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The Principle of the Least Restrictive Alternative for Mentally-Retarded Persons: The Constitutional Issues

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THE MENTALLY RETARDED CITIZEN AND THE LAW

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THE PRINCIPLE OF THE LEAST RESTRICTIVE ALTERNATIVE: THE CONSTITUTIONAL ISSUES

DAVID CHAMBERS

THE PRINCIPLE OF THE LEAST RESTRICTIVE ALTERNATIVE

Mentally retarded people are people. When strong reasons exist to treat them differently from other people, they should be provided the necessary services, restraint, or protection through means that intrude as little as possible on their freedom to live the life that others are permitted to live. "Normalization" is the term professionals use to define the goal and the process of helping mentally retarded citizens lead a "normal" life. The attainment of this goal involves undoing the multitude of formal constrictions governments have typically placed on the retarded citizen's freedom: his place of residence, his schooling, his control over his own property, his freedom to marry —in short, his freedom to do or be anything that others believe requires capacity to function "independently" and "responsibly."

The analysis here does not present data to demonstrate that normalization "works," but rather offers a legal resource to those who have found normalization does work and need help in securing its acceptance by courts and agencies.[1] The legal resource is the principle of the least restrictive alternative. The principle rests on the apple pie premise that people should in general be free to live as they please. If you accept this elementary moral premise, the principle of the least restrictive alternative easily follows; that is, when government does have a legitimate communal interest to serve by regulating human conduct it should use methods that curtail individual freedom to no greater extent than is essential for securing that interest. When you swat a mosquito on a friend's back, you should not use a baseball bat.

The principle of the least restrictive alternative is not only a useful guide to legislatures in deciding when and how to formulate new laws. It also has become a useful tool in constitutional litigation in working out rough accommodations between

[1] *See* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives,* 70 MICH. L. REV. 1107 (1972). Much of the paper that follows is a distillation of this article transplanted to the setting of mental retardation and applied to the range of official restrictions placed on retarded persons, rather than commitment alone.

constitutionally protected rights and weighty legislatively protected interests in the public's health, welfare, and safety. The Supreme Court of the United States, in the most frequently quoted recent statement of the principle, has declared that in judging governmental actions "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved."[2]

Little can be said with confidence about how far the courts will go in applying the principle to regulations affecting the mentally retarded. Few courts have employed it yet in assessing regulations affecting the retarded. The Supreme Court has heard no cases posing the issue. Moreover, even if the principle is applied by courts, there are limits to what the principle can accomplish. Attorneys who employ the principle in the context of constitutional litigation can, however, develop strong arguments in three areas in which normalization efforts are proceeding: (1) in securing the broader use of already existing alternatives to constrictions upon the freedom of the retarded; (2) in securing individualized determinations, continually reexamined, of the current needs of each mentally retarded individual whose freedom is being curtailed; and (3) in securing the creation of a range of promising new alternatives that might be used to normalize the life style of retarded citizens. In the context of education, for example, the lawyer might strive to keep a mentally retarded child in the public school near her home or might seek to secure extra tutoring or special programing within the framework of the regular class. These efforts might avert later placement in a separate class or school for the mentally retarded. The lawyer may also seek to ensure that the child's needs are continually reassessed so that even limited special programing will continue no longer than necessary.

DRAFTING AND INTERPRETING STATUTES

Reliance upon constitutional safeguards will be unneeded if legislatures employ the principle of the least restrictive alternative or if courts interpret existing legislation to require application of the principle.

Emphasizing the treasures of a free life, the evidence of success for normalization programs, and the daily anxieties of persons who know that they do not appear "normal," attorneys need to encourage legislators to retain restrictive regulations for the mentally retarded only when informal noncoercive methods cannot achieve the same goals. When legislatures do continue restrictions, such as separate institutions, they should be urged for identical reasons to develop a full range of appropriate less restrictive regulations or settings. Legislatures are beginning to embody in new laws the concept of minimum intrusion into the lives of the mentally retarded. Tennessee, for example, has adopted legislation providing that, to the maximum extent possible, children are to be educated in the normal classroom setting.[3]

[2] Shelton v. Tucker, 364 U.S. 479, 488 (1960).
[3] TENN. CODE ANN. § 49-2913(B) (Supp. 1973).

Massachusetts has adopted a similar statute.[4] Nebraska, through flexible legislation, has developed an impressive range of residential treatment programs.[5] Several states explicitly authorize or compel their courts to use least restrictive alternatives in appropriate commitment cases.[6]

Even existing legislation not openly recognizing the principle can often be rendered more flexible through imaginative interpretation. No state, for example, requires the commitment of all mentally retarded persons. Courts can often sensibly interpret statutes, almost without regard to their operant language, to require the exploration and use of alternatives whenever the state's interest in securing adequate care and protection can be better served by other means. When confronted with vague or ambiguous statutory terms, attorneys can support arguments for the use of alternatives by pointing to the principle of the least restrictive alternative as an aid in interpreting legislative intent. That is, in the absence of convincing evidence to the contrary, legislation should not be interpreted to permit greater restrictions on personal freedom than are absolutely necessary to serve the state's interests. Attorneys also can brandish the constitutional arguments for the principle hereafter elaborated and invite the court to interpret the legislation as requiring the use of the least restrictive alternative "to save the constitutionality" of an otherwise offensive statute.[7] Even a guardianship statute that would appear to deprive a retarded individual of all of his legal capacity might be interpreted to permit or require the loss only of those specific powers that the retarded person was incapable of responsibly exercising.

Many statutes still in force that are grossly discriminatory against mentally retarded citizens were drafted at a time when most people were afraid of persons labeled as "idiots" or "naturals" and when even those who were concerned for the well-being of the mentally retarded person thought they needed absolute protection. Today, courts should wisely reinterpret their statutes, not only to achieve the state's original legitimate purposes, but also to achieve them in light of the new knowledge and public acceptance of successful less constricting alternatives for securing these purposes.

THE CONSTITUTIONAL ARGUMENTS FOR THE PRINCIPLE

On dozens of occasions the United States Supreme Court and state supreme courts have compelled state governments to achieve clearly legitimate goals by methods of regulation less constrictive of some important constitutionally protected interest than the methods being used. Though not yet applied by the Supreme Court to the mentally retarded, such precedents have obvious relevance to issues relating to mental retardation.

[4] MASS. ANN. LAWS ch. 71 B, § 3 (Supp. 1972).

[5] NEB. REV. STAT. §§ 83-1, 141-146 (Supp. 1969).

[6] New Mexico, for example, has adopted new legislation requiring courts to explore alternatives prior to commitment. N.M. STAT. ANN. § 13-14-39 (Supp. 1972).

[7] *See* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (first case holding that patients in mental hospitals have a justiciable right to treatment; decided on statutory grounds with the court indicating that the Constitution was peering closely over its shoulder); *accord,* Townsend v. Swank, 404 U.S. 282, 291 (1971).

Two decisions of the Supreme Court offer illustrations.[8] In 1951, the Court struck down a ban placed by the city of Madison, Wisconsin, on the sale of milk processed more than 25 miles from the city.[9] The court invalidated the ordinance because it found that a less drastic method of inspection could fully serve the city's legitimate interest in protecting its citizens from spoiled or adulterated milk without entirely prohibiting the sale of nonlocal milk. In another case, decided in 1972, the Court examined a Tennessee statute requiring newcomers to reside in the state for 90 days before becoming eligible to vote.[10] Tennessee sought to justify the statute in part on the ground that it served to prevent fraud by persons who had not truly made the decision to become residents of Tennessee. Preventing fraud was a legitimate goal, but the 90-day residency requirement could not stand when there was an obvious alternative (checking places of former residence and checking drivers' licenses and car registrations) which did not deny constitutionally protected rights to bona fide new residents.

In terms of alternatives, this reasoning has obvious application to many of the regulations affecting the mentally retarded. For example, courts should not permit involuntary commitment if home care or a community group home can provide the needed protection and better equip the individual for independence. Courts and agencies should not permit placement in separate schools for mentally retarded children when extra assistance in regular public schools can properly educate the child and avoid the social stigma attendant upon segregation. Guardianship that denies a retarded citizen the right to make important life decisions should be avoided when the individual merely is incapable of handling one or two separable and specific kinds of responsibilities.

The application is obvious, but attorneys must leap one hurdle before they can be confident that courts and agencies will be required to apply the principle of the least restrictive alternative to state action affecting retarded citizens. The obstacle is that the Supreme Court and other courts do not apply the principle to all forms of regulations. The use of less restrictive alternatives is insisted upon only when the method of regulation used by the state affects interests that are considered especially sensitive under the Constitution, such as free speech, or are directed at groups against whom discrimination is regarded with especial suspicion by the Court, such as black Americans or aliens.[11] For example, courts will uphold a state regulation requiring sprinkler systems in apartment buildings without inquiring whether an

[8] Dunn v. Blumstein, 405 U.S. 330 (1972); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). *See also* Police Dep't v. Mosley, 408 U.S. 92, 100-02 (1972); United States v. O'Brien, 391 U.S. 367, 377 (1968); Carrington v. Rash, 380 U.S. 89, 96 (1965); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Butler v. Michigan, 352 U.S. 380 (1956); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 190-91 (1938). For similar state court precedents, see City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970); Schroder v. Binks, 415 Ill. 192, 195-201, 113 N.E.2d 169, 170-73 (1953); Altemose Constr. Co. v. Building and Constr. Trades Council, 449 Pa. 194, 212-13, 296 A.2d 504, 514-15 (1972) *cert. denied,* 411 U.S. 932 (1973). *See also* Chambers, *supra* note 1, at 1145-51; Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative,* 9 UTAH L. REV. 254 (1964).

[9] Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-56 (1951).

[10] Dunn v. Blumstein, 405 U.S. 330, 343, 347-49 (1972).

[11] *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 18, 51 (1973); *rehearing denied,* 411 U.S. 959 (most recent elaboration on the circumstances in which the Court will and will not subject a state statute to rigorous examination).

alternative form of protection to tenants that is less costly for the landlord is available.[12] They will even uphold restrictive welfare legislation which discriminates against larger families without examining claims that narrower legislation not working such hardships would serve the state's interests.[13] The Madison milk ordinance imposed a burden on interstate commerce, an activity expressly protected in the Constitution. Tennessee's voting residency requirement affected two rights afforded special protection under the Constitution: voting in political elections and travel among the states. On the other hand, the laws requiring fire sprinklers and those providing a lesser portion of needs to larger families on welfare than smaller families were immune from inquiry into alternatives because they affected no constitutionally sensitive group or interest. Despite the fact that these laws were of critical importance to the individual's livelihood and sustenance, they were found to have no special place in the Constitution.

Thus, the first task for the court asked to find a constitutional obligation to use or explore alternatives to state regulations for retarded citizens is to ask whether the regulations affect a constitutionally preferred interest or constitutionally protected group. Elsewhere in this volume, contributors have presented arguments that answer this question affirmatively.[14] One of these arguments would eliminate most special regulations of the mentally retarded. It is, quite simply, that all laws which regulate the mentally retarded as a class should, like laws overtly based on race or legitimacy of birth, be regarded as constitutionally suspect and subjected to close judicial review. An essential point is that these arguments have considerable merit, but no court has yet accepted them, one court has rejected them,[15] and the most liberal members of the Supreme Court in some recent dicta seem to accept as nonsuspect regulations based on intelligence.[16]

If the Court *does* begin to treat as suspect regulation of the mentally retarded as a separate class, *all* special regulation adversely affecting the retarded should be subject to examination for less restrictive alternatives. If the Court refuses to recognize mental retardation as a suspect classification, arguments that courts should compel inquiries into alternatives (or order the creation of alternatives) must focus on special constitutional protections for particular forms of conduct. Arguments about some of these especially sensitive types of regulation are found elsewhere in this volume. For example, state laws limiting the freedom of retarded individuals to marry or procreate interfere with federally recognized rights to privacy in marital relations.[17] Courts appropriately might require case-by-case inquiry into the necessity of discriminatory curtailment to serve legitimate state interests.

Civil commitment of the mentally retarded also intrudes on the constitutionally

[12] Queenside Hill Realty Co. v. Saxl, 328 U.S. 80, 83 (1946).
[13] Dandridge v. Williams, 397 U.S. 471, 484, 486 (1970).
[14] *See* Gilhool, pp. 173-207, Chapter 7 of this volume; Burt, pp. 418-37, Chapter 14 of this volume.
[15] *See* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 767 (E.D.N.Y. 1973).
[16] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).
[17] *See* Wald, pp. 7-15, Chapter 1 of this volume.

protected rights of travel and free association. Moreover, some Supreme Court decisions indicate a special sensitivity to regulations permitting incarceration, without reference to other specific freedoms that incarceration inhibits.[18] Reflecting this concern, three recent federal court decisions have held that prior to involuntary hospitalization of the mentally ill, the Constitution requires a demonstration that there are no suitable less restrictive alternatives.[19] In addition, the order entered by the trial court in *Wyatt v. Stickney* bars commitment of a retarded person to an institution "unless a prior determination shall have been made that residence in that institution is the least restrictive habilitation setting feasible for that person." [20]

Unfortunately, not all regulation of mentally retarded citizens affects activities considered especially sensitive by the Supreme Court. For example, at least under the United States Constitution, separate schooling for a retarded child may be permissible even though a less restrictive alternative is available, simply because the Supreme Court has found that the regulation of education, a subject nowhere mentioned in the Constitution, does not call for raised eyebrows in all cases.[21] State constitutional provisions establishing a system of public education may provide a basis for special judicial attention to regulations regarding education, but courts might well hold that such provisions at most require the state to offer some type of education to all children, retarded or otherwise, but carry no implications about the setting in which the education should occur.[22]

Similarly, government-condoned discrimination in employment (such as in the federal law permitting a lower than minimum wage for physically or mentally impaired workers)[23] does not seem to intrude on constitutionally protected rights, despite the fact that few aspects of a person's life are more important than the financial resources he needs to sustain himself. The possibility that discriminatory regulations in areas of vital importance to individual retarded citizens will be immune from invalidation on the ground of available less restrictive alternatives underscores the importance to attorneys for retarded citizens of inducing courts to view the mentally retarded as a suspect class.

[18] *See* Chambers, *supra* note 1, at 1180-1200 (arguments developed in the context of the mentally ill).

[19] Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D Wis. 1972), *vacated for entry of definitive decree,* 414 U.S. 473 (1974) (holding the trial court's order to be insufficiently specific and detailed under the Federal Rules of Civil Procedure), *clarified,* 379 F. Supp. 1376 (E.D. Wisc. 1974), *vacated on procedural grounds,* 95 S.Ct. 1943 (1975); Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971).

[20] Wyatt v. Stickney, 344 F. Supp. 387, 396 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[21] *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[22] *See* IND. CONST. art. 8, § 1 (providing that public schools shall be "equally open to all"); ILL. CONST. art 10, § 1 (providing for the educational development of all persons "to the limits of their capabilities"); N.J. CONST. art. 8, § 4, para. 1 ("through an efficient system of free public schools for the instruction of all the children in the state"); N.Y. CONST. art. 11, § 1 (public schools established so that "all children of this state may be educated"); WASH. CONST. art. 9, § 1 ("paramount of the state to make ample provision for the education of all children . . . without the distinction or account of . . . caste . . .").

[23] *See* Fair Labor Standards Act, 29 U.S.C. § 214(d) (1970).

THE MANY APPLICATIONS OF THE PRINCIPLE TO REGULATIONS AFFECTING THE MENTALLY RETARDED

Whenever it is properly applied, the principle of the least restrictive alternative requires first an articulation by the affected court or agency of the interests the state seeks to serve through the law (or regulation) at issue, for it is only through identifying the state interests that the court can determine what alternative methods may be substituted. In the process of articulating interests, courts are forced (if they act properly) to identify and reject impermissible interests that may have been the basis of the law. Thus, for mentally retarded citizens, alternatives to commitment should be assessed in terms of whether they provide needed protection or habilitation, not in terms of their effectiveness in serving the partially motivating, but improper, function of simply screening from sight persons who make others in society feel uncomfortable.[24] In defending its ban on milk processed at a distance from the city, Madison was similarly precluded from relying on its improper interest of protecting its local milk producers from outside competition.[25]

Once interests are identified, the principle can secure varied forms of relief. The most narrow, but perhaps most significant, relief is in the context of methods of regulation requiring case-by-case determination of a retarded person's need for differential treatment (*i.e.*, a civil commitment proceeding or a system for placement in a separate school). In such cases, the principle calls at a minimum for an individualized inquiry into the current availability of less restrictive alternatives that would serve the state's interests. This is the use to which the principle has been put in the context of the civil commitment of the mentally ill.[26] Irrespective of the system that exists and no matter how informally it operates currently, the principle can be used to demand an adequate unbiased inquiry into existing alternatives.

The principle (coupled with well-developed notions of due process of law)[27] also can properly be used to ensure that the search for less restrictive alternatives occurs before, and not after, the more restrictive placement occurs. Because mental retardation is rarely a condition with a sudden or insidious onset, hasty intervention should seldom be required and only in the rarest instance should a person whose only handicap is retardation be placed in a confining institution or a separate school prior to an inquiry into whether the placement is necessary at all.

[24] *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156, 170-71 (1972) (striking down, as unconstitutionally vague, a vagrancy statute aimed at "common night walkers," which served to round up "so-called undesirables"); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (Ohio statute prohibiting "annoying" assembly by three or more people on sidewalk held violative of rights of free assembly and association).

[25] Dean Milk Co. v. City of Madison, 340 U.S. at 354-56.

[26] *See* Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wisc. 1972) *vacated for entry of definitive decree,* 414 U.S. 473 (1974), *clarified,* 379 F. Supp. 1376 (E.D. Wisc. 1974), *vacated on procedural grounds,* 95 S. Ct. 1943 (1975); Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971).

[27] *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Chambers, *supra* note 1, at 1178-82.

A second extension of the principle would be to require case-by-case determinations where none are currently required. For example, the principle could be used to require individualized inquiries into and use of alternatives under statutes imposing absolute bans on marriage for institutionalized retarded persons.[28] Similarly, the principle can easily be used to compel individualized periodic reexamination of placements or restrictions to determine their continued necessity.[29]

Yet bolder uses of the principle lie in waiting. The principle may be a useful tool to lawyers in securing the removal of legal barriers to the use of currently available alternatives. For example, if a public or private agency is repeatedly blocked by zoning regulations from placing a group home in a residential area,[30] attorneys can argue that the state may not continue to confine retarded persons in institutions and retain their zoning regulations when group homes would adequately serve the needs of the institutionalized individuals. In such a case, a court striking down a zoning regulation would have to find either that the purposes underlying the zoning regulation would not be adversely served by permitting placement of the home or that (and here is an extension of the principle) the value of permitting the less restrictive home justified some intrusion in the state's interests in permitting restrictive zoning.[31]

Striking out even further, the principle may be used to compel the creation of new alternative programs or facilities (such as group homes in the community) even when no agency as yet stands ready to erect them. Many Supreme Court decisions have compelled states to choose between foregoing regulation of certain conduct altogether (such as the regulation of nonlocal milk) or adopting a new method of regulation not currently in existence.[32] Courts might similarly hold that states need not create systems of involuntary (or fictionally voluntary) commitment of mentally retarded persons, but if they do, they must create a full range of less confining residential settings so that no one is confined in a setting more restrictive of his freedom than is necessary.[33] The same argument can be made for compelling the creation of a diverse range of educational programs, so long as the state compels attendance of some mentally retarded children at segregated institutions. For institutionalized children, the creation of alternatives other than their own family homes, which may no longer be available, may be indispensable to their release.

The right to habilitation, developed in *Wyatt v. Stickney* and discussed elsewhere

[28] *See* Stanley v. Illinois, 405 U.S. 645 (1972) (Illinois forced to replace a system in which fathers of illegitimate children were barred absolutely from receiving custody of child with a system in which case-by-case determinations of fitness were made).

[29] Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969) (a case dealing with the degree of confinement within a hospital after the initial hospitalization had occurred long before).

[30] *See* Chandler & Ross, Chapter 11 of this volume.

[31] *See* Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (openly weighing whether harm to state of having no regulation at all over train lengths was outweighed by value of protecting federal constitutional interest in unimpeded flow of interstate commerce).

[32] *See e.g.,* Shelton v. Tucker, 364 U.S. 479 (1960); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[33] *See* Chambers, *supra* note 1, at 1180-1200 (arguments developed in the context of the mentally ill). A lawsuit has recently been filed in the District of Columbia through attorneys at the Mental Health Law Project seeking to force the creation of adequate alternatives to mental hospitalization for persons currently confined at St. Elizabeth's hospital. Robinson v. Weinberger, Civil No.

in this volume,[34] has in this context essentially the same potential for encouraging the creation of new programs. Under either rubric, courts have to assay the costs that government must pay as the price for continuing to incarcerate many mentally retarded citizens. In determining the forms of habilitation to be required, courts will find that experts disagree on the precise components of an adequate system of residential or educational alternatives for mentally retarded individuals. Courts may be even more puzzled by state claims that they cannot afford to create the alternatives but cannot humanely give up the institutions altogether. This seems in part to be Alabama's claimed dilemma in *Wyatt* argued through the veil (as seductive as Salome's) of the inappropriateness of judicial intrusion into this essentially legislative domain. But the judiciary has a duty to protect individual liberty, even if a consequence of this duty is to compel a redirection of funds away from programs not involving such constriction on individual liberty.[35] The effectiveness of the principle of the least restrictive alternative requires not only judicial boldness in framing an initial decree, but also steadfastness in overseeing its implementation.

Even beyond compelling the creation of alternatives to specific programs, the principle conceivably might be used to force the creation of preventive programs to ensure that institutionalization or separate education will not be necessary in the future. Phenylketonuria (PKU) testing programs, controls over lead-based paint, prenatal nutritional programs, and even broad income maintenance systems can all be justified by the principle so long as involuntary losses of freedom await some citizens who would become retarded without such programs. The costs of the development and implementation of such programs may possibly call into question the propriety of judicial use of the principle at all. For the principle brings with it an unbroken continuum of pressures on the state to avoid unnecessary deprivations of liberty. But drawing lines through undivided middles has been the magic of common law courts, and hopefully in the field of mental retardation, courts and future legislators will draw these lines toward the edge of the continuum where many current legislators still wince.

THREE PROBLEMS FOR ATTORNEYS

Three obstacles to successful application of the principle merit further consideration. The first two—state claims that placement in the restrictive setting is voluntary and that placement or regulation is the only avenue adequately serving the state's interest of maximum protection for the retarded person—may influence courts to hold that the principle does not apply at all or to apply the principle and still routinely permit the use of the most restrictive placement. The third obstacle—the inadequacy of current systems for exploring alternatives in individual cases—may not deter

[34] *See* Halpern, Chapter 13 of this volume; Burt, Chapter 14 of this volume.

[35] In a way, suits to compel the creation of new programs involve a dangerous bluff: The state can evade a court order by closing the attacked institution or school. Such closings may be disadvantageous for some residents or students if no other appropriate programs exist.

courts from holding that the principle applies, but may render useless any favorable holding that is reached.

The Myth of Voluntariness

States are likely to claim that participation in many forms of separate treatment for the mentally retarded is voluntary or that persons held are free to leave at any time.[36] If states permitted commitment to residential institutions or special schools for the retarded only when the individual voluntarily chose participation, courts might reject arguments that states must create new less restrictive alternatives (or even that they must explore existing ones). The courts might reason that the obligation to use alternatives that maximize freedom applies only when the government is seeking by force to remove an individual's freedom.

There are several responses to this position. In the first place, if courts accept the argument that disfavored treatment of persons labeled mentally retarded is constitutionally suspect, then establishing voluntary forms of segregation would arguably be as constitutionally unacceptable for the mentally retarded as the "freedom of choice" plans adopted by racially segregated school systems in response to court orders requiring elimination of racial segregation.[37] Continued reliance on the totally confining institution, even if it is operated on a voluntary commitment basis, unnecessarily perpetuates the stigma of mental retardation for both institutionalized and noninstitutionalized retarded citizens. However enticing the analogy to race discrimination may be, it is unlikely that courts will in fact borrow for the mentally retarded the full range of judicial techniques developed to attack racial segregation. Under the Constitution, racial segregation now occupies the lowest ring in hell, and courts have acted with greater aggression to uproot it than they are likely to display for any other form of institutionalized intolerance.

A more promising method of attack on claims that programs are "voluntary" is to argue that in reality the programs are "involuntary" in that they are chosen in an atmosphere of drastic governmentally threatened consequences or under misapprehensions about the consequences of not accepting such programs.[38] For example, a parent's seemingly voluntary choice of school placement might be considered involuntary if the alternative to separate placement were the child's removal from the school system. A parent's decision (or even the retarded person's own decision) might similarly be considered involuntary if not made with full disclosure about conditions and about the services provided in the school, available alternatives, and the reduced likelihood of the individual's reintegration into the community.

[36] *See* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 759-60 (E.D.N.Y. 1973).

[37] *See, e.g.,* Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960). Even in the race area, freedom of choice plans carefully drawn to ensure that choice was voluntary and that the schools were not otherwise segregated by law have been sustained. *See* Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55, 65 (5th Cir. 1964), *cert. denied,* 379 U.S. 933 (1964).

[38] *See, e.g.,* Rogers v. Richmond, 368 U.S. 534 (1961).

Finally, a parent's "voluntary" decision should almost never be considered voluntary as to the child, for the interests of parents and child (especially when the parents are considering expelling him from their home) may conflict greatly.[39] The consequence of refusing to recognize the parent's choice as voluntary would be that courts or agencies would make an independent inquiry into alternatives. (The parents' own attitude about placing their child could, of course, still be considered as one important factor in judging the adequacy of a home-based alternative program.)

The State's Interest in Protecting the Retarded Person

Courts can be expected to require the use of the least restrictive alternative only when it serves the state's legitimate interests at least as well as (or, perhaps, not much less satisfactorily than) the more restrictive program the state is seeking to impose on the retarded person.

One goal of many governmental restrictions on the mentally retarded person is to protect him from his own inadequacies. The most restrictive form of regulation —for example, commitment to a distant institution or absolute guardianship—will nearly always maximize this protection. Judges who are often concerned solely or primarily with ensuring such protection[40] are understandably reluctant to run the risk that their failure to have ordered the most restrictive alternative will later lead to some incident for which they may be blamed. Thus, judges may honestly apply the principle and still reject the retarded person's plea for greater freedom.

Attorneys must be well prepared to respond to this defensive behavior. They must try to show that protection is not the only goal of the legislation in issue and point to other goals, if they exist, such as habilitation or maximizing capacity for independent decision making. Even accepting the primacy of a goal of protection, attorneys should try to show that many retarded persons need far less protection than is commonly believed and that a high degree of protective segregation will largely undermine the ability of the retarded person to develop personal independence. Attorneys should, in short, be sympathetic to the judge's concerns, but they also must show him that a greater degree of freedom best serves the judge's own goals.

The Need for Systems to Ensure That Alternatives Are Explored

Because the most likely use of the principle for the retarded citizen lies in compelling the use of existing less restrictive alternatives to institutional commitment or separate schooling, there is a need to emphasize the difficulties of ensuring that alternatives are actually explored even after courts decree that a search for alter-

[39] *See* Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues,* 48 NOTRE D. LAW. 133, 139-43, 154-55, 156-58 (1972).

[40] *See* Lake v. Cameron, 267 F. Supp. 155, 158-59 (D.D.C. 1967) (excessively protective attitude of federal district judge).

natives is mandatory. In 1966, the United States Court of Appeals for the District of Columbia Circuit ordered that alternatives to hospitalization for the mentally ill be explored in all cases and used where appropriate.[41] The government, according to the court, bore the burden of performing the search. In the vast bulk of commitment proceedings since conducted in the District, however, little or no exploration of alternatives has occurred because, at least until recently, there was no one to carry out the search. Attorneys were ignorant of the alternatives and too overworked to explore them, the committing authority and the reviewing court were understaffed, and the person who was being committed usually was unable to discover alternatives.

The same problem is likely to exist for the mentally retarded. Thus, a bare holding that alternatives to any compulsory procedure must be explored on a case-by-case basis is by itself of small value. Attorneys must seek to ensure that alternatives are in fact routinely assessed. The same court that holds that a retarded person has a right to the least restrictive suitable placement can appropriately hold that the right must be implemented by systems to ensure that alternatives are adequately brought to the attention of decision makers.

The appropriate system for exploring alternatives will vary with the nature of the issue (residential placement, guardianship, schooling) and the nature of the decision maker (judge, school official, institutional administrator). The task of seeking alternatives to implement court decisions might be entrusted to court personnel, just as probation officers now typically advise criminal and juvenile courts on community placement.[42] The analogy is more compelling than may initially appear. Specially trained court personnel could not only help locate community alternatives, but could also play a role in monitoring the progress of the retarded persons involved. They may also infuse judges with enthusiasm for developing new community programs. Another approach to implementing less restrictive alternatives would be the development of a separate agency with a staff of lay or professional advocates, perhaps attached to an agency providing legal representation. Already in use in some legal services agencies for the mentally ill, such an independent advocacy service can serve a similar function in the context of placements for mentally retarded persons.

In both commitment and educational decisions, the state may prefer to rely on an investigation of alternatives conducted by staff persons working for the agency operating the very restrictive placement the retarded person may wish to avoid. Because of the obvious conflict of interests between retarded citizens and those who are employed in the most confining and restrictive programs, exclusive reliance on such an arrangement should be avoided.

Whatever the system created, the important point is this: Any court that accepts the principle of the least restrictive alternative must also concern itself with the method for implementing the principle. Attorneys filing class suits or appealing

[41] Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966). *See also* Chambers, *supra* note 1, at 1168-69 (discussion of implementation of *Lake*).

[42] *See* R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE (1969) (describes the function of probation officers in sentencing).

individual cases need to address explicitly the abstract constitutional principle and its implementation as well.

THE LIMITATIONS OF THE PRINCIPLE AND THE LIMITATIONS OF ATTORNEYS

The principle of the least restrictive alternative cannot alone, even if broadly accepted by courts, compel the development of the necessary variety of affirmative programs for mentally retarded citizens. Those who seek normalization walk a wobbly tightrope. To them, normalization does not mean the elimination of special programs for the mentally retarded. Rather, they seek elaborate but subtle special programs to help each mentally retarded person learn to live as nearly as possible at his own optimum level. The natural vector of the principle of the least restrictive alternative lies in the dismantling of restrictions. To the extent that it is a useful tool in arguing for the creation of community-based programs, its utility is premised on the continued existence of more restrictive programs. If acceptance of the concept of normalization of institutions and programs causes states to close their restrictive institutions and programs for the retarded, the principle would offer little aid in compelling the creation of new programs in the community. This emphasizes the point that the principle is not an affirmative right that can compel special programs if a state decides to do nothing. Today, while many restrictions remain, the principle of the least restrictive alternative can be very effective, but even today attorneys seeking special programs for the mentally retarded should couple the principle with statutory and constitutional arguments that are less intrinsically negative in their tone.

A broader warning is in order. The lawyer seeking alternatives for the mentally retarded, the mentally ill, or other segregated groups has a great responsibility. Class action lawsuits that fail may appear to vindicate current practices and impede efforts for change for the lawyer's own clients and thousands of others across the country. Class actions that succeed may produce hastily devised alternative placements or the release of institutional residents without the necessary community systems to support them. When lawyers seek to persuade courts to do what legislatures ought to have done, they bear a weighty burden to do what legislatures ought to do before they act. In this context, lawyers need to inform themselves about the varying capacities and needs of retarded citizens and the range and effectiveness of alternatives to whatever confining institution, program, or regulation they seek to dismantle. They need to visit the institutions and special programs for retarded persons and sit down and get to know some of their clients.

In some ways, attorneys involved in test cases are uniquely situated to act irresponsibly, often having no real client other than their own moral convictions, no accountability to an electorate, and no responsibility even to bear the brunt of a judicial opinion as their own. To date the attorneys who have been involved in the major litigation for retarded citizens have generally borne well the burden of

becoming informed, keeping informed, and acting with caution. As lawsuits for the benefit of the mentally retarded proliferate, the legal profession must ensure that newly involved lawyers continue to meet the same high standards.