Exclusion of Community Facilities for Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance, and Constitutional Law

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COMMENT

EXCLUSION OF COMMUNITY FACILITIES FOR OFFENDERS AND MENTALLY DISABLED PERSONS: QUESTIONS OF ZONING, HOME RULE, NUISANCE, AND CONSTITUTIONAL LAW

INTRODUCTION

"I'm frightened by the presence of the Ridgeview [home for former mental patients]. I fear for my children's safety."

The program is "the most human way to get people back into society."

"We believe in prison reform, but not on our block."

In the last 17 years, the number of patients in Illinois mental institutions has decreased from 49,000 to 12,400. The 75 per cent drop does not mean that Illinois has found the key to rapid restoration of mental health. Rather, the decrease reflects a state policy, based on clinical and economic considerations, of reducing the number of patients in large, custodial institutions while developing community programs. For

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1. This comment was made by a woman who lives in Evanston, Illinois, one block from the Ridgeview Sheltered Care Home. Ridgeview has 400 residents, about half of whom are former mental patients. Abstract for Appellant at 164, City of Evanston v. Ridgeview House, Inc., 64 Ill.2d 40, 349 N.E.2d 399 (1976).

2. Dan Simons, Adult Service Administrator, Illinois Department of Corrections, offered his opinion regarding a program for returning ex-convicts to the community through work-release centers. Chicago Sun Times, July 17, 1975, at 35, col. 1.

3. A Chicago resident expressed his feeling about the opening of a work-release center, housing 18 female ex-convicts, in his neighborhood. Chicago Tribune, July 30, 1975, §3, at 1, col. 2.

4. ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES, MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES IN ILLINOIS 2 (1974) [hereinafter cited as DMH, MENTAL HEALTH].


6. "[T]reatment and care of most patients is optimally effective in the community." DMH, MENTAL HEALTH, supra note 4, at 14, 25.

7. It costs $900 per month to keep a person with no major physical health problem in a state custodial institution. Housing the same person in a community sheltered care home costs about $450 per month—a savings of 50%. Interview with Jack Collier, Deputy Regional Administrator for Institutional Services, Illinois Department of Mental Health, in Chicago, Aug. 1, 1975. See also DMH, MENTAL HEALTH, supra note 4, at 25 n.17.


The shift is part of a national trend. In 1957 there were 546,927 persons in public hospitals, nationwide, for treatment of mental illness. U.S. BUREAU OF THE CENSUS, DEP'T
similar reasons, corrections officials are urging creation of more community facilities for offenders, although the shift of persons from prisons to community facilities is not nearly as dramatic as the shift of mental patients. A California corrections official estimates, "In excess of 70 per cent of all offenders can be placed immediately in community-based corrections activities." 

Fearing an influx of former mental patients and offenders, many communities have attempted to ban the facilities which would house them through zoning laws and nuisance litigation. Attempts also have been made to block such facilities through licensing, community political pressure, and municipal ordinances which make operating a rehabili-
The exclusion of rehabilitation facilities raises questions of public policy. There is a growing need for community facilities to reintegrate former mental patients and offenders into society. Facilities also are lacking for delinquent or dependent children, alcoholics, and drug abusers. Effective community treatment programs not only will help the individuals who are treated, but will save taxpayer dollars as well. On the other hand, the presence of a facility for criminal offenders often causes area residents to fear increased crime. Another commonly expressed apprehension is that a rehabilitation facility may alter the character of a residential neighborhood, resulting in lower property values. The establishment of rehabilitation facilities also poses constitutional and policy conflicts over which a governmental entity—the municipality, the state, or the judiciary—has the power to exclude or prevent the exclusion of rehabilitation facilities.

This Comment will examine the methods by which municipalities
and individuals attempt to exclude rehabilitation facilities\textsuperscript{20} and will detail the possible defenses to such actions. The work is divided into three main sections. The section on “Zoning and Home Rule Issues” will discuss the compatibility of rehabilitation facilities with residential areas and will urge balancing state policy and regional interests against attempts to exclude such facilities. Balancing competing interests through carefully shaped remedies is also the focus of the section on “Nuisance Issues.” The section on “Constitutional Issues” will consider possible constitutional rights of persons who are excluded from community facilities. These rights include federal and state equal protection, the right to travel, and the due process prohibition against irrebuttable presumptions.

I. ZONING AND HOME RULE ISSUES

Prior to implementation of home rule by the 1970 Illinois Constitution, all Illinois municipalities derived their zoning power from state statute.\textsuperscript{21} Adoption of home rule gave home rule units a new source of zoning power.\textsuperscript{22} Although the scope of this power has not been delineated,\textsuperscript{23} it is clear that home rule is not a license for unconstitutional or unreasonable actions by municipalities. Basic constitutional limitations on zoning power apply regardless of the source of power.\textsuperscript{24}

\textsuperscript{20} There is no generic term which adequately encompasses facilities for all the classes of individuals this Comment will discuss. For the sake of convenience, when referring to all types of facilities this Comment will use “rehabilitation facility,” although in a strict sense some facilities, such as a shelter home for retardates, might not engage in rehabilitation.

\textsuperscript{21} “To the end that . . . the public health, safety, comfort, morals and welfare may otherwise be promoted, . . . the corporate authorities in each municipality have the following [zoning] powers . . . .” ILL. REV. STAT. ch. 24, §11-13-1 (1975).

\textsuperscript{22} See note 58 and accompanying text infra.

\textsuperscript{23} To date there have been no cases demarcating the scope of a home rule unit’s zoning power. However, the broad scope of statutory zoning power indicates that home rule has not expanded it.

\textsuperscript{24} Arbitrary and unreasonable zoning has been held to violate constitutional protections of due process and equal protection. Chicago Title & Trust Co. v. Village of Wilmette, 27 Ill.2d 116, 126, 188 N.E.2d 33, 37-38 (1963) (voiding as unreasonable an ordinance which restricted an area to residential use when the surrounding land was zoned for commercial use); Atkins v. County of Cook, 18 Ill.2d 287, 293, 297, 163 N.E.2d 826, 830, 832 (1960) (voiding as unreasonable an ordinance which would not allow construction of a gas station on farm land near a busy intersection and a developing business district); Western Theological Seminary v. City of Evanston, 325 Ill. 511, 524-25, 156 N.E. 778, 783-84 (1927) (enjoining enforcement of an amended zoning ordinance as unreasonable when a seminary purchased land for establishment of a college relying on the original ordinance which allowed such a use).
When a zoning ordinance impinges on a fundamental right or creates a suspect classification, the burden of showing the validity of the ordinance is placed upon the municipality, and the municipality must show a compelling governmental interest in order to uphold the classification. In the vast majority of cases, however, the judiciary has given deference to local zoning decisions. Zoning ordinances are presumed valid and will be upheld unless the persons challenging them establish their invalidity by clear and convincing evidence that the ordinances are arbitrary and unreasonable. The general standard for reasonableness is that zoning must bear "a substantial relationship to the public health, safety, comfort, morals, and welfare." Although each case must be decided on its own facts, the Illinois Supreme Court has given six factors which should be considered in determining whether a zoning ordinance is reasonable. For the purposes of this Comment, the most important of these factors is that the proposed land use should be compatible with the existing uses of nearby property. Two other limitations on zoning


27. Marquette Nat'l Bank v. County of Cook, 24 Ill.2d 497, 501, 182 N.E.2d 147, 150 (1962). The quoted language parallels art. VII, §6(a) which gives home rule units "the power to regulate for the public health, safety, morals, and welfare . . . ." See also Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Western Theological Seminary v. City of Evanston, 325 Ill. 511, 523, 156 N.E. 778, 783 (1927); 8 E. McQuillin, MUNICIPAL CORPS. §25.17 (3d ed. 1965).

28. The factors are: (1) existing uses of nearby property; (2) suitability of property for zoned (or proposed) use; (3) extent to which destruction of property values of the site promotes the general welfare; (4) gain to the public compared to hardship imposed on property owners; (5) reduction in property value resulting from zoning restriction; (6) length of time the property has been vacant, as zoned, considered in the context of land development in the area where the property is located. Exchange Nat'l Bank v. County of Cook, 25 Ill.2d 434, 440, 185 N.E.2d 250, 253 (1962), citing LaSalle Nat'l Bank v. County of Cook, 12 Ill.2d 40, 46-47, 145 N.E.2d 65, 69 (1957). See also LaSalle Nat'l Bank v. Village of Harwood Heights, 2 Ill.App.3d 1040, 1045-46, 278 N.E.2d 114, 117-18 (1st Dist. 1971).
power, overriding state interests and regional needs, will also be discussed.

A. Compatibility With Existing Uses

When a rehabilitation facility is excluded through zoning, the parties who seek to operate the facility will argue that the exclusion is unreasonable. In the event that the municipality has made no ordinance provision for rehabilitation facilities, a court might mechanically compare the proposed use with definitions of land uses which are permitted under the existing zoning ordinances. Preferably, courts will examine the factors considered in determining an ordinance's reasonableness, particularly the suitability of the property in question for the proposed use and the uses and zoning of nearby property.

Generally, courts have held that rehabilitation facilities are compatible with residential and business zoning, but courts make an important distinction between residential areas zoned for single-family use and areas zoned for apartment use. If the relationship among the facility residents is very similar to that of a traditional family, the facility usually will be allowed in a single-family area; if the facility is more institutional in character, it is often restricted to apartment or business areas. For example, the decision concerning a facility for

29. There are three ways in which a municipality might exclude rehabilitation facilities through zoning: (1) explicit prohibition of rehabilitation facilities; (2) allowance of rehabilitation facilities through special use permits with refusal to issue such permits; and (3) failure to provide for rehabilitation facilities, neither permitting nor prohibiting them. Since the increase in number of community rehabilitation facilities is a recent occurrence, most municipalities have made no provision for rehabilitation facilities.

30. For example, in Arkansas Release Guidance Foundation v. Hummel, 245 Ark. 953, 435 S.W.2d 774 (1969), the court prohibited the opening of a half-way house for parolees because it did not meet the definition of a philanthropic institution, which was one of the permitted uses. The court did not discuss whether the use was compatible with existing uses or in keeping with public policy. It treated the issue as one for resolution by dictionary.


32. See, e.g., Langguth v. Village of Mount Prospect, 5 Ill.2d 49, 54, 124 N.E.2d 879, 881 (1955); Petropoulos v. City of Chicago, 5 Ill.2d 562, 574, 125 N.E.2d 522, 525 (1955).

33. When considering nearby property, courts may pay more attention to the actual use of the nearby property than its zoning classification. In Eckhardt v. City of Des Plaines, 13 Ill.2d 562, 568, 150 N.E.2d 621 (1958), the court refused to allow the plaintiff to operate a nursing home in an area zoned for apartments and hotels because, despite the zoning, the dominant use was single-family homes.

34. See Hazel Wilson Hotel Corp. v. City of Chicago, 17 Ill.App.3d 415, 308 N.E.2d 372 (1st Dist. 1974), in which a shelter home for former mental patients was declared permissible in a business district which already allowed apartment hotels and boarding houses.
dependent or delinquent children may turn on the home's similarity to a nuclear family. A group consisting of a married couple, their two children, and ten foster children fit the definition of family for the purpose of a zoning ordinance and thus could occupy a home in a single-family district. On the other hand, a commercially operated group home for delinquent and dependent children in which "parents" worked in shifts with other home personnel might not fall within the definition of "family" for the purposes of zoning.

While the residents of a rehabilitation facility may have greater emotional, social, or medical problems than most persons in a residential neighborhood, the facility should be deemed compatible as long as it does not radically alter the general character of the area. In balancing the needs of the neighborhood with those of facility residents, the courts seem to recognize that a community must tolerate some departures from the norm.

B. Overriding State Interest

In considering the validity of a zoning ordinance which excludes a rehabilitation facility, courts should be cognizant of questions that transcend the local community boundary. These considerations are state

The home opened in Chicago in 1967, approved by the state but without license from the city. At the time it opened, city zoning laws made no provision for shelter homes in business districts. In 1970, the city made shelter homes a special use in residential districts but refused to issue a permit to the home. The court compelled issuance of the permit. See also Ganim v. Village of New York Mills, 75 Misc.2d 653, 347 N.Y.S.2d 372 (Sup. Ct. 1973) (family care homes for former mental patients compatible with boarding house district); Beckman v. City of Grand Island, 182 Neb. 840, 157 N.W.2d 769 (1968) (treatment house for alcoholics compatible with boarding house district).

35. Dependent children are minors who have been neglected or abandoned by their parents and are wards of the state.

36. City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). The court noted the holding in Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974), that a municipality could zone to protect "family values" and "youth values" and said, "The group home does not conflict with that character, and, indeed, is deliberately designed to conform with it." 34 N.Y.2d at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

37. Browndale Int'l Ltd. v. Board of Adjustment, 60 Wis.2d 182, 208 N.W.2d 121 (1973). Schools for emotionally disturbed or delinquent children also present a compatibility issue. Some towns have attempted to exclude such schools from residential areas while permitting public schools in the same area. Courts have held that schools for disturbed or delinquent children fall within the definition of "school" and must be permitted. See Crist v. Bishop, 520 P.2d 196 (Utah 1974); Armstrong v. Board of Appeals, 158 Conn. 158, 257 A.2d 799 (1969); Wiltwyck School for Boys, Inc. v. Hill, 11 N.Y.2d 182, 182 N.E.2d 268, 227 N.Y.S.2d 655 (1962). Cf. Village of University Heights v. Cleveland Jewish Orphans' Home, 20 F.2d 743 (6th Cir. 1927), cert. denied, 275 U.S. 569 (1927).
policy, expressed by the state’s constitution and statutes, and regional interests. New York has been a leader in weighing state policy against attempts to exclude rehabilitation centers through zoning. For example, one court struck down an ordinance which attempted to prohibit the use of a home in a single-family area for the care of neglected and abandoned children, declaring, “It is clear that this zoning ordinance has the effect of totally thwarting the state’s policy as expressed in its constitution and Social Service Law, of providing for neglected children.” New York courts also have invalidated ordinances which attempted to block facilities for former mental patients and narcotic addicts, holding that the spirit of state statutes prohibited such exclusions.

While the Illinois courts have not widely used state statutes to invalidate zoning ordinances, there is at least one decision which establishes the precedent for doing so. In Duggan v. County of Cook, the Illinois Supreme Court voided a provision in a special use permit which required that the developer of a mobile home park not lease more than 25 per cent of his sites to families with children. The provision conflicted with a statute which prohibits the leasing of property on the condition that the lessee have no children under the age of 14. With little discus-

38. In addition to state policy regarding community rehabilitation centers, there are also several U.S. statutes which fund community treatment programs for various classes of individuals. See, e.g., 42 U.S.C. §2683(2) (mentally ill), §2688e (developmental disabled), §3750 (criminal offenders), §3843 (juvenile delinquents), §2688k (drug offenders), and §2688e (alcoholics).

39. While there are barriers to an ordinary statute limiting home rule powers, there are no such barriers to a statute limiting the power of non-home rule units. See the discussion of the “clean slate doctrine,” note 58 and accompanying text infra.


42. Hepper v. Town of Hillsdale, 63 Misc.2d 447, 311 N.Y.S.2d 739 (Sup. Ct. 1970). The court cited N.Y. MENTAL HYGIENE LAW §200(1), (3) (McKinney 1970) which declared there was an imperative need for drug treatment homes. The court said, “The purpose of the ordinance is obviously inconsistent with the organic law of the state, and therefore, is unreasonable, arbitrary, and oppressive to a valid state purpose.” 63 Misc.2d at 451, 311 N.Y.S.2d at 743.

43. 60 Ill.2d 107, 324 N.E.2d 406 (1975).

44. ILL. REV. STAT. ch. 80, §37 (1975):
sion, the court concluded, "We agree that the condition . . . violates the public policy of this state."\(^4\)

If Illinois courts choose to follow the *Duggan* approach and invalidate zoning restrictions against rehabilitation facilities on the basis of state policy, there are numerous statutes from which to work. The Equal Opportunities for the Handicapped Act\(^5\) provides: "It is the policy of this State . . . to guarantee physically and mentally handicapped persons the fullest possible . . . [right] to secure housing accommodations of their choice. . . ."\(^6\) The mental health laws call for persons discharged from state institutions to be placed in facilities "in or near the community in which the person resided prior to hospitalization."\(^7\) The Illinois Dangerous Drug Abuse Act\(^8\) contains language very similar to a New York statute which already has been used to strike down an ordinance prohibiting the establishment of drug abuse treatment centers.\(^9\)

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45. 60 Ill.2d at 116, 324 N.E.2d at 411. The decision in *Duggan* was against a home rule unit, but it nonetheless shows the court's willingness to use statutory policy to strike down a zoning ordinance. In the case of non-home rule units, the argument for using statutory policy is even stronger, since non-home rule units do not have the protection of the "clean slate doctrine" which home rule units have. The doctrine was established in order to promote the goal of giving home rule units added autonomy and flexibility in dealing with their own problems. It holds that statutes passed prior to the 1970 constitution do not limit home rule powers. *Duggan* was inconsistent with the "clean slate doctrine" in that it allowed a pre-1970 statute to limit a home rule unit's powers. For more on the "clean slate doctrine," see note 58 infra.


47. Id. §65-21.

48. ILL. REV. STAT. ch. 911/2, §§100-16 (1975). See also id. §§50-21, 52, 100.34, 300.1 et seq. For the Illinois Department of Mental Health and Developmental Disabilities' policy favoring community facilities, see DMH, MENTAL HEALTH, supra note 4, at 14; DMH PLAN, supra note 8, at II-2.

49. ILL. REV. STAT. ch. 911/2, §§120.1 et seq. (1975).

It is the public policy of this state that the human suffering and social and economic loss caused by addiction to controlled substances and the use of cannabis are matters of grave concern to the people of the state. It is imperative that a comprehensive program be established and implemented through the facilities of the State, counties, municipalities, the Federal Government, and local and private agencies . . . to provide diagnosis, treatment, care and rehabilitation for controlled substance addicts to the end that these unfortunate individuals may be restored to good health and again become useful citizens in the community.

Id. §120.2. The Act allows the Department of Mental Health and Developmental Disabilities to fund public and private drug abuse programs.

50. See note 42 supra.
Statutes also provide for facilities for alcoholics, ex-convicts, and delinquent and dependent children. These statutes, however, do not specifically prohibit zoning restrictions against the facilities. Therefore, if Illinois courts were to invalidate ordinances banning rehabilitation facilities on the basis of statutory policy, they would have to do so through commitment to the spirit, and not just the letter, of the policy. New York took precisely that step. It is a desirable approach, since it gives effect to state policy that otherwise might be consistently thwarted by parochial interests.

C. Regional Interests and Home Rule Issues

In Illinois, the mere existence of a statute favoring community rehabilitation facilities will not be enough to overcome a restrictive zoning ordinance passed by a home rule unit. The reason for this is the "clean slate doctrine" which holds that if a subject of legislation is

51. ILL. REV. STAT. ch. 91 1/2, § 100-10 (1975) gives the Department of Mental Health the power to establish its own alcoholic treatment centers or contract with private institutions for their establishment.

52. ILL. REV. STAT. ch. 38, §1003-14-4 (1975) allows the Department of Corrections to establish half-way homes for persons on parole or mandatory release.

53. ILL. REV. STAT. ch. 23, §§5001 et seq. (1975) allows the Department of Children and Family Services to fund public and private facilities for delinquent, dependent and handicapped children.

54. California, foreseeing obstacles to the development of community facilities for the handicapped, passed a statute specifically prohibiting restrictions against facilities for the handicapped. The statute declares, "It is the policy of this state . . . that mentally and physically handicapped persons are entitled to live in normal residential surroundings and should not be excluded therefrom because of their disability." CAL. WELF. & INST. CODE §5115(a) (West. 1972). The Act and a later amendment provide that use of property for the care of six or fewer handicapped persons shall be considered a residential use for the purposes of zoning, including single-family districts. Id. §§5515(b), 5116 (West Supp. 1975). But cf. Seaton v. Clifford, 24 Cal.App.3d 46, 100 Cal.Rptr. 779 (1972) (a restrictive covenant successfully blocked housing of retarded persons in a residential area).

55. See text accompanying notes 40-42 supra.

56. A conservative judicial view might be that if the legislature meant to override local zoning laws, it would have so provided.

57. Home rule units include any county which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000. Municipalities with a population less than 25,000 may elect to become home rule units. ILL. CONST. art. VII, §6(a). Currently, there are 86 home rule units in Illinois. INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS, HOME RULE HANDBOOK FOR ILLINOIS LOCAL OFFICIALS 79 (1975).

58. The case which introduced the "clean slate doctrine," Kanellos v. County of Cook, 53 Ill.2d 161, 290 N.E.2d 240 (1972), held that Cook County, a home rule unit, could issue obligation bonds without meeting the referendum requirement of a pre-1970 statute. It was reasoned that the goal of local autonomy would be thwarted if legislation passed
found to be a home rule power, the power should not be limited by statutes which were passed prior to the new constitution. Nonetheless, control of rehabilitation facilities should not be exclusively a home rule power, since the state and region have a substantial interest in the existence of such facilities.

The framers of the constitution gave little guidance in setting criteria for what is and is not a home rule power. The constitution itself allows home rule units to "exercise any power and perform any function pertaining to its government and affairs . . . ." To limit this power, a court would have to find that an issue of overriding state or regional interest does not pertain to a home rule unit's government and affairs and, therefore, is not a home rule power. Alternatively, a court might find that a subject is a home rule power, but the exercise of power must be limited so that it does not interfere with overriding state or regional interests.

In order to give guidance in determining what is a home rule power, Professor Terrance Sandalow, a leading writer on home rule, has suggested three factors for consideration: (1) interference with state regulation; (2) extra-territorial impact of local legislation; and (3) existence of basic community values which are better protected by the state government. These factors should be utilized along with consideration of before home rule was conceived could serve to limit home rule. In order to limit home rule powers by statute, the legislature must specifically declare its intent to do so. ILL. CONST. art. VII, §§(g)-(i). If the power being limited is not going to be exercised by the state, then the limitation must be passed by three-fifths of the members of both houses. Id. at §6(g).

Prior to the new constitution, all Illinois municipalities derived their power from the state. Illinois had adhered to Dillon's Rule, which holds that a municipality is a creature of the state and may exercise only such power as the legislature grants or is necessarily and fairly implied from the legislative grant. 1 J. DILLON, MUNICIPAL CORPS. §237(89) (5th ed. 1911). For application of the principles of Dillon's Rule, see Ives v. City of Chicago, 30 Ill.2d 582, 198 N.E.2d 518 (1964).

59. The closest the Committee on Local Government came to setting criteria for what is and is not a home rule power was a brief list of areas which are not proper subjects for home rule powers. "Their powers should not extend to such areas as divorce, real property law, trusts, contracts, etc., which are generally recognized as falling within the competence of the state rather than local authorities." SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, 7 RECORD OF PROCEEDINGS 1621 (1970) [hereinafter cited as PROCEEDINGS]. The Committee referred to judicial intervention regarding home rule as a "danger." Id. at 1622. Nonetheless, the courts cannot escape the duty to determine the scope and limits of home rule power.

60. ILL. CONST. art. VII, §6(a).

61. Extraterritorial impact refers to the effect zoning will have on communities outside the municipality which adopted the zoning ordinance.

which level of government—state or local—has the better resources for handling a particular problem. Related to these factors will be the needs for uniformity and coordination of regulation.63

Applying these criteria to home rule unit restrictions on rehabilitation facilities, a strong argument can be made for limiting a home rule unit's power to exclude rehabilitation facilities. First, exclusion of such facilities interferes with state regulations which favor the return of former mental patients and offenders to their communities.4 Second, exclusion of rehabilitation centers has substantial extra-territorial impact, especially if it is common practice to exclude such facilities. For example, if facilities are totally excluded or confined to ghettos, the problems of the persons who need the facilities and the resulting injury to society are perpetuated. Persons who require the housing are less likely to be reintegrated into society, thus causing personal suffering for them as well as a drain on society's resources. Third, the housing and treatment of society's outcasts may relate to basic community values which are better protected by the state than by local governments. And fourth, the state has better resources than local governments to coordinate state-wide regulation and placement of rehabilitation facilities. In summary, although zoning in general may be a topic of local concern,66 it is not appropriate for exclusive local control when the subject of the zoning also is a matter of overriding regional and state interest. This is not to say that local communities do not have an important interest in the safety of their citizens and the preservation of the character of their neighborhoods. Municipalities should be permitted to make reasonable

Vitullo of DePaul University holds a similar view and suggests that the courts should determine whether an activity is better handled by local control, state control, or both simultaneously. Baum, A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations, 1972 U. ILL. L. F. 137, 155 & n.63. See also 1 C. ANTEAU, MUNICIPAL CORP. LAW §3.21 (1975): "What is called for is an open discussion of whether the concern of the people of the entire state is greater, in a particular instance, than the concern of the local residents." Id. at 3-59.

63. The four sample areas of "competence of the state," see note 59 supra, fit the criteria proposed by Sandalow and this Comment. Regulation of any of the subjects would interfere with established state regulation and would have impact beyond the home rule unit's boundary. The subject of divorce relates to basic community values and is better regulated by the state than local government. The state also has better resources for determining state-wide needs in areas such as contracts, trusts, and property. Uniformity promotes smoother operation of government, business, and personal affairs.

64. See text accompanying notes 46-48 supra.

65. See Johnny Bruce Co. v. City of Champaign, 24 Ill.App.3d 900, 321 N.E.2d 469 (4th Dist. 1974), in which it was held that zoning is a home rule power. Bruce, however, concerned a home rule unit's power to change its zoning procedure. There was no substantial state or regional interest.
regulations concerning the size and location of facilities and the persons housed in them.\textsuperscript{66}

There is precedent for balancing regional needs against local interests when considering exclusionary zoning ordinances, although the cases to date have not dealt with home rule issues. Courts have held that zoning must promote the general welfare, and that general welfare encompasses the needs of an entire area—not just a single municipality.\textsuperscript{67}

In Illinois, the regional scope of general welfare for the purposes of zoning is an open question. The supreme court has not defined “general welfare” or “community,” but it has stated that zoning must promote the general welfare of the entire community rather than just a segment of the population. However, the factual circumstances in the cases indicate that the court used “community” to refer to the municipality.\textsuperscript{68} Recently, an Illinois appellate court has given some weight to regional needs. In \textit{Lakeland Bluff, Inc. v. County of Will},\textsuperscript{69} the court overturned

\textsuperscript{66.} For example, a municipality should be able to prohibit the housing of persons who are psychotic or likely to commit crimes. Municipalities also could require that rehabilitation facilities be located in areas with which they would be compatible.

\textsuperscript{67.} In Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 179, 336 A.2d 713, 727-28 (1975), the court struck down a zoning ordinance which would have effectively blocked housing for low and moderate income families, declaring: It is plain beyond dispute that proper provision for adequate housing for all categories of people is certainly an absolute essential in promotion of the general welfare in all local land use regulations. . . . [T]he general welfare which developing communities like Mount Laurel must consider extends beyond their boundaries and cannot be confined to the claimed good of a particular community.

The court said further that every municipality “must bear its fair share of the regional burden.” \textit{Id.} at 189, 336 A.2d at 733. \textit{See also} Construction Ind. Ass’n v. City of Petaluma, 375 F.Supp. 574 (N.D. Cal. 1974), rev’d on other grounds, 522 F.2d 897 (9th Cir. 1975), where the court recognized that the validity of an exclusionary zoning plan must be considered in light of regional housing needs. \textit{See also} National Land & Inv. Corp. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1966).

The groundwork for considering regional needs was laid in \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365 (1926). In addition to holding that if a zoning classification were “fairly debatable,” it would be upheld, the Supreme Court also said its ruling was not meant “to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.” \textit{Id.} at 388, 390.

Any community which argues that it should be able to exclude all rehabilitation facilities should be required to show why, among all towns in the region, it should be set aside from sharing the regional burden. \textit{Cf.} R. BABCOCK, THE ZONING GAME 149-50 (1966).


\textsuperscript{69.} 114 Ill.App.2d 267, 252 N.E.2d 765 (3d Dist. 1969).
a county zoning ordinance which prohibited development of a mobile home park in an area of worthless farmland. The court said, "While we do not predicate our conclusion upon the need for lower cost housing, we believe that this was an element which should be considered in determining the reasonableness of the restrictive zoning ordinance." 70

Another home rule issue is raised when a rehabilitation facility is being operated by the state or a political subdivision of the state. It has been asserted that home rule powers cannot be enforced against the state and that "the existence of home rule power is irrelevant to issues posed by attempted municipal regulation of other government agencies." 71 Two Illinois cases support this view. Both cases involved attempts by a home unit to block construction of a sewage treatment plant by a state-created sanitary district. 72 In the first case, the Illinois Supreme Court held that the sanitary district's "power of eminent domain was not subject to [the home rule unit's] zoning ordinance." 73 The court did not explain its ruling further; nevertheless, it seemed that operations of the state or districts created by the state are not subject to local zoning. 4 In the second case, the same city attempted to block the sewage plant through a health ordinance. The supreme court found that the ordinance, as applied, did not pertain to the home rule unit's "government and affairs" within the meaning of article VII, section 6(a) of the state constitution. The court said, "Our fundamental difficulty is that to permit a regional district to be regulated by a part of that region is incompatible with the purpose for which it was created." 75 By similar reasoning, Illinois courts might conclude that local governments

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70. Id. at 279, 252 N.E.2d at 770. The court considered the need for low cost housing in the surrounding region.
71. Sandalow, supra note 62, at 682 n.154.
73. 59 Ill.2d at 30, 319 N.E.2d at 10.
74. An alternate view of City of Des Plaines v. Metropolitan Sanitary Dist., 59 Ill.2d 29, 319 N.E.2d 9 (1974), is that the ordinance in question did not prevail because it was not an exercise of home rule power. In order to be a valid exercise of home rule power, under the alternate theory, the ordinance would have to be passed after the 1970 constitution, which created home rule power. In effect, this is an inverse of the "clean slate doctrine," which holds that statutes passed prior to the constitution cannot limit a home rule unit's powers. For more on the "clean slate doctrine," see text accompanying note 58 supra.
75. Metropolitan Sanitary Dist. v. City of Des Plaines, 63 Ill.2d 256, 261, 347 N.E.2d 716, 719 (1976). It is interesting to note that in its unreported opinion, the supreme court used different language: "Our fundamental difficulty is that it imposes environmental regulation upon an essential function of a regional District in a manner that substantially threatens the District's ability to perform." No. 47993 at 3 (Sup. Ct. Ill., March 29, 1976).
may not block operation of state operated rehabilitation facilities. Municipal prohibition of such facilities could be deemed incompatible with the purposes of the state departments of mental health, corrections, and children.\textsuperscript{74}

II. Nuisance Issues

Second to zoning, nuisance litigation\textsuperscript{77} is the major legal tool to prohibit the operation of rehabilitation facilities. Either a governmental unit or the neighbors of rehabilitation facilities can attempt to enjoin operation of a facility. While there have been no reported cases in Illinois in which a nuisance claim has been raised against a rehabilitation center, the appellate court has held that a sheltered care home which housed former mental patients is "not a use which was per se inimical to the public health, safety, or welfare of the municipality."\textsuperscript{78}

Those jurisdictions which have addressed the nuisance claim have balanced the competing interests of community safety and the welfare of individuals in need of community treatment facilities. In Nicholson

\textsuperscript{76} Following the court's reasoning in its original opinion, one could conclude that rehabilitation facilities would be deemed an essential function of the state departments of mental health, corrections, and children.

It is not clear whether the courts will hold that a home rule unit may not interfere with any state operation or whether home rule units may block some operations, but not others. If the court adopted a standard that a home rule unit may not interfere with "essential" state operations, but can interfere with others, it might conclude that rehabilitation facilities are not an essential function since alternatives are available, such as continued hospitalization or incarceration, out-patient care, and home care. Sewage plants, as in Metropolitan Sanitary Dist. v. City of Des Plaines, on the other hand, are essential since a sanitary district has no practical alternatives to sewage plants. A good standard might be a balancing test, weighing state needs against local interests. In applying this test, it should be recognized that the state has demonstrated substantial interest in an area by creating a specific agency to deal with it.

\textsuperscript{77} At common law, a nuisance is that which "unlawfully annoys or does damage to another." Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n, 34 Ill.2d 544, 546, 216 N.E.2d 788, 790 (1966). It is "offensive, physically, to the senses and, by such offensiveness, makes life uncomfortable." Bauman v. Piser Undertakers Co., 34 Ill.App.2d 145, 147, 180 N.E.2d 706, 707 (1st Dist. 1962); Rosehill Cemetery Co. v. City of Chicago, 352 Ill. 11, 30, 185 N.E. 170, 177 (1933). A nuisance can be relative to location; what is a nuisance in one place might not be in another. Bauman v. Piser Undertakers Co., supra at 147-48, 180 N.E.2d at 707. Injuries must be material and not speculative or fanciful. Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n, supra at 547, 216 N.E.2d at 790. In determining whether a nuisance exists, a common standard is "its effect upon . . . a normal person of ordinary habits and sensibilities." Id. at 544, 216 N.E.2d at 791, quoting 39 AM. JUR. NUISANCES §31.

\textsuperscript{78} Hazel Wilson Hotel Corp. v. City of Chicago, 17 Ill.App.3d 415, 419, 308 N.E.2d 372, 376 (1st Dist. 1974). For further discussion of Hazel Wilson see note 34 supra.
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v. Connecticut Halfway House, Inc., the Supreme Court of Connecticut considered a nuisance claim raised against a proposed halfway house for ex-convicts. Following the announcement of plans to open a house for 15 men in an apartment district, local property owners sought to enjoin the use on the grounds that it would threaten the peaceful use and quiet enjoyment of their property. The court denied relief, finding the neighbors' fears were based "completely on supposition" and were "speculative and intangible." The court also held, "The mere depreciation of land values, caused . . . by . . . apprehensions . . . cannot sustain injunction on the ground of nuisance."

Another example of balancing the need for community safety against the need for rehabilitation centers is found in People v. HST Meth, Inc. There, the State of New York sought to close down a methadone maintenance clinic located in a middle and upper income residential area. The clinic had a case load of 500 patients, 200 more than the maximum number recommended by the Health and Hospital Planning Council. Although finding that the center's patients terrorized residents of the neighborhood and that the street in front of the clinic was "a veritable market place for narcotics," the court chose not to enjoin the whole operation but to enjoin "only those activities which . . . make it a nuisance." Consequently, the court ordered the clinic to reduce its case load to the recommended maximum of 300 and directed it to exercise greater supervision of clinic patients within and outside the facility.

As in zoning cases, nuisance litigation will require the balancing of competing interests. This function is well suited to equity courts where nuisance claims are heard.

III. Constitutional Issues

When a municipality passes an ordinance excluding rehabilitation facilities or the persons who would be housed in them, certain constitutional issues arise. This section will examine the constitutional issues.

80. For statistics on crime by residents of half-way houses, see note 19 supra.
81. 153 Conn. at 511, 218 A.2d at 386.
82. Id. at 512, 218 A.2d at 386.
84. Id. at 921, 346 N.Y.S.2d at 148.
85. Id. at 922, 346 N.Y.S.2d at 149.
86. The greater supervision included placement of uniformed guards instructed to disperse groups of more than two people loitering on the street in the vicinity of the clinic. Id. at 923, 346 N.Y.S.2d at 149.
primarily from the perspective of residents of rehabilitation facilities. The issues include federal and state equal protection, the due process right to travel, and the due process prohibition against irrebuttable presumptions. 87

A. Equal Protection

If the courts were to subject an ordinance regarding rehabilitation facilities to strict scrutiny under the fourteenth amendment’s equal protection clause, it first would have to be shown that the ordinance affects a fundamental right or is based on a suspect classification. While the Burger Court has been reluctant “to create [new] substantive constitutional rights in the name of guaranteeing equal protection of the laws,” 88 it has continued to recognize traditional suspect classifications. 89 In determining the existence of a suspect classification, the Burger Court has recognized three indicia: (1) “immutable characteristic[s] determined solely by the accident of birth;” 90 (2) “history of purposeful unequal treatment” and disabilities; 91 and (3) “position of political powerlessness.” 92 Of the three indicia, the Court seems to favor the first because it is relatively easy to define and apply. 93

Applying these indicia to ex-convicts, drug offenders, alcoholics, and juvenile delinquents, it is unlikely that a classification regarding any of the groups would be found to be suspect. Research has not shown that the characteristics of such classes are immutable from birth; furthermore, the unequal treatment and political powerlessness of these groups might be considered justified. However, classifications concerning developmentally disabled persons 94 may be another matter. Most retarded

87. Another due process issue—the right of an owner of a facility to be free from arbitrary and unreasonable zoning—has been discussed in text accompanying notes 26-27 supra.


89. See Graham v. Richardson, 403 U.S. 365 (1971). The traditional suspect classifications are race, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954), nationality, e.g., Hirabayashi v. United States, 320 U.S. 81 (1943), and alienage, e.g., Graham v. Richardson, supra.


92. Id.

93. If the second and third indicia were to create a suspect classification in and of themselves, the unequal treatment and powerlessness probably would have to be unjustified and extreme.

94. The developmentally disabled include retarded persons and those with cerebral palsy and epilepsy. DMH, Mental Health, supra note 4, at 63 n.11.
individuals indeed possess a characteristic immutable from birth and also face unequal treatment due to their positions of powerlessness. Consequently, a classification which seeks to exclude developmentally disabled persons from community facilities arguably could be suspect under federal equal protection standards.

On the other hand, classifications concerning the mentally ill present a different problem. Under modern theory, most mental illness is considered transient—a condition which will disappear after it "serves its purpose." Thus, the characteristic is not immutable and probably not subject to federal strict scrutiny.

Regardless of the federal standard, it is likely the Illinois courts would find classifications based solely upon mental handicap to be inherently suspect. The state's interpretation of equal protection derives not only from the United States Constitution and federal cases, but also from the Illinois Constitution of 1970.

Article I, section 19 of the Illinois Constitution provides:

All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

At the time of its adoption, section 19, which applies to both governmental and private action, had no parallel in any other state constitution. Like section 18 which prohibits sex discrimination, section 19 has no committee report explaining its intended purpose, since it was first offered on the floor of the convention without formal committee recommendation.

95. Under the theory, most mental illness is considered an adaption to emotional stress. Many symptoms of mental illness are regarded as emergency devices which will cease when the need for them ceases. Illness will dissipate more rapidly when skillfully understood and dealt with. K. Menninger, The Vital Balance 2, 173, 415 (1963).


97. "Rental" is meant to include leaseholds and all other arrangements by which possession or use of property is exchanged for a valuable consideration." Report of Bill of Rights Committee, 6 Proceedings, supra note 59, at 70. Thus, the definition of rental would include "rentals" by residents of private shelter care homes for the mentally disabled, whose room and board are paid by the residents themselves, their families, or the state.


99. "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."

100. Although §19 was not introduced by the Bill of Rights Committee, the committee did consider language which would prohibit discrimination against the handicapped. The committee concluded, however, "that this was an appropriate subject for legislative action
In *People v. Ellis*, the Illinois Supreme Court used section 18 to hold that sex is a suspect classification, even though the federal Constitution might not require the same finding. Similarly, the court should utilize section 19 to declare classifications based on mental and physical handicaps to be prohibited or suspect, at least insofar as they relate to housing and employment. If the court did this, it would be creating a new form of suspect classification—one based on limited purpose. Unlike traditional suspect classifications, such as race and nationality, a

rather than constitutional provision.”

By voice vote, the convention defeated a motion to add self-executing language to §19. The self-executing clause was “These rights are in full without action by the General Assembly.” Id. at 3678. The effect of not including self-executing language is not completely certain. In debate on the section, Delegate Parkhurst said that without a self-executing clause, the section would be a mere “expression of public policy” without a remedy. Id. at 3684. Delegate Weisberg disagreed, saying, the section “is not a hortatory statement. It creates rights.” Id. at 3685. The convention did not officially resolve the issue. It only voted to include the clause.

Nonetheless, there is ample reason to believe the section would be self-executing even without the clause. Section 18 was held to be self-executing without such language. *People v. Ellis*, 57 Ill.2d 127, 311 N.E.2d 98 (1974). *Ellis* is discussed in text accompanying notes 101-102 infra. The only provision in the Bill of Rights which contains a self-executing clause is §17 which prohibits discrimination in employment and the sale or rental of property. Yet, it has not been asserted that other provisions of the Bill of Rights need special language in order to be self-executing. See, e.g., rights of due process, §2; religious freedom, §3; speech, §4; assembly, §5; and trial by jury, §13. Further, the self-executing nature of the Bill of Rights is strengthened by art. I, §12, which provides: “Every person shall find a certain remedy in the laws for all injuries and wrongs . . . .”

In order to effectuate the language of §19, the General Assembly passed the Equal Opportunities for the Handicapped Act, which *inter alia* establishes “the right to the purchase or rental of property without discrimination because of physical or mental handicap.” Ill. Rev. Stat. ch. 38, §65-21 (1975).


102. After referring to §18, the court said, “[I]n view of its explicit language and the debates, we find inescapable the conclusion that it was intended to supplement and expand the guaranties of the equal protection provision of the Bill of Rights . . . .” Id. at 132, 311 N.E.2d at 101. Like §18, §19 contains explicit language prohibiting discrimination. However, unlike §18, §19 does not have constitutional debates which emphasize its intent. Nonetheless, §19 clearly prohibits discrimination in housing and employment against the handicapped.

103. Suspect classifications related to housing would be relatively easy to determine, since §19 applies to all discrimination in housing. Suspect classifications related to employment, however, would be more complicated since the court would have to determine if the classifications were “unrelated to ability.” Courts also would have to create definitions of “handicap,” deciding, for example, what degree of mental retardation, visual impairment, respiratory problem, or loss of use of limbs constitutes a handicap under §19.
suspect classification based on mental handicap would not apply with equal force to any area in which a differentiation is made on the basis of the classification. For example, discrimination against the handicapped in education might not require strict scrutiny, although the court could extend the spirit of section 19 to this area.

In City of Evanston v. Ridgeview House, Inc., the Illinois Supreme Court briefly considered constitutional issues involving classifications based on mental handicap. In Ridgeview, the city attempted to close down a shelter care home for former mental patients, claiming the home violated a condition in a special use permit which prohibited Ridgeview from housing "persons suffering from mental retardation or mental disorders apt to make them a burden to the other residents or to the surrounding neighborhood." The city had argued that the provision should be interpreted to mean that all individuals suffering from mental retardation or mental illness could not live at the home. The supreme court said that if it accepted the city's interpretation of the ordinance, it "would entertain doubts regarding [the ordinance's] constitutionality." The court thus indicated that a blanket classification excluding the handicapped would be unconstitutional.

However, the court construed the ordinance in a manner consistent with its apparent meaning, saying that the ordinance did not exclude all persons with mental handicaps, rather it excluded only "those who were apt to be a burden." Under this construction, the court termed the ordinance a "reasonable accommodation of the interests of all parties concerned." The court said the shelter care home did not sustain the burden of demonstrating that the ordinance is "arbitrary, unreasonable, and lacking substantial relation to the public health, safety or welfare." Thus, the court did not apply a strict scrutiny-compelling interest test, even though a classification based on mental handicap was involved. Here, however, the classification was not based solely on mental handicap, but rather on handicap plus a tendency to become a burden. Had the classification been based solely on handicap, as the city had urged, the court indicated the classification would have been uncon-

104. 64 Ill.2d 40, 349 N.E.2d 399 (1976).
107. Id. at 66, 349 N.E.2d at 412.
108. Id. at 58, 66, 349 N.E.2d at 408, 412.
109. Id. at 66, 349 N.E.2d at 412.
110. Id.
The court did not indicate, however, whether it would have been unconstitutional under a strict scrutiny test or a rationality test. In light of constitutional history and *Ellis*, the court should declare classifications based *solely* on handicap to be suspect and apply strict scrutiny.

Applying a strict scrutiny test, a municipality obviously would have a compelling interest in keeping psychotic and dangerous people off its streets. But there would be no compelling interest in excluding moderately disoriented, retarded persons who pose no danger to themselves or others. The strict scrutiny requirement that the government use the least burdensome alternative available will challenge mental health workers and the courts to devise standards and screening systems which will protect the rights of the mentally handicapped while protecting the community.

**B. The Due Process Right to Travel**

Supreme Court cases protecting the right to travel have involved regulations which operated to withhold a benefit from persons who had

111. The supreme court also did not indicate under which provision such a classification would be unconstitutional. The trial court had found the ordinance contrary to state and federal provisions guaranteeing due process and equal protection, as well as art. I, §19 of the Illinois Constitution which prohibits discrimination against persons with physical or mental handicaps. In addition, the trial court found the ordinance void for vagueness. City of Evanston v. Ridgeview House, Inc., No. 73 CH6013 (Cir. Ct., Cook Cty., Ill., November 19, 1974). The supreme court reversed the trial court’s finding that the ordinance was unconstitutional and void for vagueness. Regarding vagueness, the supreme court said the ordinance “affords sufficient warning so as to guide those to whom it applies.” 64 Ill.2d at 67, 349 N.E.2d at 412. Nonetheless, the supreme court affirmed the trial court’s finding that the city failed to prove a prima facie case. Thus, the home may remain open.

112. If the court does not declare mental handicap to be a suspect classification and applies only the traditional minimal scrutiny analysis, it might sustain an exclusionary zoning ordinance if it finds a “reasonable basis” for distinguishing the class. Hoskins v. Walker, 57 Ill.2d 503, 508, 315 N.E.2d 25, 27 (1974) (upholding a statute which disqualified all persons associated with any school system from eligibility for appointment to the state board of education). *Cf.* Latham v. Board of Educ., 31 Ill.2d 178, 185, 201 N.E.2d 111, 115-16 (1964) (upholding a statute which allowed Chicago’s school board to be appointed while boards for school districts of lesser size were elected, since there was “a real and substantial difference” for distinguishing the classifications).

If the court applied the traditional analysis, ordinances could be drawn with less precision—perhaps excluding all former mental patients because a few might be dangerous. Alternatively, under an intermediate standard which applies more than “minimal scrutiny” but less than “compelling interest,” a court could find that classifications which exclude the handicapped are unreasonable or are not based on a substantial difference. *Cf.* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).
recently moved from one place to another, while conferring the benefit on long-time residents.\textsuperscript{113} Although exclusion of rehabilitation facilities does not penalize persons on the basis of travel per se, this Comment will argue that exclusion on the basis of illness, handicap, or a criminal record deprives individuals of the right to live in the community of their choice—a right which should be encompassed by the constitutional right to travel.

In order to find that exclusion of rehabilitation facilities impinges on the right to travel, courts would have to expand the right in two respects. First, it would have to be established that there is a right of intrastate travel, since most residents of rehabilitation facilities travel from a state institution to a community facility within the same state. Second, it must be shown that the scope of the right to travel includes a right not to be excluded from rehabilitation facilities and that, correlative, communities do not have the right to exclude such facilities for people who want them. This proposed application of the right to travel does not go so far as to say that persons have a right to live in a particular rehabilitation facility or that such facilities must exist. As this Comment will demonstrate, expansion of the right to travel to include intrastate travel is consistent with existing notions of due process. Expansion of the scope of the right to travel to encompass a right not to be excluded from a rehabilitation facility may be more difficult. It involves a departure from the traditional concept of the right to travel, and the Court has shown a reluctance to expand existing constitutional rights.\textsuperscript{114}

The right to travel interstate has been recognized repeatedly as a "fundamental"\textsuperscript{115} or "basic constitutional freedom."\textsuperscript{116} While the United States Supreme Court has never specifically ruled on the right to travel intrastate,\textsuperscript{117} it has been implied in dicta\textsuperscript{118} and dealt with by the lower courts.

\begin{itemize}
  \item \textsuperscript{113} See cases cited in notes 130-36 infra.
  \item \textsuperscript{114} Cf. note 88 and accompanying text supra.
  \item \textsuperscript{115} United States v. Guest, 383 U.S. 745, 757 (1966). In addition to travel, voting and equal access to appellate review in criminal cases have been recognized as fundamental interests. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (access to appellate review).
  \item \textsuperscript{117} In Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974), the Court said, "Even were we to draw a constitutional distinction between interstate and intrastate travel, a question we do not now consider . . . ." Id. at 255-56. Nonetheless, the Court's ruling protected those who had moved intrastate as well as interstate. Id. at 270 (separate opinion of Douglas, J.).
  \item \textsuperscript{118} "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. . . . Freedom of movement is basic to our scheme of values." Kent v. Dulles, 357 U.S. 116, 126 (1958). "[T]he right to travel intrastate is as
courts. The Second Circuit, for example, in *King v. New Rochelle Municipal Housing Authority*,\(^{119}\) declared a right of intrastate travel, saying, ""It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.""\(^{120}\) Prior to *United States v. Guest*,\(^{121}\) five sources of the right to travel interstate had been suggested: the commerce clause,\(^{122}\) article IV, section 2 privileges and immunities,\(^{123}\) fourteenth amendment privileges and immunities,\(^{124}\) national citizenship,\(^{125}\) and fifth amendment due process.\(^{126}\) Although it has not been necessary to pinpoint a specific source of the right of interstate travel,\(^{122}\) it may be necessary to identify the source of the right of intrastate travel. If the right to travel were based exclusively on the commerce clause, privilege and immunities clauses, or national citizenship, a right to intrastate travel would be somewhat doubtful since these clauses are concerned primarily with national rights and interstate movement. If, on the other hand, the right to travel were based on due process fundamental rights embodied in the fifth and fourteenth amendments, the rationale for a right to travel interstate would apply with equal force to intrastate travel.

Assuming there is a right of intrastate travel based on due process, the next issue to be dealt with is the scope of that right. The right to travel clearly provides protection from interference while in transit.\(^{128}\)

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\(^{119}\) 442 F.2d 646 (2d Cir. 1971).

\(^{120}\) Id. at 648. In addition, the First Circuit may have impliedly found a right of intrastate travel. In *Cole v. Housing Authority*, 435 F.2d 807 (1st Cir. 1970), the court struck down a Newport, Rhode Island housing authority regulation that denied public housing to persons who had not been Newport residents for at least two years. The court did not discuss a possible right of intrastate travel, but one of the plaintiffs, Catherine Cole, was a resident of Jamestown, Rhode Island before she moved to Newport. Cole v. Housing Authority, 312 F. Supp. 692, 694 (D.R.I. 1970).

\(^{121}\) 383 U.S. 745 (1966). The Court in *Guest*, a landmark travel case, concluded that there was no need to isolate the source of the right to travel.


\(^{123}\) See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868).


\(^{128}\) United States v. *Guest*, 383 U.S. 745 (1966), held that blacks were deprived of
and from certain disadvantages or penalties imposed because a person is a newcomer to an area. It has been suggested that the right also includes "migration with the intent to settle and abide." A right to settle and abide would imply that if a municipality prohibited a class of citizens from moving within its boundaries and living there, it would infringe on the right to travel. A federal district court used similar reasoning in Construction Industry Association v. City of Petaluma. The court declared, "[T]here is no meaningful distinction between a law which 'penalizes' the exercise of a right to travel and one which denies it altogether." In Petaluma, the court used the right of travel to invalidate a municipal ordinance which limited population growth through restrictions on the number of building permits, thus excluding "substantial numbers of people who would otherwise have elected to immigrate into the city." On appeal, the Ninth Circuit reversed the ruling and sustained the ordinance without considering the merits of the travel argument, since the plaintiff landowners and developers did not have standing to raise the travel argument.

In addition to the right to settle and abide, courts also have focused on restrictions which deprive persons of a necessity of life or a fundamental right because they have exercised their right to travel. Most travel cases have not been pure restrictions on physical movement. Courts have held that the right to travel was infringed when residency requirements affected other important interests, including voting, free federal rights, including the right to travel, when whites threatened them on interstate highways.

129. See, e.g., Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (holding that a one-year residency requirement to receive non-emergency hospitalization and medical care at county expense violated the right to travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (striking a residency requirement as a prerequisite for welfare benefits as infringing on the right to travel).

130. Cole v. Housing Authority, 435 F.2d 807, 811 (1st Cir. 1970) (invalidating a Newport, Rhode Island Housing Authority regulation that limited public housing eligibility to those who had been Newport residents for two years). Cf. Truax v. Raich, 239 U.S. 33, 39, 42 (1915) (voiding an Arizona statute which prohibited an employer from employing aliens for more than 20% of his work force). Cf. R. BABCOCK, THE ZONING GAME 36-37 (1966).

131. 375 F. Supp. 574 (N.D. Cal. 1974), rev'd on other grounds, 522 F.2d 897 (9th Cir. 1975).

132. Id. at 582.

133. Id. at 581.

134. The court did point out, "Assuming arguendo that the constitutional right to travel applies to this case, those individuals whose mobility is impaired may bring suit on their own behalf . . . ." Construction Ind. Asa’n v. City of Petaluma, 522 F.2d 897, 904 (9th Cir. 1975).


association, and "necessities of life." In a right to travel case involving welfare benefits, the Supreme Court noted that shelter is among the "necessities of life." In extending the analysis to shelter homes, the question centers on whether excluding rehabilitation facilities or the persons who would be housed in them is a deprivation of a necessity of life. The answer would depend, in part, on the availability of alternate housing. If there were no alternatives available, a rehabilitation facility would be a necessity. It might be argued that a second alternative would be to keep the persons in a state hospital, but those who do not pose a danger to themselves or others may not be involuntarily confined. The necessity of housing in shelter homes for those who have


138. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (invalidating a residency requirement to receive non-emergency medical care at county expense); Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating a one-year residency requirement as a prerequisite to welfare benefits which, the court pointed out, pay for food, shelter, and other necessities of life).


140. For example, if a state, for budget or other reasons, releases persons who although not ill, cannot completely care for themselves, those persons will need a place to stay. If they do not have families or friends to whom they can go, a rehabilitation facility may be the only alternative. Thus, it is a necessity of life for those persons—a necessity which relates to the right to travel. The "necessity" argument would not be as strong for adult and juvenile offenders for whom alternatives could include continued imprisonment or complete release. In the case of neglected and abandoned children, however, the only viable alternative might be foster homes, which are usually best located in single-family districts.

141. The power of the state to confine a person in a mental institution has been limited by O'Connor v. Donaldson, 442 U.S. 563 (1975). The Court held that it is a deprivation of liberty if a state involuntarily confines a person, who is not a danger to himself or others, in a custodial institution. Dr. LeRoy Levitt, Director of the Illinois Department of Mental Health, said O'Connor would have little effect on state mental health practices, since Illinois patients are not held involuntarily without treatment unless they are a danger to themselves or others. Chicago Sun Times, June 28, 1975, at 50, cols. 1-4.

142. Aside from the necessity argument, it would be unfair to the individuals who should be able to return to the freedom and enjoyment provided by community life when illness no longer requires hospital treatment. Traveling for reasons of health is favored by the Court. In Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974), the Court struck down a residency requirement which was a condition for eligibility for non-emergency medical care at county expense, saying, "A person afflicted with a serious respiratory ailment . . . might well think of migrating to the clean dry air of Arizona, where relief from his disease could also bring relief from unemployment and poverty." Id. at 257. By similar reasoning, it could be argued that a person afflicted with a moderate mental disorder might well think of moving to a community facility to obtain relief from his affliction and reintegration into society.
no alternative housing seems as strong as the "necessities" of welfare benefits\(^4\) and non-emergency medical care at county expense\(^5\)—neither of which can be denied by discriminating against those who have exercised their right to travel. This combination of necessity with the right to travel creates a constitutional right not to be excluded from rehabilitation facilities.

\(\textit{C. Due Process—Irrebuttable Presumption}\)

Another constitutional principle which could be asserted on behalf of persons excluded from rehabilitation facilities is the doctrine of "irrebuttable presumption."\(^6\) Under this doctrine, the Supreme Court has held that it is a denial of due process to base a classification on "a permanent and irrebuttable presumption . . . when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination."\(^7\) Application of the doctrine to rehabilitation facilities occurs when a municipality attempts to exclude an entire class of persons or facilities on the basis that such persons or facilities would be a danger or nuisance. Such an assumption is over-inclusive and would not be "universally true in fact." To draw such an assumption about an individual or group of individuals without personalized evaluation could be construed as a violation of due process. The administrative convenience of such assumptions is not a sufficient reason to exclude an entire class of persons, especially when reasonable alternatives for making the crucial determinations are available.\(^8\) An example of a reasonable alternative would be a system of screening persons before they are admitted to a community rehabilitation facility.\(^9\) Such a system may not be perfect,
but it better serves the rights of persons who need facilities, as well as the need for community safety.

IV. Conclusion

As mental health and corrections officials place greater reliance on community rehabilitation facilities, the courts will be required to balance the rights and needs of communities, the state, and persons who live in the facilities. People have a right to be treated and evaluated as individuals. Part of the spirit of a democratic society is the tolerance of some abnormality and the willingness to give an individual a second chance. A person may look different, walk strangely, and even behave bizarrely, but that person ought not to be excluded from a community unless he poses a real danger.

Persons who plan to open facilities should make greater efforts to inform and gain the support of the community in which the facility will be located. Knowledge can diminish fear, and community support will aid the goal of reintegration. If a community has a legitimate complaint about a facility, the courts can shape remedies to protect the needs of community safety, the residents of the facility, and the public-at-large. The answer is not to ignore the problem or send it somewhere else, but to deal with it with understanding and creativity in our own communities.

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institution. Second, the applicant for admission is evaluated by a committee of representatives from the Ridgeview staff and the Illinois Department of Mental Health. The committee reviews the applicant's general information sheet, psychological examination, social history, and other materials. If any one of the committee members objects, the applicant is not admitted. Third, the applicant is given a tour of the facility and interviewed by a member of both the Ridgeview staff and the Illinois Department of Mental Health. If agreeable to all, the applicant is admitted. Abstract for Appellant at 137-38, City of Evanston v. Ridgeview House, Inc., 64 Ill.2d 40, 349 N.E. 2d 399 (1976). If a resident is found to be incompatible with the home or community, the resident is sent to a more appropriate facility. City of Evanston v. Ridgeview House, Inc., 64 Ill.2d at 59, 349 N.E.2d at 410.