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Deferring to the Judgment of Mental Health and Related Professionals in Striking the Constitutional Balance Between Individual Liberty and the Interests of the State

by Patrick Wiseman*

INTRODUCTION

When a plaintiff alleges that he has been institutionalized, physically restrained, or medicated in violation of individual liberty,¹ and the government urges that its conduct serves legitimate interests,² should

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1. It is presumed throughout this discussion that institutionalization, use of physical restraints, use of chemical restraints (psychotropic medication), and so forth are deprivations of liberty in the constitutional sense. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); *Bee v. Greaves*, 744 F.2d 1387, 1394 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) ("Given the undisputed nature of antipsychotic drugs, . . . a pretrial detainee retains a liberty interest derived from the Constitution in avoiding unwanted medication with such drugs."). For a more extended discussion of the liberty interests at stake, see Costello and Preis, *Beyond Least Restrictive Alternative: A Constitutional Right to Treatment for Mentally Disabled Persons in the Community*, 20 LOY. L.A.L. REV. 1527, 1538-42 (1987).

2. Legitimate government interests are those which bear a reasonable relation to the purpose of the deprivation of individual liberty. Where the purpose of the deprivation of liberty is to address the needs of the individual, only those government interests which serve those needs are legitimate. *See infra* notes 86-92 and accompanying text. For this reason, the discussion will focus on *civil* deprivations of liberty, as *criminal* deprivations legitimately serve purposes unrelated to the needs of the individual. *See, e.g.*, *Turner v. Safley*, ____ U.S. ____, 107 S. Ct. 2254 (1987). "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate *penological* interests." *Id.* at 2261 (emphasis supplied). *Institutional* interests, it will be argued, may not be exclusively relied upon to justify *civil* deprivations of liberty.

courts, in striking the balance between the competing claims, defer to the judgment of mental health and related professionals?³

The standard adopted by the United States Supreme Court in *Youngberg v. Romeo*,⁴ requiring courts to defer to professional judgment and to impose damages liability only when professional judgment was in fact not exercised, unduly hampers the clarification of constitutional rights. The concerns justifying deference to mental health professionals are equally well addressed by granting those professionals qualified immunity. Deference effectively precludes courts from setting constitutional limits within which professional judgment must be exercised. By granting qualified immunity to a professional whose judgment is found to transgress constitutional limits, courts would remain free to give constitutional guidance to mental health and related professionals. In particular, such professionals should be required to consider and to provide when feasible that course of training, treatment, or habilitation which is least restrictive of individual liberty.⁵

Section I of this article explicates the Supreme Court's deference-to-professional judgment standard announced in *Romeo*. A critique of the standard follows in section II. In section III it is argued that, by granting qualified immunity rather than deferring to professional judgment, courts have an opportunity to clarify constitutional limits within which mental health professionals must decide on appropriate treatment. Section IV examines judicial interpretations of the deference standard, and notes the apparent absence of constitutional limits imposed on professional judgment. Section V suggests how such limits might be clarified.

I. EXPLICATION OF THE DEFERENCE-TO-PROFESSIONAL-JUDGMENT STANDARD ADOPTED IN *YOUNGBERG V. ROMEO*

In *Youngberg v. Romeo*,⁶ Nicholas Romeo, an involuntarily committed mentally retarded resident of Pennhurst State School and Hospital, a

3. For the purposes of this discussion, "mental health and related professionals" includes psychiatrists, psychologists, mental retardation professionals, social workers, and other professionals whose profession arguably involves them in the daily deprivation of individual liberty in pursuit of concededly legitimate government interests.

4. 457 U.S. 307 (1982). The Court held that professional judgment is presumptively valid and that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. See *infra* notes 16-22 and accompanying text.

5. See *infra* notes 93-112 and accompanying text.

6. 457 U.S. 307 (1982).

Pennsylvania institution, filed suit under 42 U.S.C. § 1983 against three administrators of the institution, claiming damages for the alleged violation of his constitutional rights.⁷ Romeo, who had been identified as profoundly retarded, was committed to Pennhurst by his mother, who could no longer care for him after his father's death.⁸ While at Pennhurst, Romeo was injured numerous times⁹ and on occasion was physically restrained.¹⁰

Romeo's case gave the U.S. Supreme Court its first opportunity to consider the substantive rights of involuntarily committed mentally retarded people under the due process clause of the fourteenth amendment to the United States Constitution.¹¹ Noting that the mere fact of procedurally proper commitment does not deprive a person of all substantive liberty interests,¹² the Court held that both the right to personal safety and the right to freedom from unnecessary restraint survive involuntary commitment to a state institution.¹³ The Court further held that someone who is involuntarily committed to an institution has a right to such training or habilitation¹⁴ as is necessary to ensure safety and freedom

7. *Id.* at 309. No claims for injunctive relief were adjudicated because Nicholas Romeo was a member of the class seeking such relief in another action. *Id.* at 311. See *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded*, 451 U.S. 1 (1981).

8. 457 U.S. at 309.

9. It is not contested that, while confined at Pennhurst, Romeo was injured on over seventy occasions. These injuries were both self-inflicted and the result of attacks by other residents, some in retaliation against Romeo's aggressive behavior. The injuries included a broken arm, a fractured finger, injuries to sexual organs, human bite marks, lacerations, black eyes, and scratches. Moreover, some of plaintiff's injuries became infected, either from inadequate medical attention or from contact with human excrement that the Pennhurst staff failed to clean up.

Romeo v. Youngberg, 644 F.2d 147, 155 (3d Cir. 1980), *vacated and remanded*, 457 U.S. 307 (1982).

10. 644 F.2d at 155.

11. No state "shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

12. 457 U.S. at 315.

13. *Id.* at 315-16. The state had conceded that Romeo "has a right to adequate food, shelter, clothing, and medical care." *Id.* at 315 (footnote omitted).

14. "Habilitation" is a term of art, describing the kind of training appropriate to enhance the skills of mentally retarded people. It is to be distinguished from "treatment," a term more appropriate to illness than to a developmental disability such as retardation. "The word 'habilitation' . . . is commonly used to refer to programs for the mentally-retarded because mental retardation is . . . a learning disability and

from unnecessary restraint.¹⁵

The Court next considered the appropriate standard for determining whether these rights have been violated and concluded that the question must be resolved by "balancing [the individual's] liberty interests against the relevant state interests."¹⁶ Holding that "the minimally adequate training required by the Constitution is such training as may be reasonable in light of [the individual's] liberty interests in safety and freedom from unreasonable restraint," the Court concluded that, in balancing the competing interests and so determining what is "reasonable," courts should defer "to the judgment exercised by a qualified professional."¹⁷ The Court defined a "professional" decision maker as "a person competent, whether by education, training or experience, to make the particular decision at issue,"¹⁸ and held that a "decision, if made by a professional, is presumptively valid."¹⁹ "[L]iability may be imposed," the Court continued, "only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."²⁰ The Court thus adopted "what is essentially a gross negligence standard"²¹ for constitutional

training impairment rather than an illness. [T]he principal focus of habilitation is upon training and development of needed skills." Brief for American Psychiatric Association as *Amicus Curiae* 4, n.1, as cited in *Romeo*, 457 U.S. at 309 n.1 (brackets in original).

15. 457 U.S. at 319. The Court avoided the question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*, on the assumption that *Romeo* sought only training related to safety and freedom from restraints. *Id.* at 318. Chief Justice Burger would have held that there is no constitutional right to habilitation *per se*. *Id.* at 329-30 (Burger, C.J., concurring).

16. *Id.* at 321. Given the Court's conclusion that a person involuntarily committed to an institution has the right to such training as is necessary to ensure safety and freedom from restraint, provision of adequate training is presumptively sufficient to protect the rights to safety and freedom from restraint. Thus, the Court addresses next the standard for determining the adequacy of training, and adopts its balancing test.

17. *Id.* at 322. It is worth noting that Nicholas *Romeo* suffered numerous injuries while in the care of the very professionals to whom the Court now requires deference.

18. *Id.* at 323 n.30.

19. *Id.* at 323 (footnote omitted).

20. *Id.* (footnote omitted).

21. *Doe v. New York City Dept. of Social Services*, 709 F.2d 782, 790 (2d Cir.), *cert. denied sub nom. Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983).

review of state-authorized deprivations of individual liberty by mental health or related professionals.²²

II. CRITIQUE OF THE ROMEO COURT'S DEFERENCE-TO-PROFESSIONAL-JUDGMENT STANDARD

The Court gives four principal reasons for deferring to professional judgment. First, says the Court, "[i]f there is to be any uniformity in protecting these interests, this balancing [between an individual's liberty interests and the relevant state interests] cannot be left to the unguided discretion of a judge or jury."²³ Second, limiting judicial review of challenges to conditions in state institutions by requiring courts to defer to professional judgment minimizes judicial interference with the internal operations of these institutions.²⁴ Third, "there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions."²⁵ Finally, the presumption of the correctness of professional decisions is necessary

to enable institutions of this type — often, unfortunately, overcrowded and understaffed — to continue to function. A single professional may have to make decisions with respect to a number of residents with widely varying needs and problems in the course of a normal day. The administrators, and particularly professional personnel, should not be required to make each decision in the shadow of an action for damages.²⁶

22. In another context, the Court has held "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (action by prisoner to recover damages for injury sustained when he slipped on a pillow negligently left on stairway by sheriff's deputy), overruling *Parratt v. Taylor*, 451 U.S. 527 (1981). This circumstance should be distinguished from deprivations of liberty imposed *deliberately* rather than negligently and, although in pursuit of legitimate state interests, in violation of constitutional standards. In other words, the due process clause is implicated by a deliberate act of an official causing intended loss of liberty; under *Romeo* the standard of review of such an act is whether it falls within professional standards.

23. 457 U.S. at 321.

24. *Id.* at 322 (footnote omitted).

25. *Id.* at 322-23 (citations omitted).

26. *Id.* at 324-35. Where damages are sought to compensate for prior violations of constitutional rights, deference to professional judgment is arguably more appropriate than when injunctive relief to prevent a continuing violation is sought. "Obviously the problem of hindsight interference with decisions made by hard-pressed professional

None of the Court's reasons for deferring to professional judgment is convincing.²⁷ First, the goal of uniformity in decision making is ill

staff members . . . is a more serious one than that of assisting them in directing prospective injunctive relief against appropriate state officials." *Scott v. Plante*, 691 F.2d 634, 637 (3d Cir. 1982).

27. *Romeo* was not the first occasion on which the Court had indicated that government and individual interests might appropriately be balanced by deference to professional judgment. In *Parham v. J.R.*, 442 U.S. 584 (1979), a challenge to a Georgia statute permitting commitment of children to mental institutions by their parents with the concurrence of the hospital superintendent, the Court acknowledged the child's liberty interest and held that some process is therefore due before the child may be committed to a state institution. The Court then held that due process was satisfied by a finding by a "neutral factfinder" that the child meets the statutory standards for commitment. "Due process," the Court continued,

has never been thought to require that a neutral and detached trier of fact be law trained or a judicial or administrative officer. . . . Surely, this is the case as to medical decisions, for "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments." *In re Roger S.*, 19 Cal. 3d 921, 942, 569 P.2d 1286, 1299 (1977) (Clark, J., dissenting). Thus, a staff physician will suffice, so long as he or she is free to evaluate independently the child's mental and emotional condition and need for treatment.

Id. at 607 (citation omitted). Under the Georgia statute, which was accordingly upheld, this determination was made by a psychiatrist. *Id.* at 606-08. Insofar as the decision is a purely psychiatric one, deference to professional psychiatric judgment may be appropriate. See *infra* note 32 and accompanying text. More recently, the Court has suggested that deference to professional judgment may also be appropriate in striking statutory balances as well as constitutional ones. See *School Bd. of Nassau County, Fla. v. Arline*, 107 S. Ct. 1123 (1987), in which the Court held that a chronic contagious disease (in this case, tuberculosis) is a handicap within the meaning of the Vocational Rehabilitation Act of 1973 which prohibits discrimination in federally funded programs against "otherwise qualified" handicapped persons. 29 U.S.C. § 794. In determining whether someone with a chronic contagious disease is otherwise qualified for the position or program sought, the Court held that "courts normally should defer to the reasonable medical judgments of public health officials." 107 S. Ct. at 1131. Deferring to professional judgment in striking a statutory balance is less problematic than doing so to strike a constitutional balance, as it may be justified by reference to the statute requiring the balancing. In other words, courts may appropriately defer to the judgment of qualified professionals when directed to do so by the law-making authority whose acts they are applying. Furthermore, legislatures may give guidance to the professionals as to the appropriate standards or criteria to apply in striking the balance. See, e.g., *Board of Ed. v. Rowley*, 458 U.S. 176 (1982), in which the Court interpreted the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1411 et seq. The Act sets forth detailed standards which states must observe in educating handicapped children. Given this detailed legislative guidance, the Court

served by the Court's conclusion that, in determining whether the balance has been properly struck, courts should defer to professional judgment. As the Court acknowledges, "[p]rofessionals in the habilitation of the mentally retarded disagree strongly on the question whether effective training of all severely or profoundly retarded individuals is even possible."²⁸ With such profound disagreement among professionals, deference to professional judgment is unlikely to guarantee uniformity.

Second, while judicial interference with the internal operations of institutions should perhaps be minimized, inquiry into those operations should not be foreclosed when the constitutionality of the conditions of confinement is suspect. Indeed, in response to a challenge by a prisoner to being "arbitrarily classified as mentally ill and subjected to unwelcome treatment,"²⁹ the Court has said:

[T]he inquiry involved in determining whether or not to transfer an inmate to a mental hospital for treatment involves a question that is essentially medical. The question whether an individual is mentally ill and cannot be treated in prison "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington v. Texas*, [441 U.S. 418, 429 (1979)]. The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely "[t]he subtleties and nuances of psychiatric diagnoses" that justify the requirement of adversary hearings. *Id.*, at 430.³⁰

If the medical nature of the inquiry does not justify dispensing with procedural due process requirements, it is not clear why it should justify

held that courts should defer to professional judgment as to the appropriateness of an educational program. Deference to professionals without such authority or guidance, however, inappropriately gives law-making authority to professionals. The Court generally, and appropriately, counsels deference to professional judgment in contexts where the decision is without constitutional content or implications. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), in which a student's challenge of his exclusion from an academic program was rejected. "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. Cf. *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)." 474 U.S. at 225 (footnote omitted).

28. 457 U.S. at 316 n.20.

29. *Vitek v. Jones*, 445 U.S. 480, 495 (1980).

30. *Id.*

dispensing with substantive due process requirements, particularly when the nature of the inquiry is as much constitutional as medical.

Third, the Court's definition of a "professional" decision maker as "a person competent . . . to make the particular decision at issue"³¹ begs the rather important question of the nature of the "particular decision." Where the decision is, for example, a purely medical one, persons with medical education, training, and experience are presumptively qualified to make it, and courts might appropriately defer to such judgment.³² But where the decision, although it arises in a medical context, is constitutional, there is no reason to make the same presumption. The threshold question should therefore be whether the decision at issue is a decision exclusively within the special expertise of the particular professional. Where the decision is a constitutional one, courts should not be required to defer to the judgment of professionals who have no special constitutional expertise.³³ At the very least, courts should be permitted to inquire into the nature of the decision to determine whether it raises constitutional questions and, if it does, to decide those questions.

Finally, professionals would be as well protected from damages actions by a grant of qualified immunity as by deference to their judgment. Indeed, granting qualified immunity addresses all of the Court's concerns equally as well as deferring to professional judgment while also better protecting individual rights. The goal of uniformity in decision making would be better served by granting qualified immunity than by deferring to professional judgment, insofar as courts would be able to establish uniform constitutional standards guiding professional judgment. Furthermore, granting qualified immunity limits judicial interference with the internal workings of institutions to occasions when such interference

31. 457 U.S. at 323 n.30.

32. See *Vitek v. Jones*, 445 U.S. 480 (1980); *Parham v. J.R.*, 442 U.S. 584 (1979).

33. However one defines a "constitutional" decision, where the question is how individual liberty interests should be weighed against competing state interests, there is little doubt of its constitutional dimension; and certainly there is nothing uniquely *medical* about such a decision. See, e.g., *In re M.P.*, 500 N.E.2d 216, 225 (Ind. App. 1986), *modified*, 510 N.E.2d 645 (Ind. 1987): "The [*Romeo*] proposition that there is 'no reason to think judges or juries are better qualified than appropriate professionals in making [treatment] decisions' may not be reasonably disputed. Conversely, however, I do not believe that there can be any quarrel with the proposition that those professionals are not better qualified than judges or juries in balancing delicate constitutional rights and duties" (Sullivan, J., dissenting).

is appropriate, i.e., when the conditions of confinement are found to be unconstitutional. One would also expect that professionals would welcome constitutional guidance when a decision has constitutional ramifications outside their particular sphere of expertise.

III. QUALIFIED IMMUNITY AS AN ALTERNATIVE TO TOTAL DEFERENCE TO PROFESSIONAL JUDGMENT

In *O'Connor v. Donaldson*,³⁴ the Supreme Court found for the first time that a state cannot "without more" constitutionally confine a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of others.³⁵ The Court nonetheless held that the defendant, the superintendent of a state institution, was entitled to qualified immunity from money damages even though he had violated the plaintiff's constitutional right to liberty. The appropriate question for the jury, the Court found, was whether the defendant "knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of [Donaldson], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson]."³⁶ For purposes of this question, the Court concluded, "an official has, of course, no duty to anticipate unforeseeable constitutional developments."³⁷

Thus, a state official, even though he has violated a plaintiff's constitutional rights, enjoys qualified immunity from money damages. Accordingly, he may be held liable only if he maliciously intended or knew or should have known that his conduct would violate the plaintiff's constitutional rights.

The option of granting qualified immunity to state agents, as in *Donaldson*, permits courts to clarify individual constitutional rights while

34. 422 U.S. 563 (1975).

35. *Id.* at 576. The cryptic phrase "without more" is the Court's own, and apparently means that a state may not constitutionally confine someone who is not in need of custodial care unless the state provides some form of treatment. *See* Comment, "Without More: A Constitutional Right to Treatment?", 22 LOY. L. REV. 373 (1976).

36. 422 U.S. at 577, citing *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (brackets in original).

37. 422 U.S. at 577 (citation omitted). The Court has granted qualified, "good faith" immunity in actions brought under 42 U.S.C. § 1983 to several different kinds of state agents. *See* *Procunier v. Navarette*, 434 U.S. 555 (1978) (state prison officials); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state governor, senior and subordinate officers of the State National Guard, president of state-controlled university).

protecting those agents from being unfairly held liable. If courts are required to defer to professional judgment in determining whether the constitutional balance has been appropriately struck between individual liberty interests and state objectives, then the opportunity to clarify constitutional rights is significantly diminished. This is, perhaps, the most unfortunate consequence of the *Romeo* decision. The standard declared in *Romeo*, insofar as it requires complete deference to professional judgment, goes too far in limiting the capacity of courts to clarify constitutional limits on professional judgment. Yet, from the point of view of the professional whose decision is challenged, it is hard to discern a distinction between the imposition of liability only when the decision "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment,"³⁸ and the imposition of liability only if the professional maliciously intended or knew or should have known that his conduct would violate the plaintiff's constitutional rights. From the point of view of the person whose liberty is infringed upon, however, the distinction is a significant one, because courts, in granting qualified immunity to professionals whose judgment is challenged, can clarify the constitutional limits within which professional judgment must henceforth be exercised.

IV. JUDICIAL INTERPRETATIONS OF THE DEFERENCE-TO-PROFESSIONAL-JUDGMENT STANDARD

A. Chief Justice Burger's Interpretation

Chief Justice Burger, concurring in the judgment in *Romeo*, interpreted the majority's admonition to defer to professional judgment to mean that, even if someone could demonstrate that his training programs "were inconsistent with generally accepted or prevailing professional practice — if indeed there be such — this would not avail him so long as his training regimen was actually prescribed by the institution's professional staff."³⁹ This extreme reading of the Court's standard is surely mistaken; courts are not to defer to any and all judgments of persons who happen to be professionals, but only to those judgments which are in fact professional judgments. In other words,

38. *Romeo*, 457 U.S. at 323.

39. *Id.* at 331 (Burger, C.J., concurring).

Romeo requires courts to focus on the decision made, not on the decision maker. Justice Burger's interpretation would entirely shield the judgments of professionals, whether those judgments were professional or not, from judicial review, a result clearly not intended by the majority. Although lower courts have generally not been as extreme as Justice Burger in their application of the *Romeo* standard, there has been some confusion about its appropriate application. Nonetheless, emerging from the application by lower courts of the *Romeo* standard is the principle that there is an individual right to treatment in conformity with professional judgment, neither more nor less.

B. The Right to Treatment in Conformity With Professional Judgment

1. Neither More . . .

In *Johnson v. Brelje*,⁴⁰ criminal defendants found unfit to stand trial challenged the conditions of their confinement in a state mental institution. The court, citing *Romeo*, said:

To determine whether the plaintiffs' constitutional rights have been violated, it is necessary to balance the plaintiffs' liberty interests against the relevant state interests in securing a safe facility in which treatment can be administered. . . . It is not our duty, however, to perform the balancing. The Constitution only requires us to make certain that in deciding to restrict the movements of the plaintiffs, *a professional judgment* was exercised.⁴¹

The court concluded with respect to defendants' refusal to permit outdoor activities that professional judgment had in fact not been exercised. The defendants had not justified the restriction "in terms of legitimate interests in treatment and security,"⁴² and so the court upheld the district court's injunction of the practice.⁴³

The court in *Phillips v. Thompson*⁴⁴ was more explicit in its deference to the constitutional judgment of professionals, saying, "we glean from

40. 701 F.2d 1201 (7th Cir. 1983).

41. *Id.* at 1208-09 (citations to *Romeo* omitted) (emphasis in original).

42. *Id.* at 1208-09.

43. *Id.* at 1209-10.

44. 715 F.2d 365 (7th Cir. 1983).

[*Romeo*] that it must be determined whether professional judgment in fact was exercised in balancing the liberty interest of the class members against relevant State interests."⁴⁵ Applying this extreme deference to professional judgment, the court concluded "the liberty of movement of class members [described by the court as "several hundred higher functioning but mentally retarded adults"⁴⁶] was limited only by the reasonable requirements of caring for a large number of handicapped people in an institutional setting as such requirements were determined by the professionals who directed the operations of these institutions."⁴⁷

The appellate court in *Society for Good Will to Retarded Children v. Cuomo*⁴⁸ was most extreme in its deference to professional judgment and chided the district court for its assumption that the professional judgment standard is violated "if experts at trial disagree with care or treatment decisions that were actually made, or think another course of conduct would have been better."⁴⁹ The district court had noted the agreement of all experts, both defendants' and plaintiffs', that

many clients of the [Suffolk Developmental] Center could be safer, happier and more productive outside the institution in small community residences. Their professional judgment was that transfers should be made as soon as the facilities could be made available. . . . The Constitution mandates community placement for those who have been adjudged by qualified professionals to require a community setting.⁵⁰

The Second Circuit Court of Appeals, however, rejected the district court's analysis of the expert testimony, saying

"professional judgment" has nothing to do with what course of action would make patients "safer, happier and more productive." Rather, it is a standard that determines whether a particular decision has met professionally accepted minimum standards. . . . Expert testimony is thus relevant not because of the experts' own opinions — which are likely to diverge

45. *Id.* at 368 (emphasis supplied).

46. *Id.* at 366.

47. *Id.* at 368.

48. 737 F.2d 1239 (2d Cir. 1984).

49. *Id.* at 1248.

50. *Society for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1347 (E.D.N.Y.), *vacated*, 737 F.2d 1253 (1984), *dismissed as moot* 103 F.R.D. 168 (E.D.N.Y. 1984), *rev'd*, 832 F.2d 245 (2d Cir. 1987).

widely — but because that testimony may shed light on what constitutes minimally accepted standards across the profession.⁵¹

Several other courts have applied an extreme interpretation of the *Romeo* deference-to-professional-judgment standard in various contexts, holding facially constitutional a state's statutory procedures governing voluntary, involuntary, and emergency commitment;⁵² permitting involuntary administration of psychotropic drugs;⁵³ approving procedures for patient consent to administration of such drugs;⁵⁴ upholding procedures for restraint and seclusion of mental patients;⁵⁵ declaring constitutional the placement of mentally retarded people in institutions rather than community living arrangements;⁵⁶ holding that accreditation

51. 737 F.2d at 1248 (citations omitted). *See also* Lelsz v. Kavanagh, 807 F.2d 1243 (5th Cir. 1987), *cert. dismissed*, 108 S.Ct. 44 (1987). "The constitutional minimum standard of habilitation . . . relates, not to the qualitative betterment of a retarded person's life, but only to the training necessary to afford him safety and freedom from bodily restraint. Whether that training is adequate must be determined in light of expert testimony; no constitutional violation exists unless the level of training is such a substantial departure from accepted professional judgment or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 807 F.2d at 1250.

52. *Project Release v. Prevost*, 551 F. Supp. 1298, 1309 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 960 (2d Cir. 1983): "Due process does not necessitate a full adversarial hearing before a legally-trained factfinder in every situation; in determining the rights of the mentally ill, review by an independent medical expert may be sufficient."

53. *Stensvad v. Reivitz*, 601 F. Supp. 128, 131 (W.D. Wisc. 1985): "[W]hatever rights plaintiff has to refuse antipsychotic drugs are measured by whether the decision to administer such drugs is a 'substantial departure from accepted professional judgment, practice or standards.' [*Romeo*], 457 U.S. at 323." *But see* U.S. v. Charters, 829 F.2d 479 (4th Cir. 1987) (refusing to apply deference standard to forcible medication of pretrial detainee with antipsychotic drugs).

54. *R.A.J. v. Miller*, 590 F. Supp. 1319, 1321 (N.D. Tex. 1984): "The proper balance between individual rights and relevant state interests is achieved, and due process satisfied, as long as the restrictions on liberty are imposed by the exercise of professional judgment."

55. *Doe by Roe v. Gaughan*, 617 F. Supp. 1477, 1486 (D. Mass. 1985), *aff'd*, 808 F.2d 871 (1st Cir. 1986): "[T]he present procedures for the use of restraint and seclusion are based on the exercise of professional judgment, as contemplated in *Romeo*, and thereby adequately protect the constitutional rights of the plaintiffs."

56. *Daniel B. v. O'Bannon*, 633 F. Supp. 919, 924 (E.D. Pa. 1986): "[T]he [U.S. Supreme] Court has not yet held that there is a constitutional right to confinement in the least restrictive alternative. In [*Romeo*], the Court held due process satisfied if restraints are imposed on a mentally retarded individual by decision of a qualified professional in accordance with accepted professional standards." The court nonetheless

of state institutions by the Joint Commission on Accreditation of Hospitals is *prima facie* proof of constitutionality of the conditions of confinement;⁵⁷ upholding removal of a child from a foster home;⁵⁸ and even denying damages in an action for the fatal shooting of a prisoner during an escape attempt.⁵⁹

Each of these courts interprets the *Romeo* standard to mean that a constitutional balance of individual liberty interests against competing interests of the state has presumptively been struck, if professional judgment has been exercised. Thus, professional judgment, though it infringe on individual liberty, is presumptively valid, even if the balance is struck in favor of interests of the state which are inconsistent with the liberty interests of the individual and which serve only the efficiency of the institution. Not all courts, however, have been so grudging in their application of the *Romeo* standard.

2. . . . Nor Less

In *Thomas S. v. Morrow*,⁶⁰ a young, mentally retarded man who had been a ward of the state since birth challenged his placement in a night care unit at a detoxification center as violative of his substantive due process rights under the fourteenth amendment. He alleged that his hospitalization imposed a degree of restraint on his liberty inconsistent with professional judgment concerning his appropriate

approved a settlement agreement under which the defendants would fund community placements for the plaintiffs.

57. *Concerned Citizens for Creedmoor, Inc. v. Cuomo*, 570 F. Supp. 575 (E.D.N.Y. 1983); *Woe v. Cuomo*, 559 F. Supp. 1158 (dismissed) (E.D.N.Y. 1983), *aff'd in part, rev'd and remanded in part*, 729 F.2d 96, 106 (2d Cir.), *cert. denied*, 469 U.S. 936 (1984): "JCAH approval represents an 'exercise of professional judgment' to which we must defer under [*Romeo*] . . . [But] JCAH accreditation is merely *prima facie* proof of adequacy, and . . . a court is not barred from probing behind it if presented with evidence that JCAH has, across-the-board or in a given instance, allowed its standards to slip below constitutional benchmarks."

58. *Gibson v. Merced County Dept. of Human Resources*, 799 F.2d 582, 590 (9th Cir. 1986): "[D]ecisions made by appropriate professionals are to be presumed correct."

59. *Newby v. Serviss*, 590 F. Supp. 591, 598-99 (W.D. Mich. 1984): "[P]laintiff did not submit evidence from which reasonable people could conclude that either defendant . . . failed to exercise any professional judgment with respect to Clarence Newby's right to reasonably safe conditions while confined."

60. 601 F. Supp. 1055 (W.D.N.C. 1984), *aff'd as modified and remanded*, 781 F.2d 367 (4th Cir.), *cert. denied*, 106 S. Ct. 1992 (1986) and 107 S. Ct. 235 (1986).

treatment.⁶¹ Mental retardation professionals had repeatedly recommended that Mr. S. be given a placement in the community, but such a placement had never been provided for him.⁶² Despite the fact that Mr. S. sought injunctive relief, rather than damages, which had been sought in *Romeo*, the District Court applied the *Romeo* test, as did the Fourth Circuit in affirming the lower court's conclusion that Mr. S.'s rights had indeed been violated. Furthermore, although *Romeo* dealt with the rights of persons involuntarily committed to state institutions, the *Thomas S.* court applied *Romeo*'s standards to a person under state guardianship, noting that the liberty interests protected by the *Romeo* court did not arise because of the institutional confinement but rather pre-existed it.⁶³ In remedying the violation of Mr. S.'s rights, the district court had relied on the recommendations of the state's professionals.⁶⁴ As the appellate court explained, "[t]he presumption of validity accorded the professionals' decision about appropriate treatment has not been rebutted. Consequently, in the absence of evidence that the decision is a 'substantial departure from accepted professional judgment, practice, or standards,' the district court was required to accept the recommendations of the qualified professionals"⁶⁵

Thus, despite the unsupported allegation by the defendant that Mr. S. had received minimally adequate treatment consistent with professional judgment,⁶⁶ the court affirmed the district court's order requiring appropriate community placement.⁶⁷

The *Thomas S.* court's application of the *Romeo* standard is interesting for several reasons. First, the court interpreted *Romeo* to apply outside the institutional context, to cases where the state, which has no obligation to provide any services at all,⁶⁸ has chosen to provide services. Second, the court applied the professional-judgment standard to a request for prospective relief, although the standard had been announced in a case seeking only retrospective relief. Finally, the court

61. 781 F.2d at 373.

62. *Id.* at 369-74.

63. *Id.* at 374.

64. *Id.* at 375.

65. *Id.* at 375.

66. *Id.* at 374.

67. *Id.*

68. See *Romeo*, 457 U.S. at 317: "As a general matter, a State is under no constitutional duty to provide substantive services for those within its border."

permitted application of the standard offensively, rather than defensively, despite the assertion by the defendants that their conduct met the minimal standard established by the *Romeo* decision. In so doing, the court rejected Justice Burger's narrow interpretation of the standard, as the decision to place Mr. S. in the detoxification center had presumably been made by qualified professionals. It was not, however, a "professional judgment" in the sense required by *Romeo* because it was "based on expediency and a decision to save money."⁶⁹

As in *Thomas S.*, equitable relief was sought in *Clark v. Cohen*,⁷⁰ in which a mentally retarded woman who had spent her entire adult life in an institution sought an injunction requiring her placement in a community living arrangement. The district court issued an injunction, directing the defendants (various officials of the Pennsylvania mental health/mental retardation system) to release Ms. Clark from the state institution in which she had been confined and to pay for a program of services for her outside the state institution.⁷¹ The defendants appealed on two grounds. First, even assuming that they had violated Ms. Clark's constitutional rights, the defendants claimed that the eleventh amendment bars any relief beyond ordering her release from the institution.⁷² Second, the defendants contended that Ms. Clark's constitutional rights had not been violated.⁷³ The second contention is of particular interest here.

The professional staff at the state institution in which Ms. Clark had been confined had agreed since 1976 that institutional placement was inappropriate and that she should have been transferred to a community residential facility.⁷⁴ Their efforts to secure such a placement, however, were frustrated by the defendants.⁷⁵ As the appellate court saw it:

we are dealing with a plaintiff who was committed without notice or a hearing as the result of a petition containing an

69. 781 F.2d at 375.

70. 613 F. Supp. 684 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3rd Cir.), *cert. denied*, 107 S. Ct. 459 (1986).

71. 613 F. Supp. 684 (E.D. Pa. 1985).

72. 794 F.2d at 82. The court rejected the defendants' eleventh amendment defense on the basis that injunctive relief which remedies a past constitutional violation, even if costly, does not breach the eleventh amendment. *Id.* at 83-84.

73. *Id.* at 82.

74. *Id.* at 85.

75. *Id.* at 85-86.

incorrect diagnosis, and who was retained against her will without a hearing for over twenty-eight years. Moreover we are dealing with a plaintiff who repeatedly requested that the persons in charge of her detention arrange for such a hearing, requests which were endorsed by the professional staff of the institution. Finally, we are dealing with a plaintiff as to whom the professional staff of the institution recommended against the kind of treatment to which she was subjected.⁷⁶

The Third Circuit upheld the district court's finding that Ms. Clark's "substantive rights not to be unnecessarily institutionalized and to receive the minimally adequate training that was the only purpose of her commitment were violated."⁷⁷ Citing the *Romeo* professional judgment standard, the court held that Ms. Clark's continued confinement in the state institution, in the face of unanimous professional judgment that she should be released from the institution and provided a community placement, was a violation of her substantive liberty right to appropriate treatment under *Romeo*.⁷⁸

Finally, in *Wells v. Franzen*,⁷⁹ a claim by a prisoner for damages and for declaratory and injunctive relief against various prison officials for injuries stemming from his nine-day confinement in bodily restraints,⁸⁰ the court said "Federal courts should avoid undue interference with the operations of state institutions. Judges and juries are not better qualified than trained professionals to determine an appropriate treatment, . . . and the due process standard is based on norms set by the mental health professionals."⁸¹ The court also noted, however, that

76. *Id.* at 86.

77. *Id.*

78. *Id.* at 87. See also *Lelsz v. Kavanagh*, 629 F. Supp. 1487 (N.D. Tex. 1986), in which the district court concluded that someone confined to an institution against his best interests is unduly restrained to the same extent that an individual shackled to his wheelchair is unduly restrained. 629 F. Supp. at 1494. "If professional judgment dictates that community placement is necessary in the best interest of the individual, then the individual has a constitutional right to such placement, and continued confinement in the institution constitutes undue restraint." *Id.* at 1494-95 (citation omitted). This conclusion is apparently undisturbed by the opinion of the Fifth Circuit Court of Appeals reversing another order of the district court in the same case. *Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987), *cert. dismissed*, 108 S. Ct. 44 (1987).

79. 777 F.2d 1258 (7th Cir. 1985).

80. *Id.* at 1260.

81. *Id.* at 1262 (citations to *Romeo* omitted).

[the] right to be free of bodily restraint absent a proper determination of need is infringed if prison guards interfere with medical personnel who are exercising professional judgment. Restrictions imposed by guards, which are medically unjustifiable in connection with restraint (and which have no adequate security rationale), could infringe on plaintiff's due process rights. . . . Total body restraint is a severe intrusion that may defeat constitutional challenge only in limited circumstances defined by professionally approved mental health standards. If nonprofessional prison employees arbitrarily and without good reason (such as safety) preempt the exercise of judgment by professionals, they risk violation of the due process rights of prisoners.⁸²

Each of these courts, then, interprets the *Romeo* professional judgment standard to mean that a person has an affirmative right to professionally prescribed treatment, so long as there is relative unanimity among the responsible professionals about the appropriate treatment. Failure to provide such treatment is a violation of substantive due process.

C. Summary

Courts have therefore interpreted the *Romeo* standard to mean, on the one hand, that the Constitution is presumptively satisfied by the exercise of professional judgment and, on the other, that the constitution guarantees one the right to such services as unanimous professional judgment dictates.⁸³ In short, when the state seeks civilly to deprive one of liberty in pursuit of state interests, one has a constitutional right to treatment in conformity with professional judgment, no more and no less. The total judicial deference to professional judgment which these cases exemplify⁸⁴ restricts the ability of courts to clarify the

82. *Id.* at 1263 (citations omitted).

83. These interpretations of the standard are not mutually exclusive; the first is likely to be stressed by defendants, the second by plaintiffs.

84. The cases in the second group discussed above (*see supra* notes 60-82 and accompanying text) are perhaps more protective of individual rights than those in the first group (*see supra* notes 39-59 and accompanying text). Nonetheless, both groups of cases exemplify a greater degree of deference to professional judgment than should be constitutionally required.

constitutional limits within which professional judgment must be exercised.

Unless constitutional limits are established within which professional judgment must be exercised, we run the risk that individual liberty interests will not be given appropriate weight in the balance against competing state interests. Especially in the institutional context, but also in other human service settings, professional interests may conflict with individual liberty interests.⁸⁵ The damaging effects of such a conflict of interest may be ameliorated if constitutional parameters for the exercise of professional judgment are established.

V. CLARIFYING THE CONSTITUTIONAL LIMITS ON PROFESSIONAL JUDGMENT

A. Identifying Legitimate Government Interests

The nature and duration of any civil deprivation of individual liberty by the state must be reasonably related to a legitimate purpose.⁸⁶ Certain state interests will not serve to justify a civil deprivation of liberty.⁸⁷ In particular, the decision to deprive someone of liberty may

85. See *U.S. v. Charters*, 829 F.2d 479 (4th Cir. 1987). "[T]he use of anti-psychotic medication may present a substantial conflict of interest for institutional professionals because, quite apart from its therapeutic benefits, the medication serves the institutional goals of maintaining control and ameliorating staffing costs." *Id.* at 497. The court considers this a sufficient reason not to defer to professional judgment; it is surely sufficient reason to establish constitutional limits within which professional judgment must be exercised.

86. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Although the Supreme Court has characterized *Jackson* as a "procedural due process case" (see *Romeo*, 457 U.S. at 320 n.27), the Court implied that where the purpose of commitment is "to provide reasonable care and safety," such should be provided. *Id.* See also *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975): "[A] state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends," suggesting that, should a state confine such a person, the state must provide "more" than simply custodial confinement. See *supra* notes 34-37 and accompanying text.

87. That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person

not be based "on exigency, administrative convenience, or other [non-professional] criteria,"⁸⁸ nor may it be based on financial constraints.⁸⁹

Civil deprivations of liberty may be justified by reference to either the state's police power or its *parens patriae* authority.⁹⁰ Neither source of state authority permits "government to control individual lives in the name of helping its citizens."⁹¹ Under either rationale, then, the deference-to-professional-judgment standard should be understood to require that decisions involving deprivation of liberty be based on appropriate *professional* criteria bearing on the *individual's* need for treatment, habilitation, or other services, and not on matters essentially irrelevant to individual treatment such as institutional convenience.⁹²

to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends. . . . May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public animosity cannot constitutionally justify the deprivation of a person's physical liberty.

Donaldson, 422 U.S. at 575 (citations omitted).

88. *Clark v. Cohen*, 613 F. Supp. 684, 704 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3d Cir.), *cert. denied*, 107 S. Ct. 459 (1986) (footnote omitted).

89. The Supreme Court in *Romeo* implicitly recognized that financial constraints would not justify a treatment decision in concluding that a "professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints." 457 U.S. at 323. This suggests that budgetary constraints are not *per se* relevant to a professional treatment decision. *See also Thomas S. v. Morrow*, 781 F.2d 367, 375 (4th Cir.), *cert. denied*, 106 S. Ct. 1992 (1986) and 107 S. Ct. 235 (1986).

90. *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

91. *U.S. v. Charters*, 829 F.2d 479, 494 (4th Cir. 1987) (footnote omitted).

92. *See, e.g., In Re Mental Commitment of M.P.*, 510 N.E.2d 645 (Ind. 1987). "In order to protect the patient's liberty interest in being free from unwarranted intrusions into his body and mind, it is necessary to determine which of the interests reflected by the psychiatrist is the foundation for his decision to treat the patient with anti-psychotic drugs." *Id.* at 647. Corollary to the principle that deprivations of individual liberty must be justified by reference to the treatment or habilitation needs of the individual is the principle that deprivations which are so justified must be accompanied by treatment or habilitation which meets those needs. "If a state court orders a mentally retarded person committed for 'care and treatment,' . . . I believe that due process might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of those goals. In such a case, commitment without any 'treatment' whatsoever would not bear a reasonable relation to the purposes of the person's confinement." *Romeo*, 457 U.S. at 326 (Blackmun, J., concurring).

In the context of civil deprivations of liberty, among the criteria professionals should be constitutionally required to consider is the use of the least restrictive alternative to achieve the purposes of the treatment. Use of means more restrictive than necessary to achieve the government's ends is inherently arbitrary, insofar as it exceeds the state's *parens patriae* authority or police power and should therefore be held to be a violation of due process.

B. The Least Restrictive Alternative

Even though government may act in furtherance of legitimate objectives, it should be required to choose that alternative course of action least restrictive of individual liberty, to assure that individual liberty interests are being appropriately weighed in the balance.⁹³

The Supreme Court, in *Romeo*, noted that the question of least restrictive means was not before it.⁹⁴ A panel of the Third Circuit, in *Rennie v. Klein*,⁹⁵ considered the application of the *Romeo* standard to the administration of antipsychotic drugs to an involuntarily committed, mentally ill patient. Despite the Supreme Court's disclaimer, Judge Garth, for a plurality, concluded that a least intrusive means analysis is inconsistent with the *Romeo* decision, and held:

antipsychotic drugs may be constitutionally administered to an involuntarily committed patient whenever, in the exercise

93. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960): "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." See also *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973): "Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative." See also *Jones v. United States*, 463 U.S. 354, 385-86 (1983) (Brennan, J., dissenting):

Although this Court has never approved the practice, it is possible that an inmate will be given medication for reasons that have more to do with the needs of the institution than with individualized therapy. . . . We should not presume that he lacks a compelling interest in having the decisions to commit him and to keep him institutionalized made carefully, and in a manner that preserves the maximum degree of personal autonomy.

(citations and footnote omitted; emphasis supplied). See generally Comment, *The Right to Treatment in the Least Restrictive Alternative: The Confusion Remains After Youngberg v. Romeo*, 19 NEW ENG. L. REV. 175 (1983).

94. *Romeo*, 457 U.S. at 313-14 n.14.

95. *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983), on remand from the Supreme Court for reconsideration in light of *Romeo*, 458 U.S. 1119 (1982).

of professional judgment, such an action is deemed necessary to prevent the patient from endangering himself or others [that being the statutory standard for commitment]. Once that determination is made, professional judgment must also be exercised in the resulting decision to administer medication.⁹⁶

Judge Weis, concurring, found it "regrettable"⁹⁷ that the court so construed *Romeo* and would have held that "professional judgment" should be relied upon only if "it includes an evaluation aimed at the least intrusive means — a cost-benefit analysis viewed from the patient's perspective."⁹⁸ Judge Weis continues:

A "professional judgment" based primarily on administrative convenience or the purely economic interest of the state does not pass muster. If less intrusive means to accomplish the state's legitimate objectives are available and feasible, then administrative and financial concerns are simply not significant enough to justify a patient's exposure to the serious risks accompanying use of these drugs.⁹⁹

Finally, Judge Weis notes:

Introduction of the least intrusive means standard does not supplant professional judgment; it merely adds an important factor to the analysis underlying that judgment. The least intrusive test does not constitute undue interference with professional judgment, and is surely defensible to the extent it mandates serious and deliberate consideration of the patient's interest.¹⁰⁰

Several other courts have hinted that a least restrictive means test is not inconsistent with *Romeo*. In *Santana v. Collazo*,¹⁰¹ for example,

96. 720 F.2d at 269-70 (footnote omitted).

97. *Id.* at 275 (Weis, J., concurring).

98. *Id.* at 276 (Weis, J., concurring).

99. *Id.* (Weis, J., concurring). According to Judge Weis, these considerations are especially important in a case involving administration of antipsychotic drugs, the long-term effects of which are more adverse than the effects of long-term *physical* restraint, to which Nicholas Romeo was subjected. However, it is not obvious that *any* such significant infringement of liberty can be justified by administrative or financial concerns. *See supra* notes 87-92 and accompanying text.

100. 720 F.2d at 277.

101. *Santana v. Collazo*, 714 F.2d 1172 (1st Cir.), *cert. denied*, 466 U.S. 974 (1983).

involving a challenge by juveniles to the use of isolation in an industrial school and juvenile camp, the court, citing the *Romeo* standard, suggested, "if the state can avoid the current extensive use of isolation by minimal additional attention — to distinguishing between and attempting to address the sources rather than the effects of the residents' behavior problems, it may well be unreasonable for the state not to do so."¹⁰² In *Bee v. Greaves*,¹⁰³ in which the forcible administration of antipsychotic drugs to a pretrial detainee was challenged, the court interpreted *Romeo* to have "declined to apply a 'less restrictive means' analysis."¹⁰⁴ Noting, however, that "[a]ny decision to administer antipsychotic drugs forcibly must be the product of professional judgment by appropriate medical authorities, applying accepted medical standards,"¹⁰⁵ the court held that, in making such a decision, the availability of less restrictive alternative courses of action, "such as segregation or the use of less controversial drugs like tranquilizers or sedatives, should be ruled out before resorting to antipsychotic drugs."¹⁰⁶

Other courts, however, have held that one has a constitutional right to provision of services or treatment in the least restrictive environment only if such treatment is necessary in the judgment of professionals.¹⁰⁷ In *Society for Goodwill to Retarded Children v.*

102. 714 F.2d at 1182.

103. *Bea v. Greaves*, 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

104. *Id.* at 1396 n.7.

105. *Id.* at 1396 (citations to *Romeo* and *Rennie v. Klein* omitted).

106. *Id.* (footnote omitted). See also *U.S. v. Charters*, 829 F.2d 479 (4th Cir. 1987), in which the Fourth Circuit avoided application of the *Romeo* standard in a case presenting the question whether a pretrial detainee, found incompetent to stand trial, may be forcibly medicated. The court distinguished *Romeo* on several grounds and concluded that, rather than defer to professional judgment in balancing the competing individual and government interests in such a case, courts should perform the balancing. The court held, "unless it is determined that, without medication, a patient presents an immediate threat of violence that cannot be avoided through the use of less restrictive alternatives, there is no justification for the intrusion into fundamental liberties that forcible medication represents." 829 F.2d at 493. Although the *Charters* court rejected the deference standard, it effectively established some constitutional limits within which professional judgment must henceforth be exercised.

107. See, e.g., *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3d Cir.), *cert. denied*, 107 S. Ct. 459 (1986). See also *Ass'n for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473, 486 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1983): "[A] constitutional right to the least restrictive method of care or treatment exists only insofar as professional judgment determines that such

Cuomo,¹⁰⁸ the court rejected even this reading of *Romeo*, concluding that, even if there is *unanimous* expert testimony to the contrary,¹⁰⁹ "there is no constitutional right to a least restrictive environment."¹¹⁰

Introduction of a least intrusive means analysis, however, while perhaps inconsistent with Justice Burger's extreme deference standard, is not inconsistent with an appropriate degree of deference to professional judgment. While there may be reason to suppose that professionals do not wish and should not be required to make treatment decisions in the shadow of an action for damages,¹¹¹ granting qualified immunity to such professionals provides them with as much protection from unfairly being held liable as would deferring to their judgment. Furthermore, it is far better that courts give constitutional guidance to professionals whose profession involves them in the daily deprivation of individual liberty interests in pursuit of legitimate state objectives than that they leave to such professionals the task of striking the appropriate balance. Providing constitutional guidance to such professionals does not amount to an assumption that these professionals "are insensitive to the requirements of the Constitution."¹¹² On the contrary, provision of such guidance presumes that professionals will accept it. When liberty interests are at stake, considerations of administrative convenience and budgetary constraints should not be permitted to justify their deprivation. Accordingly, professionals should be required to consider and to provide when feasible that course of treatment which is least restrictive of individual liberty. If arbitrary restrictions on individual liberty are to be avoided, courts should strike the balance between individual liberty interests and competing state interests with reference to the least-restrictive-alternative principle (and require professionals to do likewise).

alternatives would measurably enhance the resident's enjoyment of basic liberty interests." See also *Lelsz v. Kavanagh*, 629 F. Supp. 1487 (N.D. Tex. 1986) (discussed *supra* note 78).

108. *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984).

109. See *supra* notes 48-51 and accompanying text.

110. 737 F.2d at 1249 (citations omitted). See also *Giesecking v. Schafer*, 672 F. Supp. 1249, 1267 (W.D. Mo. 1987): "[No] federal constitutional right to community placement exists where the [Department of Mental Health] fails to so place an individual after professional recommendation for such placement."

111. See *supra* text accompanying note 26.

112. See *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981).

CONCLUSION

Romeo establishes that involuntary residents of mental retardation institutions have the constitutional rights to safety and freedom from unnecessary restraint and to such training or habilitation as is necessary to enable them to enjoy these rights. *Romeo* subverts these rights, however, by requiring courts to defer to the judgment of institutional professionals in determining whether the balance has been properly struck between the individual liberty interests recognized in *Romeo* and the competing state interests. The extension of the *Romeo* standard to other cases challenging a governmental infringement of individual liberty subverts individual liberty still further. There is no reason to suppose that institutional and other professionals will weigh individual liberty interests as heavily in the balance as competing government interests.¹¹³ Moreover, deference to professional judgment precludes any further clarification of the scope of constitutionally protected liberty in each context to which the deference standard is extended. Courts should therefore extend the deference standard beyond the specific context within which it arose only with extreme caution.

It would be more appropriate in most contexts for courts to determine whether a constitutional violation has occurred, by weighing the competing interests rather than deferring to professional judgment on that question. Then, if a constitutional violation is found and the professional's conduct meets the standard set forth by the court in *Donaldson*,¹¹⁴ the court should grant good-faith immunity to the professional whose judgment is challenged. If one reason for deferring to professional judgment is to avoid holding professional staff liable for well-intentioned decisions made under stressful conditions, granting qualified immunity serves that purpose equally well. Another reason offered for deferring to professional judgment is that courts are ill-prepared to make medical and other "professional" judgments. This claim simply begs the question. If the judgment to be made is a constitutional one, then courts are not only uniquely qualified to make

113. "The Court . . . placed in the hands of human service bureaucrats the power to balance the constitutional rights of their wards against their own institutional needs, according presumptive validity to the state's resolution of this balancing process." Note, *Due Process and Judicial Deference to Professional Decisionmaking in Human Service Agencies*, 35 SYRACUSE L. REV. 1283, 1305 (footnote omitted). See also *supra* notes 86-89 and accompanying text.

114. See *supra* notes 34-37 and accompanying text.

such decisions, but are bound to do so. Courts should not abdicate to medical and other professionals their constitutional duty to weigh individual liberty interests against competing state interests. At the very least, courts should give guidance to professionals whose judgment has constitutional ramifications, and should be permitted to inquire into the nature of the decision to determine whether such guidance is appropriate. Clarification of the constitutional limits within which professional judgment must be exercised, by incorporation of the least-intrusive-means analysis, would be a step in the right direction, as it would require professionals to base their judgment, at least in part, on relevant constitutional grounds and would provide courts with constitutional grounds to review the judgment of professionals. Furthermore, such clarification would provide courts, once liability has been found, with criteria for design of an appropriate injunctive remedy. Finally, the grant of qualified immunity permits courts to clarify the constitutional standard without unfairly imposing liability on professionals who may not be expected to anticipate the clarification.