A HISTORY OF UNEQUAL TREATMENT: THE QUALIFICATIONS OF HANDICAPPED PERSONS AS A "SUSPECT CLASS" UNDER THE EQUAL PROTECTION CLAUSE

MARCIA PEARCE BURGDORF

ROBERT BURGDORF. JR.

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Marcia Pearce Burgdorf*
Robert Burgdorf, Jr.**

INTRODUCTION

The last half decade has witnessed the addition of a new minority group, handicapped persons, to the ranks of those societal elements, including Blacks,[1] Mexican Americans,[2] women,[3] religious sects,[4] illegitimate children,[5] aliens,[6] and welfare recipients,[7] who have taken recourse to the United States judicial system in their quest for equality. Litigation dealing with the legal rights of handicapped people began on a broad front early in the 1970's, and there are presently more than 150 such cases either completed or pending, covering a wide range of legal issues.

As with other groups seeking equal opportunities in our society, a major legal tool of handicapped persons in attacking discrimination has been the fourteenth amendment's guarantee of "equal protection of the laws."[8] Equal protection arguments have been the focus of litigation aimed at securing and safe-

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* B.A., 1969, Manhattanville College, N.Y.; J.D., 1972, University of Notre Dame; Assistant Professor of Law, University of Maryland; Director of the Developmental Disabilities Law Project, and Consultant to the President's Committee on Mental Retardation.

** A.B., 1970, J.D., 1973, University of Notre Dame. Mr. Burgdorf has been involved in a number of lawsuits dealing with the legal rights of handicapped persons, and has authored several publications dealing with special education and the law.

1. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88 (1971).
2. *See, e.g.*, Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142, *on remand*, 350 F. Supp. 1241 (1972), *cert. denied*, 413 U.S. 920, 922, *rehearing denied*, 414 U.S. 881 (1973).
3. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973).
4. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).
5. *See, e.g.*, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).
6. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).
7. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).
8. U.S. CONST. amend. XIV, § 1, provides in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

guarding, among others, the following legal rights of handicapped persons: equal opportunity for education;[9] right to residential and treatment services in the least restrictive environment;[10] freedom from involuntary servitude;[11] freedom from restrictive zoning ordinances;[12] free access to public buildings and transportation systems;[13] freedom from confinement in the absence of proper commitment procedures;[14] and the right to procreate.[15]

The purpose of this article is to consider the degree to which handicapped persons, as a group, merit special judicial attention within the framework of the equal protection clause. Initially, the article will describe the composition of the grouping "handicapped persons," and will examine, from an historical perspective, the discrimination against handicapped people in two significant areas of state involvement: public education and residential institutionalization.

In conjunction with the historical discussion of unequal treatment, the article will examine recent court decisions which have struck down this pattern of discrimination and have recognized many of the legal rights of handicapped citizens. Subsequently, the article will focus upon the criteria for "suspectness" under the equal protection clause, and explore the extent to which legislation and administrative regulations affecting handicapped people are predicated upon such "suspect" classifications.

9. *See, e.g.*, Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866, 875 (D.D.C. 1972); *In re* G.H., 218 N.W.2d 441 (N.D. 1974); *see* note 136 *infra*.

10. *See, e.g.*, Welsch v. Likins, 373 F. Supp. 489 (D. Minn. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972); Wyatt v. Stickney, 344 F. Supp. 373, 380, 384 (N.D. Ala. 1972) (App. A, §§ 2, 7, 26); *see* notes 234-77 and accompanying text *infra*.

11. *See, e.g.*, Souder v. Brennan, 367 F. Supp. 808 (D.D.C. 1973).

12. *See, e.g.*, Stoner v. Miller, 377 F. Supp. 177 (E.D.N.Y. 1974); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974); Unteed v. Lehman, 77 Ohio L. Abs. 353, 150 N.E.2d 509 (1957).

13. *See, e.g.*, Thoben v. Eastern Airlines, No. 74-937, (D.D.C., filed June 20, 1974); Urban League v. Washington Metropolitan Area Transit Authority (D.D.C. 1973). *See generally* Sorkin, *Equal Access to Equal Justice: A Civil Right for the Physically Handicapped*, 78 CASE & COMMENT 41 (1973) [hereinafter cited as Sorkin]; Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1509 (1973) [hereinafter cited as Note, *Abroad in the Land*].

14. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715 (1972); Lessard v. Smith, 349 F. Supp. 1098 (E.D. Wis. 1972); Dixon v. Attorney General of Pennsylvania, 313 F. Supp. 653 (M.D. Pa. 1970).

15. *See, e.g.*, Wyatt v. Adderholt, 368 F. Supp. 1382 (N.D. Ala. 1973); Wade v. Bethesda, 337 F. Supp. 671 (S.D. Ohio 1971). *See generally* Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917 (1974).

I. WHO ARE "HANDICAPPED" PERSONS?

A. *General Definition*

The dictionary defines "handicap" as "a disadvantage that makes achievement unusually difficult."[16] When used generically, however, terms like "the handicapped" have a narrower meaning, referring to a particular type of "disadvantage"—a mental, physical, or emotional disability or impairment.[17] Thus, a handicapped person is an individual who is afflicted with a mental, physical, or emotional disability or impairment which makes achievement unusually difficult. It should be emphasized that physical, mental, or emotional disabilities qualify as handicaps only if they hinder achievement. Moreover, the phrase "unusually difficult" makes it clear that the hindrance must be substantial; a slight inconsequential disability or impairment is not a handicap.

But to be complete, this description requires one final element: a social judgment. A person truly qualifies as handicapped only when he or she is so labeled by others. Certain relatively severe types of impairments, such as blindness, deafness, absence or paralysis of arms or legs, or serious degrees of mental retardation or of mental illness, are nearly always considered handicaps in our society. Other impairments, such as the absence of a finger or a toe, mild mental retardation and emotional disturbance, color or night blindness, partial hearing loss, and many others, may or may not be considered handicaps. A person can be handicapped for one purpose and not for another; for example, the "six hour mentally retarded child" is considered mentally retarded during the time he or she is in school but copes well and is considered "normal" outside the academic environment.[18]

In a sense, "handicapped" is an artificial grouping created by the labeling process in our society.[19] From the broad spectrum

16. WEBSTER'S INTERNATIONAL UNABRIDGED DICTIONARY 1027 (3d ed. 1966).

17. "Handicapped" is both the accepted everyday expression and a common statutory term for describing persons having such disabilities or impairments. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1011.3 (West 1974); CAL. EDUC. CODE § 6941 (West 1975); NEB. REV. STAT. § 43-604 (1974); OHIO REV. CODE ANN. § 3323.03 (Page 1974).

However, use of a handicapping condition as a collective noun, as "the handicapped" or "the mentally retarded," is generally disfavored by handicapped individuals and their advocates, because it tends to stress the differentness of such people rather than the characteristics they share with others. Adjectival or prepositional phraseology such as "handicapped people," "mentally retarded citizens," "persons with cerebral palsy," "individuals with handicapping conditions," are preferred.

18. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE SIX HOUR RETARDED CHILD 1 (1969) (pamphlet published by U.S. Dep't of H.E.W.).

19. *See, e.g.*, Rains, Kitsuse, Duster & Freidson, *The Labeling Approach to*

of human characteristics and capabilities certain traits have been singled out and called handicaps.[20] The fine line between "handicapped" and "normal" has been arbitrarily drawn by the "normal" majority. Frequently, the various disabilities called "handicaps" have nothing in common except the label itself:

> Whatever characteristics such individuals may or may not have had in common prior to their classification, it is their involvement in the classification process that has generated the characteristics they all share—their social fate as members of a status category.[21]

Moreover, a person whose condition need not be a substantial impediment may become "handicapped" if he or she is labeled and treated as "handicapped" by members of society. Educators and psychologists use the term "self-fulfilling prophecy" to describe a process whereby persons assigned stigmatizing labels tend to conform to the expectations created by such labels.[22] This effect may be magnified when, as in the case of handicapped persons, the label has practical and legal ramifications.

B. *State Action Factor*

Equal protection challenges under the fourteenth amendment are confined to the realm of state action.[23] Combining the concept of "state action" with those definitional characteristics already mentioned steers any meaningful legal inquiry in the direction of handicapped persons who have been the subject of discriminatory actions by state officials, whether through statutes, administrative practices, or general policies. For purposes of this discussion, handicapped persons, as a class, may be described as those individuals: (a) afflicted with mental, physical, or emotional disabilities or impairments which make achievement unusually difficult; *or* (b) labeled inaccurately as having a disability or impairment; *and* (c) subjected by virtue of (a) or (b), above, to discriminatory treatment by state legislation, policies or practices.

Deviance, in 1 ISSUES IN THE CLASSIFICATION OF CHILDREN 88, 91 (N. Hobbs ed. 1975) [hereinafter cited as Rains].

20. *Id.*

21. *Id.* at 91-92. For this reason, it is proper to treat "handicapped persons" as a single class for purposes of legal analysis, even though the underlying physical, mental, or emotional handicapping conditions of individuals included in that grouping may be quite dissimilar. All such persons are similar in that they have been considered "handicapped" and suffered the consequences thereof.

22. Popularized by R. Rosenthal and L. Jacobson in PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPIL'S INTELLECTUAL DEVELOPMENT (1968). *See also* Rains, *supra* note 19, at 97-98; Guskin, Bartel & MacMillan, *Perspective of the Labeled Child*, 2 ISSUES IN THE CLASSIFICATION OF CHILDREN 189-212 (N. Hobbs ed. 1975).

23. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948).

The class of handicapped persons, as defined herein, is composed of two distinctly ascertainable subgroups. "Handicapped persons" encompasses all people who are subjected to discriminatory state action because they are classified by state agencies and officers as fitting into one of the officially recognized categories of handicapping conditions; or even though not so identified, they are, in fact, demonstrably afflicted by a handicapping condition which falls within one of the officially recognized categories.

1. *Those categorized by official state processes.*

First, the term "handicapped persons" encompasses all those people who have been diagnosed, labeled, or otherwise classified by state legislation, state officials, and state agencies as having a handicap. Thus, the state and its categorization processes define who is handicapped. To determine this class of handicapped persons, one need only focus upon those persons singled out by statutes and administrative regulations for differential treatment because of a handicapping condition.

Although there are some terminological differences from state to state, the following are among the most common handicapping conditions resulting in discriminatory treatment by state agencies and legislatures: deafness or impaired hearing,[24] blindness or impaired sight,[25] epilepsy,[26] cerebral palsy,[27] autism,[28] mental illness,[29] physical or crippling disability,[30] emotional disturbance,[31]

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24. *See, e.g.*, CAL. EDUC. CODE § 2575 *et seq.* (West 1969); MONT. REV. CODES ANN. § 80-101 *et seq.* (1947); OHIO REV. CODE ANN. §§ 3323.03, 3323.06, 3325 (Page 1972).

25. *See, e.g.*, CAL. EDUC. CODE § 2575 *et seq.* (West 1969); MONT. REV. CODES ANN. § 80-101 *et seq.* (1966). Almost all states have "White Cane Laws." *E.g.*, MO. ANN. STAT. §§ 304.080-304.110 (Vernon 1959).

26. *See, e.g.*, CAL. VEH. CODE § 12805 (West 1971) (recent amendments have deleted the use of the word "epileptic," but the intent of the section is apparently unchanged), and similar statutes discussed in Fabing & Barrow, *Restricted Driver's Licenses to Controlled Epileptics: A Realistic Approach to a Problem of Highway Safety*, 2 U.C.L.A.L. REV. 500 (1955). *See generally* Perr, *Epilepsy and the Law*, 7 CLEV.-MAR. L. REV. 280 (1958) [hereinafter cited as Perr].

27. *See, e.g.*, MINN. STAT. ANN. § 447.45 *et seq.* (Supp. 1975); MO. ANN. STAT. § 202.504.2(2) (Vernon Supp. 1974); NEB. REV. STAT. § 43-604(3)(c) (1974).

28. *See, e.g.*, CAL. EDUC. CODE § 6750.1 (West 1975); MO. ANN. STAT. § 202.504.2(4) (Vernon Supp. 1975).

29. *See, e.g.*, MINN. STAT. ANN. § 253A.02 *et seq.* (1971). *See generally* Ennic, *Civil Liberties and Mental Illness*, 7 CRIM. L. BULL. 101 (1971).

30. CAL. VEH. CODE § 9105 (West 1971); MISS. CODE ANN. § 41-11-101 (Supp. 1974); *id.* § 49-7-19 (1972); MONT. REV. CODES ANN. § 80-105 (1966); NEB. REV. STAT. § 43-604(3) (1974); OHIO REV. CODE ANN. § 3317.06 (Page 1972); WIS. STAT. ANN. § 40.53(2) (1966). For a judicial definition, *see, e.g.*, People v. Lockwood, 308 Mich. 618, 14 N.W.2d 517, 518 (1944). *See generally* Sorkin, *supra* note 13; Note, *Abroad in the Land, supra* note 13.

31. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-225(1) (1958); MISS. CODE ANN.

speech impairment,[82] mental retardation,[83] and certain other neurological and educational impairments.[34]

2. Those not categorized by official state processes.

In addition to those persons identified by the state as being handicapped, there is another, smaller group of persons who, although they have not officially been labeled as handicapped, are in fact afflicted with a handicapping condition and face discriminatory treatment because of it. For example, a person confined to a wheelchair may not have come to the attention of the state and officially been classified as physically disabled. Yet that person does have a serious handicap and may be subjected to unequal treatment because of it, as where, for example, he or she wishes to enter a public building which is not accessible to wheelchairs.[35]

Similarly, numerous handicapped children remain unidentified within the normal classroom population.[36] Because they have not been diagnosed as handicapped, they are not being provided appropriate educational programs. But in reality they do have disabilities and need educational services suited to their special needs. Precisely because they have not been identified as handicapped, these children are denied an appropriate public education program.

The group of handicapped persons not identified by state agencies is comprised of persons having handicapping conditions of the same types as those categorizations described above;[37] the only difference is that they have not been officially recognized as fitting into one of the designated categories. Hence, this second group of handicapped persons is determinable; their membership in the class of handicapped people can be determined by the diagnoses of professionals in the fields of pyschology, medicine, and

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§ 37-7-301 (1972); NEB. REV. STAT. § 43-604(5) (1974); OHIO REV. CODE ANN. § 3317.06 (Page 1972).

32. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1011.3(h) (Supp. 1974); CAL. EDUC. CODE § 6802(e) (West 1975).

33. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-172a *et seq.* (1958). *See, generally* Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133 (1972) [hereinafter cited as Murdock]. Frequently, statutes retain obsolete terminology, such as "idiots," "morons," "imbeciles" and "feeble-minded" in referring to mental retardation. *See, e.g.*, MISS. CODE ANN. § 99-13-1 (1972).

34. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1011.3(g) (Supp. 1974); CAL. EDUC. CODE § 6750 (West 1975); MO. ANN. STAT. § 202.504.2(6) (Vernon Supp. 1975). This category includes such impairments as dyslexia, developmental aphasia, minimal brain dysfunction, and perceptual disabilities.

35. *See, e.g.*, Sorkin, *supra* note 13.

36. *See* note 97 and accompanying text *infra.*

37. *See* text accompanying notes 24-34 *supra.*

education. If a person can be shown to meet the criteria for one of the categories of recognized handicapping conditions, then that individual is a "handicapped person," even if the state has not had occasion to so identify that person.

II. A DISMAL HISTORY OF UNEQUAL TREATMENT

A. *Overview: State Laws and Practices*

A federal court in Michigan has described handicapped persons as "a group that ranks among the state's most misfortuned citizens."[38] Historical and present-day examples of this pattern of discriminatory treatment afforded handicapped people are not difficult to find. The majority of American states either have, or did have, statutes providing for the involuntary sterilization of mentally handicapped and certain physically handicapped citizens.[39] A current Mississippi statute, for instance, permits sterilization for those "afflicted with hereditary forms of insanity that are recurrent, idiocy, imbicility, feeblemindedness, or epilepsy . ,... ."[40] At one time in the late 1950's, 28 states had sterilization statutes, and 17 of those laws specifically included persons with epilepsy, as well as the mentally ill and mentally retarded.[41]

Likewise, many states have statutory prohibitions on marriages between handicapped persons. Most states proscribe marriage where one of the parties is mentally ill or mentally retarded,[42] and some also limit the right of physically handicapped people to marry.[43] At least 17 states have had prohibitions against marriage by persons with epilepsy.[44]

A number of states restrict or deny the right of mentally

38. Harrison v. Michigan, 350 F. Supp. 846, 849 (E.D. Mich. 1972).

39. *See* THE MENTALLY DISABLED AND THE LAW ch. 6 (S. Brakel & R. Rock, eds. 1971); Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917 (1974).

40. MISS. CODE ANN. § 41-45-1 *et seq.* (1972).

41. Perr, *supra* note 26, at 290.

42. *See, e.g.,* KY. REV. STATS. ANN. § 402.020(1) (1970); MONT. REV. CODE ANN. § 48-105 (1947). Nor have the courts always shown themselves indisposed to enforce such prohibitions. A 1952 Kentucky decision, Beddow v. Beddow, 257 S.W.2d 45, 48 (Ky. 1952), quoted with approval the language of an 1834 ruling, Jenkins v. Jenkins' Heirs, 32 Ky. (2 Dana) 102, 104 (1834), which declared:

> A person "of unsound mind,"—an idiot, for example, is, as to all intellectual purposes, dead; and such a being, destitute of intellectual light and life, is as incapable as a dead body of being a husband or a wife in a legal, rational or moral sense.

43. *See, e.g.,* MONT. REV. CODES ANN. § 48-104 (1947), which provides that a marriage is voidable at the option of a party to a marriage "[i]f either party to a marriage be incapable from physical causes of entering into the marriage state . . . ."

44. Perr, *supra* note 26, at 289.

handicapped people to enter into contracts.[45] For a lengthy period in English and American jurisprudence, this contractual prohibition was applied to "deaf mutes" as well, based upon "[t]he old doctrine that a deaf mute was presumed to be an idiot . . . ,"[46] Moreover, for a person who was deaf and dumb *and blind* (as was Helen Keller), this presumption of incapacity to contract was irrebutable, for such a person "would be considered in law as incapable of any understanding, being deficient in those inlets which furnish the human mind with ideas."[47]

A blatant example of discrimination against handicapped people is found in a federal statute outlining qualifications for admission of aliens to the United States. Title 8, section 1182 of the United States Code provides that the following classes of aliens (in addition to criminals, paupers, vagrants, professional beggars, drug addicts, prostitutes, and polygamists) shall be excluded from admission to the United States and shall be ineligible to receive visas:

> (1) Aliens who are mentally retarded;
> (2) Aliens who are insane;
> (3) Aliens who have had one or more attacks of insanity;
> (4) Aliens afflicted with psychopathic personality, or sexual deviation, or mental defect;
>
> (7) Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such nature that, it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living . . . .

Moreover, a medical certificate issued by the examining physicians, which states that a person has any such disability, is conclusive.[48] The enforcement of these sections has blocked the entry into this country of numerous persons afflicted with various types of physical and mental disabilities.[49]

45. *See, e.g.*, ALA. CODE tit. 9, § 43 (1958); COLO. REV. STATS. ANN. § 7[illegible]-1-21 (1973); GA. CODE ANN. § 20-206 (1964); C.J.S. *Contracts* § 133(1) (1966).

46. Alexier v. Matzke, 151 Mich. 36, 115 N.W. 251 (1908). The court stated that this doctrine no longer prevails and that "deaf-mutes" could enter into contracts. *See also* Collins v. Trotter, 81 Mo. 275, 282 (1883).

47. Brown v. Brown, 3 Conn. 299 (1821) (dictum).

48. United States *ex rel.* Wulf v. Esperdy, 277 F.2d 537 (2d Cir. 1961); United States *ex rel.* Saclarides v. Shaughnessy, 180 F.2d 687 (2d Cir. 1950).

49. *See, e.g.*, United States *ex rel.* Saclarides v. Shaughnessy, 180 F.2d 687 (2d Cir. 1950); United States *ex rel.* Dunner v. Curran, 10 F.2d 38 (2d Cir.), *cert. denied*, 271 U.S. 663 (1925) (fifteen-year-old son of an immigrant minister

Handicapped persons are routinely denied other rights which most members of our society take for granted, including the right to vote,[50] to obtain a driver's license[51] or a hunting and fishing license,[52] to enter the courts,[53] and to hold public office.[54]

Often state laws and practices concerning handicapped people can only be termed "bizarre." For many years, Wisconsin had a statute which, in the interest of science, required the superintendents of state homes for the mentally retarded to authorize exploratory brain surgery upon the corpses of residents of such homes.[55]

One collection of strange provisions which discriminate against physically handicapped persons can best be described as "ugly laws." Until recently, the Chicago Municipal Code provided:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.[56]

Columbus, Ohio,[57] Omaha, Nebraska,[58] and other cities still have

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was denied admission to United States because of a heart valve problem); United States *ex rel.* Markin v. Curran, 9 F.2d 900 (2d Cir.), *cert. denied,* 270 U.S. 647 (1926).

50. *See, e.g.,* KY. CONST. § 145 ("idiots and sane persons"); NEB. CONST. art. VIII, § 2 (1875), *as amended,* art. VI, § 2 (1920) (persons who are "non compos mentis"); P.R. LAWS ANN. tit. 16, § 10 (1961). For a case in which mentally retarded plaintiffs successfully sued to secure their right to vote, *see* Carroll v. Cobb, C.A. No. L-6585-74-P.W. (Super. Ct. Burlington County, N.J., Oct. 29, 1974). *See also* notes 335-40 and accompanying text *infra.*

51. *See, e.g.,* CAL. VEH. CODE § 12805(c), (d) (West Supp. 1975); OHIO REV. CODE ANN. § 4507.08(B), (C) (Page 1973). Nearly all states place restrictions upon the driving rights of individuals with epilepsy. *See* Perr, *supra* note 26, at 292-96.

52. *See, e.g.,* MISS. CODE ANN. § 49-7-19 (1972).

53. *See* Sorkin, *supra* note 13, at 41.

54. *See, e.g., In re* Killeen, 121 Misc. 482, 201 N.Y.S. 209 (1923), where the court held that an insane person was not eligible for public office, as a matter of public policy, notwithstanding the fact that the court could perceive no constitutional, statutory, or common law basis for such a ruling.

55. WIS. STAT. ANN. § 52.04 (1930), *as amended* (1945) (repealed 1947) provided in relevant part:

> It shall be the duty of the superintendent of each home, whenever any properly committed inmate of said home shall die, to cause an examination to be made in said home, by the physician in charge, upon the brain of such inmate if in the judgment of said superintendent such post-mortem examination may prove of benefit to scientific research and investigation.

56. CHICAGO, ILL., MUN. CODE § 36-34 (1966) (repealed 1974).

57. COLUMBUS, OHIO, GEN. OFFENSE CODE § 2387.04 (1972).

58. *Unsightly Beggar Ordinance,* OMAHA, NEB., MUN. CODE OF 1941 § 25 (1967).

similar ordinances in effect. Lest it be thought that these are merely "dead letter" laws, an Omaha police officer recently arrested a man for violating such an ordinance.[59]

Employment is one area of particularly widespread discrimination against those with handicaps. Only a small percentage of the handicapped Americans who could work if given the opportunity are actually employed.[60] Transportation, physical barriers and employers' prejudices have combined to deny the handicapped person access to many avenues of employment available to other citizens.[61] It is estimated that only one third of the blind persons of working age in this country have jobs.[62] Only 47 percent of the paraplegics (persons with loss of use or paralysis of the lower half of the body on both sides) of working age are employed.[63] Between 15 and 25 percent of working age persons with epilepsy are employed.[64] And only a handful of the persons of working age with cerebral palsy have been able to secure employment.[65]

These figures are dismal indeed when one considers that the majority of unemployed handicapped persons, if given the chance, are quite capable of taking their places in the job market.[66] In fact, numerous studies indicate that the handicapped worker, when assigned an appropriate position, performs as well as or better than his non-handicapped fellow workers.[67] Yet employers continue to discriminate against handicapped job applicants because of stereotypes, prejudices, and misconceptions.[68]

Denial of employment opportunities is especially outrageous in regard to handicapped veterans. While the unemployment rate for Vietnam era veterans at the end of 1971 was estimated at 8.8 percent, 87.7 percent of handicapped veterans were unable to find jobs. The disabled Vietnam veteran "seeks employment and is rebuffed either by the private employer as incompetent, or by his

59. Omaha World Herald, Apr. 21, 1974, § B, at 1. (a.m. ed.) ("'41 Begging Law Punishes Only the Ugly").

60. Note, *Abroad in the Land, supra* note 13, at 1512. *See also* notes 62-66 and accompanying text *infra*.

61. Note, *Abroad in the Land, supra* note 13, at 1513.

62. 118 CONG. REC. 3321 (1972).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 3320. It is estimated that nine out of ten mentally retarded persons could work if given proper training and opportunities. *Id.*

67. Note, *Abroad in the Land, supra* note 13, at 1513.

68. *Id.* One common misconception is that hiring handicapped workers may cause an increase in workmen's compensation insurance rates. Statistics indicate that handicapped persons have eight percent fewer accidents than non-handicapped workers, so the hiring of handicapped employees may actually decrease the insurance rates. *Id.* at 1513; notes 79-81 and accompanying text *infra*.

Government as being essentially unplaceable."[69]

An additional problem is that those handicapped persons who do manage to find employment tend to be channeled into unskilled, low paying positions involving monotonous tasks.[70]

Transportation is another major area of current discrimination against individuals with handicaps. In our mobile society, handicapped people are all too frequently denied access to public transportation.[71]

The Air Traffic Conference, the trade association for air carriers, has promulgated the following rule concerning service to handicapped passengers by member airlines: "Persons who have malodorous conditions, gross disfigurement, or other unpleasant characteristics so unusual as to offend fellow passengers should not be transported by any member."[72] Who determines what is umpleasant," "unusual" or offensive to fellow passengers? Such vagueness permits airlines to effect policies of discrimination toward handicapped persons. For example, one airline will not allow an unaccompanied blind person to sit next to a person of the opposite sex; another refuses to accept persons with epilepsy as passengers; at least seven airlines refuse service to mentally ill passengers; and one airline expressly excludes mentally retarded people from passenger service.[73]

Moreover, a Civil Aeronautics Board regulation[74] has been interpreted by most airlines to require that an attendant accompany all passengers in wheelchairs, whether or not these passengers are capable of caring for themselves in flight.[76]

Similar discriminatory practices occur in surface transportation systems:

> Bus lines plead lack of trained personnel in helping the passenger off and on the bus, and insist that the bus aisles are too narrow for any sort of manipulation equipment. While there is no evidence that their ruling is enforced to the letter consistently, Greyhound has an official policy that . . . if an individual cannot walk onto the bus on his own power he cannot ride the bus.[76]

69. 118 CONG. REC. 2998 (1972) (remarks of Congressman Vanik).
70. *See, e.g.*, DIMINISHED PEOPLE: PROBLEMS AND CARE OF THE MENTALLY RETARDED 32 (N. Bernstein ed. 1970).
71. 118 CONG. REC. 11362 (1972). *See generally* tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966).
72. AIR TRAFFIC CONFERENCE OF AMERICA, TRADE PRACTICES MANUAL (1962), *quoted in* 118 CONG. REC. 11363 (1972).
73. 118 CONG. REC. 11363 (1972) (remarks of Congressman Vanik).
74. Specifically, Rule 15 of C.A.B. No. 142(2).
75. 118 CONG. REC. 11362-63 (1972).
76. *Id.* at 11363.

Railroads have also been guilty of unequal treatment of handicapped persons, particularly in requiring that a fare-paying attendant accompany all passengers in wheelchairs, regardless of the passenger's ability to fend for himself.[77]

Even where transportation agencies do not have active policies which restrict the travel rights of handicapped passengers, architectural impediments and physical obstacles may render use of transportation facilities impossible for various groups of handicapped citizens.[78] The "fundamental right to travel"[79] has little meaning if architectural barriers render a person unable to enter buses, trains, planes or transportation terminals.[80] New York Judge Nathanial Sorkin, himself a handicapped person, has observed:

> The physically handicapped are de facto barred from using the city's subways and to an only slighter degree from the city's surface transportation system. They are not merely relegated to the back of the bus, they are totally excluded.[81]

Judge Sorkin summarized the plight of physically handicapped people in our society by naming such persons the most discriminated minority in our nation.[82] Similarly, a Texas federal court, quoting former American Bar Association President Chesterfield Smith, has observed:

> The plight of the mentally disabled is among the saddest and most alarming problems facing our society, and too little is done to alleviate the effects of the problem. Traditionally we have relegated persons suffering from mental disabilities to deplorable institutions that have been inadequately staffed, improperly managed, and have little regard for the constitutional rights of those in the institution. The mentally disabled have been the victims of widespread governmental complacency and outright neglect. This is outrageous. But, worst of all, most of us have accepted it without protest.[83]

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77. *Id.*

78. Note, *Abroad in the Land, supra* note 13, at 1506. The author notes that modern technology and effective planning can entirely eliminate such obstacles. *Id.* at 1506 n.4 and accompanying text.

79. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Note, *The Right to Travel—Quest for a Constitutional Source,* 6 RUTGERS CAMDEN L.J. 122 (1974).

80. Note, *Abroad in the Land, supra* note 13, at 1506 n.43 and accompanying text.

81. *See* Sorkin, *supra* note 13, at 41.

82. *Id.*

83. Jenkins v. Cowley, 384 F. Supp. 441, 442 (N.D. Tex. 1974), *quoting* Smith, *New Hope for the Mentally Disabled,* 60 A.B.A.J. 909 (1974). The court, however, denied as premature plaintiff's motion for a preliminary injunction against confinement in seclusion rooms of a state hospital. 394 F. Supp. at 441. In a lawsuit involving mentally retarded children, a Maryland court expressly found that they had suffered a history of unequal treatment: "At various stages

In some instances, discriminatory practices threaten the lives of handicapped individuals. A number of situations have occurred in which medical personnel or parents of handicapped children have made no effort to provide handicapped patients with lifesaving medical services which would be administered as a matter of course to non-handicapped patients.[84] One widely publicized instance involved a child afflicted with a form of mental retardation called Down's Syndrome:

> For 15 days—until he starved to death—the newborn infant lay in a bassinet in a back corner of the nursery at the Johns Hopkins University Hospital. A sign said, "Nothing by mouth."
>
> The baby's life could have been saved by a simple operation to correct the intestinal blockage that kept him from digesting any food.[85]

Many other cases involving both physically and mentally handicapped infants who have been "allowed to die" have been reported.[86] One observer estimates that unnecessary deaths of handicapped babies in the U.S. may number in the thousands each year.[87] Recently, advocates for handicapped infants have successfully challenged the legality of denying medical treatment to such children,[88] but the fact that such events occur in our "enlightened" age, in a country which esteems life as an "inalienable" right, is frightening evidence of the discriminatory and inequitable treatment afforded handicapped people.

Two additional areas in which handicapped persons have been subjected to particularly harsh unequal treatment are pub-

of history mentally retarded children have been isolated or segregated from the general populuation. They have been subjected to discrimination." Mem., Apr. 6, 1974, at 5, Maryland Ass'n for Retarded Children v. Maryland, Eq. No. 100/182/77676 (Cir. Ct. Baltimore County, Md., Apr. 6, 1974).

84. *See, e.g.*, Murdock, *supra* note 33, at 140-143.

85. Washington Post, Oct. 15, 1971, § A, at 1.

86. *E.g.*, Duff & Campbell, *Moral and Ethical Dilemmas in the Special-Care Nursery*, 289 N. ENG. J. MED. 890 (1973); Shaw, *Doctor, Do We Have a Choice?*, N.Y. Times, Jan. 30, 1972 § 6 (Magazine), at 44; Washington Post, Dec. 13, 1974, § A, at 1.

87. N.Y. Times, June 12, 1974, at 18, col. 4.

88. *See, e.g.*, Order Relating to Protective Services, *In re* Baby Girl Obernauer, (Juv. & Dom. Rel. Ct., Morris County, N.J., Dec. 22, 1970); Maine Medical Center v. Houle, C.A. No. 74-145 (Super. Ct., Cumberland, Me., Feb. 14, 1974). The *Houle* court declared:

> Quite literally the court must make a decision concerning the life or death of a newborn infant. Recent decisions concerning the right of the state to intervene with the medical and moral judgments of a prospective parent and attending physician may have cast doubt upon the legal rights of an unborn child; but at the moment of live birth there does exist a human being entitled to the fullest protection of the law. The most basic right enjoyed by every human being is the right to life itself.

Id. at 3-4.

lie education and residential care in state institutions. As a natural consequence, there has been much litigation concerning the right to equal educational opportunity and the state's duty to provide treatment and residential programs in a manner that imposes the least restriction on constitutional liberties. This article will now examine in some detail the history of purposeful unequal treatment of handicapped persons in relation to public education and residential institutionalization.

B. *Unequal Treatment of Handicapped Persons by Public Educational Systems*

Education for all has long been a cherished American ideal. In 1846, American educator Horace Mann wrote:

> I believe in the existence of a great, immortal, immutable principle of natural law, or natural ethics,—a principle antecedent of all human institutions, and incapable of being abrogated by any ordinance of man . . . which proves the *absolute right* to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all.[89]

This principle that education should be equally available to all persons has been reflected in various facets of our legal system. The constitutions of about one half of the states include provisions that the public education system shall be equally available to all;[90] constitutions of most of the remaining states declare that their educational systems must be "general, uniform and thorough,"[91] or "thorough and efficient."[92] These constitutional mandates for education have been put into effect by specific legislation establishing and controlling the state educational systems. All of the 50 states have statutes authorizing and requiring the maintenance of a system of free public educational programs, and all but one of

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89. Mann, *Tenth Annual Report to Massachusetts State Board of Education*, in OLD SOUTH LEAFLETS V, No. 109, 177-80 (1846), *quoted in* W. LUCIO, READINGS IN AMERICAN EDUCATION 336 (1963), *cited with approval in* Serrano v. Priest, 5 Cal. 3d 584, 619, 487 P.2d 1241, 1266, 96 Cal. Rptr. 601, 626 (1971).

90. *See, e.g.*, IND. CONST. art. 8, § 1, which requires that the public schools be "equally open to all"; MISS. CONST. art. 7, § 201, which states that public education must be "for all children between the ages of 6 and 21 years"; N.D. CONST. art. 8, § 147, which requires the "establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota"; UTAH CONST. art. 10, § 1, which provides that the state public education system shall be "open to all children of the state"; WIS. CONST. art. 10, § 3, which mandates that the public schools "shall be free and without charge for tuition to all children between the ages of 4 and 20 years."

91. *See, e.g.*, IDA. CONST. art. 9, § 1; MONT. CONST. art. 11, § 1.

92. *See, e.g.*, MD. CONST. art. 8, § 1; OHIO CONST. art. b, § 2; PA. CONST. art. 3, § 14.

the states make attendance at school compulsory for persons of specified ages.[93]

The concept of universal education has been widely recognized by judicial tribunals; numerous courts across the land have declared that opportunity for an education is a right which will be jealously safeguarded.[94] The classic statement of this attitude appears in the decision of the United States Supreme Court in *Brown* v. *Board of Education.*[95]

The theoretical ideal of education for all, however, has proved to be an empty promise for many persons with physical, mental and emotional handicaps. Over the years, large numbers of handicapped persons have been denied their right to equal educational opportunities and have been systematically excluded from the public schools. Some observers estimate that there are presently one million handicapped individuals of school age in this country who are totally excluded from public educational programs.[96] When one adds to this total the approximately three million handicapped pupils attending the public schools but not being provided with special education programs suited to their needs,[97] it is clear that unequal treatment of handicapped persons by the state public education systems is a problem of gargantuan proportions.

There is a certain irony in the denial of educational programs to so many persons while school attendance remains compulsory. In 1972, the United States Supreme Court heard arguments by the State of Wisconsin in support of compelling Amish parents to send their children to public high schools, despite their contrary religious beliefs.[98] At the same time, 89,583 handicapped Wis-

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93. Mississippi is the only state which does not have a compulsory attendance statute.

94. *See, e.g.*, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Manjares v. Newton, 64 Cal. 2d 365, 411 P.2d 901, 49 Cal. Rptr. 805 (1966); Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924); Ward v. Flood, 48 Cal. 36 (1874); State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); Anderson v. Breithbarth, 62 N.D. 709, 245 N.W. 483 (1932).

95. 347 U.S. 483, 493 (1954). The majority opinion in *Brown* declared:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . . It is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity for an education. Such an opportunity, *where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*

Id. (emphasis added).

96. *See, e.g.*, Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1038 (1972).

97. *Id.*

98. Wisconsin v. Yoder, 406 U.S. 205, 219-34 (1972).

consin children were excluded from the public school system." In order to understand the full scope of the denial of public education to handicapped persons and the underlying reasons for this absence of educational opportunities, it is necessary to examine the historical development of public education and special education programs in this country.

1. *Special education—an historical perspective.*

In early colonial America, education was generally a private concern, frequently taking place in the context of one's home and family. There were a few formal institutions for schooling, but at first these were privately controlled and served only the wealthier colonists. It was not long, however, before the notion of public education caught on, and by 1647, Massachusetts had developed the first public school system in this country.[100] Other colonies followed suit and educational institutions established or supported by the colonial governments multiplied.

Teaching the "three R's" was the principal goal of early education; there were no specialized programs or grade levels. Pupils were taught only the basics of reading and mathematics, accompanied by rudimentary historical or geographical instruction.

Interestingly, the United States Constitution includes no mention of schools or educational institutions. By implication, the framers viewed public education as a matter better left to the individual states.[101] In contrast, the constitutions of every one of the 50 states contain provisions encouraging or establishing public educational programs.[102]

The development of public school education from the 17th century to the present is largely an evolution from the narrow con-

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99. 118 CONG. REC. E 561 (daily ed. Jan. 27, 1972) (remarks of Congressman Vanik). Panitch v. Wisconsin, 371 F. Supp. 955 (E.D. Wis. 1974), a statewide class action suit seeking equal educational opportunities for handicapped children, was filed on August 14, 1972. The authors are involved in the lawsuit as counsel for amicus curiae, the National Center for Law and the Handicapped. A three-judge federal panel has agreed to oversee the prompt implementation of Wisconsin's new mandatory special education legislation.

100. W. DOUGLAS, AN ALMANAC OF LIBERTY 138 (1954), *cited in* Manjares v. Newton, 64 Cal. 2d 365, 375, 411 P.2d 901, 908, 49 Cal. Rptr. 805, 812 (1966).

101. U.S. CONST. amend. X states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

102. *See, e.g.*, notes 90-92 *supra*. The California Constitution, for example, provides:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.

CAL. CONST. art. 9, § 1.

cept of education as "reading, writing and arithmetic," to the broader notion that education should encompass such diverse subjects as chemistry, home economics, driver's training, foreign languages and gym classes.[103] Yet, the expanding scope of public education did not benefit all groups of children. Educational programs for those persons with mental, emotional or physical handicaps lagged far behind the significant advances made in general educational programming. For many years, there were no educational strategies at all for teaching persons with mental handicaps. Educators had neither learned nor sought to learn the techniques of educating such persons.

Initially, it became apparent that certain persons did not make any significant educational progress within the "three R's" curriculum. Rather than question the appropriateness of the curriculum, the reaction of early American teachers and principals was to label such persons as incapable of profiting from education. Children who had been declared unable to profit from schooling were thenceforth excluded from attendance at school, and from the compulsory attendance laws.[104]

Moreover, those with physical handicaps were also effectively excluded from the public school system. In the days when transportation to school was on foot or by horseback, those with serious physical disabilities understandably had tremendous difficulty in just getting to the school house. In addition, the usual techniques for teaching the "three R's" were not successful with persons who were blind or deaf or could not use their hands. Any person who deviated from the norms of what was expected of a pupil, and thereby caused extra work for the teacher, was viewed as disrup-

103. An extensive discussion of the evolution of public education and a catalog of significant judicial decisions in this area is contained in Dodge v. Jefferson County Bd. of Educ., 298 Ky. 1, 181 S.W.2d 406 (1944). The *Dodge* court observed:

> As civilization has progressed, the ideas as to what constitutes, and the necessities for, education has followed a liberal trend. It took some time to pass from the custom, or duty placed on trustees to proclaim to parents that they might send their children to school, notwithstanding they themselves made no contribution toward paying expenses to compulsory education. It was also a far cry from the teaching of three "R's" to manual training, teaching of the arts, teaching of the evils attending the use of alcoholic liquor, free text books, transportation of pupils, insurance on school buses, teacher's pensions and higher standards. We are yet a long way from perfection. The problem will be not absolutely solved, for that would imply an absolute best education irrespective of conditions but the practical solution will be reached only when a true adjustment is made between the process of education and the life for which that education is intended to be a preparation.

Id. at 3, 181 S.W.2d at 408 (citation omitted).

104. *See, e.g.*, N.Y. EDUC. LAW § 3208 (Supp. 1974); N.C. GEN. STAT. § 115-166 (1975); OHIO REV. CODE ANN. § 3321.05 (1975); ORE. REV. STAT. § 336-090 (1947) (repealed 1965).

tive and burdensome and thus not suited for classroom instruction. As a result of either formal policy or informal practices, most physically handicapped children did not attend the public schools.[105]

The result of this exclusion of handicapped children from the public schools was the removal of any incentive for educators to develop programs suited to the needs of such children. Since the teachers did not have to face the problems of teaching handicapped students, there was little reason for developing curricula geared to their educational needs. Thus, the exclusion of handicapped children from the public school system greatly delayed the development of special education techniques, which, in turn, reinforced the "unable-to-be-educated" rationale for excluding them. This tragic spiral accounts for the sad fact that for most of our history handicapped persons had no place in American public educational systems.

It was not until the 1860's that public school special education classes for deaf children were initiated in this country, and attempts to provide public school programs for mentally retarded persons did not begin until about 1900.[106] Actually, many of the first special classes were intended primarily to assist slow learners drawn from the population of immigrants to this country. Such programs, known as "opportunity classes," were intended to aid the non-English-speaking child in developing some English language abilities and to prepare him or her for eventual absorption into regular public school classes. Because their function was to prepare students to cope with the normal public school programs, these special classes were also known as "vestibule classes," indicating that the child was waiting to join the mainstream school program.[107]

Eventually, these vestibule or opportunity classes evolved to a point where they had almost directly reversed their function. Instead of serving to prepare students for inclusion in regular classes, they became the dumping grounds for many students who could not fit into or manage to succeed in the normal classrooms.[108] In addition to those with language deficiencies, these

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105. *See, e.g.*, Record at 8, Lebanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973) (direct testimony of expert, Dr. Gunnar Dybwad) [hereinafter Testimony of Dybwad]; Rains, *supra* note 19, at 90-91.

106. Record at 10, Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) (testimony of expert, Ignacy Goldberg) [hereinafter cited as Testimony of Goldberg]; Weintraub, *Recent Influences of Law on the Identification and Placement of Children in Programs for the Mentally Retarded*, in 1 FOCUS ON EXCEPTIONAL CHILDREN — (1972).

107. Testimony of Goldberg, *supra* note 106, at 10-11.

108. *Id.*

programs came to include persons with perceptual and communication problems, slow learners, and persons with other mild mental and physical handicaps.

The creation of this middle ground between regular classroom programs and total exclusion was extremely important, for it provided educators with the opportunity and incentive to develop educational strategies to meet these students' special needs. Given the impetus, education experts did find and begin to implement such techniques.

Schooling for handicapped persons gradually became more organized. The cities of Providence, Springfield, Boston and Chicago initiated special classes for the mentally retarded shortly before the turn of the century. In 1911, New Jersey became the first state to legislate special education by statutorily authorizing classes for the mildly mentally retarded.[109] Formal classes for mentally retarded children were introduced in other states in the early 1920's.[110] It is important to note, however, that these early classes included only mentally retarded individuals who functioned at a relatively high level of intelligence. Most of the children placed in such classes were the "cream of the crop," functioning at a much higher educational level than students assigned to special classes today.[111]

The successes of these special programs led educators to divide mentally handicapped children into two groups. Those who were showing progress when put into the special classes were labeled "educable," and were increasingly included in state education systems.[112] The remainder of the handicapped children, the "uneducable," were deemed incapable of benefitting from schooling and continued to be excluded from the public schools. Categorization was frequently based upon scores on intelligence quotient tests.[113] If a child's score was above a certain point, he or she was "educable"; otherwise, the child was considered incapable of learning.

This educable-uneducable dichotomy was threatened in the mid-1920's when educators in St. Louis and New York City developed successful educational programs for children with an educational level below that which would have qualified them as "educable."[114] Rather than admitting that they had been wrong

109. W. LIPPMAN & A. GOLDBERG, RIGHT TO EDUCATION 5 (1973) [hereinafter cited as LIPPMAN & GOLDBERG].
110. Testimony of Goldberg, *supra* note 106, at 14.
111. *Id.*
112. *See generally id.* at 9.
113. *Id.*
114. *Id.* at 14.

in declaring such persons incapable of benefitting from education, educators responded by creating a new category: the "trainable." Since the individuals had already been labeled uneducable, it was decided to call new programs "training" rather than "education." Those who were unable to profit from these training programs were declared to be "sub-trainable." Thus a changing educational reality was glossed over with a vocabulary shift.

In 1930, the White House Conference on Children and Youth adopted the educable-trainable distinction, and recommended that classes be provided for both groups. These recommendations were not immediately acted upon and classes for the "trainable" mentally handicapped did not become widespread until the 1950's.[115]

In the early 1950's, California, later followed by other states, began to require by statute that special public classes be provided for certain groups of handicapped children, generally the mentally retarded.[116] For the most part, however, special education programs remained "permissive" undertakings at the discretion of local school officials.

The decades of the fifties and sixties were marked by an expanding scope and variety of special education programs. The number of school districts operating some type of special education program was reported to be 1,500 in 1948, 3,600 in 1958, and 5,600 in 1963.[117] Research and experimental teaching techniques resulted in the development of new educational strategies. Educators learned how to teach those with perceptual and communication disorders; educational programs were developed for emotionally disturbed, physically handicapped and autistic children; and eventually it was found that educational techniques could be devised for assisting even those mentally handicapped persons who had been labeled "sub-trainable."

As the number and variety of special education programs grew, it became possible to speak of "zero reject" education, a concept that involves finding instruction techniques to suit the needs and maximize the capabilities of every child.[118] In 1971, the Council for Exceptional Children, the national organization of special education teachers, supervisors and administrators, declared its official position:

115. *Id.* at 15.

116. LIPPMAN & GOLDBERG, *supra* note 109, at 6.

117. Murdock, *supra* note 33, at 166 n.126, *quoting* Weintraub, *Recent Influences of Law on the Identification and Placement of Children in Programs for the Mentally Retarded*, in 1 FOCUS ON EXCEPTIONAL CHILDREN — (1972).

118. *See* Lilly, *Special Education: A Teapot in a Tempest*, in 1970 EXCEPTIONAL CHILDREN 43-49; LIPPMAN & GOLDBERG, *supra* note 109, at 3.

> Education is the right of all children. The principle of education for all is based on the philosophical premise of democracy that every person is valuable in his own right and should be afforded equal opportunities to develop his full potential.[119]

But while special education programs have grown both in number and in quality, and while lipservice is paid to the idea of education for all, "zero reject" education has remained an unfulfilled promise for large numbers of handicapped citizens. Implementation of novel educational strategies has been slow and spotty. The education profession, despite numerous conferences, publications, conventions, workshops and seminars, has not developed an effective method for the universal sharing of information and techniques. Thus, a successful educational program designed to meet the needs of children with a particular type of handicap may be developed in one locale, while in other areas of the country (or even of the same state) similar children find their educational needs unmet.

In spite of progress and important breakthroughs in the last two decades, the public education systems in this country are still a very long way from providing equal educational opportunities for all handicapped children. Even today, the picture painted by statistics on special education programs is dismal. There are approximately seven million handicapped children of school age in this country who need special education programs.[120] Of this total, approximately 17 percent, or one million children, are receiving no formal education at all: they are totally excluded from the public schools.[121] Of the six million handicapped children who are attending the public schools, it is estimated that 3.3 million are receiving special educational services.[122] This leaves 2.7 million handicapped children who are attending the public schools but are not provided with special education programs. Combining this figure with those totally excluded from school, the result is that 3.7 million handicapped children in this country—53 percent of all such children—need public special education services but do not receive them.

119. *Basic Commitments and Responsibilities to Exceptional Children, adopted,* Council for Exceptional Children Delegate Convention, Apr. 1971, in 1971 EXCEPTIONAL CHILDREN 181-87.

120. *See* Macroff, *Hope Rises on Education of Handicapped Students,* New York Times, Apr. 21, 1974, at 1, col. 1-2, *citing* figures provided by the Council for Exceptional Children and the Bureau of Education for the Handicapped, United States Office of Education.

121. *Id.*

122. *Id.*

2. The courts and the denial of educational opportunities.

The new wave of litigation. With more than half the handicapped children of school age not receiving the educational programs they need in a country which holds as a fundamental principle the right of education for all, it is hardly surprising that in the 1970's handicapped individuals have turned to the courts in an effort to obtain their rightful access to the public education system. The litigation of the 70's was presaged in 1969 by *Wolf v. Legislature of the State of Utah,*[123] a case dealing with denial of admission to the public school system to two so-called "trainable" mentally retarded children. Judge D. Frank Wilkens ordered the children admitted to the public schools, declaring:

> Education today is probably the most important function of state and local government. It is a fundamental and inalienable right and must be so if the rights guaranteed to an individual under Utah's Constitution and the U.S. Constitution are to have any real meaning. Education enables the individual to exercise those rights guaranteed him by the Constitution of the United States of America.
>
> Today it is doubtful that any child may reasonably be expected to succeed in life if he is denied the right and opportunity of an education.[124]

Resort to legal action to obtain equal educational opportunities for handicapped children resulted from the conjunction of three factors: school desegregration lawsuits, a shift in professional attitudes toward handicapped people, and the emergence of advocates for them. The legal basis for the movement was established by the education lawsuits which had been a major part of the civil rights struggle waged by racial minorities. Particularly promising was the language of the United States Supreme Court in *Brown* v. *Board of Education:*

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[125]

The major factual consideration underlying the successful lawsuits seeking education for handicapped children was the development of a comprehensive body of professional expertise supporting the premise that *all* handicapped persons can learn, develop and benefit from appropriate educational programs: the "zero reject" concept. Without such evidence of the ability of

123. Civil No. 182646 (3d Judicial Dist. Ct., Utah, Jan. 8, 1969).
124. *Id.*
125. 347 U.S. 483, 493 (1954).

handicapped children to benefit from education, many of the important lawsuits in this area would have been impossible.[126]

The third major impetus for equal education litigation on behalf of handicapped children has been the emergence of strong and active advocacy groups concerned with the plight and rights of handicapped persons. Professional, consumer, and parent organizations have been created on both local and national levels, and many of these agencies have become effective champions for those with various types of handicaps.[127] As these organizations have become increasingly sophisticated, they have evolved from loose volunteer groups seeking charity for handicapped individuals to well-organized entities with full-time paid staffs advocating and often demanding that persons with handicaps be afforded their full legal and human rights.[128]

Class action litigation on behalf of handicapped persons began early in the present decade, and in 1971 a consent order was entered in *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*[129] which guaranteed educational programs for all of Pennsylvania's mentally retarded children. Shortly thereafter, two individual actions in New York resulted in orders directing that publicly funded educational programs be provided for an autistic child[130] and a physically handicapped child.[131]

In 1972, a decision was entered in *Mills* v. *Board of Education of the District of Columbia,*[132] a class action suit brought on behalf of all handicapped children of school age in the District of Columbia. The court found that, based on "the equal protection clause in its application to public school education,"[133] the plaintiffs had a constitutional right to "equal education opportunity."[134] The court ordered the District of Columbia to provide to

126. Gilhool, *The Right to Access to Free Public Schooling for all Children,* in SPECIAL EDUCATION IN COURT, 2 LEADERSHIP SERIES IN SPECIAL EDUCATION 167, 169 (1973). For a discussion of the "zero reject education" concept, *see* sources cited note 118 and accompanying text *supra.*

127. *See, e.g.,* Dybwad, *A Look at History and Present Trends in the Protection of Children's Right to Education,* in SPECIAL EDUCATION IN COURT, 2 LEADERSHIP SERIES IN SPECIAL EDUCATION 152, 156 (1973).

128. For example, the Fourth Congress of the International League of Societies for the Mentally Handicapped in 1967 had as its theme "From Charity to Rights." *Id.* at 155.

129. 334 F. Supp. 1257, 1258 (E.D. Pa. 1971).

130. *See In re* Leitner, 40 App. Div. 2d 38, 337 N.Y.S.2d 267 (1972); *In re* Leitner, 38 App. Div. 2d 554, 328 N.Y.S.2d 237 (1971).

131. *In re* Held, Nos. H-2-72 & H-10-71 (Family Ct., Westchester County, New York, Nov. 29, 1971).

132. 348 F. Supp. 866 (D.D.C. 1972).

133. *Id.* at 875 (paraphrasing a quotation from opinion of Wright, J., in Hobsen v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967)).

134. 348 F. Supp. at 875.

each child of school age "a free and suitable publicly-supported education regardless of the degree of the child's mental, physical, or emotional disability or impairment."[135]

The successful results in *Wolf, P.A.R.C., Mills,* and the New York cases have spawned a plethora of similar actions across the nation.[136] The complaints filed in these actions have sought to secure rights under state constitutions, statutes and regulations as well as under the United States Constitution. The decision in *In re G. H.*[137] exemplified the reasoning in such cases; the Supreme Court of North Dakota declared:

> When North Dakota undertakes to supply an education to all, and to require all to attend school, that right must be made available to all, including the handicapped, on equal terms.[138]

The *G.H.* court held that a handicapped child was entitled to equal educational opportunity under the state constitution.[139] Deprivation of that opportunity, the court concluded, was a denial of equal protection under both the federal and the state constitutions;[140] it also contravened the due process and the privileges and immunities clauses of the North Dakota Constitution.[141]

A prime example of the many legal actions aimed at enforc-

135. *Id.* at 878.

136. Kivell v. Ne Moitin, Civil No. 143913 (Super. Ct., Fairfield City, Conn., July 8, 1972); Maryland Ass'n for Retarded Children v. Maryland, Eq. No. 100/182/77676 (Cir. Ct. Baltimore County, Md., May 3, 1974); *In re* K, 74 Misc. 2d 872, 347 N.Y.S.2d 271 (Family Ct. 1973); *In re* Kirschner, 74 Misc. 2d 20, 344 N.Y.S.2d 164 (Family Ct. 1973); *In re* Apple, 73 Misc. 2d 553, 296 N.E.2d 251, 343 N.Y.S.2d 352 (Family Ct. 1973); *In re* H., 72 Misc. 2d 59, 337 N.Y.S.2d 969 (Family Ct. 1972); *In re* Reid, No. 3742 (N.Y. Comm'r of Educ., Nov. 26, 1973); *In re* G.H., 218 N.W.2d 441 (N.D. 1974); Rainey v. Tennessee Dep't of Educ., No. A-3100 (Ch., Davidson County, Tenn., July 29, 1974); *see* Lebanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Harrison v. Michigan, 350 F. Supp. 846 (E.D. Mich. 1972); *In re* Borland, 72 Misc. 2d 723, 342 N.Y.S.2d 231 (Family Ct. 1973); Pacyna v. Bd. of Educ., 57 Wis. 2d 562, 204 N.W.2d 671 (1973). Many other cases are still pending.

The broadening scope of such litigative activity was described recently in the *Congressional Record*:

> [A] number of complaints have been brought throughout the nation to require that educational services be made available to all children, including the physically and mentally handicapped. There have been 36 court cases in 24 states on the right to education for all handicapped children . . . In those cases which have been decided, judgments have been given—as they should be—in favor of the handicapped children and their parents.

120 CONG. REC. 4212-4313 (daily ed. May 21, 1974) (remarks of Congressman Vanik). Today, such lawsuits, either completed or pending, number more than fifty.

137. 218 N.W.2d 441 (N.D. 1974); *see* notes 350-53 and accompanying text *infra.*

138. 218 N.W.2d at 447.

139. *Id., construing* N.D. CONST. art. 1, §§ 11, 20.

140. 218 N.W.2d at 447.

141. *Id.*

ing state statutory guarantees with regard to educational programs was *Rainey v. Tennessee Department of Education.*[142] Tennessee had enacted comprehensive special education legislation,[143] but the implementation was proceeding slowly and had lagged behind the timetable specified in the statute. The filing of the lawsuit resulted in a consent decree aimed at providing educational programs for all handicapped children as soon as possible.[144]

Both the number and the successes of lawsuits seeking equal educational opportunities for handicapped persons are impressive. The lawsuits, however, may also be viewed as catalogues of the many different ways in which handicapped persons have been denied equal access to the public school system. Each successful case attests to the fact that handicapped persons were indeed excluded from appropriate educational programs. Sadly, the discriminatory practices struck down as unlawful in one legal action frequently continue in other jurisdictions.

Exclusionary mechanisms. The "mechanisms of exclusion"—the methods, processes, excuses and practices by which handicapped persons have been denied equality in access to public school education programs—are many. Some such mechanisms, documented in recent case law, include:

(1) *"Educable," "trainable," and "sub-trainable" categorization.* Such classifications usually involve an implication that only those labeled "educable" are entitled to education programs. This practice has been struck down in a number of cases,[145] but perhaps most emphatically by a Maryland court in *Maryland Association for Retarded Children v. State of Maryland.*[146] The Court held that there was no distinction between the words "training" and "education," and added:

A child may be trained to read or write, or may be educated

142. No. A-3100 (Ch., Davidson County, Tenn., July 29, 1974).

143. TENN. CODE ANN. §§ 49-2912 to 49-2959 (Supp. 1974).

144. Rainey v. Tennessee Dept. of Dep't of Educ., No. A-3100 (Ch., Davidson County, Tenn., July 29, 1974), at 2. The consent decree declared:

> All children can benefit from an appropriate education program and have a legal and moral right to a free public education. Tennessee's Mandatory Education Law is based upon these two premises and guarantees an equal educational opportunity to all handicapped children no later than the beginning of the school year 1974-75.

The order detailed specific steps which Tennessee was required to take to insure rapid provision of educational services to all handicapped children. *Id.* at 7.

145. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (1972), *modifying* 334 F. Supp. 1257 (E.D. Pa. 1971); Rainey v. Tennessee Dep't of Educ., No. A-3100 (Ch., Davidson County, July 29, 1974). *See also* Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

146. Mem., Apr. 9, 1974, Maryland Ass'n for Retarded Children v. Maryland, Eq. No. 100/182/77676 (Cir. Ct. Baltimore County, Md., Apr. 6, 1974).

> to read and write. A child may be educated to tie his shoes or trained to tie his shoes. Every type of training is at least a sub-category of education.[147]

(2) *Administrative buckpassing.* This is the practice of having unclear or shared responsibility for providing education programs to certain groups of children. As a result, some children "fall through the holes in the net" and are not served by any public education agency. Such a situation, where a number of school districts or state education agencies bicker about which of them should be providing education to certain individuals, was the source of the controversy in *In re G.H.*[148] This issue of administrative responsibility for education programs was also dealt with in *Mills,* where the court declared:

> The lack of communication and cooperation between the Board of Education and the other defendants in this action shall not be permitted to deprive plaintiffs and their class of publicly supported education.[149]

The *Mills* court ruled that the responsibility for providing education to all of the children residing in the District of Columbia rested with the Board of Education.[150]

(3) *Waiting lists.* This is the practice of refusing to furnish immediate educational programs for certain children and, instead, placing their names on a waiting list of persons who will be eligible for a placement *if and when* a program becomes available. The use of waiting lists has been successfully challenged in *Doe v. Board of School Directors of the City of Milwaukee*[151] and in *In re Reid.*[152]

(4) *Lagging implementation.* Of major concern are repeated failures by public agencies to provide educational services according to timetables specified in state legislation. This problem was dealt with in the *Rainey,*[153] *Maryland Association for Retarded Children,*[154] and *Reid*[155] cases. The courts ordered prompt provision of educational programs in accord with statutory requirements.

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147. *Id.* at 4-5.
148. 218 N.W.2d 441, 443-45 (N.D. 1974).
149. 348 F. Supp. at 876.
150. *Id.*
151. No. 37770 (Cir. Ct., Milwaukee County, Wis., Mar. 30, 1972).
152. No. 8742 (N.Y. Comm'r of Educ., Nov. 26, 1973).
153. No. A-3100 (Ch., Davidson County, Tenn., July 29, 1974); *see* notes 142-44 and accompanying text *supra.*
154. Mem., Apr. 9, 1974, at 4-5, Maryland Ass'n for Retarded Children v. Maryland, Eq. No. 100/182/77676 (Cir. Ct., Baltimore County, Md., Apr. 6, 1974); *see* notes 146-47 and accompanying text *supra.*
155. No. 8742 (N.Y. Comm'r of Educ., Nov. 26, 1973).

(5) *Insufficient funds.* The excuse that programs for handicapped children are too expensive was explicitly rejected in *Mills.*[156] The court, balancing the District of Columbia's competing interests in educating the excluded children and in preserving its financial resources, held that the former plainly outweighed the latter. If available funds were insufficient to finance all of the system's needed services and programs, then each program and service would have to sustain some cutbacks so that no one phase of the system would be choked off entirely.[157] "The available funds," the court ruled, "must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom."[158] The court refused to allow the inadequacies of the public school system, whether occasioned by insufficient funding or administrative inefficiency, to bear more heavily on the "exceptional" or handicapped child than on the normal child.[159]

(6) *Exclusion, placement or transfer without the opportunity to be heard.* Due process rights to notice and a hearing prior to any placement, denial of placement, or transfer to a special education class have been upheld in a number of cases.[160]

(7) *Residency problems.* In many cases, it is difficult to determine the school district in which a child resides; for example, the parents may have moved out of state, or the child may be in a residential institution located in a district different from that in which his parents reside. Frequently, the handicapped child will be denied educational services in both districts. This issue has been considered and resolved in *In re G.H.*[161] and in *Michigan Association for Retarded Citizens v. State Board of Education of the State of Michigan.*[162]

156. 348 F. Supp. at 866, 876; *see* notes 131-35 and accompanying text *supra.*

157. 348 F. Supp. at 876.

158. *Id.*

159. *Id.*

160. This is the concept of "procedural due process" as applied to state civil proceedings through the fourteenth amendment and to federal proceedings via the fifth amendment. *See, e.g.,* Goss v. Lopez, 419 U.S. 565 (1975); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-14 (1950).

Cases which have held procedural due process applicable to special education program placements include the following: Mills v. Bd. of Educ. of District of Columbia, 348 F. Supp. 866, 875 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 293-95 (E.D. Pa. 1972), *modifying* 334 F. Supp. 1257 (1971) (holding that the federal district court had jurisdiction over the subject matter because plaintiffs had raised "colorable claim" under the due process clause); Marlega v. Bd. of School Directors of the City of Milwaukee, Civil No. 70-C-8 (E.D. Wis., Sept. 17, 1970).

161. 218 N.W.2d 441, 447-48. The court ruled that where the parents had moved out of state, the school district in which he actually resided was responsible for the cost of his education.

162. No. G-74-385 C.A.5 (W.D. Mich., filed Oct. 30, 1974). The defendant

(8) *Partial public funding and tuition reimbursement ceilings.* In certain instances where public schools choose not to provide directly a specific educational program, contractual arrangements and tuition reimbursement plans are developed whereby the public school system pays for a program provided in a private school. However, some states impose an arbitrary limit upon such payments, which may or may not be sufficient to cover the costs of the special education program for a particular child. In such situations, if the parents are unable to make up the difference, the child will receive no education. This practice has been challenge in *In re Downey,*[168] *In re* K".,[164] *Halderman* v. *Pittenger,*[16S] and *In re Kirschner.*[166] The judicial attitude in these cases is typified by the holding in *Downey:*

> To order a parent to contribute to the education of his handicapped child when free education is supplied to all other children would be a denial of the constitutional right of equal protection.[167]

(9) *Misclassification.* This occurs in the inappropriate labeling, classifying, and placement of children with regard to special education programs. Culturally biased tests, improper labeling, and inappropriate educational programs have been challenged in *Larry P. v. Riles,*[168] *Diana* v. *State Board of Education,*[169] and *Rhode Island Society for Autistic Children* v. *Reisman.*[170]

(10) *Education for those in residential institutions.* Frequently the public school systems have failed to provide educational programs for residents of state institutions upon the theory that some other agency is responsible for serving these individuals. In fact, many residents of state institutions receive no education at all. The failure of the state education agency to provide educa-

public school officials agreed to issue regulations to the effect that residence for educational purposes of a child in a residential institution is in the school district in which the child resided before coming to the institution.

163. 72 Misc. 2d 772, 340 N.Y.S.2d 687 (1973).

164. 74 Misc. 2d 872, 347 N.Y.S.2d 271 (1973).

165. 391 F. Supp. 872 (E.D. Pa. 1975) (plaintiffs' claims of denial of equal protection held "sufficiently substantial to require the convening of a 3-judge court").

166. 74 Misc. 2d 20, 344 N.Y.S.2d 164 (1973).

167. 72 Misc. 2d 772, 774; 340 N.Y.S.2d 687, 690, *citing* U.S. CONST. amend. XIV, § 1; N.Y. CONST. art. XI, § 1.

168. 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974). The court invalidated culturally biased testing procedures.

169. No. C-70 37 RFP (N.D. Cal., Feb. 5, 1970). The parties agreed to a stipulation that culturally biased evaluation techniques would be discontinued.

170. C.A. No. 5081 (D.R.I., filed Dec. 1972). This action challenging the appropriateness of various educational programs for handicapped children in Rhode Island is still pending. Pretrial negotiations are underway.

tion programs for the residents of state institutions for the mentally retarded has been successfully attacked in *Michigan Association for Retarded Citizens v. State Board of Education of the State of Michigan.*[171]

Through these and other methods, the state public education systems have neglected a large number of handicapped children. While the courts have been receptive to the right of handicapped children to equal educational opportunity,[172] and while the availability of special education services has significantly increased in various states, the situation at the present time is still intolerable. In a nation which prides itself on having the highest standard of living in the world, and where education is valued as "perhaps the most important function of state and local governments,"[173] it is unacceptable that more than half the handicapped children of school age are being denied appropriate educational programs. Both currently and historically, the unequal treatment afforded handicapped persons by state public education systems is probably unmatched by similar discrimination against any other minority group.

C. *Unequal Treatment of Handicapped Persons Through Institutionalization*

From considering the denial to many handicapped citizens of the right to equal educational opportunity, we turn now to another type of unequal treatment: residential institutionalization, society's practice of confining handicapped individuals.

1. *Institutionalization: historical background.*

Institutionalization is an outgrowth of the historical pattern of segregating those people who are different from the "normal" population. Records of ancient societies reveal that handicapped people were often segregated in such a way as to limit severely their chances for survival.[174] In Sparta, around 800 B.C., mentally and physically defective children were left on mountainsides

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171. No. G-74-385 C.A. 5 (W.D. Mich., filed Oct. 30, 1974). Shortly after the filing of this action, the defendants agreed to provide educational programs for residents of state institutions.

172. The outlook for such litigation should be even better in the future. A section of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (1975), condemns discrimination against handicapped persons in any program (including the public schools) receiving federal financial assistance. Violation of this statute has been included as an additional cause of action in most of the recently filed equal educational opportunity lawsuits.

173. Goss v. Lopez, 419 U.S. 565 (1975), *quoting* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

174. 8 ENCYCLOPEDIA OF EDUCATION, *Special Education: History* 341 (1971).

or in pits to fend for themselves. Even enlightened Athenians put deaf children to death, and the practice of exposing such children reportedly had the approval of Plato and Aristotle.[175]

These inhumane and discriminatory practices continued through the Middle Ages.[176] When persons with physical or mental disabilities were not imprisoned, they were driven from the cities[177] to wander aimlessly through rural areas.[178] Western society for the most part has refused to treat handicapped persons differently from criminals, drunkards or slaves.[179] Prisons have, in the past, confined hardcore criminals with handicapped persons whose only crime was their inability to support themselves.[180]

One of the reasons that such horrendous treatment was visited upon handicapped people was that physical and mental impairments were thought to be supernatural in origin. Some viewed handicapped individuals as the children of God,[181] but more often a disability was linked to demoniacal powers. Many of these superstitions were rooted in religious beliefs.[182]

175. 1 SPECIAL EDUCATION FOR THE EXCEPTIONAL 5 (M. Frampton & E. Gall eds. 1955).

176. *See* N. KITTRIE, THE RIGHT TO BE DIFFERENT 57 (1971).

177. *Id.*

178. A. DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 25 (2d ed. 1949) [hereinafter cited as DEUTSCH].

179. N. KITTRIE, THE RIGHT TO BE DIFFERENT 57 (1971).

180. *Id.* at 57-58.

181. S. DAVIES, THE MENTALLY DEFICIENT IN SOCIETY 9 (1959) [hereinafter cited as DAVIES].

182. *Deuteronomy* 28:28 reads, "The Lord shall smite thee with madness . . . ." The New Testament reveals how Christ worked cures by casting out demons from a "dumb demonic." *Matthew* 9:32. The medieval mind was puzzled by mental instability.

> There remained the question of what supernatural influences were involved . . . . [T]he influence might be of divine origin and the inspired one therefore a superior person or even a saint. But the ravings of many persons suggested a more sinister background. Such individuals might be "possessed" of a devil, or in communion with Satan himself. Since Christian theology stressed the freedom of the human will, it was assumed witches or wizards who had abandoned themselves to these evil contacts had done so of their own consent and were therefore deserving of the most severe punishment.

Shryock, *The Beginnings: From Colonial Days to the Foundation of the American Psychiatric Association*, in ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY 1, 4 (J. Hall ed. 1944) [hereinafter cited as *The Beginnings*].

Calvin and Luther, leaders of the Reformation, referred to the mentally afflicted as "filled with Satan." DAVIES, *supra* note 181, at 10. The basic theological attitude was that the mentally disabled were dangerously inferior and not deserving of Christian charity. *The Beginnings*, *supra* at 5.

The witchcraft mania which gripped Europe and ultimately the New England region of the United States can be directly traced to superstitious notions about mental disorders. The practices of abandonment and ostracism gave way during this period to torture and persecution.

> Demonical possession was the common explanation of most forms of mental disorder, and the scourge, the rack, the stake and the gallows were

The biases against handicapped persons which existed in Europe were transmitted to colonial America. Although many handicapped persons from well-to-do families were cared for out of concern for the preservation of the individual's property,[183] the general attitude at this time was repressive, with the usual methods of "treatment" being confinement or banishment.[184]

Individuals not considered dangerous were treated as minor criminals. A common practice was to warn any such person to leave town if there was a chance that he or she might become a public charge.[185] The individual who chose to return faced corporal punishment. For example, a 1721 New York law provided for "36 lashes on the bare back of a man and 25 if a woman."[186] Another practice during the colonial period was to kidnap "feeble-minded" and insane persons during the night and leave them on the outskirts of strange towns in the hope that their inability to communicate would effectively preclude a return to their home towns.[187]

Confinement was the general rule for the violently insane. The mentally disabled person prone to violent behavior was placed in prison[188] and subjected to physical and mental tortures.[189] It was commonly believed that the insane were oblivious to their physical environment; consequently, one form of mistreatment was to abandon them outside naked in the winter snow.[190]

Basically, local officials were free to select the most expedient way to deal with handicapped individuals, and little or no thought was given to the interest of the person involved.[191] This philosophy was evidenced by the almshouse (poorhouse) system that sprang up in this country around 1800. By 1830, almost all states encouraged or mandated[192] the establishment of an almshouse, which housed the destitute as well as the sick and "insane." Conditions in these poorhouses were little better than in the prisons.

By 1843, a very few handicapped people were placed in

the common methods of treatment.
DEUTSCH, *supra* note 178, at 24-25. Unfortunately, these prejudices colored society's attitude long after the superstitious bases were proven false.

183. *See* DEUTSCH, *supra* note 178, at 40.
184. *Id.* at 41-45.
185. *Id.* at 44.
186. *Id.* at 45.
187. *Id.* at 45, 123-25.
188. *Id.* at 41.
189. *Id.* at 55-56, *quoting* J. CONOLLY, TREATMENT OF THE INSANE WITHOUT MECHANICAL RESTRAINTS 4 (London 1856) (describing conditions in English jails and almshouses).
190. *Id.* at 83-84.
191. *Id.* at 39-54.
192. *Id.* at 129.

private or state asylums.[193] The vast majority of handicapped persons, however, were confined in homes, almshouses and jails, under the most despicable conditions.[194] The common denominator inherent in the various forms of incarceration in early America—prison, almshouse or asylum—was total exclusion of the disabled person from society. In reality, confinement was a preventive detention measure for the benefit of society. There was no thought given to providing any kind of treatment program for the individual.[195]

A significant change in society's attitudes toward the handicapped person and his treatment was brought about through the efforts of Dorothea Dix. Appalled by the horrible conditions of institutional confinement, Miss Dix crusaded for improvement. As a result of her efforts, the next 40 years saw the building of new mental hospitals and the improvement of existing ones. Approximately 20 states and the District of Columbia joined the movement.[196]

Limited reforms were undertaken throughout the early 19th century.[197] Although the building of new institutions improved the lot of confined persons, what originated as a progressive ideal became rigid and anachronistic with the passing of time. The custodial concept—simply providing food, clothing, and shelter—became dominant. All too often the motivation was philanthropic rather than scientific,[198] and this sentimental humanitarianism resulted in an unproductive stasis.[199] The institution began to be conceived of as an end in itself, a universal solution to the problem of dealing with mentally and physically handicapped persons.[200] Construction of institutions took precedence over any concern for operating them according to scientific or medical principles:

> The problem of organization, administration and methods of therapy were, as a rule, considered to be of relatively small consequence in mental hospitals; the important thing was to build them. It didn't matter that some of the special hospitals and asylums were hardly better than the almshouses and jails where the insane had formerly been confined—the very change in nomenclature seemed to possess a magic potency in itself.[201]

193. *The Beginnings, supra* note 182, at 24-25.
194. *Id.* at 25; DEUTSCH, *supra* note 178, at 130.
195. DEUTSCH, *supra* note 178, at 130-31.
196. *Id.* at 184.
197. *Id.* at 188. *See generally id.* at 55-113, 132-158.
198. *Id.* at 188-91.
199. *Id.* at 186.
200. *Id.* at 187-88.
201. *Id.* at 187-88.

Disillusionment soon replaced the optimistic assumption that handicapped people were curable if confined. Demands for bigger and better institutions only increased public apprehension about the "mentally diseased," and this apprehension, given added impetus by the discoveries of Mendel and Darwin, brought a dramatic change in public attitudes.

The philanthropic movement of Dorothea Dix and her followers was based on sympathetic understanding; but the Darwian philosophy of "survival of the fittest" fostered contempt and hostility toward the handicapped citizen.[202] Eugenic propaganda spread with the swiftness of fanaticism and even sophisticated thinkers fell prey to its simplicity.[203] All social evils were the product of heredity, and "insanity" as well as "feeblemindedness" was a threat to the normal population. Mentally defective persons were inaccurately thought to be more promiscuous and therefore more prolific; eventually they would outnumber the rest of the population.[204]

Society responded by calling for measures even more drastic than the traditional methods of banishment and confinement. In 1911 the American Breeders' Association reviewed possible means to "purge from the blood of the race the innately defective strains."[205] Some of the suggested alternatives included the following: euthanasia, selective scientific breeding to remove defective traits, restrictive marriage laws, sterilization, and *life segregation for all handicapped persons.*[206] Americans preferred to concentrate their efforts on the last three alternatives. Restrictive marriage laws were passed, but it soon became apparent that the "unfit reproduce their kind regardless of marriage laws."[207] Sterilization was then emphasized as a reasonable alternative; it was even rationalized as being in the "best interests" of the individual.[208] Laws were passed making sterilization of physically and

202. *See id.* at 353.

203. Modern writers refer to this philosophy as a "social indictment" of the handicapped. DAVIES, *supra* note 181, at 42; Wolfensberger, *The Origin and Nature of Our Institutional Models,* in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 59, 101 (R. Kugel & W. Wolfensberger eds. 1969) (comp. for President's Committee on Mental Retardation) [hereinafter cited as Wolfensberger]. For discussion of the attitudes, *see* DAVIES, *supra* note 181, at 42-48; DEUTSCH, *supra* note 178, at 354-373; Wolfensberger, *supra* at 100-112.

204. DEUTSCH, *supra* note 178, at 353.

205. L. KANNER, A HISTORY OF THE CARE AND STUDY OF THE MENTALLY RETARDED 135 (1969).

206. DAVIES, *supra* note 181, at 50. *See* discussion in Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 294 (E.D. Pa. 1972).

207. Murdock, *State Care for the Feeble-Minded,* 18 J. PSYCHO-ASTHENTICS 35, 37-38 (1913).

208. Barr, *The Imperative Call of Our President to Our Future,* 7 J. PSYCHO-ASTHENTICS 5, 7 (1902).

mentally defective persons[209] compulsory; unfortunately, some courts upheld such dehumanizing treatment of handicapped people.[210] For various reasons, restrictions on the right to procreate were eventually perceived to be impractical.[211] Preventive segregation thereafter came to be considered the most acceptable means of controlling handicapped people.[212]

At the beginning of the 20th century, institutions were used to segregate all types of handicapped persons from the mainstream of society. Although it was claimed that mass institutionalization was for the individual's benefit, it was clear from the tenor of the times that the true motivation was protection of society from the handicapped.[213] National audiences were told that "every effort must be made to get these defectives out of society,"[214] and that "the righteous have sworn the segregation of all the feeble-minded."[215] Not only were handicapped individuals separated from society, but the sexes were separated from each other, sometimes in separate institutions. Serious proposals were developed for confining all mentally handicapped Americans in one national institution or reservation—a method adopted for another minority group, the American Indian.[216] Furthermore, the practice of permissive institutionalization gave way to compulsory commitments. These quasi-permanent commitments spawned many of our current commitment laws.[217]

The attempt to institutionalize all mentally handicapped persons was not totally successful. The basic reason was the lack of financial support from state legislatures. During the years 1880 to 1920, attempts were launched to make institutionalization more feasible by turning asylums into self-supporting entities financed by the labor of the residents.[218] A common form which these self-supporting institutions took was the "farm colony," built on large, often isolated tracts of land. By 1930, the isolation of the farm colony institution was both real and accepted.[219]

209. *See* notes 39-41 and accompanying text *supra.*
210. DAVIES, *supra* note 181, at 51-58; DEUTSCH, *supra* note 178, at 369-77.
211. *See* DAVIES, *supra* note 181, at 61-64; DEUTSCH, *supra* note 178, at 372-77.
212. DAVIES, *supra* note 181, at 65.
213. *Id.*
214. Address by E.R. Johnstone, president of Association of Medical Officers of American Institutions for Idiot and Feeble-Minded Persons, in Faribault, Minn., June 23, 1904, in Johnstone, *President's Address,* 8 J. PSYCHO-ASTHENTICS 63, 66 (1904).
215. 1912 PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTIONS, REPORTS FROM STATES 525 (Mass. report).
216. Wolfensberger, *supra* note 203, at 114.
217. *Id.* at 115.
218. *Id.* at 118-119.
219. *Id.* at 125.

The extreme social antipathy toward disabled persons which flared in 1910 had quieted by 1925; however, large institutions remained far removed from population centers. Although there was no longer a social rationale for the existence of such sub-human facilities,[220] large numbers of handicapped persons continued to be placed in these institutional "warehouses" located in the country.

2. *Portrait of the "modern" institution.*

Historically, the institution was devised for the purpose of segregating from society the mentally disabled, epileptics, or those with multiple or severe physical handicaps. Present-day institutions, most of which are run by states,[231] continue to operate in the spirit of 1925, when inexpensive isolation of a "scarcely human retardate" was the only answer.[222] Let us now examine the structure and operation of those facilities to discover what life in a contemporary institution is like.

First, consider the physical plant and thus the lifestyle dictated by the architecture of a state institution. Typically, the buildings were designed as monuments, as public relations endeavors; they were built for the convenience of the staff, the architect, and the community, but never for that of the residents.[228] One observer has chronicled some of the dehumanizing conditions characteristic of today's state institutions:[224]

> a. A fence or wall surrounding an entire building or even an entire facility.
>
> b. Barred windows and more sophisticated but equally effective reinforced window screens (so-called security screening).
>
> c. Locked living units. In the case of children or physically handicapped persons, door knobs may be set high above reach. These restrictive access mechanisms permit staff to perceive the facility as "open" even though it is actually locked.
>
> d. Caretaker stations providing maximum visual control over resident areas, while minimizing staff involvement. The glass-enclosed nursing station is a classical example.
>
> e. Segregation of the sexes. Such segregation becomes an absurd practice with infants and children, as well as the aged.
>
> f. Large dormitory sleeping quarters, with no (or only

220. *Id.* at 129-31.
221. DEUTSCH, *supra* note 178, at 380, *citing* 1944 U.S. Census Bureau figures.
222. Wolfensberger, *supra* note 203, at 129.
223. *Id.* at 63, 83-88.
224. *Id.* at 72-77.

low) partitions between beds. Lights may burn even at night to facilitate supervision.

g. Bedrooms lacking doors. Where doors exist they almost always contain peepholes, or "Judas-windows."

h. Toilets and showers lacking partitions, curtains or doors. Bathing facilities are frequently designed for the efficient cleansing of a large number of residents by a small number of caretakers: slabs, hoses and mass showers are used rather than installations conducive to self-cleaning.

i Often no place to store one's personal possessions. Even if there are such places, frequently they are under lock and key and inaccessible to the resident. The use of personalized clothing is denied; clothes are supplied from a common pool.

j. Beds or bed stalls are designed to be picked up and immersed in cleansing solution in their entirety.

k. Walls and floors made of a material that is virtually impossible to "deface," scratch, soil or stain. Entire rooms can be hosed down as in a zoo. Often living units have drains in the floors.

1. "Segregated" staff lounges to which caretakers withdraw for meals and coffee, heightening the "we-they" attitude of supervision and control.

Residents of institutions usually face these oppressive surroundings for a lifetime, because institutionalization is a dead-end proposition. Few residents are ever released. The Stockholm Symposium of 1967 found that the practice is to "institutionalize and throw away the key."[226] The Symposium also commented on the degenerative effect the institutional environment has upon individual development.[226]

A description of the physical plant of an average institution reveals that these facilities are little more than prisons. Listing the standard architectural and operational restrictions, however, does not begin to cover the violations of individual rights and freedoms. Not only is segregation of the sexes prevalent, but segregation from families, normal society and peer groups is also a product of institutionalization. Inmates are deprived of social touchstones which most of us take for granted: stores, bus stops, the neighborhood church, the Burger King, the football stadium. Restrictions are imposed with respect to visitors and use of the

225. *See* Shoenfield, *Human Rights for the Mentally Retarded: Their Recognition by the Providers of Service*, 4 HUMAN RIGHTS 31, 46 (1974), *citing* INTERNATIONAL LEAGUE OF SOCIETIES FOR THE MENTALLY HANDICAPPED, LEGISLATIVE ASPECTS OF MENTAL RETARDATION, CONCLUSIONS OF THE STOCKHOLM SYMPOSIUM III 3(c), (d), (e) (1967).

226. *Id.* at 39.

phone, while censorship of incoming and outgoing mail is common.[227]

3. *Legal challenges to institutional confinement: the right to freedom*

The fact that handicapped persons are confined to state institutions solely because of their mental or physical disabilities, coupled with the growing realization that these institutions do little to improve the lost of such persons,[228] has produced a recent upsurge in litigation. In the last decade, reformers have filed lawsuits challenging conditions inside residential institutions and the very existence of the institutions themselves.

In *Rouse* v. *Cameron,*[229] the petitioner had been involuntarily committed to a mental hospital by a District of Columbia Municipal Court, which found him not guilty by reason of insanity of carrying a dangerous weapon.[230] This was one of the first cases dealing with the right to treatment, a concept articulated in the 1960's by Dr. Morton Birnbaum, who proposed that

> the courts under their traditional powers to protect the constitutional rights of our citizens begin to consider the problem of whether or not a person who has been institutionalized solely because he is sufficiently mentally ill to require institutionalization for care and treatment actually does receive adequate medical treatment so that he may regain his health, and therefore his liberty, as soon as possible; that the courts do this by means of recognizing and enforcing the right to treatment; and, that the courts do this, independent of any action by any legislature, as a necessary and overdue development of our concept of due process of law.[231]

The holding in *Rouse* was that any involuntarily committed person has a right to treatment. The *Rouse* court based its decision on a Washington, D.C., statute which mandated treatment for those persons committed to a public hospital because of mental illness.[232] The court also indicated, however, that failure to provide such treatment could raise constitutional questions.[233]

227. Wolfensberger, *supra* note 203, at 76.
228. Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499 (1960) [hereinafter cited as Birnbaum].
229. 373 F.2d 451 (D.C. Cir. 1966).
230. *Id.* at 452. D.C. CODE § 22-3215 (1961) provides that carrying a dangerous weapon is a misdemeanor for which the maximum imprisonment is one year. Rouse v. Cameron, 373 F.2d 451, 452 (D.C. Cir. 1966). At the time of his appeal, Rouse had been confined four years with no end in sight. *Id.* at 453.
231. Birnbaum, *supra* note 228, at 499.
232. D.C. CODE § 21-562 (Supp. V, 1966).
233. 373 F.2d at 453.

In the two years following the *Rouse* decision, few cases dealt with the question of a constitutional right to treatment. In 1971, the important case of *Wyatt* v. *Stickney*[234] focused squarely on the inhumane conditions at three Alabama institutions. The *Wyatt* court held:

> To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.[235]

The *Wyatt* case involved a class action initiated against state officials by guardians of patients confined at a state mental hospital and later joined by certain employees of the hospital.[236] Plaintiffs contested state budgetary cuts, the resultant termination of 99 employees at Bryce Hospital in Tuscaloosa, and large-scale reorganization efforts by the Alabama Department of Mental Health.[237] A federal district court ruled that the treatment programs in existence prior to reorganization were scientifically and medically inadequate; the court required the parties to develop, promulgate and implement proper standards of treatment.[238]

Relying upon *Rouse* v. *Cameron*,[239] the *Wyatt* decision declared that where patients were involuntarily committed for treatment purposes through noncriminal procedures lacking the constitutional safeguards afforded to criminal defendants, they

> unquestionably [had] a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. The purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions such as [the one involved here].[240]

234. 325 F. Supp. 781, *on submission of proposed standards by defendants*, 334 F. Supp. 1341 (1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972).

235. Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971) (emphasis omitted).

236. *Id.* at 782. Defendants included the commissioner and deputy commissioner of the Department of Mental Health of the State of Alabama, the members of the Alabama Mental Health Board, the Governor of Alabama, and the Montgomery County probate judge (as representative of all other state probate judges).

237. Amended complaints dropped the employees' claims and added to the plaintiff class residents of Searcey Hospital (for the mentally ill) and Parlow State School and Hospital (for the mentally retarded). *Id.* at 782-83. The disputed reorganization efforts sought to introduce a "unit-team system of delivery of mental health services and treatment to patients." *Id.* at 783. The court took a "wait and see" approach to the new system; *see* note 245 and accompanying text *infra*.

238. 325 F. Supp. at 784-85.

239. 373 F.2d at 451; *see* notes 229-33 and accompanying text *supra*.

240. 325 F. Supp. at 784.

The lack of staff or facilities was no justification for failure to provide suitable, adequate treatment for the mentally ill or mentally retarded person.[241]

The *Wyatt* court heard testimony from experts in the mental health and mental retardation fields documenting the shockingly inhumane conditions at the Alabama institutions. Immediate, extensive relief was ordered and strict standards were set.[242] The court specified three fundamental elements of the right to treatment: a humane psychological and physical environment, qualified staff in numbers sufficient to administer adequate treatment, and individualized treatment plans.[243] Relief was founded on the right to due process, but the court stated that denial of equal protection and infliction of cruel and unusual punishment could provide additional grounds.[244]

The *Wyatt* opinion also emphasized the mental patient's right to be treated in the *least restrictive setting.*[245] The clear implication of the holding was that a person should not be subjected to institutionalization, which involves extensive curtailment of liberty, if he can be treated while he remains in the community.[246] The evidence presented to the *Wyatt* court indicated that long-term institutionalization in itself leads to deterioration and decreases the chance that an individual will be able to cope successfully in the outside world. Dr. Gunnar Dybwad, an expert in the field of mental retardation, testified:

> Individuals who come to institutions and can walk stop walking, who come to institutions and can talk stop talking, who come to institutions and can feed themselves will stop feeding themselves, and in other words, in many other ways, institutionalization is a steady process of deterioration.[247]

When government restricts an individual's liberty in order to accomplish a legitimate state purpose, it is constitutionally required to use the least drastic means to accomplish that purpose.[248] The "least restrictive setting" concept thus marshals

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241. 325 F. Supp. at 784.

242. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1972). After hearing evidence that showed the institutions were overcrowded fire hazards, lacking any semblance of privacy, and saddled with a poorly trained, inadequate staff and a non-therapeutic environment, the court declared that the treatment being provided was grossly inadequate and dehumanizing to the residents. *Id.* at 784. *See* MENTAL HEALTH LAW PROJECT, BASIC RIGHTS OF THE MENTALLY HANDICAPPED 10-11 (1973).

243. 344 F. Supp. at 376, 379-86.

244. 325 F. Supp. at 781.

245. 344 F. Supp. at 379, 380, 384 (app. A, §§ 2, 7, 26).

246. MENTAL HEALTH LAW PROJECT, BASIC RIGHTS OF THE MENTALLY HANDICAPPED 27 (1973).

247. *Id.* at 12.

248. *See, e.g.*, Covington v. Harris, 419 F.2d 617, 623-25 (D.C. Cir. 1969);

firm constitutional support for the argument that persons who can be treated without institutionalization should remain in the community.

While the *Wyatt* case attempted to remedy the inhumane conditions in Alabama institutions, it did not deal with the underlying problem: the *existence* of segregated facilities. The formulation of elaborate standards for recordkeeping, staffing ratios, living conditions and disciplinary policies *implies* the necessity for the existence of such institutions. *Wyatt* never confronted the basic issue of whether any large-scale, geographically remote, full-time residential institution *could* beneficially affect the lives of its residents.

There is fear among many mental health and mental retardation professionals that simply improving the conditions at residential institutions for the handicapped will guarantee their continued existence. However, serious problems would arise if the residents of existing institutions were released into the community without any provision for appropriate community services. The fear that this might occur has caused many institutional personnel, as well as parents and families of the residents, to endorse adamantly the continued existence of institutions, while ignoring the serious violations of rights that residents suffer every day, every hour of their lives.

In *Welsch* v. *Likins*,[249] plaintiffs sought an injunction halting their detention under the conditions existing at Minnesota's institutions for retarded citizens. Granting the injunction, the court held that persons civilly committed for reasons of mental retardation had both a statutory[250] and, under the due process clause, a constitutional right "to adequate care and treatment designed to give each person a realistic opportunity to be cured or to improve his or her mental condition."[251] Most importantly, *Welsch* also directed state officials to make good faith efforts to place mentally retarded persons in settings that would be suitable and appropriate to their mental and physical conditions, while least restrictive of their rights.[252] Although *Wyatt* had enunciated the right to treatment in the least restrictive environment,[253] it did not

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Lake v. Cameron, 364 F.2d 657, 659-61 (D.C. Cir. 1966); Welsch v. Likins, 373 F. Supp. 487, 501-02 (D. Minn. 1974); Morales v. Turmor, 364 F. Supp. 166, 175 (E.D. Tex. 1973); Lessard v. Schmidt, 349 F. Supp. 1078, 1095-97 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974).

249. 373 F. Supp. 487 (D. Minn. 1974).

250. MINN. STAT. ANN. §§ 252.28, 253A.01-.21, 253A.02(5), 253A.07(17)(b), (18) (Supp. 1975).

251. 373 F. Supp. at 499, *citing* Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1972).

252. 373 F. Supp. at 502.

253. *See* notes 245-48 and accompanying text *supra*.

impose upon state officials, as *Welsch* did, the responsibility of providing care, treatment, and education for the handicapped while avoiding the serious curtailments of liberty inherent in large, remote "warehouse"-type institutions.

The United States Supreme Court was asked to rule upon the issue of whether there exists a constitutional right to treatment in *O'Connor v. Donaldson.*[26]* The Court chose not to deal directly with the issue of a right to treatment, and instead addressed the basic underlying issue: the right to be free from involuntary institutionalization.

Mr. Donaldson had been involuntarily confined in a state mental hospital for 15 years. Throughout his confinement, Donaldson repeatedly demanded his release, stating that he was dangerous to no one and that in any case the hospital was not providing any treatment for his supposed illness. Donaldson brought a civil rights action,[255] contending that the superintendent and other members of the hospital staff named as defendants had intentionally deprived him of his constitutional right to liberty. The jury, after a four-day trial, returned a verdict in favor of Donaldson and assessed both compensatory and punitive damages against the defendants. The Court of Appeals for the Fifth Circuit, in a lengthy opinion, affirmed the lower court finding.[256]

Evidence presented at the trial showed that Donaldson's confinement was a simple regime of enforced custodial care. (This is not at all unlike the so-called "treatment" programs which hundreds of thousands of mentally ill, mentally retarded, and other disabled persons currently receive in state institutions.) Since the evidence also showed that Donaldson was not, nor had ever been, dangerous to himself or to others, the Supreme Court did not decide whether a person committed on grounds of dangerousness has a "right to treatment." The Court instead viewed the case as raising a single, relatively simple, but nonetheless important question concerning every person's constitutional right to liberty.[257]

A close analysis of the language of Justice Stewart's majority opinion clearly indicates that the Court attacked the basic premise of institutionalization—that is, the segregation of non-dangerous handicapped persons: "A finding of 'mental illness' alone cannot justify a State's locking up a person against his will and keeping him indefinitely in custodial confinement."[258]

The Court held that "incarceration is *rarely if ever* a

254. 95 S. Ct. 2486 (1975), *aff'g* 493 F.2d 507 (5th Cir. 1974).
255. 42 U.S.C. § 1983 (1970).
256. Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974).
257. *Id.* at 2490-93.
258. *Id.* at 2493 (emphasis added).

necessary condition for raising the living standard of those capable of surviving safely in freedom, on their own or with the help of family or friends."[259] After all, "may the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in a private community?"[260] The Court concluded that even where the confinement was originally constitutionally justified, it cannot continue after the need for confinement no longer exists.[261]

The Court expressed strong disapproval of the premises underlying the present process of institutionalization:

> May the state fence in harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might well ask if the State to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity can not constitutionally justify the deprivation of a person's physical liberty.[262]

The *Donaldson* fact pattern is very similar to situations in which many institutionalized persons find themselves. They have been confined not because they are dangerous, nor for "treatment," but because society is unwilling to tolerate their remaining in the community. These handicapped persons, like Mr. Donaldson, **are suffering violations of their *constitutional right to freedom.*[268]**

It is too soon to estimate the ultimate effect of the landmark *Donaldson* decision. It is clear, however, that the Supreme Court has delivered a significant blow to the widespread state practice of institutionalizing handicapped persons. "Harmless" persons who are mentally ill or mentally retarded, physically unattractive, or otherwise socially unacceptable, have the right to remain in the community if they so choose.[264] Although the *Donaldson* decision attacked the current legal and philosophical presumptions justifying institutional confinement, it did not address the problem of formulating acceptable criteria for commitment in those limited cases where it would be legally permissible. Several lower federal courts, however, have spoken to precisely this issue, the constitutional standards for civil commitment.

Lessard v. *Schmidt*[265] challenged the constitutionality of

259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 2494.
263. *Id.*
264. *See id.* at 2493 n.90.
265. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for more specific order*, 414 U.S. 473, *ordered accordingly*, 379 F. Supp. 1376 (1974).

Wisconsin's civil commitment statute as a misuse of state power which deprived a person of his fundamental liberty to go unimpeded about his affairs.[266] *Lessard* was a class action brought on behalf of all adult persons "held involuntarily pursuant to any emergency, temporary or permanent commitment provision of the Wisconsin involuntary commitment statute."[267] The court held that the commitment statute was constitutionally defective insofar as it

> fail[ed] to require effective and timely notice of the charges under which a person [was] sought to be detained; fail[ed] to require adequate notice of all rights, including the right to jury trial; permit[ted] detention longer than 48 hours without a hearing on probable cause; permit[ted] detention longer than two weeks without a full hearing on the necessity for commitment; [and] permit[ted] commitment based upon a hearing in which the person charged with mental illness [was] not represented by adversary counsel, at which hearsay evidence [was] presented without the patient having been given the benefit of the privilege against self-incrimination.[268]

Lessard further held that civil commitment would be allowed only where the state had proved beyond a reasonable doubt all facts necessary *to* show that the individual was mentally ill and dangerous; mere preponderance of the evidence violated "fundamental notions of due process" and was therefore constitutionally insufficient to justify commitment.[269] "Dangerousness," the court stated, must in turn be "based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another."[270] In addition, the court required those persons seeking commitment to consider less restrictive alternatives.[271]

The standards set forth in *Lessard* have rendered many current commitment statutes—usually based on superficially philanthropic language calling for commitment "in the best interests of the individual"—vulnerable to constitutional attack. Most statutes, like the Wisconsin law, require only limited notice of the commitment hearing and allow the individual threatened with

266. 349 F. Supp. at 1084.
267. *Id.* at 1082.
268. *Id.* at 1103.
269. *Id.* at 1095. For a full discussion of the standards of commitment, *see id.* at 1093-97.
270. *Id.* at 1093. Citing CAL. WELF. & INST'NS CODE §§ 5260, 5264 and 5300 (West Supp. 1970), the *Lessard* court noted:

> Even an overt attempt to substantially harm oneself cannot be the basis for commitment unless the person is found to be 1) mentally ill, and 2) in immediate danger at the time of the hearing of doing further harm to oneself.

Id. n.24.
271. *Id.* at 1096.

commitment to be absent from the hearing itself. Relying in part upon *Lessard* and *Donaldson,* the California Supreme Court recently adopted a more stringent burden of proof for commitment in sex offense cases.[272] As a result of these decisions, lawsuits challenging various commitment statutes have proliferated.[273]

Where *Lessard* applied extensive constitutional protections to adults in the commitment process, *Bartley* v. *Kremens*[274] applied those same constitutional protections to children who were threatened with institutionalization. A three-judge federal court declared the Pennsylvania commitment laws for juveniles[275] to be violative of the plaintiffs constitutional right to due process. The court held that a child who faces the possibility of being physically confined for an indefinite period of time has a true interest in the potential confinement and the right to a hearing with full due process protections which cannot be waived by any third party, including the child's parent.[276] This decision recognizes that the previous practice, which allowed for parental waiver of a pre-institutionalization hearing, was in fact an involuntary commitment of the child regardless of any euphemistic statutory language labeling it "voluntary."[277]

Thus, the courts have significantly restricted the criteria under which either an adult or a child can be constitutionally committed to a state institutional facility. There must be full procedural due process as well as a finding of dangerousness and a prior exhaustion of all the less restrictive alternatives. Implementation

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272. People v. Feagley, 14 Cal. 3d 338, 345, 535 P.2d 373, 377, 121 Cal. Rptr. 509, 513 (1975); People v. Burnick, 14 Cal. 3d 306, 313-25, 535 P.2d 352, 356-64, 121 Cal. Rptr. 488, 492-500 (1975). *Burnick* held that the proper standard of proof in mentally disordered sex offender proceedings was proof beyond a reasonable doubt, and not merely by a preponderance of the evidence. *Id.* at 324-25, 535 P.2d at 364, 121 Cal. Rptr. at 500, *citing In re* Winship, 397 U.S. 358 (1970); Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974), *aff'd,* 95 S. Ct. 2486 (1975); Lessard v. Schmidt, 349 F. Supp. 1078, 1095 (E.D. Wis. 1972), *vacated on other grounds,* 414 U.S. 473 (1974).

273. *See, e.g.,* Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Bell v. Wayne County General Hosp., 384 F. Supp. 1085 (M.D. Ala. 1974); Saville v. Treadway, C.A. No. 6969 (M.D. Tenn., March 8, 1974); Dixon v. Attorney General of Pennsylvania, 313 F. Supp. 653 (M.D. Pa. 1970); Schneider v. Radack, Civ. No. 74-4020 (Cir. Ct., Yankton County, S.D., May 9, 1974).

For an excellent discussion of recent developments in the civil commitment area, *see Developments in the Law—Civil Commitment,* 87 HARV. L. REV. 1190 (1974).

274. 44 U.S.L.W. 2063 (E.D. Pa., July 24, 1975).

275. Pennsylvania Mental Health and Mental Retardation Act, 50 PA. STAT. ANN. tit. 50, §§ 4402, 4403 (1966).

276. 44 U.S.L.W. 2063 (E.D. Pa., July 24, 1975). *See also* New York St. Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973).

277. *Id. See also* Mem. & Order, June 4, 1974, Horacek v. Exon, 357 F. Supp. 71 (D.C. Neb. 1973); Saville v. Treadway, C.A. No. 6969 (M.D. Tenn., March 8, 1974).

of these new commitment standards will probably result in the institutionalization of far fewer handicapped persons. It is extremely important, however, to remember that the historical basis for institutionalization has been the notion that handicapped persons should be isolated. Far too many of our disabled citizens are still confined in institutions. States must break with the traditional "treatment" model of providing residential programs and services in institutions and return handicapped persons to the community.

> Today, many people fail to understand that educational programming and training for the handicapped works; that the deaf, the blind and the retarded can learn and can, in fact, become productive members of society. Most of us see the handicapped only in terms of stereotypes that are relevant for extreme cases. This ancient attitude is in part the result of the historical separation of our handicapped population. We have isolated them so that they have become unknown to the communities and individuals around them.[278]

Society must follow the lead of the courts in reversing discriminatory practices, and in recognizing that handicapped persons are citizens who must finally be allowed to exercise their legal and constitutional right to live normal lives.

III. HANDICAPPED PERSONS ARE ENTITLED TO EQUAL PROTECTION OF THE LAWS

The fourteenth amendment forbids a state to deny to any person within its jurisdiction the equal protection of the laws.[279] If a state has become significantly involved[280] in the unequal treatment of its citizens, the discriminatory treatment—whether legislative,[281] administrative,[282] or judicial[283]—may be challenged under the equal protection clause. State activity is subject to judicial nullification where it "individuously"[284] singles out one

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278. 118 CONG. REC. S 1472, 1473-74 (daily ed. Feb. 9, 1972).

279. U.S. CONST. amend. XIV, § 1.

280. The state must participate to a significant extent in the alleged discrimination before the equal protection clause becomes operative. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 380 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-26 (1961).

281. *See, e.g.*, Peterson v. Greenville, 373 U.S. 244, 247 (1962) The Civil Rights Cases, 109 U.S. 3, 11 (1883); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 342 (1949) [hereinafter cited as Tussman & tenBroek].

282. *See, e.g.*, Robinson v. Florida, 378 U.S. 153, 155-56 (1964); The Civil Rights Cases, 109 U.S. 3 (1883); Tussman & tenBroek, *supra* note 281, at 342, 353.

283. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 14-18 (1948).

284. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

particular group from among those "similarly situated."[285]

On the other hand, nearly all statutes and regulations employ classifications. Under an equal protection analysis, legislatively or administratively imposed distinctions will be examined in light of their overall purpose. A classification is "under-inclusive" when it fails to include all those who are similarly situated with respect to the general purpose of the law. An "over-inclusive" classification affects a wider range of persons than those whom the particular law may legitimately reach.[288] Some laws contain elements of both under- and over-inclusiveness;[287] but the classification cannot be characterized until *after* the purpose of the law has been identified.[288] And whether the degree of "inclusiveness" is unconstitutionally broad or narrow depends, in turn, upon how closely the courts will examine the relation between the purpose of the law and the classification it employs.

A. *The "Two-Tiered" Approach*

Over the years, the Supreme Court has used various standards for reviewing state acts which discriminate among classes of citizens.[289] During the Warren era, the burden imposed upon the government to justify such laws depended on which of the two levels of scrutiny the Court employed. The "strict scrutiny" test upheld a classification only if the state convincingly demonstrated that it was necessary to promote a "compelling" governmental interest.[290] In such cases, the state was required to rebut the presumption that its interest could be furthered by a more carefully tailored classification or by some less drastic alternative.[291] The rigorous level of scrutiny would be invoked when legislation, or some other form of state action (1) contained classifications which were inherently "suspect," such as those based on race[292] or nationality,[293] or (2) affected a "fundamental right" either ex-

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285. Tussman & tenBroek, *supra* note 281, at 344-46.
286. *Id.* at 346-51.
287. *Id.* at 352.
288. *Id.* at 346.
289. *See, e.g.*, Gunther, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).
290. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-73 (1972); Dunn v. Blumstein, 405 U.S. 330, 338 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting).
291. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351, 357-60 (1974) (Brennan, J., dissenting).
292. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 9 (1966); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Korematsu v. United States, 334 U.S. 410 (1948).
293. *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948).

pressly or impliedly guaranteed by the constitution, such as the right to vote[294] or to have offspring.[296]

A second, less demanding level of judicial review was used when neither condition for strict scrutiny was present. This alternative standard, known as the "rational basis" test, upheld the classification if it was reasonably related to a legitimate governmental objective.[296] While the burden was upon the state to demonstrate a compelling interest in strict scrutiny cases, statutory validity was presumed under the rational basis test.[297]

When it applied "strict scrutiny," the Court generally struck down the challenged state action.[298] Until very recently, use of the rational basis test meant minimal scrutiny and was an almost sure tipoff that the Court would uphold the classification against an equal protection attack.[299]

This two-tiered approach has been criticized as too rigid and mechanistic.[300] Since 1971, the Burger Court has shown signs of opting for new, more flexible standards of review.[801] Strict

294. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

295. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); *See generally* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). The concept of "fundamental rights" explicitly or implicitly protected by the Constitution (and thereby triggering strict judicial scrutiny) has been criticized as unsound. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting).

296. Levy v. Louisiana, 391 U.S. 68, 71 (1968); McGowan v. Maryland, 366 U.S. 420, 425-28 (1961), Morey v. Doud, 354 U.S. 457, 465-66 (1957).

297. Lindsay v. Nat'l Carbonic Gas Co., 220 U.S. 61, 78-79 (1941).

298. *Cf.* Trancil v. Woolls, 379 U.S. 19 (1964); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

299. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-28 (1961); Morey v. Doud, 354 U.S. 457, 465-66 (1957).

300. *See* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33 (1972). *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-126 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

The "upper," or "strict scrutiny," tier has been assailed for lacking basic analytical firmness. *See e.g.*, Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966). Active Justices who have expressed dissatisfaction with the rigidity of the two-tiered approach include White, in Vlandis v. Kline, 412 U.S. 441 (1973); Brennan, in Dandridge v. Williams, *supra*; and Douglas, in San Antonio Independent School Dist. v. Rodriguez, *supra* at 70.

301. *See generally The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1 (1972). The Burger Court has declined to extend the amorphous "fundamental rights" doctrine further. *Id.* at 12-13; *see, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 37-38 (1973); Lindsey v. Normet, 405 U.S. 56 (1972); Richardson v. Belcher, 404 U.S. 78, 80-81 (1971).

In the seventies the "rational basis" approach has become a real test rather than a mere blanket endorsement of the challenged legislation. Classifications have been invalidated under the rational basis test in James v. Strange, 407 U.S. 178 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S.

scrutiny, however, continues to be invoked where states adopt classifications well established as "suspect."[302] During the past four years, the Court has added alienage[303] to the "suspect" group, while broadly implying that women[304] and illegitimate children merit similar consideration.[805]

B. *Handicapped Persons as a Suspect Class*

As a class repeatedly abused and neglected by society and its public officials and institutions, handicapped persons have a legitimate claim for special judicial solicitude under the equal protection clause. Clearly, litigants who are able to secure strict judicial scrutiny of challenged state policies stand the best chance of having those policies invalidated. Despite the Court's recent inability to achieve analytical consistency in the equal protection area, obtaining membership in the small circle of "suspect" classes would undoubtedly result in strict scrutiny of classifications based on handicapping conditions.

1. *Determining "suspectness."*

In a number of cases, the United States Supreme Court has made clear that legislative classifications focusing upon certain group traits would trigger a "compelling state interest" analysis.[306]

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71 (1971). These cases, as one commentator noted, suggest that the rational basis test has acquired new "teeth." *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 20-21 (1972).

Justice Marshall has advocated a "sliding scale" analysis which would employ a broad spectrum of standards for reviewing purported violations of the equal protection clause. Marshall's approach would gauge: (1) the character of the classification in question; (2) the relative importance of the alleged deprivation to members of the class; and (3) the state interests propounded in support of the classification. Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

The number of equal protection cases reviewed by the Court has declined over the last three years. G. GUNTHER & N. DOWLING, CONSTITUTIONAL LAW AND INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW, CASES AND MATERIALS 221 (8th ed. Supp. 1974) [hereinafter cited as GUNTHER & DOWLING]. This is at least partially due to the Court's newly acquired penchant for invalidating legislative or regulatory classifications on procedural due process grounds. Classifications based on what the Court calls "conclusive" or "irrebuttable" presumptions which are not universally true in fact, may be struck down unless the individuals adversely affected are given the opportunity to rebut them through case-by-case determinations. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Dept' of Agriculture v. Murry, 410 U.S. 924 (1972).

302. *E.g.*, race or national origin.

303. Graham v. Richardson, 403 U.S. 365 (1971).

304. The plurality opinion in Frontiero v. Richardson, 411 U.S. 677 (1973), held that classifications based on sex are inherently suspect. *Id.* at 688.

305. Weber v. Aetna Casualty & Surety Co., 406 U.S. 104 (1972).

306. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371-72 (1971); Loving

In *Korematsu* v. *United States*[307] and *McLaughlin v. Florida,*[308] the strict scrutiny test was employed because the classification involved was based on race. The same rigorous standards were applied in *Takahashi* v. *Fish and Game Commission*[309] and *Graham v. Richardson*[310] because in those cases the classifications were based on alienage. In *Oyama* v. *California,*[311] the strict scrutiny test was applied to a classification based on nationality. Although the Supreme Court held in these decisions that classifications based upon race, alienage, and nationality were inherently "suspect," it did not explicitly enumerate the criteria for determining what are and what are not suspect classes.[312]

The contours of "suspectness" began to take shape with Chief Justice Stone's widely heralded *Carotene Products footnote'.*

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[313]

The courts have recently relied upon this "discrete and insular minority" rationale in applying strict scrutiny to laws singling out aliens[314] and District of Columbia residents.[315]

Commentators have suggested an additional factor which classifications based on race, alienage and nationality have in

v. Virginia, 388 U.S. 1, 9 (1966); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944).

307. 323 U.S. 214 (1923).

308. 379 U.S. 184 (1964).

309. 334 U.S. 410, 419-20 (1947).

310. 403 U.S. 365, 371-72 (1970).

311. 332 U.S. 633 (1948).

312. *See* Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974), in which the author contends that the mentally ill comprise a suspect class. The article discusses various theories which have attempted to define the characteristic elements of "suspectness". *Id.* at 1258-68. The author's conclusion is that legislative classifications which have been held to be suspect (race, nationality and alienage) are tainted with "we-they" over-tones:

> Anytime we (a predominately white, American-born and descended legislature) compare ourselves to them (blacks, aliens, and other persons of foreign ancestry), the court should closely scrutinize the classification. If not perfect, the classification must be justified by exigent circumstances.

Id. at 1251. *See generally id.* at 1245-58. The "we-they" analysis was developed by Professor John Hart Ely in Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920, 933 n.85 (1973); *see, e.g.,* Note, *Mental Illness: A Suspect Classification?,* 83 YALE L.J. 1237, 1245 n.37, 1250-51 (1974).

313. United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

314. Graham v. Richardson, 403 U.S. 311, 372 (1971).

315. United States v. Thompson, 452 F.2d 1833 (D.C. Cir. 1971); D.C. Federation of Civic Ass'ns, Inc. v. Volpe, 434 F.2d 436 (D.C. Cir. 1970).

common: they evoke stereotypes which carry the stigma of inferiority. This criterion, it is argued, should be used to identify other suspect groups.[316]

The Court in *Weber* v. *Aetna Casualty & Surety Co*[317] articulated still another indicator of suspectness. This case dealt with a workmen's compensation law[318] which provided that illegitimate children could recover benefits on the death of their natural father only if the surviving dependants in higher priority classes did not exhaust the benefits.[319] The *Weber* opinion strongly implied that illegitimate children, as a class, warranted special judicial protection because the class was characterized by "immutability";[320] like race, illegitimacy was a changeless trait.[321] Speaking for the majority, Justice Powell also cited the "social opprobrium" suffered by illegitimates. Visiting such condemnation upon the head of an infant, he stated, was "illogical and unjust."[322] Such legislation was "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.[328]

It was not until the 1973 case of *San Antonio Independent School District v. Rodriguez*[324] that the Supreme Court capsulized the factors which make a classification suspect. *Rodriguez* was a class action which unsuccessfully challenged on equal protection grounds the Texas school financing system's reliance on local property taxation.[825] The Court summarized what it termed

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316. *See, e.g., Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1127 (1969); Black, *The Lawfulness of the Segregation Decisions,* 69 YALE L.J. 421, 426-27 (1960).

317. 406 U.S. 164 (1972).

318. LA. REV. STAT. §§ 23:1021(3), 23:1232 (1967).

319. 406 U.S. at 167-68.

320. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677, 687 (1973), *citing* Weber v. Aetna Casualty Co., 406 U.S. 164, 175 (1972).

321. Note, *Mental Illness: A Suspect Classification?,* 83 YALE L.J. 1237, 1243-44 n.30 (1974).

322. 406 U.S. at 175.

323. *Id.*

324. 411 U.S. 1 (1973).

325. *Id.* at 4-18. An extensive analysis of *Rodriguez* is beyond the scope of this article. It should be noted, however, that the Supreme Court's refusal to apply strict scrutiny to relative differences in programs within an educational system does not necessarily close the door to a finding of interference with fundamental rights when a child is totally excluded from the public education system. The Court acknowledged:

> The argument here is not that children in the districts having relatively low assessable property values are receiving no public education; rather it is that they are receiving a poorer quality education than that available to children in districts that have more assessable wealth.

Id. at 411 U.S. 23. The Court specifically based its ruling in part on a presumption that the state of Texas was providing "an 'adequate' education for all children in the state." 411 U.S. at 24.

The plaintiff in *Rodriguez* had argued that unequal educational expenditures

"traditional indicia of suspectness," stating that classification based on a group characteristic would trigger strict scrutiny when that group was

> saddled with such disabilities, or subjected to such a history or purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[326]

Less than two months after *Rodriguez,* several members of the Court advocated the addition of one more traits to the list of suspect classifications. Speaking for a plurality of four, Justice Brennan concluded that statutory classifications based on sex were inherently suspect.[327] Brennan's opinion noted that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."[328] Justice Brennan continued:

> [S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.[329]

Thus, sex classification will generally be so over-inclusive as to bear no relation to an individual's ability to contribute to society. As the plurality saw it, suspect status is therefore appropriate.

2. *Do handicapped persons qualify?*

Clearly, handicapped persons possess most, if not all, of those "indicia of suspectness" thus far enumerated by the Court.[380] Under

ought to receive strict scrutiny because education is a necessary prerequisite to a meaningful exercise of the fundamental right to speech and the right to receive information. 411 U.S. at 35-36. The Court replied:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system, fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

411 U.S. at 37. So the total exclusion of handicapped or other classes from the public school system may call for more careful scrutiny.

326. 411 U.S. at 4-18. This definition of suspectness was utilized in the United States District Court for the Northern District of California in considering whether women were an "identifiable group" for purposes of alleged grand-jury discrimination based upon statistical disparities.

327. Frontiero v. Richardson, 411 U.S. 677, 686-688 (1973).

328. *Id.* at 686.

329. *Id.*

330. For a discussion of the way in which classifications based on mental illness share the philosophical underpinnings of classifications currently recognized as suspect, *see* Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974).

the Supreme Court's ruling in *Rodriguez,*[331] to qualify as a suspect class there need only be a showing that the class has been saddled with disabilities *or* historically treated unequally *or* relegated to political powerlessness.[332] A class may thus establish its eligibility for suspectness by qualifying under any one of these three criteria. Handicapped persons qualify as a suspect class under not just one but all three tests set out in the *Rodriguez* holding.

It is not difficult to see that handicapped people are "saddled with disabilities." By definition, a handicap is a disability. And in addition to the physical, emotional or mental impairment, society places numerous limitations or prohibitions upon handicapped persons. Thus, the disabilities of handicapped individuals are compounded by the unequal treatment afforded them; mental, physical, and emotional disabilities are exacerbated by disabilities legally and socially imposed.[333]

The "political powerlessness" of handicapped persons could be the subject of extensive discussion. Most mentally handicapped persons are denied the right to vote by express provisions in state constitutions and statutes.[334] All but four states expressly exclude "idiots" arid the "insane."[335] Several states go further and exclude all those under some form of guardianship. For example, the Arizona Constitution states: "No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election . . . ."[336]

With respect to mentally ill people, one commentator has observed:

> [T]he mentally ill constitute a minority segment of the polity which is often disfranchised . . . and which is virtually powerless to improve its circumstances through the political process.[337]

Physically handicapped persons are often prevented from voting by official neglect. Transportation difficulties and archi-

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331. 411 U.S. 1, 28.

332. *Id.*

333. *See, e.g.,* notes 16-37 and accompanying text *supra.*

334. *See, e.g.,* note 50 *supra.*

335. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 308, 333 table 9.4 (1971).

336. ARIZ. CONST. art. 7, §§ 2, 16-101(5). An Arizona court interpreted this provision to disenfranchise any person not *sui juris, i.e.,* incapable of fully caring for himself. Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948). Other states have similar provisions. *See, e.g.,* ALA. CONST. art. VIII, § 182; ALA. CODE tit. 41, § 5(1) (1958); IDAHO CONST. art. VI, § 3; R.I. CONST. art. IX, § 1; *id.* amend. XXIV, § 1; S.C. CONST. art. 2, §§ 2, 6; *id.* art. 17, § 1; GA. CODE ANN. § 89-101(5) (Supp. 1972); MO. ANN. STAT. § 475.350 (Vernon 1956); TENN. CODE ANN. § 8-2801(7) (1973); 37 HARV. L. REV. 384 (1924).

337. *Developments in the Law—Civil Commitment,* 87 HARV. L. REV. 1190, 1229 n.153 (1974).

tectural barriers at polling places (such as narrow doorways, flights of stairs, and revolving doors) make it difficult or impossible for those with serious mobility problems to cast their rightful ballots.

> Public buildings, particularly those built in the past, have impressive monumental entrances fronted upon by massive flights of granite steps, pleasant to the eyes of the ordinary person, but terrifying to the physically handicapped.[338]

These and other problems, including restrictions upon the right to hold public office,[339] have rendered handicapped persons almost totally "politically powerless."[340]

Section II of this article has discussed many examples of the egregious "unequal treatment" afforded handicapped persons, both presently and historically. A strong case can be made, therefore, that the class composed of handicapped persons meets all three of the *Rodriguez* criteria. Under a *Carotene Products* type of analysis, those with physical, mental or emotional disabilities would readily qualify for "more searching judicial scrutiny."[341] Handicapped persons are a distinct minority,[342] frequently isolated from the rest of society.[343] They bear the brunt of social prejudice[344] and tend to be actively and passively cut off from the political process.[345] Taking a *Weber*[346] approach, many handicaps are immutable characteristics occurring on a random basis, punishment for which is "illogical and unjust."[347] Handicaps have traditionally

338. *See* Sorkin, *supra* note 13, at 41.

339. *See* note 54 *supra*.

340. In fact, it appears that there may be strenuous resistance in some circles to the possession of political power by handicapped citizens. For example, in Oklahoma prior to 1971 there were no express limitations upon the right of persons residing in state mental health and mental retardation facilities to vote. One author noted that residents of a state facility took advantage of their opportunity to vote. Ginsberg, *Civil Rights of the Mentally Disabled in Oklahoma*, 20 OKLA. L. REV. 117, 119 (1967). However, not long after that publication, the Oklahoma Constitution was amended to read as follows:

> . . . Nor shall any person be qualified elector of this state who is detained in a penal or correctional institution, who is a patient in an institution for mental retardation, or who has been committed by judicial order to an institution for mental illness.

OKLA. CONST. art. 3, § 1.

341. 304 U.S. 144, 152-53 n.4 (1937).

342. *See, e.g.,* notes 24-36 and accompanying text *supra*.

343. *See, e.g.,* notes 174-278 and accompanying text *supra*.

344. *See, e.g.,* note 348 and accompanying text *infra*.

345. *See* notes 334-40 and accompanying text *supra*.

346. Weber v. Aetna Casualty & Surety Co., 406 U.S. 104 (1972).

347. *Id.* at 175. Scholars differ as to the "permanence" of mental illness. *See, e.g.,* S. FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS (1924); K. MENNINGER, THE VITAL BALANCE 2 (1963); M. SCHWARTZ & C. SCHWARTZ, SOCIAL APPROACHES TO MENTAL PATIENT CARE 12-13 (1964); Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1244 (1974). However, while alienage is not a permanent, immutable characteristic, aliens are well established as a suspect class: *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413

meant social opprobrium and stigmatization for those afflicted.[348] Indeed, ostracism of handicapped individuals is one of "normal" society's standard practices.[349] It seems clear, therefore, that under any of the standards for suspectness enunciated by the Supreme Court, handicapped persons amply qualify.

Since the *Rodriguez* decision, at least one state court has found that handicapped persons do merit strict judicial scrutiny. *In re G.H.*[350] concerned disputed obligations among county and state agencies, a private school, and the parents of a physically handicapped child regarding payment for the child's education. The North Dakota Supreme Court declared that under the state constitution all children had the right to a public school education,[351] and that handicapped children were entitled to "no less than unhandicapped children."[352] The *G.H.* opinion expressed confidence that the *Rodriquez* Court

> would have held that G.H.'s terrible handicaps were just the sort of "immutable characteristic determined solely by the accident of birth" to which the "inherently suspect" classification would be applied, and that depriving her of a meaningful educational opportunity would be just the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy and sex.[353]

CONCLUSION

For various reasons, states continue to exclude, neglect and abuse handicapped persons. Those with physical, mental, or

U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365, 371-72 (1971); *see, e.g.*, Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1244 (1974).

348. *See* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 295 (E.D. Pa. 1972), for a discussion of stigmatization. *See also, e.g.*, Farina & Ring, *The Influence of Perceived Mental Illness on Interpersonal Relations*, 70 ABNORMAL PSYCH., 47 (1965); Sarbin & Mancuso, *Failure of a Moral Enterprise: Attitudes of the Public Toward Mental Illness*, 35 J. CONSULT. & CLINICAL PSYCH. 159, 162 (1970); notes 174-278 and accompanying text *supra*. The 1972 withdrawal of vice presidential nominee Thomas Eagleton is a vivid case in point.

349. *See* notes 174-278 and accompanying text *supra*.

350. 218 N.W.2d 441 (N.D. 1974).

351. 218 N.W.2d 441, 446, *construing*, N.D. CONST. art. §§ 11, 20. With respect to the integrity of educational guarantees under state constitutions, the court added: "Nothing in *Rodriguez* . . . holds to the contrary." *Id.* at 446, *citing* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).

352. 218 N.W.2d at 446.

353. 218 N.W.2d at 447, *citing* Frontiero v. Richardson, 411 U.S. 677 (1973); *See* New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973). A three-judge federal court in Colorado recently indicated that it would be open to a demonstration that handicapped persons meet the "traditional indicia of suspectness." Colorado Ass'n for Retarded Children v. Colorado, Civil No. C-4620 (D. Colo. 1973).

emotional disabilities pose very complex *human* problems for the rest of society, which has traditionally responded with an "out. of sight, out of mind" approach.[354] State legislatures and administrative agencies have projected this view into archaic, inhumane methods and programs for dealing with handicapped persons.

Historically, handicapped people have been subjected to purposeful unequal treatment of considerable scope, degree and duration. Handicapped individuals have faced and continue to face discriminatory treatment in almost every facet of life.

> The handicapped live among us. They have the same hopes, the same fears, and the same ambitions as the rest of us. They are children and adults, black and white, men and women, rich and poor. They have problems as varied as their individual personalities. Yet, they are today a hidden population because their problems are different from most of ours. Only the bravest risk the dangers and suffer the discomforts and humiliations they encounter when they try to live what we consider to be normal, productive lives. In their quest to achieve the benefits of our society they ask no more than equality of opportunity. But they are faced with continuing discrimination.[355]

Unequal treatment of handicapped people has been particularly harsh in regard to confinement in state residential institutions and denial of equal educational opportunities in public school systems.

Recently, handicapped persons have resorted to the courts in an effort to challenge some of the discriminatory practices which have plagued them for so long and to secure a portion of the equality to which they are entitled by law. These litigative efforts have, by and large, been successful. Such legal victories, however, pale in comparison to the ongoing deprivations of handicapped citizens' rights and the massive governmental inertia in meeting their special needs.

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354. *See, e.g.*, notes 174-278 and accompanying text *supra*. Noted educator S.I. Hayakawa, himself the parent of a mentally retarded son, has commented upon the social pressures to separate such children from their families. Sullivan, *The Orderly Life of Hayakawa*, San Jose Mercury-News, August 24, 1975 (California Today Magazine), at 6, col. 3-4. Claiming that parents should avoid institutionalizing a child, Hawakawa stated:

> The standard advice . . . was not to try and do anything yourself. The belief was that if you kept the child at home it might be damaging to the other children, and it would just cause grief. But it isn't damaging to the other children if they learn from you attitudes of acceptance to this handicapped child. Our [other] two children have always been very proud of [our retarded child]. They included him in their lives, taking him to shows, picnics, and all sorts of things, with the result that they're better for having had a handicapped brother.

Id.

355. 118 CONG. REC. 3320 (1972).

An important stepping-stone for handicapped persons in their rise from the long history of unequal treatment to a position of equality and dignity in our society would be a recognition by the American judicial system that handicapped persons warrant special judicial protection as a "suspect class." Strict judicial scrutiny has already been applied to classifications based on handicapping conditions by the supreme court of one state,[356] and the issue will undoubtedly be raised in other cases.[857]

Overall, it is difficult to imagine any group which meets the criteria for suspectness laid down by the United States Supreme Court more precisely than handicapped persons. It is hoped that the attitudes of more judicial tribunals toward handicapped persons will reflect that of the New York court concerning the constitutional rights of handicapped children residing at Willowbrook State School:

> The application of such constitutional guarantees for each child at Willowbrook so that his full potential no matter how limited can be obtained, should be the newest mission of the law. The right to life, liberty and the pursuit of happiness is not reserved to the healthy, ablebodied children and adults. It applies with even more force and intent to the helpless, the physically handicapped, the mentally defective and the most unfortunate of children such as those at Willowbrook.[358]

By accepting equality under the law for handicapped persons as "the newest mission of the law," our society may transform the sad examples of unequal treatment described in this article into an agenda of problems to be addressed and remedied with all possible speed.

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356. *In re* G.H., 218 N.W.2d 441 (N.D. 1974); *see* text accompanying notes 349-53 *supra.*

357. *See, e.g.*, note 353 *supra.*

358. *In re* D., 70 Misc. 2d 953, 335 N.Y.S.2d 638, 651 (1972).