

1983

Beyond Youngberg: Protecting the Fundamental Rights of the Mentally Retarded

John Adams Rizzo

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

John Adams Rizzo, *Beyond Youngberg: Protecting the Fundamental Rights of the Mentally Retarded*, 51 Fordham L. Rev. 1064 (1983).

Available at: <https://ir.lawnet.fordham.edu/flr/vol51/iss5/12>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

BEYOND YOUNGBERG: PROTECTING THE FUNDAMENTAL RIGHTS OF THE MENTALLY RETARDED

INTRODUCTION

In *Youngberg v. Romeo*,¹ 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,"² and the right to such training as may be required to ensure the protection of those interests.³ Justice Blackmun, in his concurring opinion,⁴ 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.⁵ He noted that "for many mentally retarded people, the . . . capacity to do things for themselves . . . is as much liberty as they will ever know."⁶

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.⁷ 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 prejudices 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*, 674 F.2d 582 (6th Cir. 1982).

There has been growing acceptance, however, of the possibility of training even the most severely retarded. See *Welsch 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*

training these individuals often regress, losing the ability to attend to their most basic needs.⁸

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.

Enrichment and Environmental Deprivation on Cognitive Functioning in Institutionalized Retardates, 31 J. Consulting Psychology 570, 575-76 (1967).

8. Brief for Respondent at 22, *Youngberg v. Romeo*, 102 S. Ct. 2452 (1982); *accord* *Wyatt v. Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972) (describing a state school and hospital as a “warehousing” institution, 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); *see* *Kentucky Ass'n for Retarded Citizens v. Conn.*, 510 F. Supp. 1233, 1240 (W.D. Ky. 1980) (evidence that some residents' records indicated fewer skills after residence at state school than when admitted), *aff'd*, 674 F.2d 582 (6th Cir. 1982); *Armstrong v. Kline*, 476 F. Supp. 583, 588 (E.D. Pa. 1979) (the more profoundly retarded a person is, the quicker he loses skills that are not practiced), *remanded on other grounds sub nom. Battle v. Commonwealth*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1309-10 (E.D. Pa. 1977) (reports of physical deterioration, behavioral regression, and loss of skills among Pennhurst residents), *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); Brief of *Amici Curiae* American Orthopsychiatric Association, American Psychological Association, Association for Retarded Citizens of the United States, Mental Health Association and National Association of Social Workers at 10-11, *Youngberg v. Romeo*, 102 S. Ct. 2452 (1982) (lack of practice in already-acquired skills causes institutional residents to “learn helplessness”) [hereinafter cited as Brief of *Amici Curiae*]; Herr, *supra* note 7, at 557 (lack of treatment and training causes physical atrophy and intellectual deterioration); Mitchell & Smeriglio, *Growth in Social Competence in Institutionalized Mentally Retarded Children*, 74 Am. J. Mental Deficiency 666, 669 (1970) (institution residents receiving routine care suffered “a marked deficiency in social competence development”).

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*.⁹ Relying on its recognition in penal cases that personal security and freedom from bodily restraint are basic rights that survive confinement,¹⁰ the Court held that the institutionalized mentally retarded are entitled to the training required to avoid unnecessary infringement of those rights.¹¹ 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.¹²

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.¹³ It further stated that the mere use of proper procedures in confining a person does not justify the

9. 102 S. Ct. 2452, 2457 (1982). Twice previously the Court had been confronted with cases involving the right to treatment. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981); *O'Connor v. Donaldson*, 422 U.S. 563 (1975). In *Halderman*, however, the circuit court had found a federal statutory right to treatment in the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, § 201, 89 Stat. 486, 502-03 (1975) (codified at 42 U.S.C. § 6010 (1976 & Supp. IV 1980)). *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 95-96 & n.15 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981). The Supreme Court reversed without considering the issue of a constitutional right to treatment. *See* 451 U.S. at 31. In *O'Connor*, the Fifth Circuit held that minimally adequate treatment must be provided to the involuntarily civilly committed. *Donaldson v. O'Connor*, 493 F.2d 507, 520-22 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975). The Supreme Court, however, remanded the case for a determination whether the district court had erred in refusing to give a requested jury instruction. 422 U.S. at 576-77.

10. 102 S. Ct. at 2458; *see Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part, dissenting in part) ("[l]iberty from bodily restraint [is] the core of the liberty protected . . . from arbitrary governmental action"); *Hutto v. Finney*, 437 U.S. 678, 684-85 (1978) (personal security); *The Supreme Court, 1981 Term*, 96 Harv. L. Rev. 62, 79 (1982) [hereinafter 1981 Term].

11. 102 S. Ct. at 2460; *see 1981 Term, supra* note 10, at 79.

12. *See* 102 S. Ct. at 2462-63. The state must provide training "to facilitate [the individual's] ability to function free from bodily restraints." *Id.* at 2462.

13. *Id.* at 2458; *see Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part, dissenting in part) (freedom from bodily restraint is at the core of due process clause liberty); *Ingraham v. Wright*, 430 U.S. 651, 672-74 (1977) (liberty protected by the fifth amendment due process clause, made applicable to the states through the fourteenth amendment, includes freedom from bodily restraint).

deprivation of all liberty interests.¹⁴ Consequently, a state must provide additional procedural safeguards for the liberty interests of the institutionalized mentally retarded.¹⁵ 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.¹⁶

Requiring training as a procedure to protect fundamental rights suggests that a broader habilitative right may exist.¹⁷ 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.¹⁸

14. 102 S. Ct. at 2458; *see Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (criminal conviction extinguishes right to freedom from confinement for length of prison sentence, but absent additional due process protections, state cannot classify prisoner as mentally ill and subject him to involuntary treatment). Fourteenth amendment due process rights follow convicted persons into prison, protecting them from unconstitutional action of prison authorities "carried out under color of state law." *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968); *see Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974); *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

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).

17. *See 1981 Term, supra* note 10, at 80. The scope of the right to training as a post-commitment due process protection would depend on the extent to which a grievous loss would otherwise be suffered. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The nature rather than the weight of the interest is determinative. *Meachum v. Fano*, 427 U.S. 215, 224 (1976). It must be an interest within the contemplation of the fourteenth amendment. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Fourteenth amendment due process then affords "not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

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,¹⁹ that interpretation cannot be used to supplant state judgments as to the protections that non-constitutional rights should be afforded.²⁰ 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.²¹

The right to training advocated by Justice Blackmun is derived from a broader notion of due process clause liberty.²² 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."²³ Unlike the limited right to training established by the majority,²⁴ the right Justice Blackmun advances implicates liberty interests not previously incorporated within the fourteenth amendment.²⁵ The majority noted that "[l]ib-

treatment. *Compare* *Rone v. Fireman*, 473 F. Supp. 92, 119 (N.D. Ohio 1979) (individual committed for his own protection has no independent right to treatment) *with* *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1315-16 (E.D. Pa. 1977) (the only justification for an institution like Pennhurst is providing 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).

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).

21. *Youngberg v. Romeo*, 102 S. Ct. 2452, 2460 n.25 (1982).

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

erty 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), *Criswold 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.”³⁰ 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.³¹ In the late 1930’s, however, the Court abandoned this practice of judicial activism and began treating legislative judgments as presumptively constitutional.³² 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.”³³

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

Privacy and Autonomy, 74 Colum. L. Rev. 1410, 1414-15 (1974); Monaghan, *Of “Liberty” and “Property,”* 62 Cornell L. Rev. 405, 412-14 (1977). Compare *Allgeyer v. Louisiana*, 165 U.S. 578, 591-93 (1897) (striking down a statute interfering with the right to contract) with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-99 (1937) (upholding minimum wage law). See generally J. Nowak, R. Rotunda & J. Young, *supra* note 28, at 397-404 (brief review of substantive due process era).

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”).

33. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

its decision in *United States v. Carolene Products Co.*,³⁴ 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.³⁵ From this suggestion developed the practice of selectively incorporating those rights "fundamental to the American scheme of justice"³⁶ into the due process clause.³⁷ 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.³⁸ 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).

36. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

37. See *L. Tribe, supra* note 28, 567-69; *Lusky, supra* note 35, at 1102. The doctrine of selective incorporation succeeded the "fundamental fairness" doctrine as the majority position regarding fourteenth amendment absorption of fundamental rights against the states. See *Israel, Selective Incorporation Revisited*, 71 *Geo. L.J.* 253, 286 (1982). Under the fundamental fairness doctrine, fourteenth amendment due process prohibits state action that violates personal rights found "implicit in the concept of ordered liberty" and basic to society. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled in part*, *Benton v. Maryland*, 395 U.S. 784 (1969); *Wolf v. Colorado*, 338 U.S. 25, 26-28 (1949), *overruled in part on other grounds*, *Mapp v. Ohio*, 367 U.S. 643 (1961). This doctrine posits that fourteenth amendment due process neither comprehends nor is confined to the Bill of Rights. See *Adamson v. California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring). Although fundamental fairness was the accepted device for interpreting fourteenth amendment due process, Justice Black advocated total incorporation of the Bill of Rights against the states. *Id.* at 71-72 (Black, J., dissenting); *Israel, supra*, at 286. Black's dissent in *Adamson* "contributed substantially" to the acceptance of selective incorporation. *Id.* See generally *Douglas, supra* note 29, at 7-11 (describing various interpretations of the due process clause of the fourteenth amendment).

38. See *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968) (Supreme Court has looked increasingly to the Bill of Rights to protect individual rights); *Israel, supra* note 37, at 286-87 (one advantage of selective incorporation is that it depends less on the subjective whim of the Court than does fundamental fairness). The Court had applied certain guarantees of the Bill of Rights against the states prior to adoption of the selective incorporation doctrine. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 28-29 (1949) (search and seizure, but not the exclusionary rule), *overruled in part*, *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961) (using selective incorporation to include the exclusionary rule); *In re Oliver*, 333 U.S. 257, 273 (1948) (basic rights to fair trial). This is especially true of first amendment guarantees. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (establishment and free exercise of religion); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 519 (1939) (Stone, J., concurring) (freedom of speech and assembly); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (peaceful assembly); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (free press and free speech); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (same).

the rights recognized by the *Youngberg* majority had previously been identified as part of the "historic liberty interest" protected by the fifth amendment,³⁹ the majority's ruling is consistent with the practice of protecting from state action only selectively incorporated rights.⁴⁰

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.⁴¹ Strict standards of review⁴² have been devised when state action touches on those fundamental rights "implicit in the concept of ordered liberty" embodied in the Constitution.⁴³ The Court has recog-

The Bill of Rights guarantees incorporated since the advent of selective incorporation largely include rights of criminal procedure. *See, e.g.*, *Papachristou v. Jacksonville*, 405 U.S. 156, 169 (1972) (fourth amendment probable cause requirement); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (eighth amendment proscription of excessive bail assumed to apply to states); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (fifth amendment double jeopardy prohibition); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (sixth amendment right to jury trial); *Washington v. Texas*, 388 U.S. 14, 17-19 (1967) (sixth amendment right to compulsory process); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (sixth amendment right to confront adverse witnesses); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (fifth amendment prohibition of compulsory self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963) (sixth amendment right to assistance of counsel); *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (eighth amendment prohibition of cruel and unusual punishment).

39. *See Youngberg v. Romeo*, 102 S. Ct. 2452, 2458 (1982) (citing *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part, dissenting in part) and *Ingraham v. Wright*, 430 U.S. 651, 672-74 (1977)).

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

41. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry) (majority applying equal protection, and Justice Stewart, concurring, applying due process analysis); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion rights); *Stanley v. Illinois*, 405 U.S. 645 (1972) (right to custody of one's children); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives by married couples); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate) (majority employing equal protection, and Chief Justice Stone, concurring, employing due process).

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).

43. *Sotto v. Wainwright*, 601 F.2d 184, 190-91 (5th Cir. 1979) (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).

nized such non-textual rights as freedom of association,⁴⁴ the right to vote,⁴⁵ the right to travel⁴⁶ and the right to privacy.⁴⁷ A constitutional basis for these rights is found by locating them within "penumbras" of the Bill of Rights⁴⁸ or deeming them implicit in the Constitution,⁴⁹

44. NAACP v. Alabama, 357 U.S. 449, 466 (1958). Freedom of association is protected by the first amendment. *Elfbrandt 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 . . . [e]specially 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).

46. *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law. . . . Freedom of movement is basic in our scheme of values."); see *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969).

47. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965). "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483; see *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972). The right to privacy consists of two interrelated strands: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (footnotes omitted). Justice Brandeis characterized "the right to be let alone" as "the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled on other grounds*, *Katz v. United States*, 389 U.S. 347 (1967).

48. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 928 (1973) (penumbra concept as the basis for privacy right leading to right to abortion); Henkin, *supra* note 29, at 1421-23 (penumbra concept leading to general right to privacy); Sprecher, *Mr. Justice Douglas*, 51 Ind. L.J. 6, 11 (1975) (same); Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 Yale L.J. 1579, 1585-87 (1978) (penumbral approach a substitute for natural rights approach to constitutional interpretation).

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*, 383 U.S. 745, 758 (1966)); *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 training⁵³ 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").

50. See, e.g., Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977) (privacy); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974) (travel); Baird v. State Bar, 401 U.S. 1, 6-7 (1971) (association); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969) (vote).

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. Parwatikar, 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,⁵⁵ on the theory that a mental hospital that does not treat mental illness is in effect a mental prison.⁵⁶ One court has concluded that confinement of the retarded without training is essentially incarceration due to status⁵⁷—a practice held unconstitutional by the Supreme Court in *Robinson v. California*.⁵⁸

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.⁵⁹ Without a

involuntary civil confinement); *Donaldson v. O'Connor*, 493 F.2d 507, 522 (5th Cir. 1974) (same), *vacated and remanded on other grounds*, 422 U.S. 563 (1975); Association for Retarded Citizens v. Olson, No. 80-141, slip op. at 26-27 (D.N.D. Aug. 31, 1982) (holding that a right to training exists, which will support freedom from arbitrary restraints); *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1317-18 (E.D. Pa. 1977) (when state involuntarily commits retarded persons, it must provide habilitation affording a reasonable opportunity to acquire and maintain essential life skills for coping as effectively as 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); *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); *Welsch v. Likins*, 373 F. Supp. 487, 496 (D. Minn. 1974) (due process clause compels minimally adequate treatment), *aff'd in part, vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977); *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972) (institution residents have a right to treatment providing a realistic chance for a more useful and meaningful life), *aff'd, remanded, and reserved in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

55. Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499, 503 (1960). The right to treatment as advocated by Birnbaum dealt with the mentally ill. *See id.* It was first extended to the retarded in *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972), *aff'd, remanded, and reserved in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

56. Birnbaum, *supra* note 55, at 503; *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).

57. *Welsch v. Likins*, 373 F. Supp. 487, 496 (D. Minn. 1974), *aff'd in part, vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977). Without a right to treatment, hospitalization for mental retardation would be like indefinite confinement in a penitentiary "for no convicted offense." *Id.* at 497 (quoting *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960)).

58. 370 U.S. 660, 666-67 (1962). In *Robinson*, a state statute made it a criminal offense to be addicted to narcotics. *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. *Id.* at 667. Therefore, the Court stated that it was cruel and unusual punishment. *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,⁶⁰ the state has no constitutional justification for the deprivation of liberty that confinement necessarily entails.⁶¹

A third rationale supporting the right to treatment is the *quid pro quo* doctrine. When the state confines an individual against his will it must provide a *quid pro quo* in the form of minimally adequate treatment.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.⁶³ This rationale has

adequate state-provided treatment); *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), *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), *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 *parens patriae* or police power is rationale for commitment), *vacated and remanded on other grounds*, 102 S. Ct. 2452 (1982).

The *parens patriae* duty of the state is implicated when the rationale for confinement is habilitation or protection of the individual. *Id.* at 158. Treatment prevents the exercise of the *parens 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. *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).

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

61. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1315 (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); *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972), *aff'd, remanded, and reserved in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

62. *Wyatt v. Aderholt*, 503 F.2d 1305, 1313-14 (5th Cir. 1974); *Donaldson v. O'Connor*, 493 F.2d 507, 522 & n.22 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975); *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1216 (E.D. La. 1976), *aff'd on other grounds*, 601 F.2d 240 (5th Cir. 1979).

63. *See Donaldson v. O'Connor*, 493 F.2d 507, 521-22 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975). The *quid pro quo* doctrine applies regardless of the state's rationale for confinement. *See id.* at 522. The *quid pro quo* theory has been criticized as analogous to eminent domain, Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1, 8-10 (1978), because it implies that a state can take away one's civil liberties if it is willing to pay enough. *Id.* at 9. The theory, as laid out in *Donaldson*, gives a right to treatment only to those persons "fortunate enough" to have been committed without strict procedural safeguards, and without having committed an offense, and without promise of a limited

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.⁶⁴

Courts adjudicating the rights of the civilly committed have also applied the constitutional doctrine of least restrictive alternative.⁶⁵ Civil commitment entails a "massive curtailment of liberty";⁶⁶ the

or definite duration of commitment. *Id.* at 8-10; *see* 493 F.2d at 522. The Fifth Circuit, however, subsequently restated this rationale so that the *quid pro quo* is due as long as one or more of the limitations on the state's power to detain is absent. *See* *Morales v. Turman*, 562 F.2d 993, 997-98 (5th Cir. 1977).

Courts have also employed a due process rationale to find a right to treatment. This rationale is based on a statement by the Supreme Court in *Jackson v. Indiana*, 406 U.S. 715 (1972), that due process requires the nature and duration of commitment to bear some reasonable relation to its purpose. *Id.* at 738; *see* *Donaldson v. O'Connor*, 493 F.2d 507, 520-21 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975); *Stuebig v. Hammel*, 446 F. Supp. 31, 34 (M.D. Pa. 1977). One commentator has called this an effective theory when used correctly—to find a right to treatment when commitment is for treatment purposes. *Spece, supra*, at 12-14.

The various theories supporting a right to treatment are, to a certain extent, interrelated. For example, treatment has been called the *quid pro quo* for society's power to confine an individual in its *parens patriae* capacity. Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 Creighton L. Rev. 124, 152-53 (1976); *Kittrie, Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 Geo. L.J. 848, 870 (1969). The idea that confinement without treatment is like incarceration is similar to the *quid pro quo* rationale, which states that treatment must be provided when a person is confined for no specific offense. *Compare* *Welsch v. Likins*, 373 F. Supp. 487, 496 (D. Minn. 1974), *aff'd in part, vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977), *with* *Donaldson v. O'Connor*, 493 F.2d 507, 522 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975). Furthermore, the *parens patriae* and due process rationales can be interwoven. If the state must provide habilitation once it has confined a person, habilitation becomes the purpose of the confinement; therefore if habilitation is not provided, the nature of the confinement is not reasonably related to the purpose. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1315-16 (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).

64. *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1216, 1219 (E.D. La. 1976), *aff'd on other grounds*, 601 F.2d 240 (5th Cir. 1979).

65. *See, e.g., Rone v. Fireman*, 473 F. Supp. 92, 125 (N.D. Ohio 1979); *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1319 (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); *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1216 (E.D. La. 1976), *aff'd on other grounds*, 601 F.2d 240 (5th Cir. 1979); *Welsch v. Likins*, 373 F. Supp. 487, 502 (D. Minn. 1974), *aff'd in part, vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977); *cf. Johnson v. Solomon*, 484 F. Supp. 278, 305 (D. Md. 1979) (no person should be institutionalized if community can afford the person adequate care, treatment and habilitation).

66. *Romeo v. Youngberg*, 644 F.2d 147, 157 (3d Cir. 1980) (en banc) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)), *vacated and remanded on other grounds*, 102 S. Ct. 2452 (1982).

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

67. Ferleger & Boyd, *Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 Stan. L. Rev. 717, 738 (1979). See generally Spece, *supra* note 63, at 33-47 (proposing least restrictive alternative as the proper rationale for maintaining the rights of the mentally retarded).

68. 1981 Term, *supra* note 10, at 81; see *Morales v. Turman*, 562 F.2d 993, 997-98 (5th Cir. 1977); *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973), *modified sub nom.* *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715, 718-19 (E.D.N.Y. 1975); *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335, 1341-43 (N.D. Ga. 1972), *rev'd per curiam*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975).

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

70. *Id.*

71. *Id.*

72. *Id.* But see Brief for Respondent at 23, *Youngberg v. Romeo*, 102 S. Ct. 2452 (1982) ("It would plainly violate the Constitution for the state to quarantine [people with] infectious disease and then deny treatment, permitting the disease to worsen."). It has also been suggested that provision of food, clothing, shelter, medical care and supervision may be a sufficient *quid pro quo* for confinement without treatment. See *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 125-26 (3d Cir. 1979) (en banc) (Seitz, C.J., dissenting), *rev'd*, 451 U.S. 1 (1981); *Garrity v. Gallen*, 522 F. Supp. 171, 239 (D.N.H. 1981).

73. *Garrity v. Gallen*, 522 F. Supp. 171, 237-38 (D.N.H. 1981).

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.⁷⁵ The Supreme Court, however, has shown that it will require limited training as a procedural safeguard when necessary to protect recognized liberty interests.⁷⁶

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*⁷⁷ and *Pennhurst State School and Hospital v. Halderman*⁷⁸—had come before the Court. Each case was decided without reaching the issue of a constitutional right to treatment.⁷⁹ 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.⁸⁰ It does

75. See, e.g., *Morales v. Turman*, 562 F.2d 993, 998-99 (5th Cir. 1977); *Lake v. Cameron*, 364 F.2d 657, 663 (D.C. Cir. 1966) (Burger, J., dissenting); *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335, 1342-43 (N.D. Ga. 1972), *rev'd per curiam*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975). But see *Bowring v. Godwin*, 551 F.2d 44, 48 n.3 (4th Cir. 1977) (courts cannot prescribe techniques, but if treatment is obviously called for, it must be provided); cf. *Flakes v. Percy*, 511 F. Supp. 1325, 1339 (W.D. Wis. 1981) (determination of the need for decent living conditions does not require invasion of official and medical decision-making).

76. *Youngberg v. Romeo*, 102 S. Ct. 2452, 2460-63 (1982). See *supra* notes 10-11 and accompanying text.

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

78. 451 U.S. 1 (1981).

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.⁸¹ Thus, the Court may be willing to recognize the right advocated by Justice Blackmun⁸² 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,⁸³ 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 competents and incompetents"); United Na-

interest.⁸⁴ 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,⁸⁵ freedom to choose to have an abortion,⁸⁶ freedom to control one's appearance,⁸⁷ and freedom in other personal matters,⁸⁸ have been recognized as fundamental rights. These non-textual constitutional rights comprise in essence a "general right of private autonomy."⁸⁹ As the Court stated in *Terry v. Ohio*,⁹⁰ "[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"⁹¹ Due process, therefore, precludes

tions, Declaration on the Rights of Mentally Retarded Persons (1971) ("The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings."), *reprinted in part* in R. Woody, *Legal Aspects of Mental Retardation* 46 (1974).

84. See *supra* note 42 and accompanying text.

85. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (right to access to courts to obtain divorce); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (freedom to marry); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (use of contraceptives by married couples).

86. *Roe v. Wade*, 410 U.S. 113, 164-66 (1973); see *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-75 (1976) (striking down parental and spousal consent requirements); *Doe v. Bolton*, 410 U.S. 179, 192-200 (1973) (striking down procedural requirements). *But see* *Maher v. Roe*, 432 U.S. 464 (1977) (no right to government funding for a non-therapeutic abortion).

87. *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969) (right to wear hair as one pleases protected by first amendment penumbras), *cert. denied*, 398 U.S. 937 (1970); see, e.g., *Kelley v. Johnson*, 425 U.S. 238, 250-51 (1976) (Marshall, J., dissenting) (right to determine one's appearance is an element of liberty and a part of the autonomy the Constitution is designed to protect); *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958) (right to travel is as close to an individual's heart as what he wears) (*dictum*); *Holsapple v. Woods*, 500 F.2d 49, 51-52 (7th Cir.) (in the school context, right to wear hair as one pleases is a constitutionally protected freedom), *cert. denied*, 419 U.S. 901 (1974).

88. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 650-52 (1972) (right to custody of one's children); *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (use of contraceptives by unmarried persons); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (private possession of obscene material).

89. Monaghan, *supra* note 29, at 414; see *Kelley v. Johnson*, 425 U.S. 238, 250-51 (1976) (Marshall, J., dissenting); Henkin, *supra* note 29, at 1424-25.

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.⁹²

If the right of autonomy includes the right to choose a hairstyle⁹³ and the right to have an abortion,⁹⁴ it should also encompass the right to perform tasks that are related to the well-being of one's person and appearance⁹⁵ 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.⁹⁶ While the majority of severely retarded people will never be completely self-sufficient,⁹⁷ basic self-care is worthy of protection.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.⁹⁹ If a person is toilet-trained at the time of commitment, but

92. Monaghan, *supra* note 29, at 433.

93. See *Kelley v. Johnson*, 425 U.S. 238, 250-51 (1976) (Marshall, J., dissenting); *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

94. See *supra* note 86 and accompanying text.

95. See *Kelley v. Johnson*, 425 U.S. 238, 250-53 (1976) (Marshall, J., dissenting); *Association for Retarded Citizens v. Olson*, No. 80-141, slip op. at 25 (D.N.D. Aug. 31, 1982).

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, *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 . . .").

96. See *Youngberg v. Romeo*, 102 S. Ct. at 2465 (1982) (Blackmun, J., concurring).

97. See R. Scheerenberger, *supra* note 7, at 12.

98. *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, *supra* note 28, at 959 (quoting *Richards v. Thurston*, 424 F.2d 1281, 1284-85 (1st Cir. 1970)); 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).

99. *Flakes v. Percy*, 511 F. Supp. 1325, 1329 (W.D. Wis. 1981) (confinement in a cell without a toilet is unconstitutional); see *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973); *Wolfish v. Levi*, 439 F. Supp.

loses this skill while confined,¹⁰⁰ 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.¹⁰¹ If post-commitment inactivity causes physical atrophy,¹⁰² rendering an individual non-ambulatory, the individual cannot exercise his right to move about within the institution.¹⁰³ The consequences are indistinguishable from the effects of actual physical restraint complained of in *Youngberg*,¹⁰⁴ only the cause of the immobility differs.

114, 157 (S.D.N.Y. 1977), *aff'd in part, rev'd in part and remanded on other grounds*, 573 F.2d 118 (2d Cir. 1978), *rev'd on other grounds sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979).

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.

101. See *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958); *Williams v. Fears*, 179 U.S. 270, 274 (1900).

102. *Herr*, *supra* note 7, at 557; see *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1309 (E.D. Pa. 1977) (institutionalization causes physical deterioration), *aff'd in part on other grounds, rev'd and remanded in part en banc*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981); *Wyatt v. Stickney*, 344 F. Supp. 387, 391 n.7 (M.D. Ala. 1972) (stagnation or deterioration in physical ability of residents anticipated by expert viewing institution), *aff'd, remanded, and reserved in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

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.¹⁰⁵ If, because of inadequate training, an institutional resident loses the communication skills and social competence¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸

In addition, the recognized fundamental rights to personal security and freedom from restraint are implicated by the Court in *Youngberg*.¹⁰⁹ 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.¹¹⁰ Psychiatric studies have shown that training in basic self-care does reduce violent and self-destructive behavior.¹¹¹ If a lack of training results in loss of skills

141, slip op. at 25 (D.N.D. Aug. 31, 1982) (freedom from restraint includes the right to make minor personal decisions).

105. *E.g.*, Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961); Shelton v. Tucker, 364 U.S. 479, 486 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

106. *See* R. Scheerenberger, *supra* note 7, at 31-32; Mitchell & Smeriglio, *supra* note 8, at 669; Brief of *Amici Curiae*, *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 communication 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).

109. *See* Youngberg v. Romeo, 102 S. Ct. 2452, 2458 (1982).

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,¹¹² 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 rights¹¹³ in the loss of basic skills is that such deterioration lacks the character of an affirmative taking by the state.¹¹⁴ 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.¹¹⁵ In *Youngberg*, the Supreme

112. See *Battle v. Pennsylvania*, 629 F.2d 269, 274-75 (3d Cir. 1980) (the severely or profoundly retarded lose unpracticed skills), *cert. denied*, 452 U.S. 968 (1981); *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1308-10 (E.D. Pa. 1977) (neglect causes maladaptive behavior), *aff'd, rev'd, and remanded in part on other grounds en banc*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981); Brief for Respondent at 22, *Youngberg v. Romeo*, 102 S. Ct. 2452 (1982) (without training in basic skills, the retarded will lose these skills and become aggressive and self-destructive); Herr, *supra* note 7, at 557-58 (lack of treatment leads to self-destructive behavior).

113. The first section of the fourteenth amendment provides in pertinent part: "nor shall any State *deprive* any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1 (emphasis added). Enforcement of the amendment may involve a "restraint" on the state's police power or power of procedure. C.W. Collins, *The Fourteenth Amendment and the States* 29-30 (1912). "Restraint" implies an act, not an omission, by the state. Due process protections, therefore, are generally implicated when a personal interest is infringed by state legislation or by an affirmative act of one acting under color of state authority. See, e.g., *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (transferring prisoner to mental hospital and subjecting him to treatment—affirmative deprivation); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment—affirmative deprivation); *Ingraham v. Wright*, 430 U.S. 651, 676 (1977) (corporal punishment by school authorities—affirmative deprivation); *Wolff v. McDonnell*, 418 U.S. 539, 555-57 (1974) (revoking prisoner's good time credit in disciplinary proceeding without minimal due process—affirmative deprivation); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (criminal abortion statute violating right to privacy—state legislation); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (unreasonable pre-trial commitment of person incompetent to stand trial—affirmative deprivation).

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

Court established a limited right to the training necessary to safeguard the rights of bodily security and freedom from restraint.¹¹⁶ Although the restraint in *Youngberg* was the result of state action,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.¹¹⁸ The Court nonetheless held that the right to bodily security must be protected.¹¹⁹

Justice Stevens stated in his dissent in *Estelle v. Gamble*¹²⁰: “[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.”¹²¹ It thus should not matter whether a deprivation is the result of intent, neglect, or even poverty.¹²² This is especially true in the case of the institutionalized retarded, who are not “accountable for their plight.”¹²³ In *Eckerhart v. Hensley*,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.¹²⁵ As a result of this isolation, a person

courts); *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956) (plurality opinion) (state must enable convicted defendant with right of appeal to obtain adequate and effective appellate review); L. Tribe, *supra* note 28, at 919 (emerging notions that government has an affirmative obligation to provide “minimally decent subsistence” for basic human needs are consistent with a notion that government omission can be as serious as government action).

116. *Youngberg v. Romeo*, 102 S. Ct. 2452, 2460-63 (1982).

117. *See id.* at 2455 (institution resident physically restrained by “shackles” for long periods of time).

118. *Id.* (respondent injured by himself and other residents, institution staff failed to employ appropriate preventive procedures).

119. *See id.* at 2458.

120. 429 U.S. 97 (1976). In *Estelle*, a prison inmate claimed an eighth amendment violation when prison authorities failed to provide adequate treatment for injuries and illness from which he was suffering. *Id.* at 99-101. To determine whether the state inaction violated the prisoner’s rights, the Court established a “deliberate indifference” standard. *Id.* at 106. The Court has since stated that this standard does not apply to the rights of the institutionalized retarded. *Youngberg v. Romeo*, 102 S. Ct. 2452, 2456 n.11 (1982).

121. 429 U.S. at 116 (Stevens, J., dissenting) (footnote omitted).

122. *Id.* at 116-17 & nn.12-13 (Stevens, J., dissenting). Stevens noted that intent should not be necessary for a violation of the eighth amendment. He maintained that the state has an affirmative duty to provide minimally adequate health care to those in its custody. *Id.* at 116 n.13 (Stevens, J., dissenting); *see Youngberg v. Romeo*, 102 S. Ct. 2452, 2458 (1982) (state concedes duty to provide adequate food, shelter, clothing and medical care).

123. L. Tribe, *supra* note 28, at 919. The notion that people are often accountable for their own plight is an argument against the imposition of affirmative duties on the state. *See id.* The plight of the institutionalized retarded, however, is not of their own making.

124. 475 F. Supp. 908 (W.D. Mo. 1979).

125. *Id.* at 914.

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,

126. *See id.* at 915.

127. *Harris v. McRae*, 448 U.S. 297, 316 (1980) (emphasis added).

128. *See supra* note 28 and accompanying text. The Court can then use this constitutional predicate to impose an affirmative duty on the state. *See Youngberg v. Romeo*, 102 S. Ct. 2452, 2460 n.25 (1982).

129. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (“compelling state interest”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (powerful countervailing state interest); *Romeo v. Youngberg*, 644 F.2d 147, 158 (3d Cir. 1980) (en banc) (overriding interest), *vacated and remanded on other grounds*, 102 S. Ct. 2452 (1982); *see Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (important state interest).

130. *Cf. Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969) (infringement of right to vote valid only if necessary to compelling state interest); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (burden on right to travel valid only if necessary to compelling state interest). “[State action] must be narrowly drawn to express only the legitimate state interests at stake.” *Roe v. Wade*, 410 U.S. 113, 155 (1973).

The Court has not always been precise in characterizing the interest that the state must assert when adversely affecting fundamental rights. *Schwartz, supra* note 28, at 876-77 & nn.66 & 74; *see, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (interference with right to marry requires “important” state interest); *Procunier v. Martinez*, 416 U.S. 396, 413 (1974) (censorship of prison mail must be justified by sufficiently “important or substantial” interest); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (interference with right to custody of one's children requires “powerful countervailing” interest).

131. *Youngberg v. Romeo*, 102 S. Ct. 2452, 2460 (1982); *see Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (due process represents “the balance which our Nation . . . has struck between [individual] liberty and the demands of organized society.”); *Frank v. Maryland*, 359 U.S. 360, 363 (1959) (“[D]ue process

fiscal constraints and administrative necessities.¹³² Preserving an institution's internal security is a primary concern which may require limitation of the rights retained by the individual after confinement.¹³³ A lack of training, however, can cause aggressive, violent, or self-destructive behavior,¹³⁴ 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.¹³⁵ A number of circuit courts adhere to a different position, finding that cost is not a concern when constitutional rights are involved.¹³⁶ 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.¹³⁷ 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.¹³⁸

compels inquiry into the nature of the demand . . . upon individual freedom . . . and the justification of social need."), *overruled on other grounds*, *Camara v. Municipal Court*, 387 U.S. 523 (1967).

132. *Romeo v. Youngberg*, 644 F.2d 147, 159 (3d Cir. 1980) (en banc), *vacated and remanded on other grounds*, 102 S. Ct. 2452 (1982).

133. *Bell v. Wolfish*, 441 U.S. 520, 540, 546-47 (1979).

134. See *supra* notes 111-12 and accompanying text.

135. See *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). *Mathews*, however, dealt with the cost of additional procedural safeguards—administrative hearings—and with the cost of disability payments made to ineligible persons before a determination of ineligibility can be made. *Id.* at 348-49.

136. *Romeo v. Youngberg*, 644 F.2d 147, 161 (3d Cir. 1980) (en banc) ("Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations.") (quoting *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968)), *vacated and remanded on other grounds*, 102 S. Ct. 2452 (1982); *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974) (same); *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972) (same); *accord Welsch v. Likins*, 373 F. Supp. 487, 499 (D. Minn. 1974) ("[I]nadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights.") (citing *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 687 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974)), *aff'd in part, vacated and remanded in part on other grounds*, 550 F.2d 1122 (8th Cir. 1977); *Wyatt v. Stickney*, 344 F. Supp. 387, 392 (M.D. Ala. 1972) (want of funds cannot justify failure to provide minimum care and training), *aff'd, remanded, and reserved in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

137. *Romeo v. Youngberg*, 644 F.2d 147, 168 (3d Cir. 1980) (en banc) (noting "considerable" gap that may exist between available and needed resources), *vacated and remanded on other grounds*, 102 S. Ct. 2452 (1982).

138. 102 S. Ct. at 2463.

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 commitment¹³⁹ and make certain that those skills are consistently practiced.¹⁴⁰ No judicial determination of the reasonableness of a particular form of training is needed¹⁴¹ and self-care training will not require a significant increase in state expenditures.¹⁴²

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.¹⁴³

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.

139. See SeEVERS, *Assessing Programmatic Aspects of the Problem*, in *Shaping the Future* 32 (P. Roos, B. McCann & M. Addison eds. 1980) (assessment of patient's skills is one step in determining proper residential program).

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.

John Adams Rizzo