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A SURVEY OF THE CONSTITUTIONAL RIGHTS OF THE MENTALLY RETARDED

by

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The recent litigation seeking to secure the constitutional rights of the mentally retarded provides an opportunity to review the status of such rights and to suggest future methods of securing these rights, too often flouted in the past. The basic proposition of this analysis is that the mentally retarded should be afforded the same constitutional rights and responsibilities which others possess. Because mentally retarded individuals are limited in their ability to exercise these rights and responsibilities, society faces a dilemma; shall it deny or circumscribe these rights because of this inability, or shall society provide the supporting statutory and administrative mechanisms to help disabled persons exercise their constitutional rights?

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This Article concludes that all levels of government have a constitutional obligation to provide the statutory and administrative means necessary to assist the retarded in exercising their constitutional rights at the same level of effectiveness as other, nonimpaired citizens. All statutory and administrative obstacles which impede or deny the full exercise of these rights should be removed. Additionally, self-help programs and financial support should be provided to insure the attainment of constitutional equality for this disadvantaged population.

While all citizens possess the same constitutional rights, some are uniquely vital to the retarded person. The most basic issue is whether a fetus suspected of being retarded has a right to life. Once conceived, the mentally retarded require supporting health and developmental services which assume greater significance than for the so-called normal population since the absence of such services impedes the ability of the mentally retarded to develop to their maximum potential. The right to a meaningful education is indispensable in providing the necessary tools for socialization and vocational skills which the retarded must possess if they are to exercise their rights of citizenship effectively. Freedom of an individual encompasses the right not to be stigmatized by derogatory labels and the right not to be institutionalized simply because of embarrassment or inconvenience to members of the family and the community. Like other citizens, the retarded are entitled to rights of privacy and association in their personal lives, including the right to be free from involuntary forms of discipline, such as sterilization and experimentation.

I. THE RIGHT TO LIFE

The threshold constitutional issue involves the right of a fetus diagnosed as impaired to be free from an abortion of its life. This presents a difficult question involving an intersection of the rights of the mother to privacy and control over her own body, the interests of society, and the right of a fetus to life. In *Roe v. Wade*[1] a challenge to a Texas abortion statute raised the issue of whether a fetus is afforded constitutional rights of due process under the fourteenth amendment. Justice Blackmun's opinion for the Court expressly held that the concept of "person" and the right to life, liberty, and property as used in section 1 of the fourteenth amendment do not include the unborn.[2] The concurring opinions of Chief Justice Burger[3] and Justice Stewart[4] fail to consider the constitutional rights of a fetus, while Justice Douglas's articulate defense of the mother's right to abort does not evaluate her rights in terms of the right of her fetus to life.[5] Dissenting Justice White washed his hands of the entire issue, noting that sensitive areas such as abortion are best left to the political processes designed to govern public

1. 410 U.S. 113 (1973).
2. Justice Blackmun stated that the Court "need not resolve the difficult question of when life begins." *Id.* at 159.
3. *Id.* at 167.
4. *Id.*
5. *Id.*

affairs.[6] Justice Rehnquist's dissent ignored the issue entirely.[7] This decision is an inadequate justification for the termination of life because it fails to analyze comprehensively the constitutional right of a fetus to life, and fails to consider adequately the right of the male parent to procreation.

If no well developed constitutional right to life exists for a fetus, would denial of life sustaining surgical treatment and support systems after birth for a vegetative individual constitute denial of due process or cruel and barbarous treatment? The New Jersey Supreme Court in *In re Quinlan*[8] concluded that no compelling state interest justified keeping a twenty-two-year-old vegetative female alive when no realistic basis existed for assuming that she could return to a cognitive or sapient life. The recognition of the right to privacy,[9] which precludes judicial intrusion into areas of life in which a right of privacy exists,[10] was the principal justification for refusing to order the application of life sustaining supports. Recognizing that her incompetence prevented the exercise of her right to privacy, the New Jersey Supreme Court upheld the right of the parent-guardian to use his best judgment in exercising the right on her behalf. The rationale of *In re Quinlan* was extended in *Jones & Rogers v. Saikewitz*[11] in which the guardian ad litem of a profoundly mentally retarded victim of acute leukemia opposed chemotherapy, and state officials sought permission to treat the leukemia. In refusing to order the treatment, the court apparently justified such action as a reasonable exercise of judgment by the guardian, while ignoring the retarded person's constitutional right to life. *In re Quinlan* and *Saikewitz* do not offer comprehensive policy justifications for the exercise of such draconian powers. A contrary approach was taken in *Maine Medical Center v. Houle*[12] where the court *ordered* surgical and medical treatment for a multiply handicapped infant on the ground that a human being is entitled to the fullest protection of the law, including the right to life. The court rejected the doctor's professional judgment that the probable damage to the infant's brain made his life not worth saving.

The federal courts have not adopted a constitutional policy of guaranteeing the right of life to an unborn fetus. Although restrictions on the right to abort during late stages of pregnancy have been predicated upon various personal and social interests, these have not been predicated upon the right of the fetus itself.

II. INVOLUNTARY STERILIZATION

If *Quinlan* and *Saikewitz* provide the vehicle for the termination of human life, the judicial stage play for sterilization of the mentally retarded had

6. *Id.*
7. *Id.* at 171.
8. 70 N.J. 10, 355 A.2d 647 (1976).
9. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).
10. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
11. No. SJC-711 (Mass. Sup. Jud. Ct. July 9, 1976), *noted in* U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. (O.H.D.) 77-21012, MENTAL RETARDATION AND THE LAW (April 1977).
12. Civ. No. 74-145 (Super. Ct., Cumberland, Me., Feb. 14, 1974).

already begun to run its course. In *Buck v. Bell*[13] the United States Supreme Court sustained a statute which provided for sexual sterilization of persons who possessed a hereditary form of insanity or imbecility and were confined to publicly supported institutions. In rejecting the argument that such a practice violated due process or equal protection of the law, Justice Holmes announced his famous laconic justification:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.[14]

Justice Holmes's analysis is typical of the eugenic social Darwinism era of the late nineteenth and early twentieth centuries. Fifteen years later in *Skinner v. Oklahoma*,[15] however, the Supreme Court applied the strict scrutiny standard of review to invalidate a state statute that authorized sterilization of persons convicted of grand larceny three times, but exempted embezzlers. In concluding that the statute violated the equal protection clause of the fourteenth amendment, Justice Douglas refused to defer to the legislature's judgment:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[16]

Involuntary sterilization of mentally retarded persons was recently considered in *North Carolina Association for Retarded Children v. North Carolina*.[17] At issue was the constitutionality of a North Carolina statute which required that certain designated state officials institute sterilization proceedings under the following circumstances: (1) when the state official believes sterilization is in the best interests of the mental, moral, or physical improvement of the retarded person; (2) when the state official believes that sterilization is in the best interests of the public at large; (3) when, in the state official's opinion, the retarded person, unless sterilized, would be likely to procreate children who would have a tendency toward serious physical, mental, or nervous disease or deficiency, or where such a retarded person, because of the deficiency, would be unable to care for a child; and (4) when the next of kin or legal guardian of the retarded person requests that the state seek sterilization.[18]

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13. 274 U.S. 200 (1927); *see In re* Cox, No. H4721-75 (N.Y. Fam. Ct. Apr. 8, 1976), *noted in* U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 77-21012, MENTAL RETARDATION AND THE LAW (Jan. 1978).

14. *Id.* at 207.

15. 316 U.S. 535 (1942).

16. *Id.* at 541.

17. 420 F. Supp. 451 (M.D.N.C. 1976).

18. N.C. GEN. STAT. §§ 35-36 to -50 (1976). The statute additionally requires (1) that a petition be filed with the court containing information to aid the court in making appropriate findings of facts and conclusions at law regarding the propriety of the requested sterilization, (2) that written consent or objection of the legal guardian or next of kin be obtained before

The district court held that the provision permitting the next of kin or legal guardian to request the filing of the petition was unconstitutional because there were no standards or limitations defining the exercise of such power. The court, however, upheld the validity of the other statutory provisions because they possessed a well defined, complete, and sensible scheme. For purposes of sterilization, the court interpreted the statute to apply only to mentally retarded persons who had a genetic defect which would likely be inherited by their offspring and the mentally retarded who would be incapable of caring for their children. Noting that for some purposes mentally retarded persons do not constitute a suspect class requiring application of the compelling interest test,[19] the court found that the statutory classification was not arbitrary or capricious, but rested upon respected medical knowledge and opinion. The court, however, noted that the right of procreation was a fundamental right, and determined that sterilization would constitute a denial of equal protection absent a showing of compelling governmental interest.[20] Nevertheless, the dual legislative purpose of preventing the birth of defective children, and preventing the birth of nondefective children who could not be adequately cared for by their retarded parent, was held to constitute a compelling state interest, and the statute, therefore, was constitutionally valid.[21] The court's laborious interpretation of the statute ultimately construed the statute to require sterilization only for the mentally retarded who were likely to engage in sexual activity without utilizing contraceptive devices and the mentally retarded likely to become pregnant or to impregnate.[22]

The court in *North Carolina Association for Retarded Children* made no reference to the "least drastic alternative" principle first enunciated in *Shelton v. Tucker*:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[23]

Applying this principle, the court in *North Carolina Association for Retarded Children* could have concluded that the statute was void on its face, and the court's tortuous interpretation of the statute would have been unnecessary. Nevertheless, the decision represents progress away from Holmes's analysis, rejecting eugenic Darwinism and recognizing that the nature and causes of retardation are not susceptible to facile generalization.[24] The decision also recognizes the need for stringent protection of the procedural

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sterilization, and (3) that a hearing be provided with *Miranda*-type protection, including right to counsel, subpoena, cross-examination, transcript of the proceeding, and appeal.

19. 420 F. Supp. at 458.
20. *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438 (1972)).
21. *Id.* at 457.
22. *Id.* at 456.
23. 364 U.S. 479, 488 (1960).
24. 420 F. Supp. at 454. *See also* AMERICAN MEDICAL ASSOCIATION, MENTAL RETARDATION 1-50 (1974).

rights of the person affected, and requires that the evidence supporting sterilization be clear, strong, and convincing.[25]

The statutory rationale of the North Carolina statute is illustrated in *In re Cavitt*[26] in which the Nebraska Supreme Court upheld the sterilization of a retarded female as a condition to her release from a state institution for the mentally retarded. In addition to having a low IQ and being a behavioral problem in the institution, the woman already had eight illegitimate children and repeatedly indicated she wanted more children. The Nebraska court pointed out that sterilization was not absolutely mandated; the plaintiff was required to agree to the procedure only if she wanted to be released. No policy justification was given by the court, and no consideration was given to less restrictive alternatives, such as counselling or the use of contraceptives. The record does not indicate whether her children were retarded or whether she was unable to care for them.

The most recent illustration of judicial abuse in this area is *Stump v. Sparkman*[27] in which a state judge granted an ex parte petition without the protection of a guardian ad litem for a fifteen-year-old girl whose mother requested the sterilization on the grounds the daughter was somewhat retarded and had stayed out nights several times with young men. The operation was performed after the child was told she was having an appendectomy. After her marriage the daughter learned she had been sterilized and sued the mother, the lawyer, the hospital, the operating surgeon, and the judge. The Supreme Court, in a five-to-three decision, affirmed the district court opinion that no federal cause of action would lie on the grounds that the judge was immune. Justice White's opinion for the Court stressed: "A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."[28]

Justice Stewart's dissent, joined by Justices Marshall and Powell, took the diametrically opposing point of view. They found the majority's reasoning factually untrue because the judge's actions were not normally those of a judge and legally unsound because they were not performed by the judge in his judicial capacity. Moreover, they believed the failure to use the established state administrative procedures for sterilization meant that the judge had not acted as a court. Justice Stewart believed that a judge was not free, like a loose cannon, to inflict damage indiscriminately simply because he announced he was acting in his judicial capacity. For Justice Stewart, the failure of the judge to treat this litigation as a case or controversy, with no litigants and no opportunity for appeal from his decision, meant that the attributes of a judicial hearing had been absent.

In his separate dissent, Justice Powell pointed out that the mother's behavior had precluded the daughter from vindicating her rights elsewhere in the judicial system. Justice Powell was of the opinion that the usual

25. 420 F. Supp. at 457 (quoting *In re* Sterilization of Moore, 289 N.C. 95, 225 S.E.2d 307 (1976)).
26. 183 Neb. 243, 159 N.W.2d 566 (1976).
27. 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).
28. *Id.* at 4256.

assumption of the absolute immunity doctrine would not be operative in circumstances in which the judicial officer behaved in a manner which precluded all resort to the appellate or other judicial remedies.

The consequences of a constitutional doctrine which permits liberal intrusion into the right to procreation have implications which go far beyond the interests of the mentally retarded. Recognizing the dangers of administrative abuse, racial minorities and juveniles have reason for deep-rooted fear because their culturally disadvantageous roles in our society often cause them to be mislabelled as mentally retarded or to be mistreated. Procedural due process guarantees designed to insure against arbitrary practices which restrict fundamental rights such as the right of procreation must be strictly followed. The doctrines of compelling state interest and the least restrictive alternative provide means of curbing unreasonable restrictions upon the exercise of such rights, yet no explanation has been given for not applying the strict scrutiny standard and least restrictive alternatives in judicial interpretation of involuntary sterilization statutes.

III. THE RIGHT TO EDUCATION

The importance of the right to education was recognized by the United States Supreme Court in *Brown v. Board of Education*[29] long before the recent "right to education" actions brought by the mentally retarded. The Court in *Brown* stated:

> Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.[30]

The holding in *Brown*, however, was based on the concept of equality, and the Court did not explicitly consider whether education was a constitutionally guaranteed right.

Although the Supreme Court stressed the importance of education in *Brown*, the history of education for the mentally retarded in the United States is a dismal recitation of avoidance, delay, and lack of capital and human resources,[31] all leading to the exclusion of the mentally retarded from the mainstream of public education. The first major step toward obtaining educational rights for the retarded was achieved in 1971 through a consent agreement in *Pennsylvania Association for Retarded Children v. Pennsylva-*

29. 347 U.S. 483 (1954).
30. *Id.* at 493.
31. For an excellent summary of the history of education for the mentally retarded, see Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 870-75 (1975).

nia.[32] This agreement recognized that all mentally retarded persons were capable of benefitting from educational programs and training.[33] Without identifying education as a constitutional obligation, Pennsylvania agreed that by providing a free public education for all children, the state "may not deny any mentally retarded child access to a free public program of education and training."[34] Earlier, in 1969, a Utah state district court in *Wolf v. State*[35] noted the importance of education for the mentally retarded, and determined that the right to education is a fundamental and inalienable right guaranteed by the Utah and United States Constitutions.[36]

A. *San Antonio Independent School District v. Rodriguez: Education is Not a Fundamental Right*

The Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*[37] severely limited the constitutional right to education, thus hindering the educational rights of the mentally retarded. Speaking for a bare majority, Justice Powell found that the right to education was neither explicitly nor implicitly guaranteed in the Constitution. In rejecting the argument that education was fundamental in the exercise of first amendment rights, Justice Powell noted that it was not within the province of the Court to create substantive constitutional rights in order to guarantee equal protection of the law.[38] In upholding the Texas scheme for financing its educational program, Justice Powell applied the traditional rationality standard: "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the state's system be shown to bear some rational relationship to legitimate state purposes."[39] Justice Stewart's concurrence concluded that the function of the equal protection clause was to determine whether the classifications created by state law were invidiously discriminatory, arbitrary, or capricious.[40]

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32. 334 F. Supp. 1257 (E.D. Pa. 1971); *accord*, Lebanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973).

33. The agreement additionally noted that the bulk of the mentally retarded were capable of achieving self-sufficiency, while the remainder were capable of achieving a lesser degree of self care. 334 F. Supp. at 1259.

34. *Id.* Recognizing the principle of normalization, Pennsylvania agreed that placement of mentally deficient children in a regular public school classroom was preferable to placement in special classrooms. *Id.* at 1260.

35. Civ. No. 182646 (Utah 3d Jud. Dist. Jan. 8, 1969).

36. The court in *Wolf* relied heavily on *Brown* stating:

> 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.

Id.

37. 411 U.S. 1 (1973).

38. *Id.* at 33. Justice Powell added, however, that when a state deprives or interferes with the exercise of a fundamental right or liberty, the Court will carefully scrutinize this state action. More deferrence will be given to constitutional deprivations by a state when the state action attempts to achieve equality, however imperfect the attempt. *Id.* at 37.

39. *Id.* at 40.

40. *Id.* at 59.

Justice Marshall's dissent rejected the majority assertion that only rights recognized in the text of the Constitution should be protected through strict scrutiny by the Court.[41] He pointed out that restrictions upon the right to procreate,[42] the right to vote in state elections,[43] and the right to appeal a criminal conviction[44] were subject to searching analysis by the Court, although no such guarantees appeared in the body of the Constitution. Applying the "sliding scale" analysis, Justice Marshall stated:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.[45]

Recalling the Court's characterization of education in *Brown*, Justice Marshall linked the right to education with the first amendment, stating that "education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life."[46]

Justice Marshall's searching analysis of the state justification for a particular policy and the means utilized led him to conclude that the Texas scheme violated the equal protection rights of students in economically deprived school districts. Dissenting separately against the majority's assertion that a right was fundamental only if it was explicitly or implicitly guaranteed by the Constitution, Justice Brennan endorsed Justice Marshall's "sliding scale" analysis.[47]

B. *The Erosion of Rodriguez*

Despite the majority's refusal to recognize education as a fundamental right in *Rodriguez*, progress has been made toward protecting the educational rights of the mentally retarded. The courts have invalidated educational programs where education was provided to a portion of the class of mentally retarded or handicapped, but not to all members of the class. In *Nickerson v. Thomson*[48] the Seventh Circuit denied the defendant's motion to dismiss the complaint after the plaintiff had alleged that the school board had failed to provide an adequate special education program to meet the needs of some of the various physically and mentally handicapped, while other members of the class were receiving an adequate education. The plaintiff contended that there was no rational basis for the classification scheme which thus violated the equal protection of the law concept. The court held that the statutory duty imposed upon the defendants to maintain special education facilities required equality of state action under the fourteenth amendment.

41. *Id.* at 70.
42. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).
43. *See* Reynolds v. Sims, 377 U.S. 533 (1964).
44. *See* Griffin v. Illinois, 351 U.S. 12 (1956).
45. 411 U.S. at 102-03.
46. *Id.* at 112.
47. *Id.* at 62-63.
48. 504 F.2d 813 (7th Cir. 1974).

In *Mills v. Board of Education*[49] the court found not only that the school board had failed to provide the specialized education to which the plaintiffs were statutorily entitled, but that the board had also denied the plaintiffs their constitutional rights. Relying on the reasoning of *Brown*,[50] District Judge Waddy stated: "*A fortiori*, the defendants' conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause."[51] The court rejected the argument that insufficient funding precluded the education of these children, observing that if such a condition existed, the available funds should be expended equitably so that no child would be entirely excluded from a publicly supported education. Thus, the lack of funds would not bear more heavily on the "exceptional"[52] or handicapped child than upon the normal child.

In *Fialkowski v. Shapp*[53] multiply handicapped students sued various state officials under 42 U.S.C. § 1983,[54] contending that the state programs gave them no opportunity to benefit from appropriate education and training, unlike the less severely handicapped. Denying defendants' motion to dismiss, the court distinguished *Rodriguez* on factual grounds, noting that *Rodriguez* dealt with inferior education, while the present case alleged a complete denial of education. The court stated that "[i]t would thus appear not inconsistent with *Rodriguez* to hold that there exists a constitutional right to a certain minimum level of education as opposed to a constitutional right to a particular level of education."[55]

Fialkowski thus stands for the proposition that equal educational opportunity means equal access to minimal education services, while *Rodriguez* not inconsistently holds that equal educational opportunity is not measured in terms of equal financial expenditures. The court in *Fialkowski* accepted plaintiffs' contention that the class of retarded children is a suspect class as defined in *Rodriguez*: "A class saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[56] Accordingly, the court applied the test of strict judicial scrutiny, and concluded that the plaintiffs had stated a claim for relief.

A similar claim of discrimination and unequal treatment was raised in *Frederick L. v. Thomas*[57] by several children with learning disabilities who alleged they were being denied public education and training appropriate to

49. 348 F. Supp. 866 (D.D.C. 1972).
50. The holding in *Brown* was extended to the District of Columbia in Bolling v. Sharpe, 347 U.S. 497 (1954).
51. 348 F. Supp. at 875.
52. The court defined "exceptional" children as "mentally retarded, emotionally disturbed, physically handicapped, hyperactive and other children with behavioral problems." *Id.* at 868.
53. 405 F. Supp. 946 (E.D. Pa. 1975).
54. 42 U.S.C. § 1983 (1976).
55. 405 F. Supp. at 958.
56. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).
57. 408 F. Supp. 832 (E.D. Pa. 1975).

their needs, while appropriate education was provided for "normal" and "retarded" pupils. Plaintiffs alleged they were subjected to unlawful discrimination since some students with learning disabilities were given special instruction and they were not. In rejecting the defendant school district's contention that the plaintiffs failed to state a claim for relief under section 1983, the district court characterized the right to education as a quasi-fundamental interest.[58] The court sought to find an intermediate standard of review, stating: "We think that the Supreme Court, if presented with the plaintiffs' equal protection claim, would apply the as yet hard to define middle test of equal protection, sometimes referred to as 'strict rationality.' "[59] *Frederick L.* is the first major judicial decision emphasizing the tremendous professional problems in developing a program for this class of handicapped persons whose learning disabilities are often difficult to analyze and for whom a suitable program of education and instruction may be even more elusive to develop.

Emerging from the right to education cases is a realization that the principles enunciated by the Supreme Court in *Rodriguez* have been distinguished on the basis of law and fact. Although in *In re Levy*[60] the New York Court of Appeals followed *Rodriguez*, the unique status of the blind and deaf provided the rationale for upholding differentiated treatment for the other classes of handicapped. The unwillingness of the United States Supreme Court to extend basic first amendment rights to education reflects a judicial policy halting the activist role of the Court typical of the Warren era. Beyond the chilling effect of *Rodriguez* upon the equalization of educational programs for children in poorer school districts, and the resulting negative impact upon racial minorities and poor whites residing in such school districts, *Rodriguez* also adversely affects the rights of mentally retarded children to obtain an education and training that will permit them to emerge from the shadows of our society. Yet no judicial decision applying the traditional rationality standard of review on the premise that education is not a fundamental constitutional right has explained why race qualifies as a suspect classification whereas other personal attributes such as poverty or lack of intelligence do not.

C. *Statutory Protection of the Right to Education for the Mentally Retarded*

Although the Supreme Court's posture on the right to education has infringed upon the rights of the mentally retarded, recent statutory developments may provide an alternative means of securing the right to education for this disadvantaged population. Federal law[61] requires that a state adopt and administer an educational policy which does not violate equal protection and due process of the law. More importantly, the Education For All

58. Noting that the Supreme Court determined sex to be a quasi-suspect class in Weinberger v. Wiesenfeld, 420 U.S. 363 (1975), the district court in *Frederick L.*, by analogy, characterized education as a quasi-fundamental interest. 408 F. Supp. at 836.
59. 408 F. Supp. at 836.
60. 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976).
61. 29 U.S.C. § 794 (1976).

Handicapped Children Act of 1975[62] requires that states receiving federal funds for special education provide a program of education for handicapped children between ages three and eighteen by fiscal year 1978, and provide a free education for handicapped children between the ages of three and twenty-one by September 1, 1980.[63] The Act additionally requires a hearing for identification, evaluation, and placement of the child, and requires that the educational assignment of the child be determined by multiple criteria to insure consideration of all attributes of the individual tested.[64] Consequently, recent judicial statutory construction and congressional enactments have begun to erode the *Rodriguez* holding and the resulting limitations on the access of the mentally retarded to education.

D. *Tuition Cost Liability*

The question of tuition cost liability has inspired various judicial interpretations to sustain the principle that the public should bear the entire financial responsibility of educating the mentally retarded. The petitioner in *In re Downey*[65] was certified as handicapped under a New York state law which also imposed a duty upon the state to use all means necessary to meet the physical and educational needs of handicapped children. The petitioner sought to recover the difference between a state grant of two thousand dollars and the actual tuition costs at a private school approved by the state educational authorities, after the state certified that adequate instruction could not be obtained at a public facility. The court determined that compelling the parent to contribute to the education of his handicapped child when free education was supplied to other children would deny the parent equal protection of the law under the fourteenth amendment and the New York Constitution.[66] The court noted that the child's right to an education should not be abridged or limited by the unwillingness of the parents to become financially liable for the child's education.

Tuition reimbursement for nontraditional forms of education and training also have been upheld. In *In re Richard G.*[67] a New York superior court of appeals approved tuition reimbursement to the parent for a summer instructional program if the family court concluded that the child required the additional instruction as part of his education, or if the child would regress without the instruction. Maintenance reimbursement was ordered in *In re Cox*[68] where a handicapped child was placed in a private facility which was not approved under state law. The court's holding was based on the fact that the child had shown great improvement in her ability to function, thus improving her living skills.

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62. Pub. L. No. 94-142, 89 Stat. 773 (codified in scattered sections of 20 U.S.C.).
63. 20 U.S.C. § 1412(1)(B) (1976). The Act's definition of "handicapped" includes the mentally retarded. *Id.* § 1424a(c).
64. *Id.* § 1413.
65. 72 Misc. 2d 772, 340 N.Y.S.2d 687 (Fam. Ct. 1973).
66. N.Y. CONST. art. XI, § 1 requires the state of New York to provide a free public education to all children.
67. 52 App. Div. 2d 924, 383 N.Y.S.2d 403 (1976).
68. No. H 4721-75 (N.Y. Fam. Ct. April 8, 1976).

In *Kruse v. Campbell*[69] the court considered a Virginia law entitling handicapped children to partial tuition assistance if state officials determined that special schooling was required but unavailable in the public schools and if the parents relinquished custody of the child. Plaintiffs argued violations of the due process and equal protection clauses of the fourteenth amendment and violation of section 504 of the Rehabilitation Act of 1973,[70] which prohibits discrimination against handicapped persons receiving service under federal assistance programs. The court agreed that the tuition law violated the equal protection clause of the fourteenth amendment because the statute placed a heavier burden on poor parents caring for handicapped children than on similarly situated wealthy parents. Furthermore, the court found that forcing the parents to relinquish custody of their child to receive assistance violated the plaintiffs' fundamental right to family integrity.

In *In re Levy*,[71] however, the New York Court of Appeals upheld a statutory requirement whereby parents of handicapped children other than the blind or deaf were required to contribute toward their children's maintenance in a subsidized educational program. The court rejected the argument that handicapped children constituted a suspect classification and concluded that the right to an education was not a fundamental right under the United States Constitution. The court applied the traditional "rational basis" analysis and concluded that the legislature could have reasoned that the blind and deaf were more educable than other handicapped children, noting that the blind and deaf traditionally have been recognized as a special class requiring additional assistance.

State programs which reimburse the parents of "exceptional" children attending private facilities, but place a ceiling upon such payments, also have been attacked on constitutional grounds. *Halderman v. Pittenger*[72] considered whether the due process and equal protection clauses were violated if other children were provided a free public education, while the parents of "exceptional" children were required to pay tuition costs in excess of the allowable state maximum payments. Noting that *Rodriguez* determined that education was not a fundamental right, the district court nevertheless concluded that if a state undertook to provide educational services, the funds must be spent equitably so that no child was entirely excluded from the program. In *Dandridge v. Williams*,[73] however, the Supreme Court concluded that a state did not deny equal protection merely because limited educational funding by the state produced varying economic hardship upon persons of differing economic need.

E. *Judicial Enforcement of Education Orders*

Three patterns of judicial behavior may be discerned from the right to education decisions:

69. 431 F. Supp. 180 (E.D. Va. 1977), *vacated and remanded*, 98 S. Ct. 38, 54 L. Ed. 2d 65 (1977).
70. 29 U.S.C. § 794 (1976).
71. 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976).
72. 391 F. Supp. 872 (E.D. Pa. 1975).
73. 397 U.S. 471 (1970).

(1) the judicial activist model whereby the judiciary sets substantive and procedural standards, creates enforcement mechanisms, and supervises their operation, retaining jurisdiction over litigation;
(2) the mediate judicial model in which substantive and procedural principles are developed with the obligation for compliance placed upon administrators, and jurisdiction is retained to insure compliance; and
(3) the judicial restraint model in which principles, both substantively and procedurally, are developed with the obligation for compliance placed upon administrators, and the court does not retain jurisdiction.

In *Pennsylvania Association for Retarded Children v. Pennsylvania*[74] and *Mills v. Board of Education*[75] the courts retained jurisdiction to insure compliance with the order and decree. A different approach was taken by the court in *Harrison v. Michigan*,[76] a class action alleging that the denial of access to the public schools because of mental, physical, behavioral, and emotional handicaps violated the equal protection and due process clauses of the Constitution. The court determined that the issue was mooted by the passage of new state legislation designed to meet the plaintiffs' objections. If the adverse conditions were to continue, however, the judge stated that he would rule in the plaintiffs' favor. This court believed the judiciary could not design an effective, comprehensive educational program for the handicapped:

> It [designing an educational program for the handicapped] simply is not the sort of problem which can be resolved by the issuance, no matter how well intended, of a judicial order. Any judicial order would necessarily have to incorporate many of the implementation steps in Public Act 198. The state is already taking these steps. This court could do no more than act as a cheering section. This is not the function of the judicial process.[77]

This view is consistent with the court's refusal to retain jurisdiction to determine the plaintiffs' eligibility for education and training on the grounds that such action would single them out for individually favored treatment.

An intermediate judicial position was taken in *Hoots v. Pennsylvania*,[78] in which the court considered the plaintiffs' claim that forced attendance in a racially segregated school by authorities who refused to consider the foreseeable and avoidable adverse racial and educational effects constituted a denial of constitutional rights. The court stated:

> The remedial obligation rests with the school authorities; but where in any way they fail, or are unable because of the circumstances of the case, to fulfill any part of the obligation promptly and fully, this court has broad equity power, and the duty to insure that demonstrable progress be made now; that a schedule for planning be adopted forthwith; and that necessary planning be specifically ordered and immediately undertaken in order that a constitutionally adequate plan may be fashioned, and implemented as soon as possible.[79]

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74. 334 F. Supp. 1257 (E.D. Pa. 1971); *see* notes 33-34 *supra* and accompanying text.
75. 348 F. Supp. 866 (D.D.C. 1972); *see* notes 49-51 *supra* and accompanying text.
76. 350 F. Supp. 846 (E.D. Mich. 1972).
77. *Id.* at 848.
78. 359 F. Supp. 807 (W.D. Pa. 1973), *appeal dismissed*, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974).
79. 359 F. Supp. at 824.

The division of responsibility discussed in *Hoots* is illustrated in *Panitch v. Wisconsin*,[80] a class action suit in which the plaintiffs contended that Wisconsin violated the constitutional rights of handicapped children by denying them a public education. After the action was filed, a statute was enacted which gave plaintiffs most of what they sought. Yet the court retained jurisdiction in order to review the manner in which the new statute would be enforced. When the plaintiffs questioned the school board's rejection of a recommendation by a multi-disciplinary team that the plaintiffs continue the program, the court held that the school board was without authority to alter the decision of the team.

IV. TREATMENT AND HABILITATION OF THE MENTALLY RETARDED

Involuntary commitment is based upon the principles that society has an interest in the mental well-being of the retarded and that the retarded should not make decisions regarding their treatment and care during a period in which limited judgment prevents a rational decision. Yet institutionalization without treatment, adequate care, or habilitation is an injustifiable denial of freedom. Moreover, well-intentioned governmental intrusions upon individuals' rights may constitute cruel and barbarous treatment. Dr. Morton Birnbaum notes that such reasoning has philosophical underpinnings of seminal proportion:

> It is 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 of treatment; and that the courts do this, independent of any action by any legislature, as a necessary and overdue development of our present concept of due process of law.[81]

Although the institutionalized individual may respond to treatment and become functional through drug therapy, professional counselling, and community support, the individual will not, in all probability, become normal and totally self-sufficient. Proper treatment and care at lower levels of development, however, may result in greater happiness and fewer antisocial acts of aggression against self and others. At the upper end of the developmental scale, treatment may prepare disabled individuals for release from the institutions to neighborhood halfway houses and group living arrangements. For the mentally retarded, the right to treatment must be accompanied by a habilitation program to secure maximum individual development.

A. *The Right to Treatment and Habilitation as a Substantive Constitutional Right*

The question of treatment for the mentally retarded as a substantive

80. 371 F. Supp. 955 (E.D. Wis. 1974).
81. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 503 (1960).

constitutional right was initially raised in *Rouse v. Cameron*[82] where a mental patient committed to an institution claimed deprivation of his statutory right to treatment.[83] Judge Bazelon noted in dicta that confinement without treatment raised three possible constitutional deprivations: (1) violation of due process of law in that commitment is justified only because of its humane, therapeutic goals; (2) violation of equal protection of the law where a mentally retarded person charged with a crime is committed indefinitely, while others convicted of the same offense are sentenced to a fixed term; and (3) indefinite commitment without treatment may constitute cruel and unusual punishment.[84]

The first legitimate recognition of the constitutional right to treatment for the mentally retarded occurred in *Wyatt v. Stickney*.[85] The guardians of involuntarily committed mental patients in various Alabama institutions brought a class action against the Alabama Mental Health Board, contending that the plaintiffs were not afforded adequate treatment. The court accepted Judge Bazelon's theory in *Rouse* without elaborating on the constitutional rationale, noting that involuntarily committed patients have a constitutional right to receive "such individual treatment as will give them a realistic opportunity to be cured or to improve his or her mental condition."[86] The court subsequently devised and ordered implementation of a thorough treatment program for the institutionalized retarded,[87] and clearly established a right to habilitation in addition to a right to treatment. The court noted that treatment included the "prevention, amelioration and/or cure of a resident's *physical* disabilities or illnesses,"[88] while habilitation was a broader concept, involving psychiatric and educational assistance and *treatment*, which raised the level of physical, mental, and social efficiency of the retarded.[89]

The *Rouse-Wyatt* constitutional rationale was limited one year later in *New York State Association for Retarded Children, Inc. v. Rockefeller*.[90] Although the court accepted the proposition that the quid pro quo for

82. 373 F.2d 451 (D.C. Cir. 1966).

83. D.C. CODE § 21-562 (1973). The statute provides that a "person hospitalized in a public hospital for a mental illness shall . . . be entitled to medical and psychiatric care and treatment."

84. 373 F.2d at 453.

85. 325 F. Supp. 781 (M.D. Ala.) (court reserved ruling on inadequacy of the treatment center in order to give state officials six months to implement proper standards), *modified*, 334 F. Supp. 1341 (M.D. Ala. 1971) (court reserved ruling in order for parties to present proposed standards that met medical and constitutional requirements), *modified*, 344 F. Supp. 373 (M.D. Ala. 1972) (program devised to meet minimum treatment requirements), *aff'd in part, rev'd and remanded in part sub nom.* Wyatt v. Alderholt, 503 F.2d 1305 (5th Cir. 1974) (court recognized a constitutional right to adequate treatment but reversed and remanded for further consideration of the proper means of implementing the proposed standards); *accord*, Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968) (right to treatment is a substantive constitutional right under the Massachusetts Constitution).

86. 325 F. Supp. at 784.

87. *See* notes 121-23 *infra* and accompanying text for a discussion of the court ordered treatment and habilitation program in *Wyatt*.

88. 344 F. Supp. 387, 395 (M.D. Ala. 1972) (emphasis added).

89. *Id.* at 395-96.

90. 357 F. Supp. 752 (E.D.N.Y. 1973), *consent judgment approved sub nom.* New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975). This decision is often referred to as the *Willowbrook* case because it involved the residents of the Willowbrook State Institution in New York.

commitment in lieu of criminal imprisonment was the right to treatment, the court refused to expand this right to impose a duty of habilitation upon the state. The court in *Rockefeller* stressed that the equal protection, due process, and cruel and unusual punishment clauses establish a right to protection from harm, but they do not establish a right to habilitation.[91] The right to protection from harm includes privileges afforded prison inmates, such as freedom from assault, medical care, an opportunity to exercise and have outdoor recreation, basic hygienic conditions, and adequate physical living conditions.[92]

The court's approval of a consent judgment in *Rockefeller*, however, recognized that the so-called right to freedom from harm may be the functional equivalent of the right to treatment and habilitation. The court noted, "Somewhat different legal rubrics have been employed in these cases—'protection from harm' in this case and 'right to treatment' and 'need for care' in others. It appears that there is no bright line separating these standards."[93]

In *Burnham v. Department of Public Health*,[94] however, the district court recognized a clear delineation in the standards by which the rights of an institutionalized retarded person should be evaluated. The court disagreed with the holding in *Wyatt*,[95] stating that residents of a mental institution might have a moral right to treatment, but there is no constitutional right to treatment absent a federal or state statute.[96] The Fifth Circuit, however, considered *Wyatt* and *Burnham* simultaneously on appeal[97] and adopted the *Wyatt* rationale establishing a right to treatment and habilitation.[98] The court's analysis in *Rockefeller* and the district court's opinion in *Burnham* are inadequate because they do not deal thoroughly with the due process aspects of commitment, they fail to consider adequately comparable rights possessed by prison inmates,[99] and they generally indicate an insensitive attitude toward the frustrations of institutional inmates who are unable to obtain relief through legislative and executive channels.

Despite the inconsistent lower court holdings on the nature and extent of

91. The court additionally rejected any distinction between voluntary and involuntary patients in terms of constitutional rights, noting that the residents are "for the most part confined behind locked gates, and are held without the possibility of a meaningful waiver of their right to freedom." 357 F. Supp. at 764.

92. *Id.* at 764-65.

93. New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715, 719 (E.D.N.Y. 1975).

94. 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975).

95. *See* notes 85-89 *supra* and accompanying text.

96. The court in *Burnham* stressed that the judiciary was an inappropriate agency to deal with treatment issues which were better left in the hands of trained professionals. 349 F. Supp. at 1340, 1344.

97. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Burnham v. Department of Pub. Health, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975).

98. In finding an institutional right to treatment and habilitation, the Fifth Circuit relied upon its opinion in Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975). For a discussion of *Donaldson* and its ultimate impact on *Wyatt* and *Burnham*, see notes 100-03 *infra* and accompanying text.

99. For a comprehensive analysis of the rights of prison inmates to treatment and habilitation, see Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976).

the right to treatment, the Supreme Court in *O'Connor v. Donaldson*[100] failed to provide guidelines in this important area of constitutional rights. An action was brought in *Donaldson* by a former involuntarily committed patient of a state mental hospital who alleged deprivation of his constitutional right to receive treatment or be released. The plaintiff alleged violations of 42 U.S.C. § 1983, contending that hospital officials, by depriving him of the right to receive treatment, blocked his release, even though he was not considered dangerous and trustworthy persons and agencies were willing to assume responsibility for him after release. The Fifth Circuit found that the plaintiff, a Christian Scientist who refused to take any medication or to submit to electroshock therapy for religious reasons, was denied less extreme forms of rehabilitative treatment, such as occupational therapy and psychiatric treatment.[101] Noting that due process requires minimum standards of treatment be established for nondangerous patients, the Fifth Circuit concluded that there exists "a near unanimous recognition that governments must afford a *quid pro quo* when they confine citizens in circumstances where the conventional limitations of the criminal process are inapplicable."[102] The court additionally stated that when "a nondangerous patient is involuntarily civilly committed to a state mental hospital, the only constitutionally permissible purpose of confinement is to provide treatment, and that such a patient has a constitutional right to such treatment as will help him to be cured or to improve his mental condition . . . ."[103]

On review, the Supreme Court ignored the right to treatment issue and recast the decision in terms of the fourteenth amendment right to liberty.[104] The Court determined that a state could not constitutionally confine a nondangerous individual capable of surviving safely on his own or with the aid of willing family or friends. The Court ultimately concluded that Donaldson's constitutional right to freedom was violated without due process of law. Although Justice Stewart's opinion for the Court ignored the treatment issue, Chief Justice Burger's concurrence[105] concluded that requiring treatment for the mentally retarded was of such recent origin that no historical basis existed for imposing such a limitation upon state power. The Chief Justice's rejection of the quid pro quo theory was premised upon the undesirability of fashioning a new substantive constitutional right and the Court's refusal to substitute its judgment for that of the Florida political branch. Chief Justice Burger noted that the Fifth Circuit unequivocally approved the district court's determination that " 'a person who is involuntarily committed to a mental hospital does have a *constitutional* right to receive such treatment as will give him a realistic opportunity to be cured.' "[106] Chief Justice Burger affirmatively asserted that "[t]he Court's opinion plainly gives no approval to that holding and makes clear that it binds neither the parties to this case *nor the courts of the Fifth Circuit*."[107]

100. 422 U.S. 587 (1975).
101. 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975).
102. 493 F.2d at 524.
103. *Id.* at 527.
104. 422 U.S. at 573.
105. *Id.* at 578.
106. *Id.* at 580 (emphasis added).
107. *Id.* (emphasis added).

The Court's due process analysis in *Donaldson* is, in essence, an abdication of the judiciary's responsibility to protect the rights of the mentally retarded, and has created confusion among the federal and state courts concerning the appropriate judicial policy in this area. By refusing to bind the courts of the Fifth Circuit to the lower court holding in *Donaldson*, the Chief Justice's concurrence appears to revitalize the district court's holding in *Burnham* denying the right to treatment. In fact, a federal district court in *Bettencourt v. Rhodes*[108] recently refused to recognize a constitutional right to habilitation. The court stated that "[t]he Constitution imposes no duty upon a state to provide social services to its citizens. . . . The Constitution requires only that when a state voluntarily undertakes to confine mentally retarded persons, it is obligated to provide them with reasonable medical treatment."[109] The Eighth Circuit in *Welsh v. Likins*,[110] however, held that the mentally retarded are afforded constitutional rights of treatment and habilitation, and noted that the right to treatment and habilitation is probably clearer today than in 1974, irrespective of the Supreme Court's 1975 holding in *Donaldson*.[111]

B. *The Right to be Free from Mistreatment*

Although the law is unsettled regarding the existence of constitutional rights to treatment and habilitation, there is clearly a corresponding right to be free from mistreatment while institutionalized. In *Rhem v. Malcolm*[112] prisoners confined in a section of the Manhattan House of Detention for Men, known as "The Tombs," alleged that noise, heat, inadequacy of ventilation, excessive lock-ins, lack of exercise, and cruel visitation conditions violated their constitutional rights. The court found that the plaintiffs' claim fell within both the eighth amendment and 42 U.S.C. § 1983, and the plaintiffs were constitutionally entitled to be free from mistreatment and protected from harm.[113]

In *Spence v. Staras*[114] state hospital personnel knowingly permitted a mute mental patient to be beaten by fellow patients. Reversing the district court's dismissal of the complaint, the Seventh Circuit found that the plaintiff had stated a claim for relief under section 1983, and determined that the defendants were acting under the color of state law.[115] The court stated that

108. No. C77-12 (N.D. Ohio Sept. 13, 1977), *noted in* U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 78-21012, MENTAL RETARDATION AND THE LAW 27 (Jan. 1978).
109. *Id.* at 28-29.
110. 550 F.2d 1122 (8th Cir. 1977).
111. *Id.* at 1126 n.6.
112. 371 F. Supp. 594 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974).
113. 371 F. Supp. at 627-28.
114. 507 F.2d 554 (7th Cir. 1974).
115. *Id.* at 558. At least one federal court has construed the state action requirement of a § 1983 suit narrowly, reminiscent of post-Civil War judicial construction. In Doyle v. Unicare Health Servs., Inc., 399 F. Supp. 69 (N.D. Ill. 1975), the administrator of the estate of a mentally retarded decedent sued a private institution on the grounds that her death had been caused by the refusal to give treatment and by a wanton reckless disregard of the decedent's condition, in violation of Illinois statutes and regulations. Rejecting the plaintiff's § 1983 claim the court pointed to the "private for profit" status of the facility which did not bring the institution's action within the "color of state law" requirements of the federal statute. Despite the institution's receipt of more than half of its funds from the state and the necessity to comply with state licensing and operating requirements, the court found insufficient "nexus" to be classified as state action. In applying the nexus test of Burton v. Wilmington Parking Auth., 365

"[i]t is . . . clear that the deceased had a right, under the fourteenth amendment, to be secure in his life and person while confined under state authority. . . . The defendants, being responsible for the decedent's care and safekeeping, had a duty to protect him from attacks by fellow inmates."[116]

In *Knecht v. Gillman*[117] a court-committed mental patient violated the institution's rules by lying, swearing, and disobeying orders, and apomorphine was administered as an aversion-type therapy. This therapy, which induced vomiting and deleterious cardiovascular effects, was not treatment and constituted cruel and unusual punishment unless the patient had voluntarily and knowingly consented to such treatment.

Some dispute exists as to the standard of care a mental institution is required to exercise toward its patients. In *Rodriguez v. State*[118] the plaintiff, a profoundly retarded, paraplegic, five-year-old patient, sought recovery for a supracondylar fracture of her lower left femur. The court, taking judicial notice of the abysmally poor conditions in the Willowbrook State School, determined that the plaintiff's injury was entirely foreseeable, and that the state institution did not sustain its obligation of exercising the highest degree of care. In *Martarella v. Kelley*,[119] however, the court considered allegations of cruel and unusual punishment by juveniles confined in the juvenile detention centers in New York City and enunciated a far more lenient standard of care. The court stated "that the Eighth Amendment does not impose on the States the requirement of furnishing the best possible service for those in custody nor of adhering to the highest professional standard. The office of the Eighth Amendment is to assure that custodial conditions are minimally acceptable—that is, not cruel or unusual."[120]

C. *The Role of the Judiciary in Implementing Treatment Programs*

The growth of the constitutional right to treatment and habilitation has forced the judiciary to design and implement programs which adequately insure proper care, education, and training for the mentally retarded. The district court in *Wyatt v. Stickney*[121] determined that the treatment programs in Alabama state mental hospitals were scientifically and medically inadequate, but the court deferred action, allowing the state mental health board six months to implement an adequate program. The Board, however, failed to institute even minimum standards for treatment and habilitation.[122] After amici curiae and experts toured the state institution, a three-day hearing culminated in an interim emergency order requiring immediate physical improvements for the safety of the patients. The final order contained forty-nine standards and guidelines covering treatment, habilitation, release, tran-

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U.S. 715 (1961), the court found insufficient involvement by the state in the wrongful conduct of the licensee.

116. 507 F.2d at 557.

117. 488 F.2d 1136 (8th Cir. 1973).

118. 78 Misc. 2d 174, 355 N.Y.S.2d 912 (Ct. Cl. 1974), *rev'd*, 50 App. Div. 2d 985, 376 N.Y.S.2d 685 (1975).

119. 359 F. Supp. 478 (S.D.N.Y. 1973).

120. *Id.* at 481.

121. 325 F. Supp. 781 (M.D. Ala. 1971).

122. Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971) (order setting hearing).

sitional programs, procedures, and other devices designed to guarantee the constitutional rights of the residents of the institutions.[123] The pronouncement of these court-ordered standards represents the first occasion that a federal court, utilizing constitutional rationale, has sought to delineate acceptable standards for habilitation and treatment.

This judicial activism is well illustrated in *Gary v. Louisiana*[124] in which the court elaborately articulated standards of treatment and habilitation, and ordered state officials to enter into a contract with the Louisiana State University of Medicine for development and evaluation of the individualized treatment plans. Consequently, the courts have been thrust into the middle of sensitive policy determinations which they are ill-equipped to handle by virtue of their inexperience in the administration of programs for the mentally retarded. The courts have been forced into this unfortunate position because of the failure of state legislatures and governors to administer such programs.

The conflict between the courts and the legislative and executive branches of the state governments regarding the propriety of judicial intervention in habilitation programs is illustrated in *Welsch v. Likins*.[125] The district court in *Welsch* noted that excessive seclusion, use of tranquilizers, and physical restraints by the staff of a Minnesota mental institution possibly violated the eighth and fourteenth amendments. In October 1974 Judge Larson ordered the development of individual habilitation plans, extensive improvements in physical facilities at the Cambridge State Hospital, limitations on physical restraints, drugs, and seclusion, and the development of plans to relocate residents in less restrictive facilities and residences in their communities. The order required that funds be provided to the Department of Public Welfare over and above the normal appropriation, and directed that the funds be acquired through normal legislative channels. The Minnesota Legislature, however, failed to appropriate sufficient funds to permit compliance with the 1974 order. On July 28, 1976, Judge Larson ordered the state commissioners of finance to disregard state laws which prohibited state expenditure except when the legislature had formally appropriated funds so that the 1974 order could be implemented.

While the state appealed to the Eighth Circuit, the Rules Committee of the Minnesota Senate passed a resolution authorizing the expenditure of funds to hire counsel to carry forward the appeal of the court order. On March 9, 1977, the Eighth Circuit vacated the district court order which directed the state fiscal expenditures, but indicated that the district court had the power to issue such an order under appropriate circumstances at the conclusion of the current session of the Minnesota state legislature.[126] The appellate court indicated its strong support of the trial judge in his conflict with the legislature and observed:

In any event, we desire to make it clear to the present Governor and the

123. Wyatt v. Stickney, 344 F. Supp. 373, 387 (M.D. Ala. 1972) (order granting injunction).
124. 437 F. Supp. 1209 (E.D. La. 1976).
125. 373 F. Supp. 487 (D. Minn. 1974).
126. 550 F.2d 1122 (8th Cir. 1977).

> current legislature that the requirements of the 1974 Order and the requirements of the April 15, 1976 Order that we uphold today are positive, constitutional requirements, and cannot be ignored. We will not presume they will be ignored. On the contrary, we think that experience has shown that when governors and state legislatures see clearly what their constitutional duty is with respect to state institutions and realize that the duty must be discharged, they are willing to take necessary steps, including the appropriation of necessary funds.[127]

D. *Federal Intervention to Insure the Right to Treatment*

If state practices violate the constitutional rights to habilitation, treatment, or freedom from cruel and barbarous treatment of the mentally retarded, the question arises whether the Constitution provides the federal government with authority to bring an action to protect these rights. The district court in *United States v. Solomon*[128] held that no such power existed. Although the court recognized that the federal government had inherent power to act to promote the general welfare of the public,[129] the court refused to extend this power to protect the civil rights of the mentally retarded. The court recognized that the extension of such inherent federal power into the state domain through the commerce clause was permissible, but that the legislative history of title III of the Civil Rights Act of 1957 revealed a rejection of a broad grant of power to the United States Attorney General to bring an action under the thirteenth and fourteenth amendments to protect the rights of American citizens.[130] Moreover, the court viewed the passage of the Developmentally Disabled Assistance and Bill of Rights Act as a means of using the "carrot and stick" approach by the federal government to promote higher qualitative standards for habilitative care by the state.[131] In essence, the decision mandates that the United States Attorney General may only proceed under specific statutory authorization in order to sue on behalf of the mentally retarded.[132] Under this legal reasoning the existence of a constitutional right depends upon the existence of a statutory right and, thus, denigrates a superior constitutional right. Furthermore, the decision completely ignores the parens patriae role of the federal government to protect this defenseless population from predatory state action.

V. FREEDOM FROM INSTITUTIONAL PEONAGE

It has been a common practice in the United States to have the in-

127. *Id.* at 1132.
128. 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F.2d 1121 (4th Cir. 1977).
129. This power, known as the "absolute necessity" factor, was first enunciated by Justice Brewer in *In re* Debs, 158 U.S. 564 (1895).
130. 419 F. Supp. at 370-71. The court in *Solomon* noted that the Civil Rights Act of 1957 as originally passed by the House of Representatives included a provision, title III, that permitted the Attorney General to seek civil remedies for violation of 42 U.S.C. § 1985. This provision was deleted by the Senate and, consequently, the Civil Rights Act of 1957 limits the power of the Attorney General to actions for injunctive relief. *See* 42 U.S.C. § 1985 (1970). The court noted further that attempts to include the provisions of title III in the Civil Rights Acts of 1960 and 1964 were unsuccessful. 419 F. Supp. at 371.
131. *Id.* at 369-70.
132. *Id.* at 371; *accord*, United States v. Mattson, No. 74-1-138 (D. Mont. Sept. 29, 1976), *noted in* U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 77-21012, MENTAL RETARDATION AND THE LAW 26 (Jan. 1978).

stitutionalized mentally retarded work within the facility in which they reside without fair compensation. This practice has been justified on several bases. First, such work has been characterized as habilitative since the worker develops a skill which may be helpful in attaining economic self-sufficiency after leaving the institution. Secondly, the practice has been labelled as treatment or therapy under the premise that work within the institution aids the resident in developing a sense of routine and duty which would prove helpful in reintegration in the community. Thirdly, some advocates of institutional peonage justify work programs as a means to defray the cost of caring for the patient. Fourthly, others maintain that routine work programs are preferable to idle leisure because residents would prefer to work rather than do nothing. Residents may be required to perform unskilled duties such as dishwashing, food preparation, bedmaking, cleaning, window washing, and ironing, or be assigned more skilled roles in carpentry, plumbing, mail sorting, gardening, general farm work, and auto mechanics. Although the institution's administration may characterize work details as voluntary, such labor is actually required, or at least perceived as such by the residents. The patients are coerced to work through threats of losing institutional privileges or being diagnosed as "unable to respond to treatment."

The practice of institutional peonage bears many hallmarks of slavery, and thus falls within the scope of the thirteenth amendment.[133] The resident is usually unable to perform the duties he desires, and is equally unable to cease performance at his leisure. Continuous work without a substantial cash payment reduces the worker to slave-like status. Institutional peonage additionally denies the worker important legal rights associated with working: social security benefits, worker's compensation, unemployment benefits, and retirement rights.

An important means of ending institutional peonage has been the enactment of appropriate legislation. The 1966 amendments to the Fair Labor Standards Act[134] established minimum wage and maximum hour requirements for all employees of "an enterprise engaged in commerce or in the production of goods for commerce." By including employees engaged in the operation of mental institutions within the above "enterprise concept,"[135] compensation for patient labor benefiting the institution would seem to be required. The Supreme Court in *Maryland v. Wirtz*[136] upheld the validity of the "enterprise concept" and extended the concept to a number of non-professional educational and hospital employees of state and local governments. In *Employees v. Department of Public Health & Welfare*,[137] however,

133. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

134. Pub. L. No. 89-601, 80 Stat. 830 (1966) (codified in scattered sections of 29, 42 U.S.C.); *see* United States v. Mattson, No. 74-1-138 (D. Mont. Sept. 29, 1976), *noted in* U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 77-21012, MENTAL RETARDATION AND THE LAW 26 (Jan. 1978).

135. 29 U.S.C. §§ 203(r)(1), (s)(4) (1976).

136. 392 U.S. 183 (1968).

137. 411 U.S. 279 (1963).

the Supreme Court concluded that the state enjoyed sovereign immunity from an action brought by state employees to recover overtime compensation allegedly due under the Fair Labor Standards Act (FLSA).

Although this case appeared to foreclose actions under the FLSA by mental patients in state institutions, the district court in *Souder v. Brennan*[138] held to the contrary. In *Souder* mentally retarded patients in state institutions sought an order directing the Secretary of Labor and other officials to enforce the provisions of the FLSA against state and private institutions so that the patients would be covered by the hour and wage provisions of the FLSA. The court construed the Act to include the plaintiffs and found that the legislative history of the Act did not indicate congressional intent to exclude patient workers in *nonfederal* institutions. The court's answer to the contention that work constituted therapy was clear: "[S]o long as the institution derives any consequential benefit the economic reality test would indicate an employment relationship, rather than mere therapeutic exercise. To hold otherwise would be to make therapy the whole justification for thousands of positions as dishwashers, kitchen helpers, [and] messengers . . . ."[139] The court order directed the Secretary of Labor to enforce the Act and keep appropriate records of all actions dealing with the extension of coverage to worker-patients in nonfederal institutions.

In 1974 Congress once again extended the coverage of the FLSA to include virtually all areas of public employment, both state and federal.[140] Various cities and states challenged the 1974 amendment in *National League of Cities v. Usery*[141] in which the Supreme Court overruled the "far-reaching implications" of *Wirtz*. Although the scope of the commerce clause is plenary, the Court nevertheless concluded that the 1974 amendments were an illegitimate exercise of the commerce power. As a result of *Usery*, mentally retarded patient-workers in state facilities are no longer protected by the minimum wage provisions under federal legislation.[142] But this does not preclude protection under appropriate *state* minimum wage, maximum hour legislation. *Usery*, in effect, has transferred the locus of institutional peonage litigation from the federal forum into the state judicial system.

The pre-*Usery* era also witnessed the disposal of the minimum wage issue by means of consent decree. In *Weidenfeller v. Kidulis*[143] the parties agreed that disabled residents would receive the federal minimum wage except when performing therapeutic or meaningless activities. A similar result was reached in *Jortberg v. Maine Department of Mental Health*,[144] with an additional protection that residents who did not work would not be punished or have their privileges withheld. The impact of *Usery* upon such consent decrees is to render them suspect and dissipate justification for state administrative officials to adopt a minimum wage payments policy under state law.

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138. 367 F. Supp. 808 (D.D.C. 1973).
139. *Id.* at 813.
140. 29 U.S.C. § 203(x) (1976).
141. 426 U.S. 833 (1976).
142. *See* Roebuck v. Florida Dep't of Health & Rehabilitation Servs., 502 F.2d 1105 (5th Cir. 1974) (where the trial court entered judgment for defendants in light of *Usery*).
143. 380 F. Supp. 445 (E.D. Wis. 1974).
144. No. 13-113 (D. Me. June 18, 1974).

VI. THE EFFECT OF LOCAL LAND USE RESTRICTIONS ON GROUP HOMES AND HALFWAY HOUSES FOR THE MENTALLY RETARDED

Although the principle of normalization requires that the mentally retarded live in residential communities free from segregation and isolation, the attitudes and actions of citizens in the community may prevent achievement of this goal. The reactionary attitude toward normalization projects is illustrated by the early comment of the Pennsylvania Supreme Court in *In re Devereux Foundation, Inc.*[145] In *Devereux* the foundation was refused a permit to construct sleeping accommodations for impaired children attending the foundation school because a local ordinance prohibited the construction of a building to house the mentally deficient, weak, or abnormal. The court stated:

> [I]t is natural that the creation of a dormitory. . . should arouse added apprehension among the neighbors, for the close presence of persons who are below the normal standards of mental capacity and are subject to psychological and psychiatric aberrations not only constitutes a depressing factor calculated to interfere with the enjoyment of home life but even involves the potential danger of physical disturbances.[146]

This attitude has precipitated the enactment of zoning ordinances, the public referenda process, and restrictive covenants to exclude normalization projects from local communities, thereby limiting the retarded's right to live in the community.

The right of a state to enact zoning statutes is derived from the power of a state to promote the health, welfare, and safety of its citizens.[147] The state may entirely exclude usage of private property, provided the exclusion bears a substantial relationship to the protection of the public,[148] or the state may regulate and restrict the use of private property. An illustration of the exclusionary effect which restrictive zoning statutes may have on normalization projects for the mentally retarded is *Village of Belle Terre v. Boraas*.[149] The ordinance in dispute in *Village of Belle Terre* restricted land use to single family dwellings and prohibited occupancy of any building by more than two persons who were not related as a family, although the statute permitted cohabitation of an unlimited number of persons who were related through blood, adoption, or marriage. Several unrelated college

145. 351 Pa. 478, 41 A.2d 744, *appeal dismissed*, 326 U.S. 686 (1945); *see* Jortberg v. Maine Dep't of Mental Health, No. 13-113 (D. Me. June 18, 1974).

146. 351 Pa. at 485, 41 A.2d at 747.

147. U.S. CONST. amend. IX. This police power may be used to create a residential district in a specified area which excludes apartment houses, retail stores and billboards, provided the exclusions are not arbitrary and have a reasonable and substantial relationship to the exercise of such power. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Under such authority, specific businesses and activities such as brickmaking, liveries, stables, and the emission of smoke and noxious fumes may be prohibited. Hadacheck v. Sebastion, 239 U.S. 394 (1915); Reinman v. City of Little Rock, 237 U.S. 171 (1915); *cf.* Bacon v. Waller, 204 U.S. 311 (1907) (upholding Idaho statutes which prohibited sheepgrazing on public pastures within two miles of another's habitation).

148. Where total exclusion occurs, the statutory provisions may provide for no deviation, may provide for a variance from what is permitted under the regulation, or may delegate authority for deviations or variances with appropriate conditions and restrictions on the appropriate administrator or a quasi-judicial body.

149. 416 U.S. 1 (1974).

students challenged the statute, contending that it violated their equal protection rights, as well as their rights of association, privacy, and travel.[150] Of particular importance to the establishment of small group homes for the mentally retarded was the majority's response to the students' argument that if two unmarried persons constitute a "family" under the ordinance, then no legitimate reason exists why three or four unrelated persons should not also constitute a "family." Justice Douglas's opinion for the majority replied that the drawing of every legislative line leaves out some who might have been included, but this exclusion was merely an exercise of legislative judgment not subject to judicial review.[151] This rationale may apply to zoning ordinances which exclude small group homes for the mentally retarded.

Justice Marshall dissented, arguing that the ordinance invaded the students' first amendment rights of association and privacy by limiting their selection of living companions and life style.[152] Justice Marshall's rationale would safeguard the mentally retarded's right to group home living which is essential to the normalization process. Retarded persons often find it difficult to live with their natural family and are able to function more effectively under the guidance of professionally trained houseparents. In such an environment each disabled member learns to function as part of an entire household. These small group homes for the retarded, therefore, function as single family units very similar to natural nuclear family units. Unless *Village of Belle Terre* can be distinguished on factual grounds, this decision may impose significant barriers to constitutional due process challenges of local zoning restrictions that exclude group homes of the retarded, impairing the normalization process of the retarded living in group homes.

The decision in *Little Neck Community Association v. Working Organization for Retarded Children*[153] illustrates that state courts may find alternative grounds for allowing small group homes for the mentally retarded in neighborhoods with zoning ordinances similar to the one in *Village of Belle Terre*. The neighborhood in *Little Neck* was zoned for "single family" residences, defined as "not more than four unrelated persons occupying a dwelling." In holding that a small group home caring for twelve children five years of age and older constituted a "family" under the ordinance, the court reasoned that zoning was intended to control types of housing and living, not the generic or intimate internal family relationships of the house occupants. The court distinguished *Village of Belle Terre* on the grounds that it dealt with transients who introduced a life style repugnant to traditional values, while in the instant situation the proposed group home would provide retarded children with a stable environment and an opportunity to develop to their full potential.

In some instances local zoning ordinances which exclude small group homes for the mentally retarded conflict with state legislation exempting

150. *Id.* at 7.
151. *Id.* at 8.
152. *Id.* at 13.
153. (N.Y. Sup. Ct., App. Div. May 3, 1976), *noted in* U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 76-21012, MENTAL RETARDATION AND THE LAW 28-29 (Sept. 1976).

such homes from local regulation. In *State v. City of Missoula*[154] a city zoning ordinance limited the single family zoning unit to a family related by marriage, blood, or adoption, although the state law exempted homes for the disabled from the provisions of the local zoning ordinances. In resolving the conflict in favor of the state legislation on a general theory of supremacy, the court reasoned that the city had the inherent power to adopt the "one family" criterion for zoning, but this power was limited by subsequent state legislative action. The trial court in *City of Temple Terrace v. Hillsborough Association for Retarded Citizens, Inc.*[155] refused to submit a privately owned, state subsidized home for the mentally retarded to regulation under the single family zoning provision of a local ordinance, even though there was no state statute similar to the statute in *Missoula* exempting the home. The court applied the superior sovereign test, holding that since a municipality was a creature of the state legislature, the city might not enact legislation in areas preempted by the state. On appeal the Florida district court of appeal reversed, conceding the validity of the superior sovereign test but concluding that the doctrine could not be applied to the facts of this case because no clear legislative intent could be ascertained regarding whether the facility should be subject to zoning ordinances.[156] The court found that where no clear legislative intent could be determined the appropriate standard was the "balancing of interests" test which permitted a case-by-case determination considering all factors properly influencing the result.[157]

An additional barrier to securing the constitutional right of the mentally retarded to reside in the community is illustrated by a recent Supreme Court decision allowing a city to submit zoning questions to the people of the community through the referendum process. In *City of Eastlake v. Forest City Enterprises*[158] the city charter provided that proposed land use changes must be submitted to public referendum and ratified by fifty-five percent of the vote. Chief Justice Burger, speaking for the majority, concluded that the due process rights of the landowner were not violated and rejected the landowner's contention that the charter provision constituted an unconstitutional delegation of legislative power to the electorate.[159] Chief Justice Burger noted that the Constitution required that all power emanate from the people, and, therefore, the people could resolve the issue themselves. The referendum was held not to constitute a delegation of power, but to be a direct exercise of power by the people. An express provision of the Ohio Constitution which reserved the power of referendum to the people of each municipality was a significant factor in the decision.

154. 168 Mont. 375, 543 P.2d 173 (1975); *accord*, City of Los Angeles v. California Dep't of Health, No. 116571 (Cal. Super. Ct. Oct. 24, 1975).
155. 322 So. 2d 571, 573 (Fla. Dist. Ct. App. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).
156. 322 So. 2d at 577.
157. *Id.* at 578.
158. 426 U.S. 668 (1976). *See also* Goldy v. Beal, 429 F. Supp. 611 (M.D. Pa. 1976).
159. *Cf.* Washington v. Roberge, 278 U.S. 116 (1928) (Court struck down a "standardless delegation of power to a limited group of property owners" in the form of an ordinance which permitted establishment of philanthropic homes for aged in residential areas only on the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility).

Justice Powell's dissent stressed the fundamental unfairness of the procedure which denied the property owner a realistic opportunity to be heard on the merits of the proposal.[160] Justice Stevens dissented on the ground that the procedure violated fundamental due process since it submitted the zoning issue to thousands of voters who had only a slight interest in the matter.[161] Furthermore, he concluded the referendum procedure was fundamentally unfair because it disposed of the issue without a reasonable opportunity to consider the merits of the case under a set of defensible rules.

The effects of this development on housing programs for the retarded are far reaching. If the political process is able to bring about the result reached in *Eastlake*, then the door to normalization for the retarded may be closed. *Eastlake* may shift the battleground from the courts to the political process, where the struggle to secure the rights of the mentally retarded has already begun.

In some communities opponents of normalization projects challenge group living arrangements for the mentally retarded on the basis of restrictive covenants limiting the use of property to single family dwellings. Recently, the New Jersey Supreme Court in *Berger v. State*[162] upheld the right of the state to operate small group homes for the mentally retarded on property subject to reciprocal negative covenants which prohibited usages other than for single family dwellings. The court affirmed the lower court holding that the restrictive covenants regulated the type of the structure and not the occupancy or use of the premises. The court reasoned that since the facility was used for a private residential dwelling purpose, this purpose was within the framework of the negative reciprocal covenants.

The outcome appears to depend upon a number of factors. These include whether state legislation has preempted local zoning ordinances, the detailed provisions of the contracts created to provide the service, and the extent to which actual operations fall within the use perimeters of the property as a single family use function.

VII. PROCEDURAL PROTECTIONS IN INVOLUNTARY COMMITMENT AND ACCESS TO EDUCATION

Due process arguments have been raised in various areas affecting the mentally retarded. The core of the due process concept is one of fundamental justice rooted in the traditions and conscience of our society.[163] The requisites of due process are searchingly applied to legislative, judicial, executive, and administrative processes of both federal and state governments. Recognizing that what is fair in one situation may be unfair in another, the due process principle is flexible. But such flexibility does not provide the justification for denying the rights of an individual merely because of a mental handicap. Until recently, nonetheless, the mentally retarded have been denied the procedural protection of the due process clause in the areas of involuntary commitment and access to education.

160. 426 U.S. at 680.
161. *Id.* at 690.
162. 71 N.J. 206, 364 A.2d 993 (1976).
163. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97 (1934).

A. *Access to Education*

The landmark decision in *Pennsylvania Association for Retarded Children v. Pennsylvania*[164] established procedural protections for children excluded from public school programs. The federal district court concluded that a child may not be denied admission to a public school program or have his educational status altered without proper notice of the reasons for exclusion, a hearing, the right to counsel, the right to present evidence and cross-examine witnesses, the right to an independent medical, psychological, and educational evaluations, the right to a transcript of the hearings, and the right to a decision based on the recorded evidence and testimony. Procedural due process violations were also recognized by the court in *Mills v. Board of Education*,[165] where the court stated:

> Not only are plaintiffs and their class denied the publicly supported education to which they are entitled many are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter. Due process of law requires a hearing prior to exclusion, termination of classification into a special program.[166]

The elements of a due process hearing similar to those in *Pennsylvania Association* were detailed by the court in *Mills*.[167]

Although the Supreme Court has not addressed the scope of procedural due process rights for the mentally retarded in the field of public education, *Goss v. Lopez*[168] provides some indication of the nature of these rights. In a five-to-four decision, the Court invalidated an Ohio statute which permitted the principal of a public school to suspend a student for up to ten days or to expel him for misconduct, after notifying the parents and giving reasons for the discipline within twenty-four hours. Speaking for the majority of the Court, Justice White observed that in providing a public education program, due process required a hearing and an opportunity for the student to deny or answer the reasons for dismissal. The majority approvingly cited *Mills*, noting that the due process clause was applicable to actions taken by tax supported educational institutions.[169] Justice Powell's dissent insisted that a ten-day suspension from school was not of constitutional dimension, since due process applied only to severe detriment or grievous loss.[170] The dissenting opinion noted that extending due process protection to public education would result in judicial interference in day-to-day school administration. Recognizing the nonadversarial character of the pupil-school relationship, the dissent feared that placing due process protection on school discipline would further exacerbate conflict and promote adversary relationships.

The post-*Goss* decisions indicate that once a hearing has been held, the appellate courts will be reluctant to reverse the holding. In *Taylor v. Mary-*

164. 334 F. Supp. 1257 (E.D. Pa. 1971).
165. 348 F. Supp. 866 (D.D.C. 1972).
166. *Id.* at 875.
167. *Id.* at 880-83.
168. 419 U.S. 565 (1975).
169. *Id.* at 578 n.8.
170. *Id.* at 587.

land School for the Blind[171] a hearing was held for a multi-handicapped child excluded from a program on the grounds of failure to benefit from the program, and alternate placement for custodial service was recommended. Noting that due process demanded a full and flexible hearing to meet the needs of the individual circumstance, the court refused to substitute its judgment for that of experienced authorities when the decision did not rest upon arbitrary or capricious standards but was an exercise of judgment upon facts developed during the hearing.

B. *Involuntary Commitment*

By contrast, the development of due process rights in the field of commitment have not been as neatly unidirectional. Until recently, most communities provided care for the mentally retarded in public or private institutions. The "least restrictive alternative" doctrine enunciated in *Shelton v. Tucker*[172] and the increasing acceptance of the concept of "normalization," however, have forced deemphasis of institutionalization. A decade after *Shelton* the district court in *Dixon v. Attorney General*[173] concluded that Pennsylvania's civil commitment statute for the mentally ill and mentally retarded violated due process because an individual was entitled to notice of the charges and a hearing. The right to a hearing included the right to counsel, the right to present evidence, the right to subpoena witnesses and records, and the right to cross-examine.

The following year District Judge Sprecher canvassed the entire area of due process in commitment proceedings for the mentally retarded in *Lessard v. Schmidt*.[174] The plaintiff in *Lessard* sought to enjoin the Wisconsin involuntary commitment statute which failed to provide for notification of the specific charges justifying detention, permitted detention for more than forty-eight hours without a hearing, failed to provide a right to jury trial or right to counsel, and permitted a decision based on hearsay and psychiatric evidence elicited without the benefit of the privilege against self-incrimination. The plaintiff also contended that the statute did not provide for consideration of less restrictive alternatives other than commitment to an institution.

The court recognized that there may be emergency circumstances which would permit short-term detention without a hearing, but held that detention of longer than forty-eight hours without a hearing was impermissible, and prohibited waiver of the right to a hearing. Under the *Lessard* decision the proof establishing the necessity of commitment must be beyond a reasonable doubt. The court stated: "The argument for a stringent standard of proof is more compelling in the case of a civil commitment in which an individual will be deprived of basic civil rights and be certainly stigmatized

171. 409 F. Supp. 148 (D. Md. 1976).
172. 364 U.S. 479 (1960); *accord*, Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on procedural grounds*, 414 U.S. 473 (1974).
173. 325 F. Supp. 966 (M.D. Pa. 1971).
174. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on procedural grounds*, 414 U.S. 473 (1974).

by the lack of confidentiality of the adjudication."[175] Noting that psychiatric interviews and examinations raise the possibility of self-incrimination, the court in *Lessard* determined that the privilege against self-incrimination should be applied in civil commitment proceedings, and the detainee must be informed of the right before any statement is made. Finally, the court ruled that hearsay evidence should be excluded in a civil commitment proceeding on the grounds that the possible loss of liberty justified the strictest standard of evidence. *Lessard* thus provides a complete panoply of due process rights.[176]

In instances where a parent-guardian or other legal representative of a mentally retarded person requests civil commitment, the courts are *not* in agreement as to the applicability of procedural safeguards. In *Saville v. Treadway*[177] the plaintiffs challenged a Tennessee statute which permitted commitment of the mentally retarded upon application by the parent or guardian. Alternatively, any spouse or close adult relative of the individual, or any health or public welfare officer, or school official could request commitment if the application was accompanied by a certificate from a licensed physician stating that an examination of the individual had been conducted within thirty days from the date on which commitment was sought, and that the individual was mentally retarded and needed institutional care and treatment. The district court recognized that the unrestricted power of the parent or guardian to place the retarded person in an institution for life constituted a deprivation of life, liberty, and property without due process of law. The court noted that, "[t]he procedures required by due process vary with the nature of the case, and the more serious the deprivation the more extensive the procedural safeguards which must precede its imposition."[178] The court framed a comprehensive order which embodied the right to a hearing of an informal and nontechnical character and notice thereof, the right to counsel, the right to present and rebut evidence, and the right to a decision based on the evidence presented.

Conversely, the right to procedural due process protection was rejected in *Bartley v. Kremens*,[179] which involved the constitutionality of the Pennsylvania commitment law. The statute permitted a parent to apply for the commitment of a child or ward under eighteen years of age, and did not provide for pre-commitment due process protections. The district court found that no constitutional right to a pre-commitment hearing existed for juveniles committed by parents or guardians because of the strong tradition of parental concern for their children. Ultimately, the Supreme Court found that the constitutional issue was mooted in light of a new state statute

175. *Id.* at 1095.

176. An earlier Tenth Circuit case, Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968), reached a similar conclusion without an as extensively supported analysis. The court there stated that, "[w]here, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process . . . ." *Id.* at 396.

177. 404 F. Supp. 430 (M.D. Tenn. 1974).

178. *Id.* at 432.

179. 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated as moot, remanded for substitution of class representatives with valid claims*, 97 S. Ct. 1709, 52 L. Ed. 2d 184 (1977).

prohibiting a parent from committing a child fourteen years of age or older. The Court remanded the case to the district court for the exclusion of moot claims and the substitution of class representatives with valid claims.[180]

When a statute provides for involuntary commitment of the mentally retarded, the standards of commitment must be precise and comport with due process requirements. In *Goldy v. Beal*[181] the court held the standard "in need of care and treatment" in the Pennsylvania Mental Health & Mental Retardation Act of 1966[182] unconstitutionally vague, noting that the statute did not limit the discretion of administrative officials to prevent arbitrary action.

While the procedural due process cases indicate that a hearing is essential, there is no agreement upon the need for a preliminary hearing preceding detention. The court in *Bartley* was impressed by the argument that circumstances may exist whereby an individual may be temporarily committed for his own safety or the safety of others without a preliminary hearing, and *Lessard* established a maximum forty-eight hour emergency commitment without a hearing. Apparently there is judicial consensus that due process requires a hearing prior to commitment unless there are compelling emergency reasons for short-term detention, and an opportunity to challenge the action at a subsequent hearing.

VIII. CONCLUSION

This Article has indicated the emergence of constitutional rights for the mentally retarded, a trend resulting from increased litigation following unsuccessful efforts to secure recognition of these rights from state administrators of various programs in housing, education, and state institutions. A significant characteristic emerging from this recent litigation is the active role of the judiciary in securing these rights, but doubts exist as to the propriety of judicial involvement in the daily administration of programs for the retarded. Critics note the judiciary's inexperience in administering such programs, and label the judiciary's involvement as an intrusion into another branch of government. Yet too often these efforts, mischaracterized as judicial usurpation, represent judicial response to the void created by administrative rigidity and legislative disinterest.

Three steps are required to assure the rights of the mentally retarded. First, aggressive political leadership is needed in the executive departments of state government. Administrators of various programs affecting the retarded must recognize the need to reorient their professional values by accepting and enforcing these new rights. In addition, training seminars acquainting local administrators with these emerging rights would bring immediate policy changes at the level where the impact upon the lives of the retarded is the greatest. Furthermore, an urgent need exists for review and amendment of the programs affecting the retarded to reflect these emerging rights. By eliminating obsolete statutory provisions and regulations the present pace of litigation will decrease dramatically.

180. Kremens v. Bartley, 97 S. Ct. 1709, 52 L. Ed. 2d 184 (1977).
181. No. 75-791 (M.D. Pa. 1976).
182. PA. STAT. ANN. tit. 50, § 4406 (Purdon 1966).

Secondly, widespread educational programs must be instituted to acquaint the bar and judiciary with the problems, issues, and trends in this field. Although the current efforts of the American Bar Association are commendable, these efforts need to be extended to state, county, and city bar associations. Information, education, and training programs to improve the practitioner's skills will enhance the quality of service rendered to the retarded. Parallel programs are also required to orient all levels of the judiciary. In this regard, the judiciary has an important role in explaining and suggesting solutions to various problems to the legislature.

Finally, state legislatures have periodically reviewed and updated their criminal codes, commercial legislation, and inheritance laws. There is a similar need for a cohesive, longitudinal examination of the entire spectrum of rights for the retarded in order to eliminate archaic, obsolete, and barbaric legislation presently in the statutes.

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