NOTE

Liberty from Transfer Trauma: A Fundamental Life and Liberty Interest†

*By Colette I. Hughes**

"I could tell you a lot; there is so much that is happening. We are being treated as if we were in Nazi Germany or Russia.

"The food is slop; the residents are pushed, prodded and mishandled. We are told nothing. Then we are told this place is closing and we must move. Then once again we are told nothing. What are we to think?

"I want to stay here—I won't leave. Where would I go? As bad as it is, the others are no better. I would again be separated from my friends; *they would ship us out of here like freight*."[1]

Introduction

Transfer trauma is the medically accepted term of art used to describe the dangerous effects of involuntary relocation on nursing home patients.[2] The basic principle of this phenomenon, as the federal dis-

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† This note is respectfully dedicated to the Honorable Stanley A. Weigel, Judge of the United States District Court for the Northern District of California.

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1. Statement of Guy Bracco, former resident, San Franciscan Convalescent Center ["Post Street"] (Feb. 20, 1978) (emphasis added) (written in support of motion for preliminary injunction to halt relocation in Bracco v. Lackner, 462 F. Supp. 436 (N.D. Cal. 1978)) Mr. Bracco was one of the elderly leaders who unsuccessfully fought the closing of the facility and the relocation of more than 300 of San Francisco's elderly Medicaid poor. He was transferred from the facility in June, 1978 to a nursing home miles away. Mr. Bracco died three months later.

For a history of the Post Street residents' struggle to stop their involuntary transfer, see Oddone, *Post Street Post-Mortem: Old But Not Forgotten*, NEW WEST, Oct. 22, 1979, at 23-29. *See also* Oddone, *Post Street Post Mortem: Scenario of a Nursing Home Crisis*, GRAY PANTHER NETWORK, May/June 1980, at 7; Stix, *Elderly Patients in Fight for Rights*, L.A. Times, Apr. 20, 1978, § IV, at 1, col. 1.

2. The phenomenon is also known as "transplantation shock" or "relocation effect."

trict court noted in *Bracco v. Lackner*,[3] "is the recognition that the transfer of geriatric patients to any unfamiliar surroundings produces an increased rate of morbidity and mortality."[4]

The deleterious effects of transfer trauma resulting in physical and emotional deterioration have been recognized by the federal courts since 1974.[5] In *O'Bannon v. Town Court Nursing Center*,[6] however, the United States Supreme Court found no constitutionally cognizable interest in freedom from transfer trauma:

> This case does not involve the withdrawal of direct benefits. Rather, it involves the Government's attempt to confer an indirect benefit on Medicaid patients by imposing and enforcing minimum standards of care on facilities like Town Court. When enforcement of those standards requires decertification of a facility, there may be an immediate, adverse impact on some residents. But surely that impact, which is an indirect and incidental result of the Government's enforcement action, does not amount to a deprivation of any interest in life, liberty or property."[7]

In *O'Bannon*, as in most other relevant cases in which the transfer trauma issue has arisen, the Court was faced with a common factual dilemma. At the heart of the dispute was the program known as Medicaid.[8] The Department of Health, Education and Welfare (HEW) had revoked the authority of a nursing home to provide its elderly residents

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See generally Pastalan, *Environmental Displacement: A Literature Reflecting Old Person-Environment Transactions*, in AGING AND MILIEU: ENVIRONMENTAL PERSPECTIVES ON GROWING OLD (G. Rawles & R. Ohta eds. to be published 1982). Pastalan's chapter is derived from L. Pastalan, Relocation: A State of the Art (Nov. 1979) (unpublished paper available through the Institute of Gerontology, University of Michigan) [hereinafter cited as L. Pastalan, Relocation]. Dr. Leon Pastalan is Director of Research at the Institute of Gerontology, University of Michigan and Co-Project Director of the National Institute for Mental Health Investigation's Study of Involuntary Change of Patients from One Socio-Physical Environment to Another. He organized the Pennsylvania Preparation for Relocation Project, which includes a longitudinal study of transfer trauma and its effects. This project is in its ninth year of assisting the Pennsylvania Welfare Department in the development and utilization of a plan for preparation of elderly residents for relocation from one nursing home to another. The Pennsylvania relocation program has already been adopted, in whole or in part, in Rhode Island, New Jersey, New York, Florida, and Michigan.

3. 462 F. Supp. 436 (N.D. Cal. 1978).

4. *Id.* at 445.

5. *See, e.g.*, Hathaway v. Mathews, 546 F.2d 227, 231 (7th Cir. 1976); Klein v. Mathews, 430 F. Supp. 1005, 1009 (D.N.J. 1977); Burchette v. Dumpson, 387 F. Supp. 812, 819 (E.D.N.Y. 1974).

6. 447 U.S. 773 (1980).

7. *Id.* at 787.

8. 42 U.S.C. §§ 1396, 1396a (1976). The purpose of the program is to enable each state to furnish medical assistance to aged and disabled persons whose income and resources are not sufficient to meet the costs of necessary medical services.

with medical care at government expense pursuant to Medicaid provider agreements.[9]

In response to the revocation, the nursing home and several of its residents brought suit for injunctive relief, alleging that the residents were entitled to an evidentiary hearing on the merits of the revocation before Medicaid payments were discontinued.[10]

The residents' argument in support of their interest was based primarily upon the "entitlement theory" of due process which blossomed in the early 1970's.[11] Relying on a series of cases beginning with *Goldberg v. Kelly*,[12] the residents asserted a constitutionally protected property interest in continued occupancy of the facility under various Medicaid provisions. Not surprisingly, the Court rejected the alleged entitlements.[13]

The Supreme Court, in an opinion written by Justice Stevens, held that elderly Medicaid beneficiaries have no interest in receiving benefits for care in a particular facility that entitles them, as a matter of constitutional law, to a hearing before HEW and the Pennsylvania Department of Public Welfare (DPW)[14] can decertify that facility: "Whatever legal rights the patients may have against Town Court for

9. Through Medicaid the federal government reimburses the states for a percentage of expenditures for medical services rendered to eligible recipients by qualified providers.

The primary administrator in each state (usually called the Department of Health) must administer the program in accordance with a state implementation plan required by 42 U.S.C. § 1396a(a) (1976 & Supp. III 1979). The state must determine whether or not a provider of services is qualified to participate under the applicable federal standards. 42 U.S.C. § 1396a(a)(33)(B) (1976). A provider that fails to comply with the applicable standards for participation cannot be certified. The result is a loss of "qualified provider" status. 42 U.S.C. § 1396a(a)(5), (23), (28) (1976 & Supp. III 1979).

Federal funds can be paid only on behalf of individuals receiving medical and/or nursing services from a "qualified provider." 45 C.F.R. § 249.10(b)(4)(i)(C) (1976). *See also* 42 U.S.C. § 1396a(a)(23), (28) (1976 & Supp. III 1979); 45 C.F.R. § 249.33(a)(1), (4), (6), (10) (1976). Subject to certain conditions, however, "the State agency may continue to claim Federal financial participation in payments on behalf of eligible individuals for such services furnished by such institution during a period not to exceed 30 days . . . ." 45 C.F.R. § 249.10(b)(4)(i)(C) (1976).

10. The United States District Court for the Eastern District of Pennsylvania entered judgment for defendants, from which plaintiffs appealed. The court of appeals reversed, 586 F.2d 280 (3d Cir. 1978), and *certiorari* was granted, 441 U.S. 904 (1979).

11. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 514-22 (1978). *See also* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

12. 397 U.S. 254 (1970).

13. *See* L. TRIBE, *supra* note 11, at 527-32. Professor Tribe describes the Court's recent application of due process entitlement theory to cut back on the reasonable expectations of individuals in their relations with the government when those expectations derive from independent sources such as state law and not from the "core" liberty and property concepts grounded in the Constitution and common law. Tribes cites, as the first example of this application, Paul v. Davis, 424 U.S. 693 (1976).

14. DPW is the state administrator of the Medicaid program. *See* note 8 *supra*.

failing to maintain its status as a qualified skilled nursing home . . . the enforcement by HEW and DPW of their valid regulations did not directly affect their legal rights or deprive them of any constitutionally protected interest in life, liberty, or property."[15]

In reaching this conclusion, the Court rejected reliance on the reasoning of an earlier appellate court decision, *Klein v. Califano*,[16] that had identified three Medicaid provisions as creating a "legitimate entitlement to continued residency at the home of one's choice absent specific cause for transfer."[17] The court in *Klein* so identified a statute vesting in Medicaid beneficiaries the right to obtain services from any qualified facility,[18] a regulation prohibiting certified facilities from transferring or discharging a patient except for certain specified reasons,[19] and a regulation prohibiting the reduction or termination of financial assistance without a hearing.[20] The Court was also unpersuaded by the residents' argument that transfer may engender such severe physical and/or emotional impact as to constitute a deprivation of life or liberty, thus requiring a due process hearing.[21]

At first blush, the Court's pronouncement would end the inquiry. But close examination of *O'Bannon*, its predecessors and progeny, reveals that the constitutional dimensions of transfer trauma remain to be considered by the Supreme Court.[22]

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15. O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 790 (1980).

16. 586 F.2d 250 (3d Cir. 1978).

17. *Id.* at 258.

18. 42 U.S.C. § 1396a(a)(23) (Supp. II 1978) provides in relevant part: "[A]ny individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services . . . ." The same "free choice of providers" is also guaranteed by 42 C.F.R. § 431.51 (1979).

19. 42 C.F.R. § 405.1121(k)(4) (1979) requires skilled nursing facilities licensed either as Medicare or Medicaid providers to establish written policies and procedures to guarantee that each resident admitted to the facility "[i]s transferred or discharged *only for medical reasons, or for his welfare or that of other patients*, or for nonpayment of his stay (except as prohibited by Titles XVIII or XIX of the Social Security Act), and is given reasonable advance notice *to ensure orderly transfer or discharge* . . ." (emphasis added).

20. 45 C.F.R. § 205.10(a)(5) (1979) provides in relevant part that an "opportunity for a hearing shall be granted to any applicant who requests a hearing because his or her claim for financial assistance . . . or medical assistance is denied, . . . and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance."

21. *See* text accompanying note 7 *supra*.

22. *See* Yaretsky v. Blum, 629 F.2d 817 (2d Cir. 1980), *cert. denied*, 450 U.S. 924 (1981). *See also* Brede v. Director for the Dep't of Health, 616 F.2d 407 (9th Cir. 1980); Rockhill Care Center, Inc. v. Harris, 502 F. Supp. 1227 (W.D. Mo. 1980); Bracco v. Lackner, 462 F. Supp. 436 (N.D. Cal. 1978).

The viability of elderly Medicaid nursing home residents' interest in liberty from transfer trauma, as a constitutional interest standing alone, was not confronted by the majority in *O'Bannon*. Freedom from transfer trauma instead was viewed as a mere adjunct to a property entitlement claim in continued occupancy. Furthermore, it is urged that the concurrence erred in concluding that the existence of the transfer trauma phenomenon is not supported by substantial evidence and that the interest is therefore undeserving of Fifth Amendment protection. This note posits not only that transfer trauma does exist, but that its life threatening impact is forseeable. This premise was embraced by the Second Circuit Court of Appeals in the post-*O'Bannon* decision of *Yaretsky v. Blum*,[23] which held that elderly nursing home residents possess a *constitutionally* protected liberty interest in avoiding the fatal potential of transfer trauma. However, the predecertification hearing remedy provided in *Yaretsky* did not constitute meaningful due process protection. The author proposes that meaningful due process protection can only be afforded if the various states are required to develop and implement relocation plans tailored to counter the deleterious impact of relocation trauma.[24]

I. *O'Bannon* in Context: A Ruling Not Supported by the Record

The procedural manner in which the transfer trauma interest came before the Supreme Court is particularly noteworthy. As previously observed,[25] the residents sought a preliminary injunction to halt the termination of payments in order to ensure continued occupancy. They "alleged that termination of the payments would require Town

23. 629 F.2d 817 (2d Cir. 1980), *cert. denied*, 450 U.S. 924 (1981).

24. If liberty from transfer trauma is a fundamental interest, the state cannot relocate frail elderly Medicaid beneficiaries without demonstrating a compelling state interest. *See* Shapiro v. Thomson, 394 U.S. 618 (1969). However, even if the state had a compelling interest, it could not then proceed to relocate individuals in whatever manner it deemed fit. Such latitude would violate the due process clause's mandate of fundamental fairness which bars unbridled state action. Accordingly, since it is *relocation* that threatens elderly Medicaid beneficiaries' interest in freedom from unnecessary emotional and physical harm, any *meaningful* due process safeguard must act on the *relocation process itself*. This is precisely why a *procedural* due process hearing prior to relocation does not safeguard against the constitutional harm threatened. Here, the constitutional problem is not the withdrawal of a statutory benefit without notice and hearing, but rather the state's contention that it may relocate these fragile, elderly individuals absent a compelling state interest, and without a plan tailored to mitigate the life threatening effects of transfer trauma. *See, e.g.*, Bracco v. Lackner, 462 F. Supp. 436, 443-46 (N.D. Cal. 1978). *See also* Rockhill Care Center, Inc. v. Harris, 502 F. Supp. 1227 (W.D. Mo. 1980).

25. *See* text accompanying note 10 *supra*.

Court to close and would cause the individual plaintiffs to suffer *both* a loss of benefits *and* 'immediate and irreparable psychological and physical harm.' "[26] The theory of psychological and physical harm alleged in the complaint was linked by a conjunction to the entitlement allegation. As a result, the allegation of harm did not stand alone, nor was the interest specifically pleaded as liberty from transfer trauma. In contrast, the benefit loss allegation was particularly pleaded as a termination of payment resulting in closure of the home. Thus, in *O'Bannon*, as in each of its relevant predecessors, the interest in freedom from transfer trauma was presented as an adjunct to a property entitlement claim in a last minute effort to maintain the status quo.[27] The result is that transfer trauma has been repeatedly characterized as a potentially irreparable harm in a fashion tailored to satisfy the standards for granting a preliminary injunction, but *not* as a constitutional claim per se, appropriate for adjudication on the merits *following* imposition of preliminary injunctive relief. This helps to explain why the Court treated the interest in freedom from transfer trauma as though it shared a common constitutional genesis with the property entitlement claim.

Moreover, examination of the life and liberty interest in freedom from transfer trauma reveals that a property entitlement claim to continued occupancy is not only a separate interest, but is the *secondary*, rather than the primary, interest at stake. The elderly Medicaid nursing home residents of *O'Bannon* did not seek equitable relief simply "to remain in the home of their choice"[28] pending an evidentiary hearing to determine whether "good cause for transfer" existed.[29] Rather, they sought protection from likely death or serious illness in the wake of involuntary, haphazard relocation. The fact that an evidentiary decertification hearing was the *only* remedy sought further substantiates the proposition that freedom from transfer trauma did not stand squarely

26. O'Bannon v. Town Court Nursing Center, 447 U.S. at 777 (emphasis added).

27. *See, e.g.*, Bracco v. Lackner, 462 F. Supp. 436, 447 (N.D. Cal. 1978), in which the court explains the pressure under which it was forced to act. "The Court specifically requested counsel for the Department to determine whether the Department would be willing to maintain the status quo, *i.e.*, maintenance of adequate levels of care at the Center. However, the Department declared its unwillingness to maintain the status quo for more than about three days. The Department took this position even though that status quo was essential to the preservation of this Court's power to render a meaningful decision on the merits, even of this motion for a preliminary injunction, let alone the merits of plaintiffs' claims for final adjudication of federal statutory and Constitutional rights." *Id.* at 447. *See also* Brede v. Director for the Dep't of Health, 616 F.2d 407 (9th Cir. 1980).

28. 447 U.S. at 784.

29. *Id.*

before the Court as a constitutional interest. Since an evidentiary hearing on the merits of the facility's decertification would not mitigate the seriousness of the physical and emotional harm threatened by transfer trauma, effective relief would have to address the *transfer process* itself.[30] The formulation and implementation of a relocation plan tailored to minimize the impact of the damage threatened would constitute the only meaningful due process remedy.[31]

Although the Court claimed that its opinion weighed the risk of transfer trauma, it seems clear that the posited interest was viewed as *de minimus*, particularly in light of the dearth of evidence before the Court.[32] Justice Blackmun, although concurring in the judgment, not only stated that the interest in freedom from transfer trauma should be constitutionally analyzed separately from the entitlement interest,[33] but expressed alarm at the lack of evidence and the consequent risk. Justice Blackmun stated,

> I question whether the life and liberty interest decided by the Court is properly presented. The District Court refused to extend a preliminary injunction after a brief hearing. In that court, the plaintiffs only touched on the concept of transfer trauma. There was no explicit argument that the patients were threatened with a deprivation of life or liberty; rather, the danger of transfer trauma was noted only as a circumstance raising a likelihood of irreparable injury justifying injunctive relief . . . . The transfer trauma studies cited to this Court were not cited to the District Judge. Testimony regarding transfer trauma was limited to the little-explained assertion of an expert witness that removal would subject some patients in the group to endangerment of their lives or aggravation of their illnesses . . . . In the Court of Appeals, the patients again did not contend that decertification exposed them to a deprivation of life or liberty . . . . It is to be remembered that this case arises from the refusal to extend a preliminary injunction—an order preceded by limited development

30. *See* note 24 *supra*.

31. *Cf.* Bracco v. Lackner, 462 F. Supp. 436, 445-46 (N.D. Cal. 1978) (explaining why the absence of such a plan presents a "substantial danger" to elderly residents' health and well-being and summarizing some of the factors critical to formulating a relocation plan).

32. The Court stated, "The patients cite a number of studies indicating that removal to another home may cause 'transfer trauma,' increasing the possibility of death or serious illness for elderly, infirm patients . . . . In denying the motion for a preliminary injunction, the District Court did not take evidence or make any findings on the harm that might result from a transfer. Nevertheless, we *assume* for purposes of this decision that there is a risk that some residents may encounter severe emotional and physical hardship as a result of a transfer." 447 U.S. at 784 n.16 (emphasis added).

33. *Id.* at 790 (Blackmun, J., concurring).

of the record and not guided by focused presentation of legal arguments.[34]

As a result of the evidentiary void, the Court considered the interest in liberty from transfer trauma as triggered by only a hypothetical risk of harm.[35] That the Court viewed the harm as hypothetical helps to explain the path of its due process entitlement reasoning. The majority's conclusion turned on the application of a test to determine whether or not the withdrawal of benefits was a direct or indirect result of decertification.[36] The Court reasoned that since decertification was a lawful exercise of state power, any harm resulting from the exercise of that power could be viewed only as an indirect consequence undeserving of Fifth Amendment interdiction.[37] The majority concluded, "[T]hat the decertification of a home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm."[38]

Justice Blackmun's concurrence questioned the relevance of this observation: "When the Government erroneously commits a person to a mental hospital, it is not 'deci[ding] to impose . . . harm' either. But we have recognized that the risk that such action 'may lead to severe hardship' is sufficiently great to justify a hearing for the transferee."[39] Justice Blackmun also found overly simplistic and irrelevant the majority's analysis as to whether or not the residents' losses are properly labeled direct or indirect. In criticizing the test applied by the majority,

34. *Id.* at 802-03 n.10 (Blackmun, J., concurring).

35. *See* note 32 *supra*.

36. *See* text accompanying note 7 *supra*.

37. 447 U.S. at 789. "Over a century ago this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the indirect adverse affects of governmental action." *Id.* at 789 (citing the Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870)).

The Court then went on to support its conclusion that decertification triggering transfer can result in only consequential injuries by analogizing the residents' alleged interest to the argument (which the Court had recently rejected) made by the parents of a girl murdered by a parolee. In Martinez v. California, 444 U.S. 277 (1980), the murdered girl's parents contended that a California statute granting absolute immunity to the parole board with respect to its release decisions deprived their daughter of her life without due process of law. The Court in *Martinez* concluded, "A legislative decision that has an incremental impact on the probability that death will result in any given situation—such as setting the speed limit at 55-miles-per-hour instead of 45—cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander." *Id.* at 281.

38. 447 U.S. at 789.

39. *Id.* at 804 n.12 (Blackmun, J., concurring) (citing Vitek v. Jones, 445 U.S. 480 (1980)).

he pointed out that the *primary purpose* of decertification is to force residents to relocate:[40]

> I have no quarrel with the Court's observation that the Due Process Clause generally is unconcerned with 'indirect' losses . . . . To say that the decertification decision directly affects the home is not to say that it 'indirectly' affects the patients. *Transfer is not only the 'inevitabl[e] . . . clearly foreseeable consequence of decertification, [but] a basic purpose of decertification is to force patients to relocate.*[41]

Therefore, whether or not the allegedly life-threatening effects of forced relocation are labeled direct or indirect begs the question. The real life result is that once a facility is decertified, the residents are relocated. The pivotal question, then, is: What *degree* of harm does forced relocation threaten?

Although the majority assumed some danger to residents' lives and health might be the "indirect" result of relocation, the majority's conclusion (resulting from application of the test) precluded inquiry into the foreseeable degree of harm threatened. For this reason, the majority felt itself under no compulsion to evaluate the transfer trauma studies cited to the Court. Justice Blackmun, on the other hand, acknowledged a judicial responsibility at least to consider the evidence regarding transfer trauma before determining whether or not the interest is constitutionally cognizable. But he concluded,

> [T]he patients cannot establish that transfer trauma is so substantial a danger as to justify the conclusion that transfers deprive them of life or liberty. Substantial evidence suggests that 'transfer trauma' does not exist, and many informed researchers have concluded at least that this danger is unproved. Recognition of a constitutional right plainly cannot rest on such an inconclusive body of research and opinion.[42]

II. The Reality of Transfer Trauma

Contrary to Justice Blackmun's conclusion, substantial evidence shows not only that transfer trauma exists, but that its life threatening impact is foreseeable and can be substantially mitigated through proper relocation planning. The medical literature and the leading expert research, including the studies cited to the Court, stand for two propositions: 1) That elderly residents who are *forced* to move suffer higher mortality rates than non-relocated control groups; and 2) That pre-

40. In support of this conclusion, Blackmun observed, "Thus, not surprisingly, § 1396(a)(23) specifically ties the patient's right to continued residence in a home to qualification of the facility." 447 U.S. at 794.

41. *Id.* at 793-94 (Blackmun, J., concurring) (citations omitted & emphasis added).

42. *Id.* at 804. *See also id.* at 804 n.13 (citing relocation studies).

relocation preparation programs increase the predictability of the new environment and effectively *reduce* mortality rates.[43]

Apparently contradictory findings of studies do not necessarily mean that those studies fail to present substantial evidence demonstrating the severe harm threatened by transfer trauma. All the relevant data must be closely scrutinized in order to develop a comprehensive analytical framework for determination of what constitutes substantial evidence of transfer trauma and what does not.[44] Dr. Leon Pastalan,

43. L. Pastalan, Relocation, *supra* note 2, at 23.

44. The Court's decision in *O'Bannon* was based on the erroneous premise that the transfer trauma phenomenon is unproven. The Court was misled by unsupported research findings to the detriment of the lives and health of elders living in government regulated nursing homes. The studies that the Court relied on are not credible because the researchers drew their conclusions without applying any meaningful analytical framework to their observations.

These faulty research findings were recently discredited in Bourestom & Pastalan, *The Effects of Relocation on the Elderly: A Reply to Borup, J.H., Gallego, D.T., & Heffernan, P.G.*, 21 GERONTOLOGIST 4 (1981), Bourestom and Pastalan responded to the Borup group's contention that transfer trauma is a myth and relocation planning unnecessary: "We regard these recommendations as dangerously irresponsible . . . . The conclusions upon which they are based are naive and fallacious." *Id.* at 4-5.

The research conclusions relied on by the Court in *O'Bannon* are invalidated where comprehended within a meaningful analytical framework: "[I]f one examines the studies to which Borup refers, one finds that virtually all of them were different from one another with respect to the conditions of relocation and the characteristics of the populations under study. Thus, the [Borup group] lump[s] together and treats as the same relocations under voluntary circumstances with those that were forced, relocations that involved moderate environmental change with those that involved radical environmental change, relocation programs that included extensive preparation with those that included no preparation and, finally, relocations that involved the moves of healthy elderly populations in the community with those that involved sick and debilitated populations residing in institutions. Among the 12 studies cited by Borup as yielding negative findings with respect to relocation effects, virtually all of the relocations were positive with respect to the conditions we have described and would not be expected to yield negative results . . . .

"Failure to take account of, or at least describe these crucial qualifying conditions is also apparent in the [Borup group's] own study . . . .

". . . [A] key characteristic that must attend any study of this kind is the physical and mental health status of the patients. The [Borup group] come[s] close to ignoring this point . . . .

". . . No data are presented on the level of care these patients required, on the type and extent of their disabilities, on their mental impairment, sensory problems, ability to perform the activities of daily living or on the comparability of the experimental and control groups with respect to these crucial characteristics. Like the studies they group together, the investigators have fallen into the trap of grouping all patients together and treating them as if they were similar.

"We feel that [these] studies and recommendations cannot be taken seriously. The question no longer is whether relocation has negative (or positive) effects but under what conditions and with what kinds of populations are those negative or positive effects most likely to be observed. . . . [R]adical and involuntary relocation of frail elderly individuals carries with it potentially high risks. Ample data as well as casual observation support this

addressing this point, concluded,

> A major reason for the apparently contradictory findings is that underlying all the conclusions are qualifying factors such as the characteristics of the people being moved, and of the receiving facility; the reasons for the move, and its meaning to the mover; and the helping techniques used to facilitate the moves. Thus, the results can be said to revolve around five major factors:
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> — the degree of *choice* in making the move.
> — the degree of *environmental change*.
> — the degree of *health*.
> — the degree of *preparation*.
> — the *methodology* utilized in the study.[45]

Moreover, whenever the courts have received evidence on the phenomenon of transfer trauma, they have consistently concluded that the overwhelming weight of the evidence, both in volume and credibility, supports the conclusion that abrupt relocation threatens both the lives and health of fragile, elderly nursing home residents.[46] The House of

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notion. Those of us responsible for the care and treatment of the elderly are remiss if we do not recognize these risks and act to minimize them." *Id.* at 6-7.

45. L. Pastalan, Relocation, *supra* note 2, at 2. The importance of adhering to a comprehensive analytical framework is demonstrated by the faulty conclusion reached in Borup, Gallego & Heffernan, *Relocation and its Effect on Mortality*, 19 GERONTOLOGIST 135, 136 (1979) (noting that six previous studies found increased mortality rates while twelve did not: "findings have been ambiguous and appear to be contradictory") *cited in O'Bannon*, 447 U.S. at 804 n.13 (Blackmun, J., concurring). For example, the Borup study itself did not base its conclusions on any of the five major analytical factors. The study, which concluded that "relocation does not increase the probability of mortality," is therefore fatally flawed. *See* Borup, Gallego & Heffernan, *supra*, at 138. The only conclusion reached by the study is that "the lower mortality rate of the relocated patients was a result of age and not of relocation." *Id.* at 138. In other words, the study reaches no conclusion regarding relocation trauma. *See id.* at 137-38 (summary of findings). Rather, it appears to stand for the proposition that a particular patient characteristic affects mortality rates, i.e., that the younger the resident, the less likely he or she is to die as a proximate consequence of relocation. This finding is consistent with the literature, as advanced age has long been acknowledged a strong predictor of mortality following relocation. *See, e.g.*, L. Pastalan, *supra* note 2, at 20.

46. *See* Bracco v. Lackner, 462 F. Supp. 436, 445 (N.D. Cal. 1978), where the court concludes, "Plaintiffs claim that the described consequences of forced removal, or the threat of it, are symptomatic of a phenomenon termed 'transfer trauma,' characterized by physical and emotional deterioration as well as by increased rates of mortality. While there was some conflict in the evidence on this issue, the Court finds the overwhelming weight, both in volume and credibility, to support plaintiffs."

The court described the effects of transfer trauma on particular plaintiffs: "Patients and their friends or relatives have been found weeping with fear and distress . . . . In some cases, supportive patient friendships have been undermined even though both patients remain at the Center. Mary H., 83, diabetic and totally blind and Mary B., 85, suffering from two broken hips and chronic alcoholism, developed a close supportive friendship as roommates for a year. As the Center has been depopulated, their floor was closed and they were moved to new rooms, with new roommates, on different floors . . . Mary B. . . . has suffered from continual symptoms of nausea, diarrhea and loss of appetite. Mary H. complains

Representatives Select Committee on Aging has reached the same conclusion.[47]

Additionally, if the phenomenon of transfer trauma does not exist, any relocation plan would fail to mitigate transfer trauma's life threatening effects. Such is not the case. Beginning in 1976, a model relocation plan for involuntary nursing home relocation was successfully implemented in Pennsylvania.[48] The results demonstrate clearly not only that transfer trauma is a real, rather than a hypothetical, harm, but that its foreseeable devastating consequences can be mitigated substantially.[49]

Although the *O'Bannon* majority failed to confront squarely the discrete interest of Medicaid beneficiaries in freedom from transfer trauma, it is clear that responsibility for that failure cannot entirely be laid at the door of the Court. The alleged interest was not permitted to stand alone for the Court's scrutiny; available relevant evidence was not in the record and hence not considered by the Court. These serious flaws in the review gave rise to Justice Blackmun's misgivings. In effect, the majority attempted to dismiss the interest without so much as quantifying the gravity of the harm threatened. As Justice Blackmun stated, "By focusing solely on the 'indirectness' of resulting physical and psychological trauma, the Court implies that regardless of the degree of the demonstrated risk that widespread illness or even death attends decertification-induced transfers, it is of no moment. I cannot join such a heartless holding."[50]

'Why did they separate us? Why did they take my eyes from me?' In another case, the patient did not survive the initial move between floors of the Center . . . . In the professional opinion of their treating physician, the deaths of Connie W. and Ellis W. were causally related to the trauma associated with ongoing relocation . . . ." *Id.* at 444-45. *See also* cases cited in notes 5 & 22 *supra*.

47. *Closing of Post Street Convalescent Home: Hearings Before the House Select Comm. on Aging*, 95th Cong., 2d Sess. 1-76 (1978). *See also id.* at 35 (testimony of Dr. Arthur Schwartz, University of Southern California Andrus Gerontology Center). "Clearly, the cure [referring to relocation as a result of decertification] is worse than the disease. Relocation trauma is not a professional buzz word. It should be recognized for exactly what it represents, an intolerable stress which can and frequently does result in the *untimely, tragic, unnecessary death* of the older person." *Id.* at 97 (emphasis added).

48. L. Pastalan, Relocation, *supra* note 2, at 19.

49. The impact of the model relocation plan was measured by comparing mortality rates between the relocated nursing home residents and the nursing home population at large. "For 236 persons relocated between July 1975 and July 1976 the mortality rate was 11%, as compared to 26.6% for Pennsylvania and 27.5% for the United States." *Id.*

50. 447 U.S. at 803 (Blackmun, J., concurring).

III. Transfer Trauma as a Fundamental Life and Liberty Interest

A. Constitutional Considerations

Medicaid nursing home residents are entitled to the protections of the due process clause when the facilities in which they reside are threatened with closure. They have a life and liberty interest in not being exposed unnecessarily and arbitrarily to the deleterious effects of transfer trauma.

The interest urged by elderly Medicaid nursing home residents in need of continuity in their specialized care has its roots in the foundation of our American constitutional system of government. The interest dates from the time of Blackstone, whose vision of liberty guided the Framers of the Bill of Rights. Blackstone's perception of liberty embraced the belief that "[t]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[51] Certainly a government's decision to decertify a home, if that decision will result in haphazardly planned relocation which engenders a substantial risk of death or serious mental and physical illness, is within the ambit of liberties enunciated by Blackstone. Justice Blackmun embraced a parallel constitutional analysis in his opinion in *O'Bannon* and concluded, "[W]here such drastic consequences attend governmental action, their foreseeability, at least generally, must suffice to require input by those who must endure them."[52] This line of reasoning, if accepted, would require due process intervention prior to relocation since the consequences of transfer trauma are foreseeable.[53]

The Supreme Court acknowledged that the due process clause protects the interest in liberty from physical and psychological harm in *Roe v. Wade*.[54] In *Roe* the Court found that the Fourteenth Amendment's concept of personal liberty and restrictions upon state action was broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[55] Significantly, the Court reasoned that the state could not prevent a woman from terminating her pregnancy dur-

51. 1 W. BLACKSTONE, COMMENTARIES *129.

52. 447 U.S. at 803 (Blackmun, J., concurring).

53. *See* text accompanying note 50 *supra*. *See also* critique of studies cited by Justice Blackmun, note 44 *supra*.

54. 410 U.S. 113 (1973).

55. Although the *Roe* decision is most frequently cited as a right to privacy case, its reasoning loses no force when applied in support of the proposition that elderly Medicaid beneficiaries have a fundamental liberty interest in avoiding the unnecessary effects of transfer shock. As pointed out by the Court, the particular right to privacy found in *Roe* has its

ing the first trimester because continued pregnancy could be more dangerous to the woman's physical and mental health than an abortion. The Court explained,

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent.[56]

Similarly, in the companion case of *Doe v. Bolton*,[57] Justice Douglas explained in his concurring opinion why "the freedom to care for one's health"[58] constitutes a fundamental liberty interest protected by the Fourteenth Amendment. As in *Roe*, the threat of both immediate and future physical and psychological harm was used to explain why a woman must be left free to determine whether or not to bear a child. Specific findings of harm threatening the physical health of the woman included the possible discomfort and pain of pregnancy and childbirth and its concomitant higher mortality rate.[59] The emotional health of the woman was held unjustifiably threatened by the denial of the right to terminate pregnancy in its early stages. Specific findings of unjustifiably imposed psychological harm included suffering, dislocations and misery.[60]

Given the reasoning of *Roe* and *Doe*, it follows that elderly Medicaid nursing home residents possess a similar fundamental life and liberty interest in protecting themselves from exposure to the unnecessary dangerous effects of transfer trauma. The compelling state interest here is the health and welfare of the residents, and because involuntary relocation may be more dangerous to residents' fragile physical and mental health than continued occupancy in a substandard home, the state should be barred from transferring residents in the absence of a finding that relocation with its accompanying risks is less dangerous to residents' lives and health than continued occupancy.[61] Additionally, in

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genesis in the broader Fourteenth Amendment concept of personal liberty and restrictions upon capricious state action. *Id.* at 153.

56. 410 U.S. at 153.

57. 410 U.S. 179 (1973).

58. *Id.* at 213.

59. *Id.* at 179.

60. *Id.* at 216.

61. *See* Rockhill Care Center, Inc. v. Harris, 502 F. Supp. 1227 (W.D. Mo. 1980), in which the court held that a nursing home was entitled to a preliminary injunction to halt transfer and to continue the payment of Medicaid funding where there was little basis for concluding that the nursing home was not presently suitable for Medicaid patients, or that the environment in the home would not have been superior to the situation the patients

the event that transfer becomes unavoidable, the state should be prepared to set into motion a relocation plan designed to minimize the dangerous effects of relocation. The absence of such a plan necessarily renders barren the interest of elderly Medicaid residents in liberty from unnecessary physical and emotional trauma at the hands of the state.

A constitutional analysis similar to that applied in *Roe* and *Doe* has been used to bar the states from administering dangerous psychotropic medications to committed mental patients against their will.[62] The psychotropic medication cases are generally based on the individual's right to refuse unwanted medical treatment as an aspect of liberty or privacy. However, the interest urged by elderly Medicaid beneficiaries is analogous to that posited by committed psychiatric patients,[63] since the core of the right to refuse unwanted medical treatment is the right to be free from unwarranted governmental intrusions that violate personal security.[64] Certainly, abrupt, haphazard relocation of elderly Medicaid nursing home residents, absent a compelling state interest, constitutes an unwarranted invasion of personal security.[65]

An appreciation of the nature and impact of nursing home institutionalization on the residents, as individuals and as mutually interdependent members of a community, is required to understand why

would face if forced to relocate, despite the fact that the facility had already been decertified.

"Perhaps the only policy consideration favoring the agencies is the possible loss of credibility of their decertification procedures. Decertification is presented to the Court as the sole means available for maintaining standards. In a situation where there was less dependence on Medicaid funding, and more credible alternatives for residents, the Court might be impressed by this argument. In the present context, however, defendants are asking the Court to stand aside while they 'throw the baby out with the bathwater.'" *Id.* at 1231.

62. *See, e.g.*, Rogers v. Okin, 478 F. Supp. 1342, 1360 (D. Mass. 1979), *rev'd in part, vacated and remanded*, 634 F.2d 650 (1st Cir. 1980), *cert. granted*, 451 U.S. 906 (1981). *See also* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

63. *See, e.g.*, Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980) (applying the reasoning of *Roe* and holding that forcible medication of mental patients, absent an emergency, violates their fundamental right to privacy in decisions concerning their own bodies), *cert. granted*, 451 U.S. 906 (1981).

64. *See, e.g.*, Schloendorff v. Society of N.Y. Hospital, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914) in which Judge Cardozo stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." *Cf.* Ingraham v. Wright, 430 U.S. 651, 673 (1977), in which the Court stated: "Among the historic liberties . . . was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."

65. Even though the psychotropic drug cases may be distinguished by the fact that they involve physical invasions of the body cavity (i.e., the administering of a pill or injection), the distinction does not appear persuasive. Forced evacuation from a facility that an individual considers home, which engenders a substantial physical and emotional risk to life and health, appears at least as invasive of personal security as forcing potentially dangerous psychotropic medications on an already involuntarily committed psychiatric patient.

liberty from transfer trauma is an interest that should be deemed fundamental. A nursing home is an institution that houses individuals in need of frequent nursing attention for long periods of time. Most residents are elderly; their mean age is eighty.[66] The average length of stay is 1.6 years.[67] While most nursing home residents are physically dependent on assistance in basic activities of daily life,[68] they are also often isolated from the community beyond the facility. More than half of all nursing home residents have no close family ties or visits with friends.[69] As a result, the only human and social interaction many residents experience takes place solely within the nursing home with other residents and staff.

The physical, emotional and financial dependency of the Medicaid nursing home population renders the institution more than merely the provider of nursing and medical services. Nursing homes become, in most instances, the entire and only world known to their residents. Indeed nursing homes have been likened to migrant labor camps because of the substantial control exercised over residents.[70] No similar analogy has ever been drawn to describe other classifications of health care providers.[71] It is not surprising, then, that any disruption in the nursing home's fragile environment—particularly one so drastic as involuntary, abrupt transfer—can have a devastating impact on the health and lives of residents.[72] Certainly loss of home, separation from family and

66. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NURSING HOME UTILIZATION IN CALIFORNIA, ILLINOIS, MASSACHUSETTS, NEW YORK AND TEXAS: 1977 NATIONAL NURSING HOME SURVEY 4 (Vital and Health Statistics Ser. 13—No. 48).

67. *Id.*

68. The following statistics reveal the levels of functional dependence of Medicaid nursing home residents: In 1977, 86% required assistance in bathing, 69% required assistance in dressing, 53% required assistance in using the bathroom, 33% required assistance in eating, and 66% were chairfast, bedfast or walked only with assistance. *Id. See also* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, 1977 NATIONAL NURSING HOME SURVEY 43-52 (Vital and Health Statistics Ser. 13—No. 43).

69. SENATE SPECIAL COMM. ON AGING, SUBCOMM. ON LONG-TERM CARE NURSING HOME CARE IN THE UNITED STATES: FAILURE IN PUBLIC POLICY, INTRODUCTORY REPORT, S. REP. No. 1420, 93d Cong., 2d Sess. 16 (1974).

70. "Nursing homes and migrant labor camps are analogous environments since both the labor camp and the nursing home are usually isolated from the general society; residents of both are recognized as having problems deserving of governmental attention; both groups are confined to the premises of the property either by necessity, or through choice predicated on compelling social realities existing outside the borders of the camp." Comment, *Nursing Home Access: Making the Patient Bill of Rights Work*, 54 J. URB. LAW 473, 497 (1977).

71. *Id.*

72. The following statement dramatically demonstrates why the degree of interdependence among nursing home residents makes the disruption of relocation so dangerous:

"My name is Anna Smiliansky. I was born in Russia 83 years ago. When the revolution broke out in 1917, we fled to Manchuria, then to Shanghai, where we lived for 17 years.

friends, and substantial risk to health (and possibly to life itself) all deprive residents of basic standards of life and decency which are "fundamental" and "implicit in the concept of ordered liberty."[73]

How, then, did the Supreme Court escape the conclusion that transfer trauma poses a substantial threat to Medicaid nursing home residents' constitutional rights? It appears that the Court avoided examining the *individual's* interest in freedom from transfer trauma by focusing solely on the beneficent *purpose* of decertification which purports to protect elderly Medicaid recipients interest as a *class*. Therefore, although the Supreme Court in *O'Bannon* did not squarely face the risk of harm from transfer trauma, it reasoned that decertification followed by transfer works to the benefit of relocated residents "as a whole."[74] The Court concluded that decertification triggering relocation "involves the Government's attempt to confer an indirect benefit on Medicaid patients by imposing and enforcing minimum standards of care on facilities like Town Court."[75] The Court's reasoning assumes that decertification is an effective means of enforcing minimum standards of care.[76]

The presumption that decertification constitutes a meaningful enforcement mechanism is without foundation. That decertification is an ineffective means of enforcing minimum standards of care is substantiated by the fact that both the states and the Department of Health and Human Services rarely decertify nursing homes from eligibility to participate in the Medicaid program even in the face of pervasive deficiencies.[77] The most common practice is to require plans of correction.[78]

My husband worked for an American firm there. Then the Chinese revolution broke out, so we had to leave again. We went to Israel and lived there for five years.

"We came to San Francisco in 1967, and opened a cleaning establishment here, but only a few months later, my husband died.

"Now I get only a widow's pension through Social Security.

"I have lived in this hospital since 1975, when the doctor said that because of my heart condition and severe arthritis, and the fact that I had had several falls, I must come here.

"Now I feel this is my home. My only friend is here. Please don't make me move." Statement of Anna Smiliansky (Feb 19, 1979) (written in support of motion for preliminary injunction to halt relocation in Bracco v. Lackner, 462 F. Supp. 436 (N.D. Cal. 1978)).

73. Roe v. Wade, 410 U.S. 113, 152 (1973).

74. 447 U.S. at 789-90 n.22 (citations omitted).

75. *Id.* at 787.

76. *See* 42 U.S.C. § 1396(a)(19) (1976), which provides that the Medicaid program be carried out in a manner ensuring the "best interests of the recipients."

77. Regan, *When Nursing Home Patients Complain: The Ombudsman or the Patient Advocate*, 65 GEO. L.J. 691, 693-94 (1977); Regan, *Quality Assurance Systems in Nursing Homes*, 53 J. URB. L. 153, 180-85 (1975); Comment, *Regulation of Nursing Homes—Adequate Protection for the Nation's Elderly?*, 8 ST. MARY'S L.J. 309, 320 (1976).

78. 42 C.F.R. § 442.251(b) (1980). In 1974, for example, of 7,000 Medicaid nursing

State agencies are understandably hesitant to impose this drastic sanction, fully aware that the Medicaid bed shortage may mean that there simply is no facility (let alone a better facility) to which residents can be relocated.[79] As a result, while the government may be attempting to enforce minimum standards (albeit for the most part with qualified success), it is at the same time risking the lives and health of those it has voluntarily undertaken to protect without giving them the benefit of due process.

B. *Yaretsky v. Blum:* A Finding of Transfer Trauma Despite *O'Bannon*

Despite the Supreme Court's earlier decision in *O'Bannon*, the Second Circuit, in *Yaretsky v. Blum*,[80] recognized the great physical and emotional harm threatened by transfer trauma. In *Yaretsky*, Medicaid nursing home residents sought an injunction on due process grounds when threatened with a precipitous transfer resulting from an HEW regulatory Utilization Review.[81] The Second Circuit held that Medicaid patients have a constitutionally protected liberty interest in avoiding the effects of transfer trauma.[82] The court found that patients are entitled to due process even if transferred from a lower level of care to a higher one, and even if the transfer is initiated by private physicians.[83] This conclusion departs significantly from the Supreme Court's reasoning in *O'Bannon* in two major respects.

First, the decision in *Yaretsky* rejects the contention that transfer by a private physician is an indirect consequence of state action and is therefore undeserving of Fifth Amendment interdiction. The court noted that when a patient is transferred either to a lower or to a higher level of care the state Medicaid authorities adjust the patient's benefits.

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homes, 4,776 homes with deficiencies were certified with six-month timetables for correction, while only 327 homes were decertified by the states. SENATE SPECIAL COMM. ON AGING, *supra* note 70, at 104.

79. Indeed, decertification of a facility may actually result in discontinuance or termination of medical assistance if alternative Medicaid beds are not found for the residents who must be moved. Bracco v. Lackner, 462 F. Supp. 436, 444 (N.D. Cal. 1978). *See* Brown, *An Appraisal of the Nursing Home Enforcement Process*, 17 ARIZ. L. REV. 304, 324-56 (1975), in which the author discussed more flexible enforcement mechanisms such as citation systems and receiverships. *See also* Rockhill Care Center, Inc. v. Harris, 502 F. Supp. 1227 (1980).

80. 629 F.2d 817 (2d Cir. 1980), *cert. denied*, 450 U.S. 925 (1981).

81. Utilization Review is a procedure promulgated through HEW regulations requiring state Medicaid authorities to audit patients in order to determine whether or not they require lesser or greater levels of care. A determination that an individual requires a lesser level of care results in a decrease in financial benefits; a determination that an individual requires a higher level of care results in an increase in financial benefits. *Id.* at 819-20.

82. *Id.* at 821.

83. *Id.* at 820.

"The state has, in essence, delegated a decision to increase or reduce a public assistance recipient's benefits to a 'private' party; but such a delegation cannot prevent due process guarantees from attaching."[84]

Second, the court rejected the notion espoused by the Court in *O'Bannon*, that transfer of a patient to a higher level of care deserves no due process protection because such transfer involves no withdrawal of "direct benefits" which are "essentially financial in character."[85] Although the court in *Yaretsky* recognized that transfer from a lower to a higher level of care necessarily involves no withdrawal of protected financial statutory entitlement benefits, the court nonetheless held that "a patient's interest in avoiding the effects of 'transfer trauma' is a constitutionally protected 'liberty interest.' "[86] Clearly, the court in *Yaretsky* viewed liberty from transfer trauma, in and of itself, as a viable constitutional interest protected by due process.

The court also attempted to distinguish the facts before it from those in *O'Bannon* in order to avoid the conclusion reached by the Supreme Court (i.e., that decertification triggering transfer does not cause Medicaid recipients to suffer an injury "direct" enough to result in a deprivation of life, liberty or property).[87] The court justified its holding by noting that the situation before it involved the decision to transfer *particular* patients, rather than to decertify the facility.[88] The court went on to state:

> Moreover, *O'Bannon* was not decided on the basis of a record that included much detailed information about the existence of transfer trauma . . . . We note that the record in this case contains ample evidence that transfer of elderly patients, even when it does not pose an increased risk of mortality, carries with it the undeniable possibility of emotional and psychological harm—at least in the case of many individuals. To us this does not seem any less a 'liberty interest' than a prison inmate's interest in not being transferred from a penitentiary to a psychiatric hospital . . . .[89]

84. *Id.*

85. 447 U.S. at 786-87.

86. 629 F.2d at 821.

87. *Id.* The court in *Yaretsky v. Blum* asserted, "We do not believe, however, that *O'Bannon* forecloses the question whether there is a liberty interest in avoidance of transfer trauma . . . ." *Id.*

88. *Id.* The relevance of this factual distinction is doubtful since either decision may result in the involuntary transfer of the *individual*. *See* text accompanying note 41 *supra*, in which Justice Blackmun, concurring in *O'Bannon*, criticizes the majority's rejection of reliance on transfer trauma as denial of a liberty interest because "decertification . . . is not the same for purposes of due process analysis as a decision to transfer a particular patient." 447 U.S. at 793.

89. 629 F.2d at 821. *See* Vitek v. Jones, 445 U.S. 480 (1980), in which the Court held

Significantly, before the *Yaretsky* injunction was made permanent, the parties entered into a consent decree embodying several procedural safeguards with respect to patient transfers.[90] The state's consent to the formulation and implementation of a relocation plan tailored to lessen the physical and emotional havoc of precipitous, involuntary relocation reflects the growing awareness of state and federal officials alike that when relocation is necessary, humane and orderly relocation planning is also necessary.[91]

Conclusion: The Due Process Remedy

Since 1974 the federal courts have consistently recognized the substantial risk of physical and psychological harm posed by involuntary relocation of Medicaid nursing home residents.[92] *Yaretsky* held that residents have a constitutionally cognizable interest in liberty from the effects of transfer trauma deserving of due process protection.[93]

The pivotal question remains: what process is due? That predecertification hearings cannot mitigate the harm threatened to elderly residents' physical and mental health is a crucial consideration.[94] Since

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that a prisoner has a liberty interest in not being transferred from a prison to a mental hospital without procedural protections, including a finding that he is suffering from a mental illness for which he cannot secure adequate treatment in prison. *See* note 39 and accompanying text *supra*, in which Justice Blackmun reaches the same conclusion in *O'Bannon*.

90. 629 F.2d at 820.

91. *See* L. Pastalan, Relocation, *supra* note 2, at Appendix: Summary of State of Pennsylvania Relocation Plan. *See also* Bracco v. Lackner, 462 F. Supp. 436, 445 (N.D. Cal. 1978) (brief discussion of the crucial aspects of a proper relocation plan); HEW Administration on Aging, Technical Assistance Memorandum (no. 75-1 February 19, 1975), stating, "There is a genuine hazard in the relocation of infirm aging persons from one facility to another. Dramatic increases [in mortality rates] far in excess of what would normally be expected have been documented." (quoted in Klein v. Mathews, 430 F. Supp. 1005, 1009 (D.N.J. 1977)).

92. *See* note 5 & 22 *supra*.

93. *See* text accompanying note 82 *supra*.

94. The purpose of decertification hearings is to determine whether or not "good cause for transfer" exists. *O'Bannon*, 447 U.S. at 784. Decertification hearings, when granted, do not address the merits of the relocation decision and therefore do not affect the *transfer process*. The only meaningful purpose such hearings could fulfill in relation to elderly Medicaid beneficiaries' interest in freedom from transfer trauma would be to determine whether or not a compelling state interest necessitating transfer exists (*i.e.*, whether or not continued occupancy poses a greater threat to residents' lives and health than does transfer). *See* Rockhill Care Center, Inc. v. Harris, 502 F. Supp. 1227, 1232 (1980) ("Except for *Town Court*, the case law on pretermination hearing rights in nursing home medicaid cases has seemed to fall into two classifications: (1) where *significant safety conditions* were at issue, *emergency* terminations of benefits would be sanctioned, with full evidentiary hearings deferred [*see, e.g.*, Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975)]; (2) where less pressing health and safety conditions were in question, a pretermination evidentiary hearing before

it is the *relocation process* that threatens elderly Medicaid beneficiaries' interest in freedom from unjustified emotional and physical harm, any meaningful due process safeguard must affect the relocation process itself. Therefore, the most sensible, effective solution appears to be the formulation and implementation of relocation plans designed to mitigate the disastrous effects of transfer trauma should relocation become unavoidable.[95] This is the most meaningful way to prevent the species of unbridled state discretion that has resulted in the dangerously haphazard relocation of elderly Medicaid beneficiaries.[96] The apparent be-

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an independent hearing officer would be required [*See*, *e.g.*, Hathaway v. Mathews, 546 F.2d 227 (7th Cir. 1976)]" (emphasis added and citations & footnote omitted)).

95. *See* note 24 *supra*. There is no reason why a court of competent jurisdicition could not order the formulation and implementation of a relocation plan tailored to mitigate the lifethreatening effects of transfer trauma if it deemed fit. The Supreme Court has repeatedly held, in a variety of contexts, that once a constitutional violation has occurred, a court has broad powers to remedy that violation. *See*, *e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). It is axiomatic that this authority is not limited by actions taken by the state legislature. *See*, *e.g.*, Cooper v. Aaron, 358 U.S. 1, 17 (1958); United States v. Peters, 5 U.S. (1 Cranch) 115 (1809).

Particularly relevant to this discussion is Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977), in which the Minnesota Legislature refused to appropriate funds to improve an institution for the mentally retarded pursuant to a court order. In response to a claim that the state's obligation is subject to what action the legislature may take on a specific budget request, the court stated, "If Minnesota chooses to operate hospitals for the mentally retarded, the operation must meet minimal constitutional standards, and that obligation may not be permitted to yield to financial considerations . . . . There must be no mistake in the matter. The obligation of the defendants to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what the defendants may be able to accomplish with means available to them. As stated, if Minnesota is going to operate institutions like Cambridge, their operation is going to have to be consistent with the Constitution of the United States." *Id.* at 1132.

96. A quotation from the lengthy opinion in *Bracco v. Lackner* poignantly describes the quality and degree of unbridled discretion that Medicaid nursing home residents seek to avoid. "What caused all this fear, havoc, injury and misery? Was it a war, flood, tidal wave, earthquake or other terrifying Act of God? Not at all. It was the decision of a large State bureaucracy, not unaided by a huge federal bureaucracy, requiring these helpless, elderly patients to move out in a hurry . . . ." 462 F. Supp. at 445.

The dangerous degree of unbridled discretion that threatens elderly Medicaid residents in the absence of an adequate relocation plan is likewise demonstrated by the situation presented in Brede v. Director for Dep't of Health, 616 F.2d 407 (9th Cir. 1980). In *Brede*, patients at Hale Mohalu, a Hawaii leprosarium, brought suit complaining of the closing of the leprosarium. "A number of the facility's residents, in appreciation of the residential nature of Hale Mohalu with its private or semi-private living quarters and easy access to friends and family, chose to remain . . . . [T]he inpatient residents remaining at Hale Mohalu were among the more elderly, afflicted, and crippled of the leprosy population. On January 26, 1978, the Hale Mohalu facility was officially closed. In recognition of the continued residence of those patients who had decided to remain, the state provided water, electrical power, telephone service, food, medical care, and supplies *until September 1, 1978, when all these services were terminated*. On September 5, a number of those patients still at Hale Mohalu filed . . . suit . . . ." *Id.* at 410 (emphasis added).

lief of Medicaid regulatory enforcement agencies that decertification triggering transfer remains a viable method to enforce standards of care does little to justify the devastating effects of transfer trauma on fragile, elderly nursing home residents.[97] The Constitution guarantees to all individuals the right to be free from unwarranted state-imposed physical and psychological harm. How much longer will this fundamental right be denied to those among us who find themselves in government regulated nursing homes?

97. The beneficent purpose of decertification loses its vitality in light of the fact that decertification is an ineffective enforcement mechanism. *See* notes 78, 79 and accompanying text *supra*. This is particularly true when the purpose of decertification is weighed against the dangers of relocation shock. "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).