GROUP HOMES AND DEINSTITUTIONALIZATION: THE LEGISLATIVE RESPONSE TO EXCLUSIONARY ZONING

INTRODUCTION

In February 1963, President Kennedy sent a message to Congress urging establishment of a nationwide network of community-based mental health services. His hope was that "within a few years . . . [and with] . . . the redirection of State resources from State mental institutions . . . [we would] . . . achieve our goal of having community-centered mental health services readily accessible to all."[1] Today we are faced with a situation where many communities applaud deinstitutionalization conceptually, but only so long as the group homes do not locate in their neighborhoods.[2] In addition, a vocal and highly organized "community" of institutions, in concert with the newly emerged "professional and semiprofessional 'helping occupations,' "[3] fight tenaciously for continued institutional appropriations.

To effectuate a policy of deinstitutionalization, a state must anticipate and overcome the likely obstacles; particularly formidable is zoning.[4] Zoning authority is typically vested in local government bodies which naturally are most concerned with local self-interests rather than state and national policy goals. Considerable litigation has evolved from zoning ordinances which characterize certain areas of a town as "single-family residential," thereby excluding all non-conforming uses. This technique, which has become known as exclusionary zoning,[5] is the barrier group homes most

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1. COMPTROLLER GENERAL, G.A.O. REP. NO. HRD-79-38, LEGISLATIVE AND ADMINISTRATIVE CHANGES NEEDED IN COMMUNITY MENTAL HEALTH CENTERS PROGRAM 2 (May 2, 1979) (catalog of U.S. Gov't. Publications, No. 79-15102).

2. *See infra* text accompanying note 5.

3. A. SCULL, DECARCERATION, COMMUNITY TREATMENT AND THE DEVIANT: A RADICAL VIEW 15 (1977) [hereinafter cited as DECARCERATION].

4. A recent development in Ohio suggests that state statutes must be scrupulously drawn. In Garcia v. Siffrin Residential Ass'n, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), the court declared unconstitutional a statute which made certain group homes a conforming use in single-family residentially zoned areas. This surprising opinion, which in the dissenters' words "handcuff[s] the General Assembly so that it may not create areas of statewide licensing which are exempt from local municipal control," *id.* at 279, 407 N.E.2d at 1383, (Brown, J., dissenting) focused on the fact that the statute did not operate uniformly throughout the state. The statute distinguished between towns with and without comprehensive zoning schemes in place by a certain date.

5. Exclusionary zoning is the first line of defense for a community trying to exclude group homes. Most commonly, a restrictive definition of "family" is inserted in the munici-

frequently confront.

This note will focus on exclusionary zoning, and evaluate its validity as a response to the perceived threat of group homes. Statutes and case law from seven states will be surveyed. Six are the New England states: Vermont, New Hampshire, Maine, Connecticut, Massachusetts, and Rhode Island. New York law will also be examined in some depth because of the role it has played in articulating some of the most persuasive arguments in favor of deinstitutionalization and the progressive nature of its jurisprudence. California, arguably the *most* progressive state, will be briefly surveyed; special attention is given to some of the important policy statements in the California code.

Although group homes are used for many different types of people, this note places particular emphasis on the problems of seven groups:[6] (1) mentally retarded, (2) mentally ill, (3) developmentally disabled, (4) juvenile delinquents, (5) alcohol and drug abusers, (6) foster children, (7) aged. These categories, while not all mutually exclusive, do reflect the terminology often employed by legislative draftsmen.[7]

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pal zoning code, which can then be used to keep households of unrelated persons from areas zoned "single-family residential." *See generally*, Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. REV. L. & SOC. CHANGE 137 (1975); Comment, *Exclusion of Community Facilities for Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance and Constitutional Law*, 25 DE PAUL L. REV. 918 (1976); Note, *Zoning for the Mentally Ill: A Legislative Mandate*, 16 HARV. J. ON LEGIS. 853, 869-71 (1979) [hereinafter cited as *Legislative Mandate*]; Comment, *Exclusionary Zoning and Its Effects on Group Homes in Areas Zoned for Single-Family Dwellings*, 24 U. KAN. L. REV. 677 (1976).

6. One very difficult problem outside the scope of this note is the "normalization" of convicted adults. Not only are there obvious legal differences, stemming in no small part from the clash between the penal goals of deterrence and rehabilitation, but there exist formidable obstacles in terms of community resistance to deinstitutionalizing convicts which may surpass even those barriers to the seven classes of disadvantaged persons discussed herein. It is worthwhile to note that at least one Scandinavian country does not share our criminal justice philosophy. Authorities in Denmark believe that deprivation of liberty is punishment enough, and therefore prison should be "as humane and as similar to the ouside community as physically possible." Umbreit, *Danish Use of Prisons and Community Alternatives*, 44 FED. PROBATION 24, 25 (June, 1980) (citing lecture at University of Copenhagen by H. H. Brydensholt, Director General of the Danish Criminal Justice System (June 20, 1979)).

7. The most difficult distinction to be drawn is among the first three categories. The third, developmentally disabled, includes the mentally retarded in some states. (*See e.g.*, N.H. REV. STAT. ANN. § 171-A:2(V) (1977 & Supp. 1979)). More commonly, it refers to persons with some physical handicap which is manifest to a degree of incapacity rendering necessary assistance in daily activities. Typically included would be blindness, deafness and some specific diseases like epilepsy. Mental retardation is considered clinically distinct from

I. Background To The Problem

A survey of group home litigation reveals four main bases of attack, which are examined below: constitutional arguments, preemption arguments, governmental versus proprietary function distinctions and private covenant arguments.

A. *Constitutional Arguments*

The Supreme Court has not been very clear about its acceptance of the constitutional arguments which are based primarily on due process, equal protection, the right of association and the right of privacy. Contrary to earlier dicta,[8] in 1974 Justice Douglas, writing for the majority in *Village of Belle Terre v. Boraas*,[9] opined that a zoning ordinance which was used to exclude six unrelated college students who had rented a Belle Terre home, did not interfere with any fundamental rights.[10] However, a divided Court in *Moore v. East Cleveland*[11] accepted a constitutional argument in holding that a city housing ordinance with a very restrictive definition of "family" violated the due process requirement of the fourteenth amendment. Justice Powell, joined by Justices Brennan, Marshall and Blackmun, felt that East Cleveland had gone too far in determining the occupancy of the city's housing. The plurality opinion effectively limited the holding to its facts, which involved the "jailing [of] a 63-year-old grandmother for refusing to expel

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mental illness. While the former is often described in terms of scores on an intelligence-quotient test, the latter is described in terms of neuroses and psychoses. *See, e.g.*, Readings in Law and Psychiatry 60-61, 74-75 (R. Allen, E. Ferster, & J. Rubin eds., rev. ed. 1975).

8. In United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 538 (1973), Justice Douglas, concurring, found that a section of the Food Stamp Act, 7 U.S.C. § 2012(e) (Supp. II 1972) was unconstitutional because it would deny food stamps to a household containing unrelated persons. The concurrence was grounded in the right of association. The Food Stamp Act subsequently has been amended on several occasions. 7 U.S.C. § 2012(i) (1976 & Supp. IV 1980). Eligible households now include "a group of individuals who live together and customarily purchase food and prepare meals together for home consumption . . . ." *Id.* Other provisions have been added to include nonprofit group homes of up to sixteen residents, battered women and children shelters, narcotics addicts and institutionalized alcoholics. *Id.*

9. 416 U.S. 1 (1974).

10. *Id.* at 7. United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973), was distinguished as concerning a law which totally forbade unrelated persons from receiving food stamps, whereas the Belle Terre ordinance permitted cohabitation by unrelated groups of up to two persons. *Id.* at 8 n.6. *See* 19 Vill. L. Rev. 819 (1974) for the (somewhat optimistic) suggestion that *Belle Terre* may be "no more than a manifestation of a guarded fear of communal or 'hippie-type' living arrangements although this seems doubtful in light of the Court's position in *Moreno*." *Id.* at 831.

11. 431 U.S. 494 (1977).

from her home her now 10-year-old grandson who has lived with her and been brought up by her since his mother's death when he was less than a year old."[12]

Recently, the Court heard arguments in *Pennhurst State School and Hospital v. Halderman*,[13] which presented more clearly than ever before the constitutional issues involved in deinstitutionalization. Thus, *Pennhurst* had the potential for tremendous impact in this area. The Court was asked whether the "bill of rights" provisions[14] of the Developmentally Disabled Assistance and Bill of Rights Act of 1975[15] created in mentally retarded persons any substantive rights to "appropriate treatment, services, and habilitation" in "the setting that is least restrictive of the person's personal liberty."[16] Basing its decision on the fourteenth amendment due process and equal protection guarantees as well as section 504 of the Rehabilitation Act of 1973,[17] the United States district court had ordered Pennhurst State School and Hospital closed and the residents deinstitutionalized.[18] The Third Circuit Court of Appeals modified the ruling to the extent of refusing to close the institution[19] and the Supreme Court, in a five to four vote, agreed to stay the district court's order, which required immediate community placement for the current residents of the institution.[20]

In a lengthy opinion by Mr. Justice Rehnquist, the Supreme Court reversed the lower courts, in finding no "imposition of binding obligations on the States" which accept federal funding.[21] Rather, according to the majority, the congressional purpose of the

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12. *Id.* at 506 (Brennan, J., concurring). The rather astonishing prosecution drew some (well deserved) harsh words from Justice Brennan (with Justice Marshall concurring). "[T]he zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life." *Id.* at 507. Characterizing East Cleveland's ordinance as "cultural myopia," Brennan went on to write, "[t]he line drawn by this ordinance displays a depressing insensitivity toward the economic and emotional needs of a very large part of our society." *Id.* at 507-08. *See generally* N. WILLIAMS, 2 AMERICAN LAND PLANNING LAW § 52.02 at 48-49 (Supp. 1980) for an interesting analysis of this case.

13. 101 S. Ct. 1531 (1981).

14. 42 U.S.C. §§ 6010(1)-(4) (1976 & Supp. II 1978).

15. 42 U.S.C. §§ 6000-6081 (1976 & Supp. II 1978).

16. 42 U.S.C. §§ 6010 (1) & (2) (1976).

17. 29 U.S.C. § 794 (1976 & Supp. III 1979).

18. Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295, 1326-29 (E.D. Pa. 1977).

19. 612 F.2d 84, 116 (3d Cir. 1979).

20. 448 U.S. 905 (1980).

21. 101 S. Ct. 1531, 1544 (1981).

Act was " 'encouragement' of state [deinstitutionalization] programs."[22] In large part, the Court was persuaded by the "high cost of providing 'appropriate treatment' in the 'least restrictive environment'. . . ."[23] "Nothing in either the 'overall' or 'specific' purposes of the Act reveals an intent to require the States to fund new, substantive rights."[24] The case has been remanded for a determination of whether substantive rights to appropriate treatment are provided by Pennsylvania law.[25]

B. *Preemption*

Municipal zoning authority is derived from either specific grants of state police power[26] or home rule amendments to the state constitution.[27] Courts have quite naturally displayed a much greater willingness to hold that a municipality has overstepped the boundaries of permissible health and welfare regulation when it conflicts with a clear statement of state policy.[28] It has been argued that the preemption doctrine should apply to deinstitutionalization so that states may control the field to the exclusion of local governments by virtue of the desirability of uniform implementation and because of the state's greater expertise in the area.[29]

The need for statewide reform is revealed by the following two examples: (1) An experimental project in Ohio attempted a two year lobbying effort aimed at local zoning reform, with the goal of effecting changes which would allow group homes for the mentally

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22. *Id.* at 1544, 1545.

23. *Id.* at 1540.

24. *Id.*

25. *Id.* at 1546-47 & n.24.

26. *See generally* N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW §§ 18.01 *et seq* (1974).

27. Home rule amendments are considered "a logical culmination of efforts to impose constitutional limitations upon the state's power to deal with local problems." S. SATO and A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 134 (1977). *See, e.g.*, MASS. CONST. art. 2, § 6 ("exercise any power or function . . . which is not inconsistent with the constitution or laws enacted by the general court. . . ."); WASH. CONST. art. 11, § 11 ("make and enforce . . . regulations . . . not in conflict with general laws").

28. City of Los Angeles v. California Dept. of Health, 63 Cal. App. 3d 473, 133 Cal. Rptr. 771 (1976) (broad statement of legislative purpose of normalization is constitutionally permissible); Lorie C. v. St. Lawrence County, 49 N.Y.2d 161, 424 N.Y.S.2d 395, 400 N.E.2d 336 (1980) (state policy as enunciated in the Family Court Act does not specifically preempt local welfare department's placement plans); Zubli v. Community Mainstreaming Assoc. Inc., 102 Misc. 2d 320, 423 N.Y.S.2d 982 (1979) (choice of site selection is a legitimate governmental purpose under Padavan Law of 1978, and is therefore superior to an easement).

29. City of Pittsburgh v. Commonwealth, 468 Pa. 174, 187, 360 A.2d 607, 614 (1976) (Eagen, J., dissenting).

retarded. Of the 930 communities canvassed, only five acted to change their laws, and one actually closed up loopholes that the lobbying effort had pointed out.[30] This discouraging data, in conjunction with even a generalized notion of the sheer number of different local zoning codes, suggests the futility of efforts aimed solely at local reform. (2) Courts will most likely uphold legislative efforts at statewide reform.[31] "To the extent that zoning power is delegated by state legislation, . . . that power may be restricted by amendatory state legislation. [Once recognized,] the policy of fulfilling the needs of disadvantaged or troubled citizens through community care may be given precedence over local zoning by the legislature."[32]

C. *Governmental versus Proprietary Functions*

Where no express policy statement exists, an alternative argument is that a group home is immune from local regulation because the sponsoring state agency is performing a governmental function. In that the agency actions are for the benefit of the entire state, the activity in essence is *government* business and should not be thwarted by more narrow-sighted localities. Distinguishing this function from corporate or proprietary functions most often leads into a morass of faintly drawn lines; despite the fact that the argument has surfaced in at least three recent group home cases,[33] it is considered disingenuous by most courts.[34]

D. *Private Restrictive Covenants*

Restrictive easements and covenants designed to preserve the identity of a neighborhood have met with varied success in excluding group homes.[35] Private covenants will most likely fall when

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30. 2 MENTAL DISABILITY L. REP. (ABA) 794, 797 n.20 (1979).

31. *See supra* cases cited at note 28.

32. *Legislative Mandate, supra* note 5 at 883 (citations omitted).

33. City of Baltimore v. State Dept. of Health and Mental Hygiene, 38 Md. App. 270, 381 A.2d 1188 (1978) (on same facts, held governmental use and not subject to prohibitory local regulation); Connors v. New York State Ass'n of Retarded Children, Inc., 82 Misc. 2d 861, 370 N.Y.S.2d 474 (1975) (group home held governmental use therefore exempt from local zoning provisions); Vermont Div. of State Bldgs. v. Town of Castleton Bd. of Adjustment, 138 Vt. 250, 251, 415 A.2d 188, 193 (1980) (lease of state property for group home held proprietary use and therefore subject to reasonable town zoning ordinances).

34. *See generally* Note, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869, 872-74 (1971).

35. *See infra* notes 175-76 and accompanying text.

confronted with contrary state policy.[36] Again, this should emphasize the importance to deinstitutionalization advocates of a coherent statement of normalization philosophy.

II. State Survey: The Legislative Response

The four bases of attack discussed above revolve around two related concepts: least restrictive environment and normalization. In the words of a representative statute, " '[l]east restrictive environment' means the facility, program or service which least inhibits a person's freedom of movement, freedom of choice, and participation in the community, while achieving the purposes of habilitation and treatment."[37] Normalization refers to "community based services which provide reasonable alternatives to institutionalization in settings that are least restrictive to the client."[38] As will be seen, these two doctrines recur throughout the statutes, administrative regulations and cases cited in the following survey.

A. *Vermont*

Vermont is one of seventeen states[39] that has enacted a statute limiting municipal zoning power regarding group homes.[40] The statute is typical; it provides that a licensed group home or community care home for six or fewer developmentally disabled or physically handicapped persons "shall be considered by right" a conforming use of single family residential property, "except that no such home shall be so considered if it locates within 1,000 feet of another such home."[41] A declaration of policy states the normal-

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36. *See infra* notes 175-76 and accompanying text.

37. N.H. Rev. Stat. Ann. § 126-A:39 (Supp. 1979).

38. Me. Rev. Stat. Ann. tit. 34 § 2141(2)(A) (1978).

39. Ariz. Rev. Stat. Ann. §§ 36-581 to 36-582 (Supp. 1981); Cal. Welf. & Inst. Code §§ 5115-5116 (West Supp. 1981); Colo. Rev. Stat. § 31-23-303 (Supp. 1980) (construed in Adams County Ass'n for Retarded Citizens, Inc. v. City of Westminster, 196 Colo. 79, 580 P.2d 1246 (1978)); Conn. Gen. Stat. Ann. § 8-3e (West Supp. 1981); Md. Ann. Code art. 59A, §§ 19, 19A, 19B, 20C (1957 & Supp. 1979); Mich. Comp. Laws Ann. § 125.583b(2) (Supp. 1981); Minn. Stat. Ann. § 462.357 (Supp. 1980); Mont. Code Ann. § 76-2-314 (1981); N.J. Rev. Stat. Ann. § 40:55D-66 to 66.2 (West Supp. 1981); N.M. Stat. Ann. § 3-21-1.C (1978); N.Y. Mental Hyg. Law § 41.34 (McKinney Supp. 1981); Ohio Rev. Code Ann. § 5123.18 to .19 (Baldwin 1980) (declared unconstitutional in part; see *supra* note 4); R.I. Gen. Laws § 45-24-22 to 23 (1980 & Supp. 1981); Tenn. Code Ann. §§ 13-24-101 to 103 (1980); Vt. Stat. Ann. tit. 24, § 4409(d) (Supp. 1981); Va. Code § 15.1-486.2 (1981); Wis. Stat. § 60.74(9) (West Supp. 1981).

40. Vt. Stat. Ann. tit. 24, § 4409(d) (Supp. 1981) (effective March 24, 1978).

41. *Id.* The provision requiring a minimum of 1000 foot separation between group homes is typical of the technique used to prevent concentration of the facilities in a single

ization philosophy.[42]

Thus far, the most important case to reach the Vermont Supreme Court is *Vermont Division of State Buildings v. Town of Castleton Board of Adjustment*.[43] In that case, the court noted that title 24, section 4409(a) of the Vermont Statutes Annotated "specifies that municipalities may make reasonable provision for the *location* of such facilities by bylaw . . . ."[44] A town may regulate by restrictive zoning if it is nondiscriminatory and acts "consistent with an articulated regulatory scheme which minimizes the adverse impact of one land use upon another . . . ."[45] Holding that the town was regulating consistent with "the legislative intent of 25 V.S.A. § 4409(a),"[46] the court emphasized Castleton's employment of a nonarbitrary scheme of permitted uses in residential districts.[47] In any event, the group home which was to be established in Castleton (in an unused college dormitory) was for eight juveniles and thus not "specially permitted by statute (as in the case of community care homes for six or fewer handicapped persons . . .)."[48]

Notwithstanding the court's decision, deinstitutionalization is clearly the policy of the state even with regard to juveniles.[49] Throughout the Vermont statutes there are references to placement alternatives for children. Before a child could be placed in Vermont's former juvenile institution, the Weeks School,[50] a report

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neighborhood.

42. *Id.* For a representative definition, *see supra* notes 37 and 38 and accompanying text.

43. 138 Vt. 250, 415 A.2d 188 (1980). *See* 6 VT. L. REV. 309 (1981).

44. *Id.* at 258, 415 A.2d at 193.

45. *Id.* at 259, 415 A.2d at 194 (citing VT. STAT. ANN. tit. 24, § 4302(a)(11) (1975)).

46. *Id.* at 259, 415 A.2d at 194. VT. STAT. ANN. tit. 24, § 4409(a) (1975) provides that state owned and operated facilities may be regulated only with regard to "size, height, bulk, yards, courts, setbacks, density of buildings, off-street parking and loading facilities and landscaping or screening requirements."

47. Castleton Zoning Regulations § 630 — Residential 20,000 R. 20.

48. 138 Vt. at 259, 415 A.2d at 194 (citing VT. STAT. ANN. tit. 24, § 4409(d) (Supp. 1981)).

49. *See generally In re* R.B., 136 Vt. 466, 394 A.2d 1122 (1978). The policy decision involved in this case was the closing of Weeks School, Vermont's primary institutional care facility for juvenile delinquents and youthful offenders. Placement of youths was to be in smaller, presumably more therapeutic settings. Those children manifesting the most severe dysfunctions were to be placed in either the Eckerd Wilderness Educational System Camping Program in Benson, Vermont, or in a new "secure emergency shelter" to be set up at the Waterbury State Hospital. *See also* VT. STAT. ANN. tit. 33, §§ 656, 657 (1981).

50. As noted *supra* n.49, Weeks School was closed by 1979. This has placed even more emphasis on alternative care, but the ramifications of the closing on other statutes have yet

had to be made showing "[t]hat appropriate placement alternatives [were] not available outside the institution."[51] Additionally, the statute also required "[t]he identification of each alternative resource which was evaluated and the reasons each was deemed inappropriate or inadequate to meet the needs of the child."[52] Another section requires the placement of a child in need of care or supervision in an environment "most suited to protection and physical, mental and moral welfare of the child . . . ."[53] Similarly, to achieve the purpose of providing for "the care, protection and wholesome moral, mental and physical development of children . . . , [the child should be kept in] a family environment, separating the child from his parents only when necessary for his welfare or in the interests of public safety . . . ."[54]

Vermont provides alternatives to institutionalization for other people in need of services as well. In July 1978, the Vermont Alcohol Services Act[55] (a uniform act) became effective, increasing treatment options in the state.[56] Despite funding uncertainty, all four halfway houses for alcohol treatment are scheduled to continue in operation.[57] Laws concerning the elderly[58] and mentally retarded[59] clearly establish a policy of care and habilitation in the

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to be assessed. *See, e.g.*, the current controversy surrounding the establishment of a secure unit at the Waterbury State Hospital for juveniles who formerly would have been sent to Weeks School. Barre-Montpelier Times Argus, March 16, 1981, at 6, col. 1; Burlington Free Press, March 9, 1981, at 1A, col. 3.

51. VT. STAT. ANN. tit. 38, § 656(b)(2) (1981).

52. *Id.* § 656(b)(3).

53. *Id.* § 656(a).

54. *Id.* § 631(a)(1), (3).

55. VT. STAT. ANN. tit. 18, §§ 9141-9144 (Supp. 1981).

56. Vermont is ranked fifth in the country for per capita alcohol consumption. STATE ASSISTANCE BRANCH, NAT'L INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, STATE PLAN PROFILES 190 (1978) [hereinafter cited as STATE PROFILES] (catalog of U.S. Gov't. Publications No. 79-11727).

57. *Id. See also* 42 Vermont Alcohol and Drug Information Clearinghouse Newsletter 6 (Winter 1980).

58. VT. STAT. ANN. tit. 18, § 1150 (Supp. 1981) ("to provide a temporary or permanent nurturing and safe environment for older Vermonters when necessary . . ."); VT. STAT. ANN. tit. 33, § 2501(2) (1981) ("it is the purpose of its social welfare laws to establish and support programs which contribute to the prevention of dependency and social maladjustment . . ."); VT. STAT. ANN. tit. 33, § 2501(4) (1981) (administer benefits to encourage dignity, self-respect and self-reliance).

59. VT. STAT. ANN. tit. 18, § 8820 (Supp. 1981) (establish procedures for determination of appropriate care for mentally retarded); VT. STAT. ANN. tit. 18, § 8821(4) (Supp. 1981) (" 'less restrictive environment' means community programs, residential and nonresidential, which can provide the respondent with appropriate care, treatment and habilitation"); VT. STAT. ANN. tit. 18, § 8824(1) (Supp. 1981) (the commissioner of mental health must deter-

client's own home or other non-institutional setting.[60]

As a practical matter, however, local opposition to these alternatives remains a formidable obstacle in Vermont,[61] and legislative action has been hesitant. One noteworthy effort which attracted considerable attention was House Bill 197, introduced during the 1980 legislative session. Of particular interest was section sixteen of the bill, which sought to amend section 4409(a) of title 24 of Vermont Statutes Annotated, the "group home" statute.[62] Lengthy public hearings have been held, the bill has passed the House of Representatives and it seems likely that sections of the bill will be enacted.

B. *New Hampshire*

The practitioner in New Hampshire confronts an even greater panoply of legislation. While one statute may evidence worthwhile objectives, another may seriously hamper attainment of those goals. A few examples will illustrate this point: Housing statutes decry "a serious shortage of safe and sanitary dwelling accommodations at rents which elderly and low income persons can afford . . . ,"[63] and establish "[t]hat it is in the public interest that work on projects [to relieve the acute housing shortage] be commenced as soon as possible . . . ."[64] The same chapter, however, requires that housing projects comply with municipal zoning laws.[65] Another chapter, although not resolving the zoning problems, at least

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mine the availability of a less restrictive environment).

60. VT. STAT. ANN. tit. 18, § 2501-2502 (Supp. 1981) established the home care policy, and VT. STAT. ANN. tit. 18, § 8901 (Supp. 1981) expands community mental health services with a goal of "obtain[ing] better understanding of the need for community mental health — mental retardation services."

61. The group home ousted from Castelton, (*see supra* note 43 and text accompanying notes 43-48), moved into a remote ski chalet in Sherburne, Vermont. The town manager did not learn of the home for three weeks; the town lawyer was reported to be "investigating the matter." Barre-Montpelier Times Argus, Sept. 22, 1980, at 13. The Barre Project Residential Center in Montpelier, Vermont bought and refurbished an expensive home on the outskirts of town for its home for troubled youth; it now is fighting a zoning battle with its neighbors.

62. Specifically, H. 197 would have added subsections (5)-(9) to § 4409(a). Those sections would have significantly restricted the ability of a town to exclude group homes, community care homes, community residences and intermediate care facilities of up to 13 persons.

63. N.H. REV. STAT. ANN. § 204-A:1 (1978).

64. *Id.* § 204-A:1(IV) (1978).

65. *Id.* § 204-A:11 (1978).

"acknowledges the intersection of zoning and group residences,"[66] and requires that mentally ill and developmentally impaired persons be placed in "the community living facility [which] is the least restrictive environment appropriate to the needs of the individual."[67] While "least restrictive environmental" treatment remains New Hampshire's policy, the preceeding sections of its statutes, which had created a subdivision within the Office of Mental Retardation charged with deinstitutionalization has curiously now been repealed.[68]

The New Hampshire Legislature has passed many salutary laws for a variety of different groups. However, implementation would be furthered by a clear restriction on the zoning power of the localities which thwart state policies. The policy in the state is to establish and operate mental health programs in local communities:[69] the "care and treatment [of the mentally disordered offender] in the most appropriate locations,"[70] the [development] of a "broad range of social and related services . . . promoting child development and child care . . . and enabling them to live in their own homes or foster homes rather than in institutions,"[71] and development of a similar "broad range of social and related services aimed at protecting adults and enabling aged and infirm adults to live in their own homes or shared homes rather than in institutions . . . ."[72] New Hampshire's alcohol and drug abuse program remains small, although alternate care facilities are listed as a treatment option.[73]

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66. *Legislative Mandate, supra* note 5 at 880-81, n.148. The statute, N.H. REV. STAT. ANN. § 126-A:39 (Supp. 1979), established a bureau charged with, among other duties, coordinating the state grant programs, setting standards for the homes and providing services to the residents.

67. N.H. REV. STAT. ANN. § 126-A:39 (Supp. 1979). This statute, effective July 1, 1979, defines "least restrictive environment" as "the facility . . . which least inhibits a person's freedom of movement, freedom of choice, and participation in the community, while achieving the purposes of habilitation and treatment."

68. N.H. REV. STAT. ANN. § 126-A:37-a(II)(iii) (1979) (repealed effective July 1, 1979).

69. *Id.* § 126-B:1 (1978).

70. *Id.* § 126-C:2 (the Interstate Compact on the Mentally Disordered Offender, art. I(a)(2)).

71. *Id.* § 161:2(XII).

72. *Id.* § 161:2(XII-a).

73. *Id.* § 172:2-a to 172:14 (1977 & Supp. 1979). According to a U.S. Dept. of Health, Education and Welfare survey, STATE PROFILES, *supra* note 56 at 122-24, New Hampshire has the dubious distinction of ranking third in the nation for alcohol consumption. However, the survey reports that in 1977 only one halfway house within the state was in operation. A priority for the 1977-78 fiscal year was to promote community support in planning and implementing treatment programs. *See also* N.H. REV. STAT. ANN. § 172:B:1 (Supp. 1979).

Within the last few years, more statutes have been enacted to secure non-institutional care for neglected, abused and exploited adults,[74] severely and physically disabled persons,[75] abused children[76] (including those abandoned, sexually abused, physically injured and neglected),[77] and children in need of services.[78]

The reality of implementing this montage of programs is not heartening. A 1975 Act carefully laid out eight types of child care agencies,[79] excluding institutions, evincing an enviable spectrum of alternate care systems. Another statute, however, specifically requires that the child care agency comply with all applicable zoning laws.[80] Similarly, New Hampshire's policy is to care for the developmentally impaired in the least restrictive environment.[81] Unfortunately, the legislature has yet to remove zoning barriers to facilitate these programs.

A recent New Hampshire Supreme Court case may significantly affect the ability of a town to restrict the establishment of group homes. In *Region 10 Client Management, Inc. v. Town of Hampstead*,[82] a unanimous court held that "the statutory scheme of placing developmentally-impaired persons in various locations throughout the State carries out a State policy that cannot be frustrated by local zoning restrictions."[83] The statutory policy "was to deinstitutionalize some of the patients at the Laconia State School by use of 'community residences' located throughout the State . . . ."[84] The court declined to read the word "family" as embrac-

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74. N.H. REV. STAT. ANN. § 161-D:1 — 161-D:6.

75. *Id.* § 161-E:1 to 161-E:3.

76. *Id.* § 169-C:2(I)(d).

77. *Id.* § 169-C:3 (I), (II).

78. *Id.* § 169-D:17 (I). The wording here is particularly strong: "if the court finds the child is in need of services, it shall order the least restrictive and most appropriate disposition considering the facts in the case. . . ." Specifically listed as an alternative is "[a] group home, crisis home, or shelter care facility. . . ." *Id.* § 169-D:17(I)(b) (2). Children in need of services are defined as status offenders or juvenile delinquents. See *id.* § 169-D:2 (IV) (Supp. 1979).

79. *Id.* § 170-E:1(X) (a)-(h) (1978).

80. *Id.* § 170-E:4(I).

81. *Id.* § 171-A:2(XII) (1978); *Id.* § 171-A:6(III) (Supp. 1979); § 171-A:10 (Supp. 1979); § 171-A:11(I) (c) (1978); N.H. STAT. ANN. § 171-A:12(e) (1978).

82. 120 N.H. 885, 424 A.2d 207 (1980). *Region 10* has been followed by Northern N.H. Mental Health Housing, Inc. v. Town of Conway, ___ N.H. ___, 435 A.2d 136 (1981), which held that "local zoning ordinances are inapplicable to an entity specifically carrying out a State function, unless the legislature has clearly manifested an intent that they apply." *Id.* at ___, 435 A.2d at 137-38.

83. *Id.* at 888, 424 A.2d at 209.

84. *Id.* at 886, 424 A.2d at 208 (relying on N.H. STAT. ANN. § 171-A:2(XVI) (Supp.

ing "group homes or other shared living arrangements"[85] but found instead that despite "a long tradition of local home rule, plenary authority exists within the legislature to override local control when necessary for the greater good."[86]

Prior to *Region 10*, at least one case had held that a legitimate governmental purpose — keeping the family intact — may be effectuated by the use of density requirements in zoning ordinances which apply *only* to nonrelated persons.[87] Density of population is a "standard [objective] of the Standard State Zoning Enabling Act"[88] and can effectively be employed to prevent establishment of group homes.[89] There is some indication that New Hampshire courts may be receptive to a necessity argument[90] although it is unclear how compelling the need must be and whether the nexus with state policy objectives will be found to be persuasive.[91]

C. *Maine*

Much of Maine's statutory law regarding alternative care has been enacted within the last few years, and not surprisingly, it is

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1979)).

85. *Id.* at 887, 424 A.2d at 208-09.

86. *Id.* at 888, 424 A.2d at 209 (citing Public Service Company v. Town of Hampton, 120 N.H. 68, 411 A.2d 164 (1980)).

87. Town of Durham v. White Enterprises, Inc., 115 N.H. 645, 348 A.2d 706 (1975). A similar case, Beaudoin v. Rye Beach Village Dist., 116 N.H. 768, 771-72, 369 A.2d 618, 621 (1976) upheld the power of the local zoning board to prevent four couples from occupying a single beach property, despite facts tending to show that no other part of Rye was so "non-single family residence in character" and that other beach properties were similarly nonconforming.

88. Beck v. Town of Raymond, 118 N.H. 793, 796, 394 A.2d 847, 849 (1978) (citing R. ANDERSON, AMERICAN LAW OF ZONING § 7.06 (2d ed. 1976)).

89. *See supra* note 41. *See also, Legislative Mandate, supra* note 5, at 891 *et seq.* The author comments that the "practical wisdom of the dispersion and density devices is also far from clear." *Id.* at 892. She is critical of the preference for earlycomers "without regard to the comparative qualities of their programs" and suspicious of the precedential value of Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976) which established the constitutional validity of density control mechanisms with regard to pornographic theatres. *Id.* at 892.

90. *See, e.g.*, Bois v. City of Manchester, 113 N.H. 339, 306 A.2d 778 (1973); Carter v. City of Nashua, 113 N.H. 407, 308 A.2d 847 (1973).

91. In Bois v. City of Manchester, 113 N.H. 339, 306 A.2d 778 (1973), a residential youth center for up to 15 boys was allowed where the building was an unused rectory, the neighbors were not vocally opposed, and the owner, a church, was in need of a charitable use for its property. It is perhaps ill-founded optimism to expect this sort of result in the face of organized opposition, especially to a residence as large as the one contemplated in *Bois*. The larger group homes, most dissimilar to a traditional family, often generate the greatest animosity and the most litigation.

largely untested in the courts. In 1979, the Maine Legislature passed the Interstate Compact on the Mentally Disordered Offender,[92] which encourages placement in the "most appropriate locations."[93] Juveniles in Maine are promised "necessary treatment, care, guidance and discipline"[94] and the intake worker is charged with "provid[ing] whatever services are necessary to prevent the juvenile from coming into contact with the juvenile court system."[95] The Maine Legislature clearly favors a nonsecure (minimally restrictive) environment for juveniles whenever practicable.[96]

Before being institutionalized, the mentally ill, a category which in Maine includes drug addicts and alcoholics[97] but excludes the mentally retarded,[98] must first be considered for "less restrictive treatment settings and modalities."[99] Institutionalization is authorized only where alternatives are unavailable[100] or clearly unsuitable.[101] Mentally retarded persons, however, are included within the penumbra of the state's normalization policy.[102]

Two other enactments worthy of note which serve to encourage the use of community facilities are (1) the increase in the personal needs allowance for recipients in adult foster homes,

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92. ME. REV. STAT. ANN. tit. 15, §§ 2301-2313 (1980). Maine joins a neighboring state in enacting the Interstate Compact. *See* N.H. STAT. ANN. § 126-C:1 (1978). Rhode Island repealed its Interstate Compact in 1980, and recodified some of its provisions in R.I. GEN. LAWS § 40.1-5-24 and 40.1-5.3-1 to 40.1-5.3-10 (Supp. 1980).

93. ME. REV. STAT. ANN. tit. 15, § 2302(1)(B) (1980).

94. *Id.* § 2302(1)(D). Maine's new juvenile code withstood constitutional challenge in State v. Gleason, 404 A.2d 573 (Me. 1979), a thorough opinion examining the purposes of the code.

95. ME. REV. STAT. ANN. tit. 15, § 3301 (1980) (Reporter's comments).

96. *Id.* § 3313 (1980 and Supp. 1981). A commentary accompanying the statute indicates that a "secure institution [is an exceptional disposition to be used] only as a last resort when their welfare and safety or the protection of the public would otherwise be endangered." *Id.* § 3313 (1980) (Summary of Preliminary Report—Guiding Principles).

97. In 1977, Maine operated 12 fully licensed treatment centers, and planned three more intermediate care facilities and one women's treatment program for construction in 1978. Maine enacted the Alcoholism and Drug Abuse Act, a uniform act, effective July 1, 1974. STATE PROFILES, *supra* note 56, at 84-86. *See also* ME. REV. STAT. ANN. tit. 22, §§ 8001-8005 (1980 & Supp. 1981) (provision for residential drug treatment centers).

98. ME. REV. STAT. ANN. tit. 34, § 2251(5) (1978).

99. *Id.* § 2251(7)(A).

100. Note the potential size of this loophole — unavailability of alternatives — vis-a-vis Judge Bazelon's comments, Bazelon, *Preface, Symposium on Mentally Retarded People and the Law*, 31 STAN. L. REV. 541, 542 n.6 (1979).

101. The rights of the mentally ill in institutions are codified in Maine, and have recently been extended to mentally ill patients in residential care facilities.

102. ME. REV. STAT. ANN. tit. 34, §§ 2141(2), 2641 (1978).

boarding homes and nursing homes,[103] and (2) the increased flexibility in reimbursement rates for residential care facilities.[104]

In 1981, the Maine Legislature passed a number of bills which expanded the rights of disadvantaged persons and clarified state policy. In-home and community support services for adults with long-term care needs have been examined and found lacking.[105] To remedy this problem and to prevent inappropriate institutionalization for such persons — primarily the aged — new programs have been established and a strong state policy enunciated.[106] Boarding care facilities[107] with more than six but fewer than sixteen beds need not comply with the expensive institutional fire code.[108] The houses still must comply with applicable fire safety provisions for lodging and rooming houses as well as special requirements for mobile nonambulatory residents.[109] Similarly, new sections relating to children's homes, emergency shelters, family foster homes, residential child care facilities and specialized children's homes[110] were enacted, designed in part to simplify interagency licensing regulations.[111] Zoning laws in Maine are not specifically directed at group homes, although sections of the Maine Revised Statutes dealing with urban renewal do speak of "expansion and improvement of the quantity and quality of community services . . . [which are] essential for sound community development . . . ."[112]

D. *Rhode Island*

Rhode Island is one of the seventeen states which has, by statute, waived all local zoning requirements for community residences housing up to six retarded adults or children, or eight mentally disabled persons.[113] State courts had explicitly held, even before

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103. ME. REV. STAT. ANN. tit. 22, § 3273(1)(B) (1980) (effective October 1, 1980).

104. *Id.* §§ 4061-4062 (Supp. 1981). It is not entirely clear that the flexibility in this new statute will have a positive impact if fiscal restraints sharply curtail available funding.

105. ME. REV. STAT. ANN. tit. 22, § 7301(1) (Supp. 1981).

106. *Id.* §§ 7301-7306. *See also id.* §§ 7321-7323, 7341-7343.

107. *Id.* § 7901(1) (1980) ("a house or other place having more than 2 residents which, for consideration, is maintained wholly or partly for the purposes of boarding and caring for the residents").

108. *Id.* § 7904(3) (Supp. 1981).

109. *See, e.g., id.* § 7904(4).

110. *Id.* §§ 8101(1)-(5).

111. *Id.* §§ 8101-8106 (1980 & Supp. 1981).

112. ME. REV. STAT. ANN. tit. 30, § 4852(2)(D) (1978). *See generally* ME. REV. STAT. ANN. tit. 30, §§ 4961-4964 (1978 & Supp. 1981).

113. R.I. GEN. LAWS §§ 45-24-22 to 23 (1980 & Supp. 1981).

the zoning limitation law was passed, that since the state grants localities the power to zone, the state may place restrictions on that power.[114]

Alternatives to institutionalization in Rhode Island are to be considered as treatment options for the blind, deaf and otherwise physically handicapped,[115] alcoholics, drug abusers, mentally ill or mentally retarded,[116] and "chronic and quiet class" patients with mental diseases.[117] A Governor's commission on mental retardation has been established to encourage the use of community resources and facilities,[118] and a similar blue ribbon council established in 1979 seeks to "stimulate . . . integration" of mental health programs throughout the state.[119]

Alcohol and drug abusers are to be afforded a "continuum of treatment in order that they may lead normal lives as productive members of society."[120] Four of the eight catchment areas in Rhode Island (subdivisions around which their alcohol and drug treatment program is organized) had established formal linkages with community-based treatment centers by 1977.[121] The Division of Substance Abuse of the Department of Mental Health, Retardation, and Hospitals, created in 1976, anticipates increased coordination with existing local programs.[122]

E. *Massachusetts*

While the New York courts were expansively defining "family" so as to make a group home a conforming use in a residential area,[123] Massachusetts courts had rediscovered an 1887 case with

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114. Camara v. City of Warwick, 116 R.I. 395, 403-04, 358 A.2d 23, 29 (1976).

115. R.I. GEN. LAWS § 40-9.1-1 (Supp. 1981) (particular emphasis is placed on public facilities — defined rather confusingly as a community residence which does not offer medical or custodial care. R.I. GEN. LAWS § 40.1-24-1(b) (Supp. 1981)).

116. *Id.* § 40.1-24-2.

117. *Id.* § 40.1-5.2-27. These patients are "boarded out" at the discretion of the Director of Hospitals. *See also* CONN. GEN. STAT. ANN. § 17-176 (West Supp. 1981); MASS. ANN. LAWS ch. 123, § 24 (Michie/Law. Co-op. 1981).

118. R.I. GEN. LAWS § 40.1-8-1 to -6 (Supp. 1981).

119. *Id.* § 40.1-6-3(2).

120. *Id.* § 40.1-4-1 (1977).

121. *See* STATE PROFILES, *supra* note 56, at 165-67.

122. *Id.*

123. *See infra* text at notes 139-45, discussing City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). *See also* Village of Freeport v. Association for the Help of Retarded Children, N. 13165/76 (Sup. Ct., Nassau Cty., N.Y., 1977); Oliver v. Zoning Comm'n of Chester, 31 Conn. Supp. 197, 326 A.2d 841 (1974) (Conn. C.P.,

an appropriately amorphous definition of education:

> Education is a broad and comprehensive term. It has been defined as 'the process of developing and training the powers and capabilities of human beings' . . . . Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all.[124]

Massachusetts zoning law, which grants to municipalities the power to zone,[125] exempts from local ordinances structures used for "educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic . . . or by a nonprofit educational corporation . . . ."[126] Although caselaw in the state is far from conclusive, the courts have applied the 1887 definition in the group home context.

Three cases illustrate this point. In *Schuman v. Board of Aldermen of Newton*,[127] the court upheld the Aldermen's decision that the Freeport Foundation could establish a residence for up to sixteen high school age students alienated from living with their parents. The court reasoned that "[i]n a general sense, Freeport is an 'educational' institution attempting to prepare its high school 'clients' for life and to assist them to solve their difficulties in adjusting to their parents."[128] Similarly, in another case, a program which focused on the teaching of basic socialization skills (such as personal hygiene and household care) was upheld as an "educational purpose."[129] Lastly, deinstitutionalized emotionally disturbed adolescents living and being taught "basic self-help skills and other daily living skills [in a group home were also] within the broad definition of education required to implement the state's

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Middlesex Cty). *But see* Garcia v. Siffrin Residential Ass'n, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980) (*cert. denied*, 49 U.S. L. W. 3617) (Ohio Supreme Court refused to read expansively the meaning of family, despite OHIO REV. CODE ANN. § 5123.18(d) (Supp. 1980)).

124. Mt. Hermon Boys' School v. Inhabitants of Gill, 145 Mass. 139, 146, 13 N.E. 354, 357 (1887).

125. MASS. ANN. LAWS ch. 40A §§ 1-17 (Michie/Law. Co-op. Supp. 1981).

126. *Id.* § 3.

127. 361 Mass. 758, 282 N.E.2d 653 (1972).

128. *Id.* at 766, 283 N.E.2d at 659.

129. Dynamic Action Residence Enter., Inc. v. Board of Appeals, Town of Mashpee, No. 36049 (Super. Ct., Worcester, Mass., Jan. 28, 1977) (discussed in 2 MENTAL DISABILITY L. REP. (ABA) 17 (1977)). The program was for six foster youths and one delinquent youth. The court went on to hold, in some noteworthy dicta, that success or failure of the program is monitored by state authorities and immaterial for the purposes of zoning statutes.

mental health policies."[130]

While the route seems circuitous, such interpretive reading of statutes could include any type of facility aiding socialization of the residents. A clear state policy of deinstitutionalization unfortunately remains elusive in Massachusetts; it is not surprising to see the courts turning to precedent as authority for their decisions.

It is true that treatment of mentally ill and mentally retarded persons requires a multifaceted plan: the social service providers must periodically review the treatment and undertake "consideration of all possible alternatives to continued hospitalization . . . [and] . . . available community resources . . . ."[131] Residential facilities in the state are required to be licensed[132] and are grouped in one or more of twelve categories indicative of the level of security of the facility.[133] Placement in a residential facility is in accordance with "a determination that the placement will offer individuals a better opportunity for personal development in a suitable living environment which is the least restrictive alternative appropriate for clients."[134] Appropriate care includes "[t]he opportunity to live and receive services in the least restrictive and most normal setting possible."[135] In fact, the regulations guiding the Department of Mental Health outline a comprehensive scheme for normalization.[136]

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130. Schonnings v. People's Church Home, Inc., No. 7188 (Super. Ct., Worcester, Mass., Jan. 28, 1977) (discussed in 2 MENTAL DISABILITY L. REP. (ABA) 17, 17-18 (1977)).

131. MASS. ANN. LAWS ch. 123, § 4 (Michie/Law. Co-op. 1981).

132. MASS. ANN. LAWS ch. 19, § 29 (Michie/Law. Co-op. 1980).

133. MASS. ADMIN. CODE tit. 104, § 2.04 (1980). These categories also include different levels of care, apply to different age groups and relate to a variety of different program goals. (*e.g.* - alcoholic treatment center - class IV; persons under age of 16 - class VI).

134. *Id.* § 14.04(4) (1979).

135. *Id.* § 14.04(4)(b)(4).

136. Portions of section 15.03 (formerly codified at § 4.39 (1979)) are reproduced here because they strikingly demonstrate that worthy and well articulated program goals in the form of regulations promulgated by an administrative agency are considerably less persuasive than clear statutory language indicating the intent of the legislature. The cases cited in the text accompanying this section are intended to buttress this administrative law axiom. The Department of Mental Health includes among their "Standards to Promote Client Dignity":

> (d) The opportunity to receive services which are to the maximum extent possible adequate, appropriate, consistent with the client's needs and least restrictive of the client's freedom;
>
> . . .
>
> (f) The opportunity to undergo normal experiences, even though such experiences may entail an element of risk . . . ;
>
> . . .

Despite these regulations, considerable deference is traditionally paid to local ordinances.[137] In the words of one respected commentator, "[i]f a municipality has taken the trouble to pass an ordinance controlling land use, the Massachusetts courts tend to take the position that this is a major and serious declaration of local policy, and to stand behind it, even to do what they can to facilitate its enforcement."[138] The survival of an explicit prohibition in Boston's zoning code "expressly designat[ing] halfway houses for the mentally ill as forbidden uses in most residential districts"[139] seems to support this observation in that it is contrary to state policy. On the other hand, a recent supreme court decision upheld the authority of a state agency to locate a jail in Dartmouth, Massachusetts: "[A]n entity or agency created by the Massachusetts Legislature is immune from municipal zoning regulation (absent statutory provision to the contrary) at least insofar as that entity or agency is performing an essential governmental function."[140] This case is important in Massachusetts because it sets out a test for inconsistent local zoning ordinances: "If the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the State legislation . . . ."[141] Generally,

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(i) The opportunity to engage in activities and styles of living which encourage and maintain the integration of the client in the community through individualized social and physical environments including:

1. Engaging in social interactions which maximize the client's contact with other citizens in culturally typical community settings;
2. Presenting an appearance which is appropriate to the client's chronological age . . . ;
3. Enjoying recreation and leisure activities appropriate to the client's chronological age . . . ;
4. Living in the most homelike environment possible in terms of numbers of clients present, physical comfort, style of decor, opportunities for privacy, external appearance, type of neighborhood where located, and access to the community.

Id. §§ 15.03(2)(d), (f) & (i) (selected portions only).

137. *See generally* Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926) (setting out a test of "clearly arbitrary and unreasonable").

138. N. Williams, Massachusetts Zoning Law 5 (unpublished manuscript on file in the Vermont Law School library).

139. *Legislative Mandate, supra* note 5 at 871 (citing BOSTON ZONING CODE, Use Item No. 23).

140. County Comm'rs of Bristol v. Conservation Comm'n, ___ Mass. ___, 405 N.E.2d 637, 640 (1980); *cf.* Annot. 84 A.L.R.3d 1187 (1978).

141. ___ Mass. ___, 405 N.E.2d at 642, (*citing* Bloom v. Worcester, 363 Mass. 136, 155-156, 293 N.E.2d 268, 280 (1973)). Dicta in County Comm'rs of Bristol, ___ Mass. ___, 405 N.E.2d at 643 speaks of "a host of other situations in which the Legislature did not intend

one may conclude that despite the Massachusetts Home Rule amendment to its constitution,[142] municipal zoning ordinances will fall in the face of conflicting state action.[143]

Recognition of civil and constitutional rights for the mentally ill in Massachusetts continues to be litigated. For example, in a related area, a major class action suit was recently decided by a federal district court in favor of mental patients who were protesting involuntary treatment with psychotropic drugs.[144] The mentally retarded, developmentally disabled and aged apparently fare somewhat better under Massachusetts law, which limits the size of the facilities with exceptions not here relevant, to fifteen beds and requires appropriate social and psychological services.[145] Halfway houses for alcoholics are specifically classified as a single family residence under regulations[146] promulgated by authority of chapter 111B of the Massachusetts Annotated Laws, section 6-A. They may house "not more than twelve (12) unrelated persons between the ages of seven (7) and fifteen (15) inclusive, or of not more than twenty-five (25) unrelated persons sixteen (16) years of age or over who are capable of self-preservation . . . ."[147]

F. *Connecticut*

With the passage in 1979 of Public Act 79-353,[148] Connecticut has joined the ranks of those states specifically exempting group

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to yield to local regulations but did not specifically refer to them in the statute. . . ." This language is easily broad enough to include community residences.

142. MASS. CONST. art. II, §§ 6, 8.

143. County Comm'rs of Bristol v. Conservation Comm'n, ___ Mass. ___, ___, 405 N.E.2d 637, 643 (1980).

144. Rodger v. Okin, 478 F. Supp. 1342, 1360-71 (D. Mass 1979). The district court also ruled that "it is an unreasonable invasion of privacy, and an affront to basic concepts of human dignity, to permit forced injection of a mind-altering drug into the buttocks of a competent patient unwilling to give informed consent." *Id.* at 1369. The United States Court of Appeals for the First Circuit affirmed in part and reversed in part this "lengthy and complex civil rights action. . . ." 634 F.2d 650, 653 (1st Cir. 1980), *cert. granted*, 101 S. Ct. 1972 (1981).

145. MASS. ANN. LAWS ch. 111, § 72 (Michie/Law. Co-op. Supp. 1981).

146. MASS. ADMIN. CODE tit. 105, §§ 165.025, -.026 (1978).

147. MASS. ADMIN. CODE tit. 105, § 165.025 (1978). As of 1978, 45 houses were licensed and operating, and funding was budgeted for a moderate program expansion. STATE PROFILES, *supra* note 56, at 94. Massachusetts is ranked sixteenth in alcohol consumption. *Id.* at 93.

148. "No zoning regulation shall treat any community residence which houses 6 or fewer mentally retarded persons and 2 staff persons and which is licensed under the provisions of section 19-574 of the general statutes in a manner different from any single family residence." 1979 Conn. Pub. Act 79-353.

homes from municipal zoning laws. Despite the limited reach of the act, its tone is indicative of other recent Connecticut laws which reinforce the right to treatment in the least restrictive setting. A 1979 law directs a court of probate to place mentally retarded persons "in any appropriate setting which meets his individual habilitative needs in the least restrictive environment . . . ."[149] Following sections mandate a hearing and placement "in any foster home, group home, regional center or other facility which such court is satisfied is the least restrictive setting commensurate with the needs of the respondent."[150]

In addition to the recent statutory mandate, Connecticut courts have been lenient with regard to group homes for mentally retarded persons. In the often cited case of *Oliver v. Zoning Commission of Chester*,[151] the court determined that a loosely drawn definition of family — a single housekeeping unit — included the use of a residence for eight or nine mentally retarded, employable adults and a specially trained married couple as houseparents.[152]

Regulations governing state agencies generally require normalization for most client groups. Alcoholic intermediate care facilities are geared toward preserving "an organized therapeutic environment in which [the client] shall receive the opportunity to develop new skills in socialization, and work out new patterns of adjusting to life . . . ."[153] Other provisions require that "[t]he exterior of the facility providing this service should conform as much as possible to other buildings in the area, and evidence to the general public that the facility is an alcoholic rehabilitation unit should not be

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149. CONN. GEN. STAT. § 19-569d(a) (West Supp. 1981). This section applies equally to developmentally disabled persons.

150. *Id.* § 19-569d(e). It is interesting to speculate whether a suit filed by the Connecticut Association for Retarded Citizens, in an effort to deinstitutionalize residents of the Mansfield Training School (Connecticut A.R.C. v. Thorne, No. H78-653 (D. Conn., filed Dec. 6, 1978)) supplied any of the impetus for this legislation. The suit charged that the large isolated institution was antithetical to normalization philosophy, and that the public promises by the state to develop 100 group homes by 1976 had not been met. "Instead, defendants have established only five group homes with a population as high as 36, accommodating only 83 persons, during the last three years and a total of only 19 such facilities since June of 1973." The case is noted in 3 MENTAL DISABILITY L. REP. (ABA) 104 (1979). For a report of similar class action litigation which resulted in a landmark consent decree, see Brewster v. Dukakis, No. 76-4423-F (E.D. Mass., Dec. 6, 1978) *reprinted in full* at 3 MENTAL DISABILITY L. REP. (ABA) 44-50 (1979).

151. 31 Conn. Supp. 197, 326 A.2d 841 (1974) (Conn. C.P., Middlesex Cty).

152. *Id.* at ___, 326 A.2d at 845-46.

153. CONN. AGENCIES REGS. § 17-227-35(A) (1975).

emphasized."[154]

Intermediate treatment facilities for adults "recovering from mental, emotional or behavioral problems, disturbances or dysfunctions"[155] are to serve as an alternative to institutionalization with a "goal of resocialized independent living."[156] However, these facilities must "comply with all applicable local and state ordinances and codes pertaining to zoning . . . ."[157] Somewhat surprisingly, comparable facilities for mentally ill adults, which are limited to a maximum of six residents[158] are not specifically required to conform to local zoning laws but to be merely verified by the building and fire inspectors as being "reasonably safe."[159] "Drug-dependent persons" are afforded a variety of residential facilities, to some degree reflective of the federal funds available for certain types of detoxification programs. The so-called "freestanding facilities," those not part of a larger psychiatric institution, must be licensed[160] and comply with all local zoning codes.[161] Residential facilities for the mentally retarded must also comply with local zoning codes under Connecticut regulations promulgated by the Department of Mental Retardation.[162] This regulation creates a partial conflict with the above quoted enactment which defines the homes out of the single-family residential quagmire.[163]

Administrative regulations tend to be the clearer source of state policy in Connecticut where many statutes are vague about requiring least restrictive placement. Some statutes which might in other states incorporate normalization philosophy are facially neutral in Connecticut.[164] Because of this, imaginative advocacy is likely to be required in order to persuade the courts that there is a strong state policy of deinstitutionalization.

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154. *Id.* § 17-227-35(C) (1975).
155. *Id.* § 17-227-45(f) (1977).
156. *Id.*
157. *Id.* § 17-227-47(B) (1977).
158. *Id.* § 17-227-51(C) (1979).
159. *Id.* § 17-227-52B(2)(b) & (c) (1979).
160. *Id.* § 17-227-62, 65 (1979).
161. *Id.* § 17-227-63(b)(1)A (1979).
162. *Id.* § 19-4g-2 (1977).
163. *See supra* note 148 and accompanying text.
164. *See, e.g.*, CONN. GEN. STAT. § 17-424 (Supp. 1981), which provides for a varied program of mental health and psychiatric clinics for juveniles, but does not speak directly to the conditions of placement.

G. *New York*

Deinstitutionalization advocates in New York have achieved some notable advancements in 1980. No fewer than five bills directly encouraging the development of community-based facilities were signed into law by Governor Hugh Carey; twice that number dealing more generally with treatment facility needs became law.[165] They evidence a continuing concern for the aftercare of psychiatric and developmentally-disabled patients[166] as well as a progressive understanding of the treatment modalities for alcohol and drug abusers.[167]

New York has been a leader in placements in less restrictive environments. A widely cited 1970 decision by the appellate division of the supreme court, *Abbott House v. Village of Tarrytown*,[168] held that an agency boarding home for six neglected children and a married couple was a family, and that local zoning ordinances defining residential use in terms of the size of the family unit were "totally thwarting the State's policy, as expressed in its Constitution and the Social Service Law . . . ."[169] Four years later, the Court of Appeals of New York reached the same result in *City of White Plains v. Ferraioli*,[170] again reading expansively the meaning of "family," although not reaching the constitutional state policy argument. Coincidentally, the group home at issue in *White Plains* was financed by Abbott House, Inc. The house, located in a single family residential zone, consisted of a married couple, their

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165. For example, New York session laws for 1980 include provisions which are designed to make elderly and handicapped citizens more comfortable (1980 N.Y. LAWS, ch. 701) and secure (1980 N.Y. LAWS ch. 754-756). Residential Health Care Facilities are brought within the ambit of a consumer information rating system (1980 N.Y. LAWS, ch. 620) and loopholes in the system for reporting abuse of persons in such facilities were closed (1980 N.Y. LAWS, ch. 622). Educational opportunities in "the least restrictive environment" are assured by N.Y. EDUC. LAW §§ 4001-4005 (McKinney 1981).

166. N.Y. MENTAL HYG. LAW § 29.15(f), (g), (h), (m), (n) (McKinney Supp. 1981) (recognizing that appropriate patient care requires a spectrum of support services and advance coordinated planning); N.Y. PUBLIC HEALTH LAW § 3610 (McKinney Supp. 1981) (providing long-term home health care as an alternative to institutional placement); N.Y. MENTAL HYG. LAW § 41.36 (McKinney Supp. 1981) (providing for streamlining fee reimbursement arrangements to encourage the development of new community facilities). Useful grist for persuasive argument may be found in 1980 N.Y. LAWS at 1865, 1866, 1874, 1907 (Governor's written comments accompanying bill approval).

167. N.Y. MENTAL HYG. LAW § 19.01 (McKinney Supp. 1981).

168. 34 A.D.2d 821, 312 N.Y.S.2d at 841 (1970).

169. *Id.* at 822, 312 N.Y.S.2d at 843. The court's reference was to the N.Y. CONST. art. VII, § 8, subd. 2 and to the Care and Protection of Children Act, found at N.Y. SOC. SERV. LAW §§ 371(16) and 374-b (McKinney 1976 & Supp. 1981).

170. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

two children and ten foster children including seven siblings. It was designed to "emulate the traditional family and not to introduce a different 'lifestyle.' "[171] Significantly, emphasis was placed on the purpose and the functional character of the home, rather than the organizational technicalities. Thus, a "relatively permanent household . . . not a framework for transients or transient living . . . conforms to the purpose of the ordinance . . . [in that] . . . the purpose of the group home is to be quite the contrary of an institution and to be a home like other homes."[172]

The functional equivalency concept has continued to be applied by the New York courts in grappling with the meaning of family. Chief Judge Breitel, author of the *White Plains* decision with its liberal construction of "family," found himself arguing with the minority in 1978 against establishment of a group home in a North Hempstead single family residential area.[173] The majority did not accept the argument that some degree of transience in the resident population should preclude "family" status.[174]

In 1978, the New York Legislature passed a series of laws, called by Governor Carey "the most important mental hygiene legislation of the session."[175] These laws seeks to minimize the "real possibility that residents of the facility will be unwelcome neighbors, ostracized from the life of the community" by providing for "community participation in the site selection process."[176] The current legislative test is whether "the nature and character of the area in which the facility is to be based would be *substantially*

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171. *Id.* at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

172. *Id.* at 306, 313 N.E.2d at 758, 357 N.Y.S.2d at 453.

173. Group House of Port Washington, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead, 45 N.Y.2d 266, 274, 380 N.E.2d 207, 211, 408 N.Y.S.2d 377, 381 (1978) (Breitel, C.J., dissenting).

174. *Id.* at 273-74, 380 N.E.2d at 210-11, 408 N.Y.S.2d at 380. The majority concluded that to hold otherwise "would, of course, be absurd. The flaw in [the town's] position is that it would have us simply take the word temporary, give it some talismanic significance, and apply it to exclude any 'group home' regardless of the underlying realities." *Id.* at 273, 380 N.E.2d at 210, 408 N.Y.S.2d at 380. The town had seized upon two facts in the case to buttress its arguments: (1) the weekend surrogate parents differed from the weekday surrogates, and (2) the purpose of the home was to return the mentally disturbed youngsters to their natural families when and if practicable. *Id.* at 276, 380 N.E.2d at 212, 408 N.Y.S.2d at 382. The majority did not consider the broader question of whether the state had preempted the zoning power of municipalities with regard to group homes. *Id.* at 272-74, 380 N.E.2d at 209-11, 408 N.Y.S.2d at 379-81.

175. 1978 N.Y. LAWS at 1821-1822. (Governor's written comments accompanying bill approval).

176. *Id.* at 1821.

altered as a result of establishment of the facility."[177] Further, the statute establishes that a community residence which meets the requirements of the new chapter "shall be deemed a family unit, for the purposes of local laws and ordinances"[178] thus removing the most formidable obstacle: zoning.

The new era of cooperation between state policy and local governments was quickly tested in several cases decided in late 1979. The appellate division of the supreme court affirmed a "terse" lower court decision which had concluded that no substantial alteration of the community would occur as a result of the establishment of a group home.[179] In a lengthy and tightly reasoned opinion by Justice Young, the supreme court upheld the constitutionality of the so-called Padavan Law,[180] expressly found that it preempted conflicting local zoning ordinances and dismissed a cause of action based on an alleged violation of a restrictive easement.[181] Additional support for the meaning of "substantially altered" within the Padavan law comes from a recent memorandum decision in *City of Schenectady v. Coughlin.*[182] A 1979 New York Attorney General's opinion further confirms the state policy of treating community residential facilities as a family unit.[183]

Juvenile delinquents (ages seven to sixteen) and persons in need of supervision (males under sixteen and females less than eighteen who are "incorrigible, ungovernable or habitually disobedient")[184] have presented particular problems for the state of New

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177. N.Y. MENTAL HYG. LAW § 41.34(b)(5) (McKinney Supp. 1981) (emphasis added).

178. *Id.* § 41.34(e).

179. Town of Greenburgh v. Coughlin, 73 A.D.2d 672, 672, 423 N.Y.S.2d 209, 210 (1979).

180. N.Y. MENTAL HYG. LAW § 41.34 (McKinney Supp. 1981).

181. Zubli v. Community Mainstreaming Ass'n Inc., 102 Misc. 2d 320, 423 N.Y.S.2d 982 (1979). Both the state and the village had already approved the site selection in this case. A vigorous challenge was mounted by adjoining landowners who were apparently terrified at the prospect of up to 12 functionally retarded and mentally disabled adults living virtually in their backyard and sharing an easement on their driveway. The same result was reached in an Ohio decision, Brownfield v. State, No. 77-12-2995 (Ohio Ct. App., Summit Cty. June 12, 1978) (relying on preemption by the state concerning treatment of mentally ill) and by a Minnesota court in Alexander v. Minnesota Jewish Group Homes, Inc., No. 746834 (4th Jud. Dist. Ct. Minn. July 26, 1978) (relying in part on MINN. STAT. ANN. § 462.357 (West Supp. 1980) discussed *supra* note 39).

182. 74 A.D.2d 985, 986, 426 N.Y.S.2d 328, 329 (1980). "[T]he statute requires consideration of the effect the residence will have on the area where it is to be established, not on the effect the residence would have if established in some other area of the city."

183. *See,* N.Y. MENTAL HYG. LAW § 41.34 (McKinney Supp. 1981) (note 2).

184. N.Y. FAM. CT. ACT § 712(a) & (b) (McKinney Supp. 1981).

York. Torn between the rehabilitation, treatment, punishment or incarceration approaches to the problem, the legislature has responded by broadening the range of dispositional alternatives. Not least has been the provision for secure facilities[185] which are perceived as essential for the protection of the community and of equal importance with the best interests of the juvenile.[186] Although not enjoying the most favored status accorded the mentally ill and developmentally disabled, it is clear that New York sincerely desires to make the "punishment fit the crime." Public outrage at the increasing number of serious crimes by juveniles led to the enactment of the Juvenile Justice Reform Act of 1976, which effectively tightened the conditions needed for deinstitutionalization.

The new mandate of section 711 of the Act requires that the court balance "the need for protection of the community"[187] with the best interests of the juvenile. Fact finding hearings are required[188] prior to judicial determination of the appropriate placement.[189] The mandatory use of secure detention facilities for certain juveniles recently withstood constitutional challenge in *Matter of Quinton A.*[190] The Court of Appeals of New York held that the statutory scheme selected by the Legislature reflects a reasoned policy response to "a dramatic increase in crime by seemingly remorseless juveniles."[191] The Family Court Act attempts to settle the confusion of a crossover group of young persons, those adjudged juvenile delinquents who suffer from mental illness, mental retardation or developmental disability by providing for temporary transfer to the Department of Mental Hygiene from the

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185. *Id.* § 753-a provides for restrictive placement for those who commit designated felony acts, considered by the commentators cited *infra* note 186 as the central feature of the Juvenile Justice Reform Act of 1976.

186. N.Y. FAM. CT. ACT § 711. *See also*, Supplementary Practice Commentaries by Simon K. Barsky & Richard N. Gottfried at *id.*

187. *Id.*

188. N.Y. FAM. CT. ACT §§ 752, 743, 753 (McKinney Supp. 1981).

189. Indications are that the family courts are taking this duty very seriously. Typical of the scores of cases litigated under the act is, In the Matter of Elizabeth J., 98 Misc. 2d 362, 364, 413 N.Y.S.2d 867, 868 (1979), where the court refused to make a disposition until a hearing could be held which included a current probation department assessment.

190. 49 N.Y.2d 328, 425 N.Y.S.2d 788, 402 N.E.2d 126 (1980) (rev'd on other grounds).

191. *Id.* at 333, 402 N.E.2d at 129. N.Y. FAM. CT. ACT § 753-a(2)-a (McKinney Supp. 1981), challenged here, provides for mandatory restrictive placement for juveniles who commit a "designated felony act in which the respondent inflicted serious physical injury . . . upon another person who is sixty-two years of age or more. *See generally* 45 FORDHAM L. REV. 408 (1976) for an analysis of New York's attempts to deal with seriously violent youth.

Division for Youth.[192] The Division does retain control over a wide range of program alternatives, including "urban homes, group homes, family foster care placements, youth development centers, day services and rural based facilities . . . ."[193]

Under a major reorganization of the Mental Hygiene Department in 1977,[194] a new Office of Alcoholism and Substance Abuse was established in a sweeping effort to reach a higher percentage of those afflicted.[195] The Legislature has further determined that alcohol abuse among women "is increasing at twice the rate of that of men."[196] As a result, women have been targeted for a special effort,[197] as have adolescents.[198] Use of the terms "drug" and "narcotic" have been replaced by the general term "substance" for greater program flexibility, and community alternatives are emphasized.[199]

H. *California*

California has probably adopted the broadest mandate for deinstitutionalization of any state, and for that reason, a brief description of some of its more important statutes is included in this survey. As early as 1967, with the passage of the Lanterman-Petris-Short Act,[200] California was in the vanguard of the reform movement. The two major thrusts of the Act, both of which continue in various reincarnations with full force today, were: "to restore the civil liberties of persons alleged to be mentally ill . . . [and] . . . to accelerate the trend already in motion in California . . . to substitute community-based care and treatment of the mentally ill for care and treatment in state mental institutions."[201]

The Welfare and Institutions Code, for example, sets forth the policy "that mentally and physically handicapped persons are enti-

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192. N.Y. FAM. CT. ACT § 760 (McKinney Supp. 1981).

193. N.Y. EXEC. LAW § 501[7] (McKinney Supp. 1981).

194. 1977 N.Y. LAWS ch. 978.

195. N.Y. MENTAL HYG. LAW § 19.01(a) (McKinney Supp. 1981) declares that "less than five percent of the estimated eight hundred thousand victims of alcoholism" are reached by the state programs. *See also* STATE PROFILES, *supra* note 56 at 134.

196. N.Y. MENTAL HYG. LAW § 19.01(a) (McKinney Supp. 1981).

197. STATE PROFILES, *supra* note 56, at 135.

198. N.Y. MENTAL HYG. LAW § 19.01(a) (McKinney Supp. 1981).

199. 1980 N.Y. LAWS at 1875 (memoranda to amendments to ch. 471 & 472).

200. This act, a model of reformist objectives, went through a number of major rebirths, fascinatingly chronicled in E. BARDACH, THE IMPLEMENTATION GAME (1977).

201. *Id.* at 9, 10.

tled to live in normal residential surroundings and should not be excluded therefrom because of their disability."[202] The code then specifically preempts local zoning power: "It is necessary to establish the statewide policy that the use of property for the care of six or fewer mentally disordered or otherwise handicapped persons is a residential use of such property for the purposes of zoning."[203] Similar policy statements in California exist for narcotic and drug abuse programs,[204] for juvenile delinquents,[205] and for alternate care facilities in general.[206] The end result that the state Legislature desires is to "[i]ncrease the use of nonsecure community based facilities as a percentage of total commitments to juvenile facilities; and . . . [to d]iscourage the use of secure incarceration and detention."[207]

Effective July 1, 1978, a new State Department of Alcohol and Drug Abuse was established[208] to coordinate the wide variety of services available in California.[209] In *City of Los Angeles v. California Department of Health*,[210] the sweeping statutory language withstood a constitutional challenge that it was overbroad. The effect that state policy directives will have on private restrictive covenants remains unclear.[211] In an era of fiscal conservatism, continued appropriations for the vast array of mental health services available in California are also in doubt.[212] In spite of these concerns, California remains an example of the positive benefits which can inure when a legislature and judiciary remain in accord with contemporary medical and sociological thought.

CONCLUSION

We have not yet realized the national objective enunciated by President Kennedy — a network of community-based care facili-

202. CAL. WELF. & INST. CODE §§ 5115, 5116 (West Supp. 1981).
203. *Id.*
204. CAL. HEALTH & SAFETY CODE § 11971(a) (West Supp. 1981).
205. CAL. WELF. & INST. CODE § 1851 (West 1972).
206. *Id.* § 2002 (West Supp. 1981).
207. *Id.* § 2002 (h)(2) and (3).
208. STATE PROFILES, *supra* note 56, at 22-26.
209. *Id.* at 23. California was ranked number seven in the nation for alcohol consumption in 1977.
210. 63 Cal. App. 3d 473, 133 Cal. Rptr. 771 (1976) (discussed at *supra* note 28).
211. See Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (Ct. App. 2d Div. 1972) (enforcing a restrictive covenant).
212. *See generally* E. BARDACH, *supra* note 200 for an excellent discussion of the problems which exist even after a bill becomes law.

ties.[213] Moreover, anticipated shifts in funding responsibility, from federal to state governments, may well impact negatively on attainment of this goal. State legislators may be increasingly attracted to a method of treatment which promises economies of scale. At least one critic of deinstitutionalization has pointed to economics as the reason for the emergence of institutions in the first place.[214] But despite the charge that "the movement is not a therapeutic reform but a short-run budgetary savings scheme, victimizing both the deviant and the poor in whose neighborhoods . . . such deviants are lodged . . ."[215] the growth of normalization philosophy continues on the federal and state[216] as well as the scientific and medical levels.[217]

Most of the codes surveyed contain a patchwork of often conflicting laws which attempt to incorporate some degree of normalization with a large measure of laissez-faire politics. It is argued here that implementation of deinstitutionalization requires a statewide policy. The policy should be uniformly applicable to all localities in the state and must be articulated in clear and direct terms.

Although some courts have shown a willingness to deinstitutionalize even without a mandate from a legislature, the results have been haphazard. The New Hampshire Supreme Court cases discussed earlier[218] represent a bold step in that they adopt the preemption rationale, particularly worthy of note in a state with home rule.[219] As a result of those decisions, the need to decide many of the difficult questions which have generated so much litigation[220] has been obviated — at least in New Hampshire. A hu-

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213. *See supra* note 1 and accompanying text.

214. A. SCULL, DECARCERATION, *supra* note 3. Professor Scull has put the growth of institutions in an interesting historical context. He argues that the emergence of capitalist enterprise in the sixteenth century mercantile period produced structural pressures first responsible for the growth of institutions. *Id.* at 15. In Scull's view, those "deviant" groups most readily subjected to state control provided a labor pool for the increasingly centralized economic activity of the period. *Id.* at 15-17.

215. Kaplan, *State Control of Deviant Behavior: A Critical Essay on Scull's Critique of Community Treatment and Deinstitutionalization*, 20 ARIZ. L. REV. 189, 189-90 (1978).

216. *See, e.g.*, Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (1976 & Supp. III 1979). *See also* statutes cited *supra* note 39.

217. *See, e.g.*, READINGS IN LAW AND PSYCHIATRY 77 (R. ALLEN, E. FERSTER & J. RUBIN *eds.*, rev. ed. (1975)).

218. *See supra* note 82 and accompanying text.

219. *See supra* note 27 and accompanying text; 2 MENTAL DISABILITY L. REP. (ABA) 794, 803 (1979).

220. The questions constantly and, in the view of this writer, needlessly being litigated include the meaning of family, the meaning of education and the line between governmental

manistic policy of normalization, requiring least restrictive placements for most, if not all of the surveyed classes of people, should be a priority for all levels of government.

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and proprietary functions.