651, 678-79 & n.47 (1977).


18. 102 S. Ct. at 2459 & n.23. By deriving a right from traditionally protected recognized freedoms, the Court failed to resolve lower court confusion on the right to
If the interpretation of the due process clause employed by the majority merely guarantees training as a procedural protection for existing constitutional rights, that interpretation cannot be used to supplant state judgments as to the protections that non-constitutional rights should be afforded. Consequently, only if a constitutional basis for the interests Justice Blackmun seeks to protect is identified would the notion of due process relied upon by the majority protect those interests.

The right to training advocated by Justice Blackmun is derived from a broader notion of due process clause liberty. Blackmun stated that loss of basic self-care skills during confinement as a result of the state’s unreasonable refusal to provide training represents “a loss of liberty quite distinct from—and as serious as—the loss of safety and freedom from unreasonable restraint.” Unlike the limited right to training established by the majority, the right Justice Blackmun advances implicates liberty interests not previously incorporated within the fourteenth amendment. The majority noted that “[l]ib-


19. See supra notes 13-16 and accompanying text.

20. See Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68-70 (1978) (case does not involve fundamental right to vote, so Court subjects state statute to minimal scrutiny); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35-40 (1973) (education is not a fundamental right, so state legislation need be only rationally related to legitimate state purposes); Dandridge v. Williams, 397 U.S. 471, 484-87 (1970) (Court declined to question wisdom of state legislation affecting welfare benefits because they are not recognized constitutional rights).


22. See id. at 2464 (Blackmun, J., concurring). Justice Blackmun referred to unreasonable bodily restraints and unsafe institutional conditions as just two examples of post-commitment deprivation of liberty. Id.

23. Id. (Blackmun, J., concurring). But see Association for Retarded Citizens v. Olson, No. 80-141, slip op. at 27 (D.N.D. Aug. 31, 1982) (court broadly interprets the right to freedom from restraint to support an habilitative right similar to that advocated by Justice Blackmun); Philipp v. Carey, 517 F. Supp. 513, 519 (N.D.N.Y. 1981) (court prevents state infringement of interest in personal autonomy by broadly interpreting the freedom of locomotion protected in Romeo v. Youngberg, 644 F.2d 147, 157-58 (3d Cir. 1980) (en banc), vacated and remanded on other grounds, 102 S. Ct. 2452 (1982)).

24. See supra notes 10-11 and accompanying text.

25. See Ingraham v. Wright, 430 U.S. 651, 672-74 (1977). The Court in Ingraham stated that personal security and freedom from restraint are liberty interests protected by the fifth amendment and incorporated by the fourteenth amendment. The Court in Youngberg could therefore predicate a right to training on the need to protect these interests. 102 S. Ct. at 2460-63. Justice Blackmun, however, refers to no
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ty from bodily restraint *always has been recognized* as the core of the liberty protected by the Due Process Clause." 26 It found, therefore, that the state has a duty to protect the involuntarily committed individual from loss of that liberty. 27 Deriving a right to training from general notions of liberty, however, rather than from the need to protect identified rights, is inconsistent with the Court's practice of protecting only fundamental interests implicitly or explicitly found in the Constitution. 28

B. The Concept of Liberty Under the Fourteenth Amendment

Between 1897 and 1937, 29 the Court liberally applied the liberty component of the due process clause to protect individual liberty from specific liberty interest on which to predicate a broader right to training. See id. at 2464-65 (Blackmun, J., concurring); id. at 2460 n.25 (federal court must identify constitutional predicate for imposing duty on state). He does, however, state that personal autonomy is implicated whenever basic self-care skills are concerned. 102 S. Ct. at 2465 (Blackmun, J., concurring); cf. Kelley v. Johnson, 425 U.S. 238, 250-53 (1976) (Marshall, J., dissenting) (right to determine one's appearance is protected by the fifth amendment and is an aspect of personal autonomy which the Constitution is designed to protect) (citing Roe v. Wade, 410 U.S. 113 (1973), Stanley v. Georgia, 394 U.S. 557 (1969), Griswold v. Connecticut, 381 U.S. 479 (1965), and Kent v. Dulles, 357 U.S. 116 (1958)); Association for Retarded Citizens v. Olson, No. 80-141, slip op. at 25 (D.N.D. Aug. 31, 1982) (personal autonomy is an element of the right to be free from restraint); Philipp v. Carey, 517 F. Supp. 513, 519 (N.D.N.Y. 1981) (right to treatment ensures that custody by the state will not interfere with fundamental liberty interest like personal autonomy).

26. 102 S. Ct. at 2458 (emphasis added) (quoting Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part, dissenting in part)).

27. See id. at 2462-63.

28. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (a right, to be fundamental, must be explicitly or implicitly found in the Constitution); Sotto v. Wainwright, 601 F.2d 184, 190-91 (5th Cir. 1979) (liberty protected by fourteenth amendment due process encompasses only specific provisions of the Bill of Rights, and fundamental rights "implicit in the concept of ordered liberty") (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled in part, Benton v. Maryland, 395 U.S. 784 (1969)), cert. denied, 445 U.S. 950 (1980); Schwartz, A "New" Fourteenth Amendment: The Decline of State Action, Fundamental Rights, and Suspect Classifications under the Burger Court, 56 Chi-Kent L. Rev. 865, 878-80 (1980) (only rights explicitly or implicitly found in the Constitution are protected by strict judicial scrutiny under the fourteenth amendment). The list of non-textual rights found fundamental by the Court is fairly short. J. Nowak, R. Rotunda & J. Young, Constitutional Law 418 (1978). The Court attempts to justify these rights as extensions of the Bill of Rights, see L. Tribe, American Constitutional Law 570, 893 (1978), or it may recognize them simply because they are essential to society's concept of liberty. J. Nowak, R. Rotunda & J. Young, supra, at 416.

29. These years generally mark the duration of the substantive due process era. See L. Tribe, supra note 28, at 435; Douglas, Harlan Fiske Stone Centennial Lecture: The Meaning of Due Process, 10 Colum. J.L. & Soc. Prob. 1, 5 (1973); Henkin,
"unreasonable, unnecessary and arbitrary interference." The Court examined state and federal regulatory legislation to determine whether the legislation had a "real and substantial" relationship to its objectives, thereby not unreasonably infringing upon individual liberty. In the late 1930's, however, the Court abandoned this practice of judicial activism and began treating legislative judgments as presumptively constitutional. More recently, it reaffirmed its displeasure with the substantive use of the due process clause to protect individuals from legislative judgments, stating that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."

The Court, however, did not foreclose the possibility that due process liberty provides the individual with substantive constitutional protection from government action. In a much-disputed footnote to


30. Lochner v. New York, 198 U.S. 45, 56 (1905). Due process clause liberty received a broad interpretation during the substantive due process era. In addition to freedom from physical restraint, liberty included the free enjoyment of one's faculties, freedom to live and work where one wished, and freedom to earn one's livelihood by any lawful calling, Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897), the right to contract, the right to acquire useful knowledge, the right to marry and establish a home, the right to worship God according to the dictates of one's conscience, and the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

31. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (statute requiring children to attend public school unconstitutionally interferes with parents' liberty to raise children as they choose); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (statute prohibiting the teaching of foreign languages to grade school students not adequately related to purpose of protecting children's health); Adkins v. Children's Hosp., 261 U.S. 525, 561-62 (1923) (minimum wage law an unconstitutional interference with right to contract), overruled, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Buchanan v. Warley, 245 U.S. 60, 81-82 (1917) (ordinance preventing blacks and whites from living in the same neighborhood struck down as an unreasonable interference with right to dispose of one's property); Lochner v. New York, 198 U.S. 45, 64 (1905) (statute limiting number of hours in the work week purports to protect workers' health but does not, thereby unreasonably infringing freedom to contract); Allgeyer v. Louisiana, 165 U.S. 578, 592-93 (1897) (statute interfering with freedom to contract struck down).

32. See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("existence of facts supporting the legislative judgment is to be presumed"); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"); Nebbia v. New York, 291 U.S. 502, 525 (1934) ("subject only to constitutional restraint the private right must yield to the public need").

its decision in *United States v. Carolene Products Co.*, the Court suggested that the presumption of constitutionality was not as strong when specific constitutional prohibitions for the benefit of fundamental rights, such as those expressed in the Bill of Rights, are involved. From this suggestion developed the practice of selectively incorporating those rights “fundamental to the American scheme of justice” into the due process clause. The justification for this practice is that the Bill of Rights offers clear constitutional guidance to the Court for supplanting the judgment of the legislature with its own. Because

34. 304 U.S. 144, 152 n.4 (1938).

35. *Id.*; see Skinner v. Oklahoma, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring) (“There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned . . . .”). See generally *Lusky, Footnote Redux: A Carolene Products Reminiscence*, 82 Colum. L. Rev. 1093 (1982) (explaining the genesis of the footnote and legal developments which followed from it).


38. *See generally* *Douglas, supra* note 29, at 7-11 (describing various interpretations of the due process clause of the fourteenth amendment).

the rights recognized by the Youngberg majority had previously been identified as part of the "historic liberty interest" protected by the fifth amendment, the majority's ruling is consistent with the practice of protecting from state action only selectively incorporated rights.

In other contexts, however, such as those in which certain civil or human rights were threatened, the Court has substituted its judgment for that of the state in the absence of an established constitutional directive. Strict standards of review have been devised when state action touches on those fundamental rights "implicit in the concept of ordered liberty" embodied in the Constitution. The Court has recog-


40. See supra notes 28, 36-38 and accompanying text.


42. See Roe v. Wade, 410 U.S., 113, 155 (1973) (state action can only limit fundamental rights when justified by "compelling state interest"); Griswold v. Connecticut, 381 U.S. 479, 497-98 (1965) (Goldberg, J., concurring) (compelling interest, or state action necessary to effectuate permissible state policy); Dowben, Legal Rights of the Mentally Impaired, 16 Hous. L. Rev. 833, 879 (1979) (acknowledging Court's use of a compelling state interest test). One Justice criticized the Court for transposing the compelling state interest test from equal protection considerations to a due process case. See Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting). Justice Stewart has stated, however, that in some fundamental rights cases equal protection "is no more than substantive due process by another name." Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring).

nized such non-textual rights as freedom of association, the right to vote, the right to travel and the right to privacy. A constitutional basis for these rights is found by locating them within "penumbras" of the Bill of Rights or deeming them implicit in the Constitution.

44. NAACP v. Alabama, 357 U.S. 449, 466 (1958). Freedom of association is protected by the first amendment. Elflbrandt v. Russell, 384 U.S. 11, 18 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 507 (1964). The right may be abridged only to the extent that it is abused, such as by assembling to incite violence or crime. De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937). When the right is abridged the restrictions must not "sweep unnecessarily broadly and thereby invade the area of protected freedoms." Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964) (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

45. See Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). The Constitution expressly prohibits denial by the states of the right to vote on the basis of race, U.S. Const. amend. XV, § 1, sex, id. amend. XIX, § 1, age, id. amend. XXVI, § 1, or because of "failure to pay any poll tax or other tax," id. amend. XXIV, § 1. Although it prohibits the use of these franchise requirements, however, the Constitution does not expressly grant a right to vote. Nevertheless, the Supreme Court has established the right to vote as a fundamental right within the fourteenth amendment, stating: "[u]ndoubtedly, the right of suffrage is a fundamental matter . . . [s]pecially since the right to exercise the franchise . . . is preservative of other basic civil and political rights . . . " Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). Therefore, alleged infringements are subject to strict scrutiny. Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969); Reynolds v. Sims, 377 U.S. 533, 562 (1964).


49. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969) (right to interstate travel so elementary that it is a "necessary concomitant") (quoting United States v. Guest, 338 U.S. 476, 488 (1949)); Louisiana v. NAACP, 366 U.S. 293, 296 (1961) ("[F]reedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment.");
and therefore entitled to protection from unreasonable state intrusion. 50 Thus, while the Court might hesitate to derive a substantive right to training from a concept of general due process liberty, 51 it could derive the right advocated by Justice Blackmun from recognized penumbras of the Constitution—the rights to free association, free movement, privacy and autonomy—without departing from its practice of selective incorporation. 52

Falling short of constructing this constitutional standard, lower federal courts have employed an alternative approach to establishing a right to training in basic self-care skills. While reaching a result that encompasses the right Justice Blackmun seeks to establish, these courts have not found it necessary to undertake the rigors of a fundamental rights analysis.

II. A Right to Treatment—The Lower Court Alternatives

Numerous lower courts using varying approaches have relied on the state's role in confining the individual to establish a constitutional right to training 53 that extends beyond the preservation of basic skills. 54 For instance, if an institutionalized individual has not

Kent v. Dulles, 357 U.S. 116, 125-26 (1958) (right to foreign travel an element of fifth amendment liberty, since "[f]reedom of movement is basic in our scheme of values").


51. See supra notes 25-28 and accompanying text.

52. See infra pt. III.

53. Courts generally refer to a right to treatment when dealing with the mentally ill and a right to training or habilitation when the retarded are concerned. Compare Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974) (a person civilly committed to a state mental hospital has a right to treatment giving him a reasonable opportunity to be cured), vacated and remanded on other grounds, 422 U.S. 563 (1975), with Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1317-18 (E.D. Pa. 1977) (state that confines retarded person must provide minimally adequate habilitation), aff'd in part on other grounds, rev'd and remanded in part en banc, 612 F.2d 84 (3d Cir. 1979), rev'd, 451 U.S. 1 (1981). To avoid potential confusion from using these terms interchangeably, in this section of the text treatment will be used to denote the general concept, encompassing both treatment and training, and training will be employed in reference to particular case holdings concerning the retarded.

54. E.g., Romeo v. Youngberg, 644 F.2d 147, 165 (3d Cir. 1980) (en banc) (right to treatment arises upon involuntary confinement, whether state's rationale is parens patriae or police power), vacated and remanded on other grounds, 102 S. Ct. 2452 (1982); Goodman v. Parwatiqar, 570 F.2d 801, 804 (8th Cir. 1978) (due process clause compels minimally adequate treatment); Wyatt v. Aderholt, 503 F.2d 1305, 1314 (5th Cir. 1974) (minimally adequate habilitation is the quid pro quo for
committed any crime, imprisonment without treatment may violate his substantive due process rights,\(^5\) on the theory that a mental hospital that does not treat mental illness is in effect a mental prison.\(^6\) One court has concluded that confinement of the retarded without training is essentially incarceration due to status\(^7\)—a practice held unconstitutional by the Supreme Court in *Robinson v. California*.\(^8\)

Other courts have ruled that by confining a person for treatment or protection the state assumes the role of the parent, and thus has a *parens patriae* duty to furnish care and treatment.\(^9\) Without a

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\(^{56}\) Birnbaum, \textit{supra} note 55, at 503; \textit{accord Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966)}. Birnbaum's article has been credited as the genesis of the legal right to treatment, and *Rouse* has been called the first significant judicial development in the area. *Murdock, Civil Rights of the Mentally Retarded: Some Crucial Issues*, 48 Notre Dame Law. 133, 149-50 (1972). 


\(^{58}\) 370 U.S. 660, 666-67 (1962). In *Robinson*, a state statute made it a criminal offense to be addicted to narcotics. \textit{Id. at 666}. The Court, considering narcotic addiction a disease rather than a crime, likened incarceration based on addiction to imprisonment for having the common cold. \textit{Id. at 667}. Therefore, the Court stated that it was cruel and unusual punishment. \textit{Id.}  

\(^{59}\) E.g., *Johnson v. Solomon*, 484 F. Supp. 278, 300 (D. Md. 1979) (right to treatment is state's corresponding obligation in light of its right to exercise *parens patriae* power over citizens); *Eckerhart v. Hensley*, 475 F. Supp. 908, 914-15 (W.D. Mo. 1979) (by confining mentally ill or retarded person, the state absolutely forecloses any other treatment; thus such a person has a constitutional right to minimally
training program designed to provide an institutionalized retarded person with a realistic chance for a more useful and meaningful life,\textsuperscript{60} the state has no constitutional justification for the deprivation of liberty that confinement necessarily entails.\textsuperscript{61}

A third rationale supporting the right to treatment is the \textit{quid pro quo} doctrine. When the state confines an individual against his will it must provide a \textit{quid pro quo} in the form of minimally adequate treatment.\textsuperscript{62} This treatment, however, is only required when three limitations on the state's power to detain—retribution for a specific offense, detention for a fixed term and observation of fundamental procedural safeguards—have not been observed.\textsuperscript{63} This rationale has


\textsuperscript{61} Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1315-16 (E.D. Pa. 1977) (only justification for committing retarded to an institution is to provide habilitation), \textit{aff'd in part on other grounds, rev'd and remanded in part en banc, 612 F.2d 84 (3d Cir. 1979), rev'd, 451 U.S. 1 (1981); Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972) (same), \textit{aff'd, remanded, and reserved in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); see Romeo v. Youngberg, 644 F.2d 147, 165 (3d Cir. 1980) (en banc) (right to treatment arises whether \textit{pares patriae} or police power is rationale for commitment), vacated and remanded on other grounds, 102 S. Ct. 2452 (1982).}

\textsuperscript{62} The \textit{pares patriae} duty of the state is implicated when the rationale for confinement is habilitation or protection of the individual. \textit{Id. at 158}. Treatment prevents the exercise of the \textit{pares patriae} power from being merely a "pretext for arbitrary governmental action." Morales v. Turman, 562 F.2d 993, 997 (5th Cir. 1977). Some courts, however, may differentiate between confinement for care and treatment and confinement for protection, saying care and treatment must be provided in the former instance, but not in the latter. \textit{See Rone v. Fireman, 473 F. Supp. 92, 118-19 (N.D. Ohio 1979); cf. Jackson v. Indiana, 406 U.S. 715, 738 (1972) (nature and duration of commitment must bear some reasonable relation to its purpose).}

\textsuperscript{63} Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972), \textit{aff'd, remanded, and reserved in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).}

\textsuperscript{64} See Donaldson v. O'Connor, 493 F.2d 507, 522 & n.22 (5th Cir. 1974), \textit{vacated and remanded on other grounds, 422 U.S. 563 (1975); Gary W. v. Louisiana, 437 F. Supp. 1209, 1216 (E.D. La. 1976), \textit{aff'd on other grounds, 601 F.2d 240 (5th Cir. 1979).}
been used in arguing for a constitutional right to a training program affording the individual an opportunity to acquire and maintain life skills commensurate with his capacities.  

Courts adjudicating the rights of the civilly committed have also applied the constitutional doctrine of least restrictive alternative.  

Civil commitment entails a "massive curtailment of liberty"; the
least restrictive alternative doctrine requires that confinement of the retarded not unduly intrude on fundamental liberties, regardless of governmental purpose. 67

Some courts have criticized both the right to treatment and the rationales supporting it. 68 The parens patriae rationale, for example, has been challenged on the grounds that confinement under the state's parens patriae power need not logically require treatment; 69 states exercising the parens patriae power have historically provided only custodial care. 70 Similarly, requiring treatment as a quid pro quo for confinement following committal proceedings with reduced procedural safeguards has been criticized because safeguards are less likely to be required as the government interest increases in importance. 71 The procedural safeguards of a criminal trial are not needed, for example, to quarantine a person with a communicable disease. 72 Thus, if the state does not owe the safeguards in the first place, it will not owe the individual any treatment as the quid pro quo for not providing them.

Application of the least restrictive alternative doctrine in the civil commitment context has been criticized as an improper extension of a first amendment principle. 73 Moreover, the least restrictive alternative may vary according to the needs of each resident. 74 Finally, some courts have expressed concern that the constitutional right to

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69. Morales v. Turman, 562 F.2d 993, 998 (5th Cir. 1977).

70. Id.

71. Id.


74. See Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 128 (3d Cir. 1979) (en banc) (Seitz, C.J., dissenting), rev'd, 451 U.S. 1 (1981). The least restrictive alternative also may change over time, thereby becoming a medical question. Id.
treatment is not a proper issue for court adjudication. The Supreme Court, however, has shown that it will require limited training as a procedural safeguard when necessary to protect recognized liberty interests.

The Court has yet to adopt any of the aforementioned lower court rationales. Prior to Youngberg, two potential right to treatment cases—O'Connor v. Donaldson and Pennhurst State School and Hospital v. Halderman—had come before the Court. Each case was decided without reaching the issue of a constitutional right to treatment. Moreover, the Youngberg holding that there is a limited right to training arising out of the need to protect traditionally recognized freedoms does not resolve the continuing dispute concerning the viability of the lower court approaches. It does


77. 422 U.S. 563 (1975).


79. In O'Connor, the Court vacated the Fifth Circuit's opinion and remanded the case for a determination whether the trial court erred in refusing a requested jury instruction. 422 U.S. at 576-77. The Fifth Circuit had recognized a constitutional right to treatment. Donaldson v. O'Connor, 493 F.2d 507, 520-22 (5th Cir. 1974), vacated and remanded, 422 U.S. 563 (1975). In Halderman, the Court reversed the Third Circuit decision that had found a federal statutory right to treatment. 451 U.S. at 31-36. The Court, therefore, did not face the issue of a constitutional right, the issue on which the district court had pinned its decision. See Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1317-18 (E.D. Pa. 1977), aff'd in part on other grounds, rev'd and remanded in part en banc, 612 F.2d 84 (3d Cir. 1979), rev'd, 451 U.S. 1 (1981).

80. See Youngberg v. Romeo, 102 S. Ct. 2452, 2459 (1982) ("this case does not present the difficult question whether a mentally retarded person . . . has some general constitutional right to training per se"). The Youngberg opinion has been interpreted both narrowly and broadly. An internal Justice Department memo from Civil Rights Chief William Bradford Reynolds stated that in light of Youngberg, the Justice Department could investigate institutions to ensure resident safety and freedom from restraint, but not to see whether proper care and therapy is being provided. See Justice Department Moves Away from Enforcement of the Rights of Institutionalized, 6 A.B.A. Mental Disability L. Rep. 356, 356 (1982). Reynolds concluded in light of the Court's holding that it was not a constitutional violation to fail to provide training to residents. Id. Arthur E. Peabody, Jr., head of the Civil Rights Division's special litigation section, criticized this interpretation as "incorrect" and "unnecessarily restrictive." Id. Clearly, the Court did not mean to foreclose the
suggest, however, that the Court is reluctant to recognize and protect a substantive right that has not previously been included in constitutional lexicon. Thus, the Court may be willing to recognize the right advocated by Justice Blackmun only if that right can be identified as protective of well-established constitutional interests.

III. A RIGHT NOT TO REGRESS

The mentally retarded possess the same constitutional rights as other citizens, which can be overborne only by an overriding state possibility of a broader right to treatment. See Youngberg v. Romeo, 102 S. Ct. 2452, 2459 & n.23 (1982) (the case does not present the question of a constitutional right to habilitation per se). The Court merely opted to decide only the issue plainly before it. Youngberg received a broader reading from the District Court of North Dakota in Association for Retarded Citizens v. Olson, No. 80-141 (D.N.D. Aug. 31, 1982). The court posited that the right to freedom from undue restraint includes the right to make small personal decisions, id. at 25, and to receive training in basic self-care, id. at 27. The skills mentioned by the district court included “feeding, bathing, dressing, self-control, and toilet training.” Id. The court explained that maintenance of these skills is “essential to the exercise of basic liberties.” Id. The court thus reached a result similar to that advocated by Justice Blackmun in Youngberg, see supra notes 4-5 and accompanying text, while purporting to follow the Youngberg majority’s analysis, see Association for Retarded Citizens v. Olson, No. 80-141, slip op. at 26 (D.N.D. Aug. 31, 1982). The district court’s holding is probably the result of an overbroad interpretation of Youngberg. See Youngberg v. Romeo, 102 S. Ct. 2452, 2458 (1982) (Court referring to protected liberty interest in freedom from bodily restraint). The court did, however, concede that the Youngberg Court “closely tied the right to training to particular liberty interests.” See Association for Retarded Citizens v. Olson, No. 80-141, slip op. at 29 (D.N.D. Aug. 31, 1982).

81. See Youngberg v. Romeo, 102 S. Ct. at 2452, 2460 n.25 (1982) (minimally adequate training is that which is reasonable in light of identifiable liberty interests); 1981 Term, supra note 10, at 80-81.

82. See 102 S. Ct. at 2464-65 (Blackmun, J., concurring). It is important to note that the right advocated by Justice Blackmun is more limited, and therefore less onerous on the state, than habilitative rights framed by some lower courts. Training in pre-existing basic skills is aimed more at maintaining the status quo than at maximizing the individual’s potential. Compare Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1317-18 (E.D. Pa. 1977) (state must provide habilitation affording individuals a reasonable chance to acquire and maintain life skills for coping as effectively as their capacities permit), aff’d in part on other grounds, rev’d and remanded in part en banc, 612 F.2d 84 (3d Cir. 1979), rev’d, 451 U.S. 1 (1981), and Gary W. v. Louisiana, 437 F. Supp. 1209, 1219 (E.D. La. 1976) (same), aff’d on other grounds, 601 F.2d 240 (5th Cir. 1979), and Wyatt v. Stickney, 344 F. Supp. 387, 396 (M.D. Ala. 1972) (habilitation should be suited to individual needs, and it should enable the individual to maximize his abilities), aff’d, remanded, and reserved in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), with Youngberg v. Romeo, 102 S. Ct. 2452, 2464 (1982) (Blackmun, J., concurring) (fourteenth amendment may require training to preserve skills an individual possessed when he entered the institution).

83. R. Scheerenberger, supra note 7, at 65-68; see Dowben, supra note 42, at 879 ("[t]he Bill of Rights does not refer to incompetents and incompetents"); United Na-
The loss of basic self-care skills as a result of institutionalization is equivalent in result to the deprivation of certain fundamental rights, such as the rights of free association, privacy and autonomy. By providing the training that would preserve self-care skills, an institution could avoid the unconstitutional infringement of those rights.

A. Implicating Fundamental Rights

Freedom of choice in marital relations, freedom to choose to have an abortion, freedom to control one's appearance, and freedom in other personal matters have been recognized as fundamental rights. These non-textual constitutional rights comprise in essence a "general right of private autonomy." As the Court stated in Terry v. Ohio, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person . . . ." Due process, therefore, precludes

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84. See supra note 42 and accompanying text.
90. 392 U.S. 1 (1968).
91. Id. at 9 (quoting Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)).
governmental conduct that does not evidence a decent respect for personal integrity and that outrages public sensibility.\textsuperscript{92}

If the right of autonomy includes the right to choose a hairstyle\textsuperscript{93} and the right to have an abortion,\textsuperscript{94} it should also encompass the right to perform tasks that are related to the well-being of one's person and appearance\textsuperscript{95} absent the supervision of a state employee. Although Justice Blackmun did not premise his extended right to training upon a specific, recognized constitutional right, he did suggest that mentally retarded persons might argue for substantive constitutional protection of their basic self-care skills necessary to personal autonomy.\textsuperscript{96} While the majority of severely retarded people will never be completely self-sufficient,\textsuperscript{97} basic self-care is worthy of protection.\textsuperscript{98}

A number of fundamental rights are implicated by the loss of basic self-care skills. For example, lower courts have found that all citizens have the fundamental rights to defecate and urinate without government permission and to avoid the odor of one's urine and feces.\textsuperscript{99} If a person is toilet-trained at the time of commitment, but

\begin{thebibliography}{99}
\bibitem{92} Monaghan, \textit{supra} note 29, at 433.
\bibitem{94} See \textit{supra} note 86 and accompanying text.
\bibitem{96} The fact that a retarded person is unable to exercise his autonomy right as fully as other human beings should not foreclose his opportunity to exercise it at all. See Dowben, \textit{supra} note 42, at 879-80 ("The test of compelling justification for denial of fundamental rights to citizens is stricter than a mere showing of incompetence of judgment in certain areas of human functioning. Every human being should be presumed to have these rights unless someone can show an almost certain probability of disastrous consequences . . . .").
\bibitem{97} See Youngberg v. Romeo, 102 S. Ct. at 2465 (1982) (Blackmun, J., concurring).
\bibitem{98} See R. Scheerenberger, \textit{supra} note 7, at 12.
\bibitem{99} Youngberg v. Romeo, 102 S. Ct. 2452, 2464-65 (1982) (Blackmun, J., concurring); Brief of the American Psychiatric Association as Amicus Curiae at 6, Youngberg v. Romeo, 102 S. Ct. 2452 (1982). For many mentally retarded people, the ability to do things for themselves is as much liberty as they will ever know. 102 S. Ct. at 2464 (Blackmun, J., concurring). Liberty is "an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty." L. Tribe, \textit{supra} note 28, at 959 (quoting Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970)); \textit{cf.} Truax v. Raich, 239 U.S. 33, 41 (1915) (right to work for a living is essential to personal freedom); Smith v. Hill, 285 F. Supp. 556, 560-61 (E.D.N.C. 1968) (same).
loses this skill while confined, the person has lost control over essential body functions. Although the result of staff inattention, the consequences are the same as those caused by an affirmative deprivation by the state.

The Supreme Court has recognized locomotion as a fundamental right. If post-commitment inactivity causes physical atrophy, rendering an individual non-ambulatory, the individual cannot exercise his right to move about within the institution. The consequences are indistinguishable from the effects of actual physical restraint complained of in Youngberg; only the cause of the immobility differs.


The above line of cases involved eighth amendment challenges, alleging that confinement under such conditions constitutes cruel and unusual punishment. See Flakes v. Percy, 511 F. Supp. 1325, 1330-31 (W.D. Wis. 1981). The eighth amendment, however, does not apply to civil confinement. Romeo v. Youngberg, 644 F.2d 147, 156 (3d Cir. 1980) (en banc), vacated and remanded on other grounds, 102 S. Ct. 2452 (1982); see Bell v. Wolfish, 441 U.S. 520, 535 & n.16 (1979). Rather, the due process clause applies, and the issue is whether confinement conditions amount to punishment. Id. at 535. Fifth amendment liberty includes freedom from punishment administered without due process of law. Id. at 536 n.17. It seems, furthermore, that conditions extreme enough to be considered cruel and unusual in the criminal context must be considered violations of fifth amendment freedom from punishment in the civil commitment context. See Youngberg v. Romeo, 102 S. Ct. 2452, 2458 (1982) ("If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.") (emphasis added).

100 Brief of Amici Curiae, supra note 8, at 23-24.


103. See Kent v. Dulles, 357 U.S. 116, 126 (1958) ("[f]reedom of movement is basic in our scheme of values"); Dowben, supra note 42, at 879-80 (retarded have same rights as others); cf. Raper v. Lucey, 488 F.2d 748, 752 (1st Cir. 1973) (freedom to use one's property to get from place to place is protected by due process) (quoting Wall v. King, 206 F.2d 878, 882 (1st Cir.), cert. denied, 346 U.S. 915 (1953)).

104. See Youngberg v. Romeo, 102 S. Ct. 2452, 2455 (1982). In the wake of Youngberg, one court has broadly interpreted the restraint from which the involuntarily confined must be free. See Association for Retarded Citizens v. Olson, No. 80-
The Court has also recognized a fundamental right of association, arising out of the free speech clause of the first amendment. If, because of inadequate training, an institutional resident loses the communication skills and social competence that he possessed when committed, the result is similar to that of a deprivation of first amendment rights. In actuality, the first amendment forbids not the abridgment of speech, but the abridgment of freedom of speech. If institutionalization causes an individual to lose his communication skills, however, he loses the ability to express himself. At least as far as the individual is concerned, the consequences are far more serious than abridgment of freedom to express a specific idea. Moreover, loss of the ability to express basic needs could cause further deterioration of skills, thus implicating protected rights.

In addition, the recognized fundamental rights to personal security and freedom from restraint are implicated by the Court in Youngberg. The Court held that it may be unreasonable not to provide training that could significantly reduce the need for physical restraints or the likelihood of violence. Psychiatric studies have shown that training in basic self-care does reduce violent and self-destructive behavior. If a lack of training results in loss of skills

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106. See R. Scheerenberger, supra note 7, at 31-32; Mitchell & Smeriglio, supra note 8, at 23-24.

107. A. Meiklejohn, Political Freedom 21 (1960). The Court has recognized situations in which abridgment of speech or other communications is constitutionally permissible. See, e.g., Miller v. California, 413 U.S. 15, 23 (1973) (obscene material not protected by first amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words tending to incite an immediate breach of peace not protected); Schenck v. United States, 249 U.S. 47, 52 (1919) (free speech does not encompass use of words which creates a "clear and present danger"). Generally, however, the first amendment provides individuals with the right to express ideas freely. See, e.g., Cohen v. California, 403 U.S. 15, 20-26 (1971) (use of four-letter word constitutionally protected when not directed to any particular hearer and not intended to arouse anyone violently); Roth v. United States, 354 U.S. 476, 487 (1957) (mere portrayal of sex is not sufficient reason to deny freedom of speech) (dictum); Yates v. United States, 354 U.S. 298, 319-20 (1957) (courts must distinguish between advocacy of revolutionary action and mere advocacy of abstract doctrine).

108. See Association for Retarded Citizens v. Olson, No. 80-141, slip op. at 27 (D.N.D. Aug. 31, 1982) (communication skills enable the exercise of basic liberties).


110. Id. at 2462-63.

111. Brief of Amici Curiae, supra note 8, at 11 & nn.29-30 (citing numerous psychiatric studies); 1981 Term, supra note 10, at 83 & n.47 (same).
and self-destructive or maladaptive behavior, self-care training serves to prevent the conditions Youngberg seeks to cure.

B. The Duty Not to Deprive

An obstacle to finding a deprivation of rights in the loss of basic skills is that such deterioration lacks the character of an affirmative taking by the state. However, the situation of the institutionalized retarded is unique, and the Court should, as a matter of policy and practicality, impose an affirmative duty on the state to act whenever the consequences of inaction are serious enough to resemble the deprivation of fundamental rights. In Youngberg, the Supreme Court held that [insert reasoning here].


114. Compare Youngberg v. Romeo, 102 S. Ct. 2452, 2455 (1982) (physical restraint of institution resident by means of "shackles" for long periods of time, an active deprivation of freedom from restraint), with Wyatt v. Stickney, 344 F. Supp. 387, 391 (M.D. Ala. 1972) (describing state institution as incapable of providing habilitation, and therefore conducive to deterioration of residents) (quoting Mar. 2, 1972 unreported interim order), aff'd, remanded, and reserved in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), and Brief of Amici Curiae, supra note 8, at 10-11 (lack of practice in already-acquired skills causes institutional residents to "learn helplessness") and Herr, supra note 7, at 557 (lack of treatment and training causes physical atrophy and intellectual deterioration).

115. See Bounds v. Smith, 430 U.S. 817, 828 (1977) (prison authorities have affirmative duty to facilitate prisoners' exercise of fundamental right of access to [insert reasoning here].
Court established a limited right to the training necessary to safeguard the rights of bodily security and freedom from restraint.\textsuperscript{116} Although the restraint in \textit{Youngberg} was the result of state action,\textsuperscript{117} the unsafe institutional conditions that infringed the right to personal security were not affirmatively created by the state, but rather, were caused by inaction—failure to provide adequate safeguards.\textsuperscript{118} The Court nonetheless held that the right to bodily security must be protected.\textsuperscript{119}

Justice Stevens stated in his dissent in \textit{Estelle v. Gamble}\textsuperscript{120}: "\textit{W}hether the constitutional standard has been violated should turn on the character of the [injury] rather than the motivation of the individual who inflicted it."\textsuperscript{121} It thus should not matter whether a deprivation is the result of intent, neglect, or even poverty.\textsuperscript{122} This is especially true in the case of the institutionalized retarded, who are not "accountable for their plight."\textsuperscript{123} In \textit{Eckerhart v. Hensley},\textsuperscript{124} the district court posited that because the mentally retarded person is set apart from society when committed, he receives only the treatment the state chooses to provide.\textsuperscript{125} As a result of this isolation, a person
committed against his will should have a right to minimally adequate treatment.126 Although the Supreme Court has declared that government need not remove from the path of freedom those obstacles "not of its own creation,"127 the state in effect creates such an obstacle, through its inattention to an institutionalized retarded person, when it causes that person to lose the skills he possessed prior to commitment.

C. Balancing State Interests

If loss of basic self-care skills is considered the constitutional equivalent of deprivation of established fundamental rights, the Supreme Court's directive that substantive protection be accorded only to those rights that are either expressly or implicitly mandated by the Constitution will be satisfied.128 Given the implication of fundamental rights, the state must demonstrate an overriding interest to justify an infringement of that right.129 Therefore, to override an individual's interest in the preservation of his self-care skills during institutionalization, the state must show that its failure to train is a necessary means to achieve a compelling state interest.130

Among the state interests that may be balanced against an institutional resident's fundamental rights131 are security concerns,
fiscal constraints and administrative necessities. A lack of training, however, can cause aggressive, violent, or self-destructive behavior, thereby threatening, not facilitating, internal security. Therefore, with training, and the resulting preservation of self-care skills, will come a more secure environment.

The Supreme Court has taken the view that at some point a constitutional right must be subordinated if enforcement of that right directly conflicts with fiscal and administrative necessity. A number of circuit courts adhere to a different position, finding that cost is not a concern when constitutional rights are involved. One court has added, however, that once minimum treatment is provided, courts should be hesitant in requiring the allocation of resources necessary for ideal treatment. In Youngberg, the Supreme Court stated that, given fiscal and administrative limitations, treatment decisions of professionals affecting institution residents must bear a presumption of correctness.
Basic self-care training is, by its nature, neither administratively demanding nor fiscally burdensome. The state should gauge the skills an individual possessed at the time of commitment and make certain that those skills are consistently practiced. No judicial determination of the reasonableness of a particular form of training is needed and self-care training will not require a significant increase in state expenditures.

It is far from clear that not providing training in basic self-care skills serves state interests. In fact, training that preserves the basic skills of institution residents may lessen the burden of supervisory care that would be imposed on the state if all such residents were instead rendered helpless by institutionalization.

**Conclusion**

Justice Blackmun's suggestion in *Youngberg* that the Constitution provides the institutionalized retarded a right to the training necessary to preserve their basic self-care skills must not be quietly overlooked.

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140. Cf. Patterson, *Developing Residential Services in the Community*, in *Shaping the Future* 143 (P. Roos, B. McCann & M. Addison eds. 1980) (in community-based residential program, "the resident must have consistent opportunities to practice necessary skills"). Initially, practice of basic skills will require specific reinforcement, but over time the reinforcement may be varied or employed less frequently, so that the skills nearly become self-sustaining. See Nawas & Braun, *An Overview of Behavior Modification with the Severely and Profoundly Retarded: Part III. Maintenance of Change and Epilogue*, in *Vocational Rehabilitation of the Mentally Retarded* 20-23 (L. Daniels ed. 1974).

141. When the reasonableness of the form of training must be determined, the determination is to be made by a professional. See *Youngberg v. Romeo*, 102 S. Ct. 2452, 2461-63 (1982) (in determining what is reasonable, courts must show deference to the judgment of a qualified professional); *Bowring v. Godwin*, 551 F.2d 44, 48 n.3 (4th Cir. 1977) (courts cannot prescribe techniques, though they can require treatment when it is obviously called for). It is the professional who ultimately must determine whether the program is benefiting particular residents.

142. Studies indicate that increases in expenses and personnel do not guarantee better care; how personnel are used is more telling. McCormick, Balla & Zigler, *Resident-Care Practices in Institutions for Retarded Persons: A Cross-Institutional, Cross-Cultural Study*, 80 Am. J. Mental Deficiency 1, 14 (1975). Results of one study showed that only five percent of aides' time was devoted to formal training of residents, with most contact between aides and residents in ward management and custodial contexts. Veit, Allen & Chinsky, *Interpersonal Interactions between Institutionalized Retarded Children and Their Attendants*, 80 Am. J. Mental Deficiency 535, 541 (1976); see *Wyatt v. Aderholt*, 503 F.2d 1305, 1311 (5th Cir. 1974) (treatment geared mainly toward housekeeping functions).

143. See Nawas & Braun, *supra* note 140, at 21 (by freeing the staff of chores like changing the diapers of the retarded person, self-care of the retarded allows staffers to devote time to more rewarding duties).
Although Justice Blackmun did not specify a recognized constitutional right on which to predicate an affirmative duty on the state, his concurring opinion serves the purpose of recognizing that such a duty should be imposed. The consequences of the loss of basic skills are similar to the consequences of the deprivation of certain fundamental rights. Therefore, absent a compelling state interest that would necessitate state inaction, the state has an affirmative duty to prevent the loss of basic self-care skills. Not only does the state lack such a compelling interest, but preservation of basic skills may advance the state interest in the efficient administration of facilities for the institutionalized mentally retarded.

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