TOWARD A LEGAL THEORY OF THE RIGHT TO EDUCATION OF THE MENTALLY RETARDED

COMMENT

I. INTRODUCTION

Danny is a good-natured child. Nobody knew there was anything wrong with him until he went to school. He had a little trouble learning to read, and that embarrassed him. He was tested by the school psychologist, who told his parents that he was "mildly retarded," but they didn't understand what that meant. He was put in the "basic" class, and everyone knew what *that* meant; the other kids called him "reetard" on the playground. He fell far behind; he sought attention by clowning in class. He was told that if he continued misbehaving he would be sent home, which gave him little incentive to "behave" since he was unhappy at school anyway. He was sent home periodically, and the periods grew longer and longer. He is now 13 years old and has not been to school regularly for three years. The school authorities now say he needs to go to a special school, but there is a long waiting list. So Danny waits.

This is a recurring scene in every major city in the country thousands of times each year. The curious thing is that we as a society are only beginning to be aware of the Dannys who drift in and out of our public school system. Until recently, almost no one paid any attention to Danny, much less to the question of his rights in this kind of situation.[1]

Parents and professionals are now challenging both the educational and the legal system to recognize that the vast numbers of mentally retarded children in this country have legally enforceable rights. One of the most important of these is the right to education. The educational process has traditionally been seen as a fundamental tool for the vindication of the rights of minority groups. Yet, ironically, the persons who need education most because of their special disability, have been systematically denied this tool largely because they have been judged unable to wield it. This comment will analyze the right of mentally retarded children to equal educational opportunity. The analysis begins by examining the nature of mental retardation and the present status of retarded children in relation to the educational system. The discussion will then analyze the nature

[1] In fact, when provision is made for the educational needs of "exceptional children," all too often it is thought of, as one newspaper put it, as an "education gift." In describing a proposed bill in the state legislature which would require school districts to provide education to all children regardless of handicap, the report uses the gift metaphor throughout. The legislators are writing a "gift list," and the "packaging" is House Bill 2256. The state is contemplating giving to exceptional children—deaf, blind, cerebral palsied, learning disabled, mentally retarded—a *gift* of education, something which "normal" children take for granted as their due. G. Hutton, House bill may give education gift for exceptional children, The Arizona Republic, March 9, 1973 at 45, col. 2.

of the right to education and explore the contours of this right as it applies to the mentally retarded. Finally, special emphasis will be placed on the right to integration into regular classrooms of the "educable mentally retarded" (EMR), who, if they are being educated at all, are currently being placed in special classes in the public schools.

II. EDUCATION AND THE MENTALLY RETARDED

A. Who Are the Mentally Retarded?

"He that begetteth a fool, doeth it to his sorrow." Proverbs

When a person is considered mentally retarded, the sorrow is not solely in his handicap of retardation but more significantly in the treatment, or even nontreatment, accorded him by the "normal" world. The parents of a retarded child are pitied; their child is viewed as an anchor around their necks, and a drain on society's resources, useless both to himself and to the world around him. Society's sincere pity for, and neglect of, these children is mirrored in the public school system, which, while expressing concern, altogether excludes large numbers of these children.

This neglect which often results in exclusion from the educational process or even institutionalization is based in large part on the misconception that retarded individuals make up a large, homogeneous group of persons who are incapable of learning even to care for themselves, much less to cope with the world or to pursue a useful occupation. Thus, it is thought, this group is easily set apart from the "normal" population; a person is either retarded or not, and the difference is a measurable one. Such misconceptions ignore the very real problems involved in defining what is meant by mental retardation and in distinguishing among the various levels or ranges of retardation. Although there is some confusion and overlap in the terms used, educational experts agree on the importance of distinguishing among the degrees of impairment represented by these levels.

> Degrees of mental retardation are measured by considering both "measured intelligence" and "impairment in adaptive behavior." For descriptive convenience the range of mental retardation has been divided into four levels—mild, moderate, severe, and profound. Children who are classified as mildly retarded (frequently called "educable mentally retarded" by educators), although limited in their potentials for advanced academic achievement, can usually be brought by special educational techniques to a state of self-sufficiency as adults. Moderately retarded children show a rate of mental development which is less than half of that normally expected, but can nevertheless learn to take care of their personal needs and perform many useful tasks in the home or in a sheltered working situation. The severely retarded can learn self-care, but their potential economic productivity is limited.
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> The profoundly retarded also respond to training in basic self-care,

and they additionally profit from special training in such areas as behavior control, self-protection, language development, and physical mobility.[2]

Thus, although the mentally retarded as a class share many characteristics, each level presents its own special problems and needs, and each demands some specific response by society. This response is not forthcoming when a society not only fails to discern the differences in learning capabilities, but also judges the whole class by those who have the most severe impairment and the least potential for development. Society's perceptions of some 7,000,000 persons are thus based on the characteristics of a subclass of only 92,000 persons, the profoundly retarded. The following figures, based on 1970 data, are important for this discussion only to show the relative size of each subgroup.

ESTIMATES OF RETARDATION BY AGE AND DEGREE—1970[3]

1970 Census	All Ages	Under 21 Yrs.
General Population	203.2 million	80.5 million
3% General Population	6.1 million	2.4 million
Retarded		
Profound (IQ 0-20) About 1½%	92 thousand	36 thousand
Severe (IQ 20-35) About 3½%	214 thousand	84 thousand
Moderate (IQ 36-52) About 6%	366 thousand	144 thousand
Mild (IQ 53+) About 89%	5.4 million+	2.1 million+

The factor of crucial importance in this data is that the mildly retarded, often called "educable mentally retarded," comprise the great bulk of the entire retarded class—2.1 million persons out of a total of 2.4 million under 21 years of age. The next largest group is the moderately retarded, sometimes called "trainable," consisting of only 144,000 persons under 21 years of age. Thus, it must be remembered in the following discussion that a mentally retarded child is very much more likely to fall into the EMR class than into any other.

B. Denial of Education to the Mentally Retarded

Today approximately 60% of mentally retarded children receive no education at all.[4] Assuming that none of the states is simply indifferent to

[2] NATIONAL ASSOCIATION FOR RETARDED CHILDREN, FACTS ON MENTAL RETARDATION 4 (1971).

[3] *Id.* at 15.

[4] THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, MR 69: TOWARD PROGRESS: THE STORY OF A DECADE, 18 (1969) [hereinafter cited as MR 69].

the fate of these children, the explanation for their exclusion probably relates to claims that 1) they cannot benefit from education, and 2) it is too expensive to educate them.

1. Can the mentally retarded benefit from education?

All states provide, usually in their constitutions, for free public education to all children of specified ages; all states make school attendance compulsory.[5] But most states exempt from compulsory attendance those who cannot benefit from education.[6] For example, until recently Pennsylvania provided that the State Board of Education had no obligation to educate a child certified as uneducable and untrainable by a school psychologist.[7] Further, compulsory school attendance was waived for a child found unable to profit therefrom (it appears that in practice, Pennsylvania used this statute to exclude mentally retarded children from its schools).[8] Similarly, the District of Columbia's legal obligation was only to provide a publicly supported education to each resident of the District capable of benefiting from such instruction.[9] The federal courts which examined these situations found that such laws were being used to justify excluding mentally retarded children from public schools on the grounds that they could not benefit from education.[10]

The attitude that the mentally retarded cannot benefit from education is reflected in the laws of most states. As one writer puts it, "historically, mental retardation and other developmental disabilities . . . have been taken *de facto*, as sufficient cause for the denial of educational rights."[11] This attitude is based on the ancient assumption that certain people simply cannot learn.

Modern educators reject this dogma. These "pessimistic views, which have been so widely, and for so long, entertained regarding the ineducability of the mental defective, are unwarranted."[12] The Council for Exceptional Children takes the position that all mentally retarded children are educable and must be provided for in the public school system: "There is no dividing line which excludes some children and includes others in edu-

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[5] THE COUNCIL FOR EXCEPTIONAL CHILDREN, DIGEST OF STATE AND FEDERAL LAWS: EDUCATION OF HANDICAPPED CHILDREN (1971).

[6] *Id.*

[7] Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 279, 282 (E.D. Pa. 1972) [hereinafter cited as PARC]. *See also* 24 PURD. STAT. Sec. 13-1375 (1965).

[8] PARC, 343 F. Supp. at 282.

[9] Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866, 874 (D.D.C. 1972).

[10] PARC, 343 F. Supp. 279; Mills v. Board of Education, 348 F. Supp. 866.

[11] Goldberg, *Human Rights for the Mentally Retarded in the School System*, 9 MENTAL RETARDATION 3, 5 (1971).

[12] R. YATES, BEHAVIOR THERAPY 324 (1970).

cational programs. Mentally retarded children of yesteryear who were excluded because they were "unteachable" have recently become 'educable' or 'trainable'."[13] The National Association for Retarded Children also stresses this idea:

> Public School Education must be provided for all mentally retarded persons, including the severely and profoundly retarded. There should be no dividing line which excludes children from public education services. If current educative technologies and facilities are inappropriate for the education of some retarded persons, then these existing educational regimes should be modified.[14]

A federal court in Pennsylvania became the first court in the country to accept this idea of the educability of all mentally retarded.[15] The Pennsylvania Association for Retarded Children brought a class action suit to challenge the state's practice of excluding mentally retarded children from its schools on the grounds they were unable to benefit from education. The plaintiffs presented convincing evidence, which was accepted by the court, that all children can benefit from education. The state, presumably, in an effort to preserve the constitutionality of its education laws, agreed to reinterpret its statutes so as to prevent their being used to exclude mentally retarded children. Thus it entered into a consent agreement with the plaintiffs in which the state agreed to provide "to every person between the ages of six and twenty-one . . . access to a free public program of education and training appropriate to his learning capacities."[16] The consent agreement, significantly incorporating the following summary of expert opinion, concludes that

> all mentally retarded persons are capable of benefitting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency and the remaining few, with such education and training are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education.[17]

In a similar suit brought in the District of Columbia, the federal district court granted summary judgment to the plaintiffs, declaring that no child of an age making him eligible for public education shall be excluded unless

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[13] 37 J. EXCEPTIONAL CHILDREN 422, 429 (1971).

[14] National Association for Retarded Children, Policy Statement on the Education of Mentally Retarded Children, adopted April, 1971, at 2.

[15] PARC, 343 F. Supp. 279.

[16] *Id.* at 302.

[17] *Id.* at 296 (footnotes omitted).

he is provided "adequate alternative educational services suited to the child's needs, which may include special education or tuition grants."[18]

Thus, courts are beginning to recognize that all individuals can benefit from education and that state laws which exclude some children on the basis of "ineducability" are cruelly anachronistic.

2. Is it too expensive to educate the mentally retarded?

Although expert opinion holds that all children can benefit from education, it is unarguable that it would be more expensive per child for the state to provide education for the mentally retarded child than for the "normal" child. Special training for the teacher, small pupil-teacher ratios allowing for more individual attention, and an adjusted tempo of "progress" expectations are all required. In addition, some mentally retarded children are multi-handicapped, thus necessitating medical facilities and personnel, and an even higher degree of teacher specialization.

Two important facets of the cost problem must be considered. First, is it in fact more expensive to educate mentally retarded children than not to do so, and second, if it is more expensive, is that sufficient justification for denying education to the mentally retarded?

As to the first question, while it is clear that the retarded are individually more expensive to educate than the non-retarded, it has been persuasively argued that it will ultimately cost the state a great deal more *not* to educate these children. In 1967, this country spent $500-600 million for institutionalizing about 200,000 people (half of whom were children) in public institutions for the mentally retarded.[19] In addition, there are private institutions (with 20,000 mentally retarded residents) and institutions for the mentally ill (in which the mentally retarded comprise 10 percent of the residents). The number institutionalized increases by 3,000 every year.[20] Finally, there are many thousands of mentally retarded persons who are either economically dependent on the state for public assistance or are dependent on private sources and are economically unproductive in society. The President's Committee on Mental Retardation estimates that with education and training three-quarters of all mentally retarded people could be fully self-supporting; an additional 10-15% percent could be partially self-supporting.[21] Members of the President's Committee writing in 1972 said:

> The major point of difference in the levels of retardation is that while the profoundly retarded may have to remain in institutions during their

[18] Mills v. Board of Education, 348 F. Supp. at 878.

[19] CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 17 (R. Kugle & W. Wolfensberger, ed. 1969) [hereinafter cited as CHANGING PATTERNS].

[20] *Id.*

[21] MR 69 at 17.

> entire lives, the others are educable to a surprising degree. The moderately retarded can be taught to take care of themselves physically and can learn some manual skills. Though the moderately retarded cannot master formal school work, the mildly retarded can reach the sixth grade and can also learn to do and to hold *simple* jobs.[22]

A federal court in Alabama concluded last year that no "mildly retarded" individual should be institutionalized at all.[23] Yet of those residing in institutions, 18 percent are mildly or borderline retarded. An additional 22 percent who are moderately retarded, could presumably become fully or partially self-sufficient through education.[24] Thus it is submitted that, with education, many of those presently institutionalized could not only be released, but in large measure be self-supporting. Because those who are institutionalized include the most severely retarded, presumably a far greater percentage of those who reside outside of institutions are likely to be able to achieve self-support.

A state which studied this problem in long-range economic terms should find that taxpayers' money would be saved by immediate investment of funds in the education and training of its mentally retarded citizens. Most could become totally or partially self-supporting; even those who must remain in institutions could attain a measure of self-care, which would decrease the cost of institutionalization.[25]

One expert has estimated the saving a state might make by educating one mentally retarded individual for twelve years (at an annual cost of $1,000) instead of allowing him to become a ward of the state (50 years at $2,000 per year).[26] On the basis of these figures alone, the saving would be $88,000 per person.[27] Anything the individual earns after he is educated may represent an even greater saving to the state in tax revenue. This expert concluded: "*This country can no longer afford to avoid its responsibilities for educating the handicapped either in financial or moral terms.*"[28]

Thus, evidence indicates that in purely economic terms it makes sense for a state to educate the mentally retarded. However, states often overlook such long-range economic benefits, focusing instead only on apparent short-term costs. In light of this tendency, the important question is whether, even if it were not possible to save money through the education of its mentally retarded citizens, a state can justify denying them educa-

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[22] Haggerty, Kane, & Udall, *An Essay on the Legal Rights of the Mentally Retarded*, 6 FAM. L. Q. 59, 65 (1972).

[23] Wyatt v. Stickney, 344 F. Supp. 387, 396 (M.D. Ala. 1972).

[24] CHANGING PATTERNS, *supra* note 19, at 20.

[25] This assumes that most of the staff at institutions is custodial. *See, e.g.*, Murdock, *Civil Rights of the Mentally Retarded*, 48 NOTRE DAME LAW. 133, 164 (1972).

[26] *Id.* at 165 n.122.

[27] *Id.*

[28] *Id.* at 165.

tion merely on a cost basis, once it is recognized that the mentally retarded can benefit from education.

III. EQUAL PROTECTION

A legal analysis of the denial of education to the mentally retarded must begin with the equal protection clause. Historically the Supreme Court has employed one of two standards in determining whether a particular classification is a denial of equal protection. If a state has established a classification that either affects a fundamental interest or creates a suspect classification, the Court will apply the "strict scrutiny" test to the legislative classification in question.[29] A heavy burden is then placed upon the state to show that it has a compelling interest in maintaining the classification.

If the special scrutiny test does not apply, the Court has traditionally used a rational basis test to see whether the classification works an invidious discrimination on one class or another.[30] A discrimination is invidious if it is not reasonably related to a permissible legislative purpose.[31] One who attacks a legislative classification under the equal protection clause then must "carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."[32]

Given the Court's traditional deference to the legislative judgment, this is an especially heavy burden. In speaking of this deference, former Chief Justice Warren noted that it

> permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[33]

A survey of recent opinions demonstrates that the Court has been willing to use a more elastic equal protection analysis than the black-white dichotomy used by the Warren Court.[34] Shades of gray emerge as the Court appears to look more closely at the reasonableness of the challenged

[29] *See, e.g.*, interstate travel: Shapiro v. Thompson, 394 U.S. 618 (1969); voting: Harper v. Virginia Bd. of Elections, 387 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); procreation: Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[30] Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[31] Morey v. Doud, 354 U.S. 457 (1957).

[32] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79 (1911).

[33] McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

[34] Gunther, *The Supreme Court, 1971 Term: Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

legislative classification. For example, seven decisions handed down in 1972 sustained an equal protection claim without the need for strict scrutiny.[35] In other words, in each of these cases, the state's claim of a rational basis for its legislation was rejected, and the Court indicated that it would inquire into the rationality of the means employed by the legislature to achieve its stated purpose. Professor Gerald Gunther has called this a means-focused equal protection test,[36] saying that "the yardstick for the acceptability of the means would be the purposes chosen by the legislatures, not 'constitutional' interest drawn from the value perceptions of the Justices."[37]

Four of the equal protection decisions were unanimous. Mr. Justice Blackmun, in *Jackson v. Indiana*,[38] found that Indiana's procedure for committing criminal defendants who are declared incompetent to stand trial made commitment easier and release more difficult than procedures governing civil commitment. The Court held this discrimination to be a violation of the equal protection clause. Although the Court once alludes to the "substantial rights" which the criminal defendant is denied, it never mentions constitutionally fundamental rights, suspect classification, or strict scrutiny. Likewise, in *Humphrey v. Cady*,[39] *James v. Strange*,[40] and *Reed v. Reed*,[41] Justices Marshall, Powell, and Burger, respectively, make no mention of special scrutiny, but in each case the legislative classification is struck down as violative of the equal protection clause. In *Reed*, the Court analyzed a sex-based classification which gave mandatory preference to men in the administration of decedent's estates. Mr. Chief Justice Burger noted that Idaho's stated purpose of reducing the probate courts' workload by eliminating the need for a hearing in one class of contests "is not without some legitimacy."[42] If the Court were using the traditional equal protection test, the inquiry would no doubt have stopped there, and the classification would have been allowed. But the Court found "crucial" the question whether the statute advances the stated objective "in a manner consistent with the command of the Equal Protection Clause."[43] In striking

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[35] James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). The constitutional challenge was rejected in only four equal protection cases: Jefferson v. Hackney, 406 U.S. 535 (1972); Lindsey v. Normet, 405 U.S. 54 (1972); Schilb v. Kuebel, 404 U.S. 357 (1971); Richardson v. Belcher, 404 U.S. 78 (1971). *See generally* Gunther, *id.* at 12-37.

[36] Gunther, *supra* note 34, at 28.

[37] *Id.* at 21.

[38] 406 U.S. 715 (1972).

[39] 405 U.S. 504 (1972).

[40] 407 U.S. 128 (1972).

[41] 404 U.S. 71 (1971).

[42] *Id.* at 76.

[43] *Id.*

down the statute, the Court said: "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Fourteenth Amendment."[44] There is no mention in *Reed* of fundamental interests or suspect classes.[45]

The same approach is utilized in *Eisenstadt v. Baird*.[46] Mr. Justice Brennan relied on *Reed*, and explicitly eschewed any need for special scrutiny: "Just as in *Reed v. Reed* . . . , we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard."[47]

Mr. Justice Powell also avoided making a choice between polar extremes in *Weber v. Aetna Casualty & Surety Co.*[48] In invalidating a statutory classification which gave a preference to legitimate over illegitimate children for their father's workmen's compensation benefits, the Court again analyzed the state's purposes. It did not question the importance of the state's interest in protecting legitimate family relationships and in minimizing problems of proof of dependency. But it did question whether the means employed in the statute in fact served those ends. It held that the means violated the fourteenth amendment rights of illegitimate children, and that "the classification is justified by no legitimate state interest, compelling or otherwise."[49]

The Court has recently handed down another sex discrimination case, *Frontiero v. Richardson*,[50] in which the classification was held unconstitutional. Although four members of the Court[51] in the plurality opinion declared that sex is a suspect classification deserving of special scrutiny, the other five[52] explicitly refused to take that step. It is noteworthy, however, that eight of the nine Justices voted to strike down the statute, four under a special scrutiny test, and four under a rational basis test. Those Justices who would apply the rational basis test merely cite *Reed*, saying it is unnecessary to add sex to the "narrowly limited group of classifications which are inherently suspect."[53]

Thus, in none of these cases is strict scrutiny applied; yet, the scrutiny is more careful than in the traditional equal protection analysis. What

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[44] *Id.*

[45] However, Gunther, *supra* note 34, at 34, suggests that the Court is displaying a "special sensitivity to sex as a classifying factor," see discussion of *Frontiero v. Richardson*, *infra*, text accompanying notes 50-53.

[46] 405 U.S. 438 (1972).

[47] *Id.* at 447, n.7.

[48] 406 U.S. 164 (1972).

[49] *Id.* at 176.

[50] 41 U.S.L.W. 4609 (U.S. May 14, 1973).

[51] Justices Brennan, Douglas, White, and Marshall.

[52] Justices Stewart, Powell, Burger, and Blackmun. Justice Rehnquist dissented.

[53] 41 U.S.L.W. at 4614.

may be developing is either a modified test of rationality, in which the rationality will be examined rather than presumed, or the "spectrum of standards" preferred by Mr. Justice Marshall. Gunther sees this emerging theory as an "intensified" scrutiny of means which would "close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry."[54]

A. Education As a Fundamental Interest—Rodriguez

Many state and lower federal courts have treated education as a fundamental interest requiring a strict scrutiny test. These courts have stressed the importance of education both to the individual and to society, noting its "unique impact on the mind, personality, and future role of the individual child;"[55] it is "unmatched in the extent to which it molds the personality of the youth of society."[56] Similarly, the public schools have been termed by the Supreme Court "the most powerful agency for promoting cohesion among a heterogeneous democratic people,"[57] and a "most vital civil institution for the preservation of a democratic system of government."[58]

However, despite such previous statements, the Supreme Court recently considered the nature of the right to education, and apparently rejected the developing theory. In *San Antonio Independent School District v. Rodriguez*,[59] a class of poor Mexican-American children and their parents challenged the Texas system of financing its public schools through property taxes. The plaintiffs claimed that the system favored the affluent, and thus denied to the poor the equal protection of the law. The plaintiffs' claims were based on two theories either of which would have required special scrutiny: 1) education is a fundamental right, and 2) wealth is a suspect classification. The Court, although recognizing the importance of education, refused to recognize it as a fundamental right in the constitutional sense.

The Court's treatment of wealth as a suspect classification, on the other hand, was equivocal. The Court found inapplicable the precedents which suggested that a classification based on wealth was an invidious discrimination.[60] In those cases, according to Mr. Justice Powell's analysis, the per-

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[54] Gunther, *supra* note 34, at 24.

[55] Van Dusartz v. Hatfield, 334 F. Supp. 870, 875 (D. Minn. 1971).

[56] Serrano v. Priest, 5 Cal. 3d 584, 609-10, 487 P.2d 1241, 1259, 96 Cal. Rptr. 601, 619 (1971).

[57] Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring).

[58] Abington School District v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

[59] 93 S. Ct. 1278 (1973).

[60] Bullock v. Carter, 405 U.S. 134 (1972); Tate v. Short, 401 U.S. 395 (1971); Williams

sons discriminated against were so poor that they could not pay for a desired benefit, and as a result they "sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[61] In *Rodriguez*, the Court found no clearly defined class of "the poor." Furthermore, it accepted Texas' assertion that the state presently assures "every child in every school district an adequate education."[62] The Court suggested, however, that had the plaintiffs been able to show that the two distinguishing characteristics of wealth classifications, a definable class of indigents and a total deprivation of the desired benefit, were present in *Rodriguez*, they "might arguably [have met] the criteria established in these prior cases."[63] Mr. Justice Powell thus strongly suggested that, were the plaintiffs receiving no public education at all, they would have had a colorable equal protection claim.[64]

Having rejected the bases for application of strict scrutiny, the Court then moved to a traditional rational basis test. Under this test, the attack on the state's classificatory scheme failed. The Court's analysis reflects the two-tiered approach to equal protection utilized by the Warren Court in the 1960's.[65] It assumes that equal protection analysis can be made to fit into "one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality."[66] Such a conception implies two polarized standards, rather than a spectrum of standards for equal protection analysis. Mr. Justice Marshall, perhaps the most articulate spokesman for a flexible equal protection test, dissenting in *Rodriguez* refers to such a polarization as "an emasculation of the Equal Protection Clause."[67] The most comprehensive statement of his philosophy to date is found in this dissent, in which he suggests that a principled reading of recent Court opinions would reveal that the Court had applied a spectrum of standards. According to Marshall,

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v. Illinois, 399 U.S. 235 (1970); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[61] Rodriguez, 93 S. Ct. at 1290.

[62] *Id.* at 1292, citing appellant's brief at 35.

[63] *Id.* at 1291.

[64] *Id.* at 1292, n.60:

> An educational finance system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. After all, Texas has undertaken to do a good deal more than provide an education to those who can afford it. It has provided what it considers to be an adequate base education for all children and has attempted, though imperfectly, to ameliorate by state funding and by the local assessment program the disparities in local tax resources.

[65] Gunther, *supra* note 34, at 12.

[66] Rodriguez, 93 S. Ct. 1278, at 1330 (Marshall, J., dissenting).

[67] *Id.*

> [t]his spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification.[68]

On its face the Court's opinion in *Rodriguez* seems to revert to the minimal scrutiny standard and thus to raise anew the problem inherent in a rigid two-tiered equal protection analysis. However, the *Rodriguez* holding might not be so much an abandonment of the "means-focused equal protection test" as an exception to it. In speaking of the scope of the means-focused approach Gunther notes that "the major limitation on the exercise of that scrutiny would stem from particular consideration of judicial competence, not from broad priori categorization of the "social and economic" variety."[69] Such a limiting principle sets up what might be called a competence parameter of judicial intervention—a point at which the Court feels that "intractable economic, social, and even philosophical problems"[70] prevent it from being able to make any kind of principled decision on the particular issues involved. Such questions then are best left to the legislative not the judicial process.

The Court indicated that it viewed *Rodriguez* as something other than one more in a long line of education cases. Had it seen the plaintiffs' petition as simply asking for access to education on an equal basis, the Court would certainly have concluded that it had the expertise to scrutinize carefully the Texas educational system; for then the context of the issue would have been a familiar one with which the Court, in a long line of cases beginning with *Brown*, had frequently dealt. Rather the Court felt the case concerned more complex questions. This can be seen in the way Justice Powell framed the issue in the majority opinion:

> This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax

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[68] *Id.*, citing Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall J., dissenting).

[69] Gunther, *supra* note 34, at 23.

[70] Dandridge v. Williams, 397 U.S. at 487.

> local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures.[71]

It has deferred in the past, said the Court, and should continue to do so because "the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues."[72]

There are two other reasons why the Court saw *Rodriguez* to be especially appropriate for a limited form of review. The first, a necessary corollary to its deferential stance towards a state's programs of taxation and fiscal policies, concerns the implications of federalism. In speaking about the problem of federalism Justice Powell stated that "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State."[73] Thus not only was Texas' system of financing being scrutinized but also the systems of almost all the other states.[74] Further, too rigorous a standard of scrutiny would perhaps allow all local fiscal schemes to be called into question, not just those relating to education.

Finally, in addition to these questions of fiscal policy and federalism, *Rodriguez* involved difficult issues of educational policy, especially the unsettled and controversial question whether there is any correlation between educational expenditures and educational quality. Because the theory that the quality of education varies directly with the amount of funds spent for it is a matter of considerable dispute among educators and because the Court believed that the correlation—or lack of it—between these two factors was the basis underlying virtually every legal issue, the Court was especially unwilling to impose on the states any constitutional restraints in this area. Further questions as to the proper goals of an educational system or the proper relationship between state and local boards of education only multiplied and magnified the "myriad of 'intractable economic, social, and even philosophical problems' " the Court saw itself confronting. Because it involved these most delicate and difficult questions of local taxation, fiscal planning, educational policy, and federalism, considerations counseling a more restrained form of review,[75] *Rodriguez* can be distinguished from cases which seek equal access to the educational system for the mentally retarded.

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[71] Rodriguez, 93 S. Ct. at 1300.

[72] *Id.* at 1301.

[73] *Id.* at 1302.

[74] Except Hawaii.

[75] Rodriguez, 93 S. Ct. at 1300-1302.

B. *Equal Protection and the Mentally Retarded*

For the mentally retarded the issue is whether any children who are capable of being educated can be denied a public education. Before the question can be resolved under the equal protection clause it is necessary to determine the appropriate standard for review. Three possible equal protection standards currently exist: the strict scrutiny standard, the means-focused approach, and the rational basis test. Under all of these approaches, briefly discussed below, the mentally retarded may not be denied a public education.

Rodriguez having declared that education is not a fundamental interest, the strict scrutiny test could only be triggered if the mentally retarded were considered a suspect class. Traditionally, the indicia of suspectness have included three factors.[76] First, like race and alienage, mental retardation is an immutable or unalterable trait over which the individual has no control. Second, because such a trait has become for each individual a badge of opprobrium or a stigma of inferiority, the class has been subject to a history of purposeful discrimination, which has made its members second class citizens. Finally, as a class, the mentally retarded have been relegated to a position of political powerlessness and thus need special judicial protection from the majoritarian political process. Because of these factors—an immutable trait or disability, a history of purposeful discrimination, and a position of political powerlessness—the mentally retarded qualify as a suspect class. State action excluding such a class from a public education should, then, fall unless the state can show a compelling interest in support of the discrimination—a burden the state presumably could not bear.

If a court did not invoke strict scrutiny, it could apply either the means-focused test, discussed above, or the rational basis test. These differ in that the means-focused test requires a careful consideration of the rationality of the legislation in relation to its purpose, whereas the rational basis test, under which rationality is presumed, requires a showing that the exclusion of the mentally retarded serves no legitimate state purpose. Hence, if the state's legislation or action systematically excluding the mentally retarded from the public school system is unconstitutional under the rational basis test, it is, *a fortiori*, unconstitutional under the more exacting means-focused test.

The rational basis test requires an examination of the state's purpose and of the state's action in relation to that purpose. The states acknowledge that the purpose of their educational systems, typically stated in state constitutions, is to educate their citizenry.[77] Each state implements this

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[76] *Id.* at 1294. *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1125-27 (1969).

[77] The Legislature shall establish, organize, and maintain a liberal system of public

constitutional purpose through statutory schemes which establish systems of public education and make school attendance compulsory. The legitimacy of this state purpose is nowhere in dispute. The question to be resolved, then, is whether state legislation excluding the mentally retarded is rationally related to the avowed state purpose. The expert data, some of which is set out in Part II, *supra*, of this comment, establishes that most of the children denied a public education by the states because they are mentally retarded *are educable*. The state purpose of educating its citizenry is thereby thwarted by arbitrary state action; here, then is action which is wholly arbitary and irrational.

Nor may a state effectively argue that its resources are insufficient to educate the mentally retarded. To make such an argument, the state would need to establish that not educating the mentally retarded is less expensive than educating them. In Part II, *supra*, it was seen that it is economically more sound for a state to provide the means for the retarded to become self-supporting than to bear the cost of their care for the rest of their lives.

Education is one of the costliest services the state provides. But if we accept the proposition that all children can benefit from education,[78] then exclusion of any child is arbitrary indeed. If the goal of the state, as expressed both in its constitution and in its legislation, is to educate its citizens, then to exclude citizens who are capable of benefiting from education is to set off a class of persons in a way that is not reasonably related to the goals of the state. Equal protection of the law under the special scrutiny test, the rational basis test or the modified means-focused test requires at the very least that all children be given access to the state system of public education.

C. *Case Law: Mills and PARC*

Since the Supreme Court has yet to consider the right to education of the mentally retarded, precedent must be found in lower court decisions. The case law has begun to establish the right to education of mentally retarded children. In *Mills*, the class, by the defendant school board's own estimate, comprised some 15,000 children with various types of handicap, 80 percent of whom were not being served by the public schools.[79]

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schools throughout the state for the benefit of the children thereof between the ages of seven and 21 years . . . ALA. CONST. art. XIV, § 256.

The legislature shall provide for the maintenance and support of the system of free common schools, wherein all the children of this state may be educated. OHIO CONST. art. b, § 2.

The General Assembly shall make such provisions . . . as . . . will secure a thorough and efficient system of common schools throughout the state . . . N.Y. CONST § 1.

[78] PARC, 343 F. Supp. 279 (1972).

[79] Mills v. Bd. of Educ., 348 F. Supp. at 868-69.

In its opinion, the court decried the school system's complete exclusion of these children:

> The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[80]

The court fashioned a comprehensive scheme of relief, including the due process safeguards of hearing procedures, notice requirements, and guidelines for identification, notification, assessment, and placement of class members. Furthermore, the court articulated the substantive right of these children to receive a free public education. It ordered that within thirty days "the District of Columbia shall provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment."[81] The *Mills* decision was not appealed, and is now the established law of the District of Columbia. What was effectuated by court order in the District of Columbia was implemented by consent agreement in Pennsylvania.[82] Here, too, the court formulated an elaborate scheme to enforce what it declared to be the clear right of all children to be educated by the state.

Mills and *PARC* are the landmark cases vindicating the rights of mentally retarded children. Significantly, in neither case did defendant department of education contest the central issue of its affirmative duty to educate these children. Nor did either defendant argue that the children could not benefit from such education.

In addition to the equal protection and due process theories under the federal constitution, both cases also rest on independent state grounds. In light of the *Rodriguez* holding, the state theory of action has become increasingly important, allowing crucial rights to be vindicated without departing from the traditional principle that education is primarily a state concern. At least thirteen suits are presently being litigated, all of which rely heavily on state constitutional and statutory rights.[83] In addition,

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[80] *Id.* at 876.

[81] *Id.* at 878.

[82] PARC, 343 F. Supp. 279.

[83] Lori Case v. State of California, Dept. of Educ., Civil Action No. 191679 (Cal. Superior Ct., Riverside County); Larry P. v. Riles, Civil Action No. C-71-2270 (N.D.Cal.); Kivell v. Nemoitan, No. 143913 (Superior Ct., Fairfield County, Conn., July 18, 1972); Lebanks v. Spears, Civil Action No. 71-2897 (E.D. La., N.O. Division); Maryland Association for Retarded Children v. Maryland, Civil Action No. 72-733-K (U.S. District Ct., Maryland); Stewart v. Philips, Civil Action No. 70-1199-F (D. Mass.); Harrison v. Michigan, Civil Action No. 38557 (E.D. Michigan); In the Matter of Peter Held, Civil Action No. H-2-71, (Family Court of New York, Westchester County); Piontkowski v. Syracuse School District (filed with Commissioner of Education of State of New York); Hamilton v. Riddle, Civil Action No. 72-86 (Charlotte Division, W.D.N.C.); North Carolina Association for Retarded Children v. North Carolina Dept. of Educ. (E.D.N.C., Raleigh Division); Panitch v. Wisconsin, Civil Action No. 72-L-461 (U.S. District Court, Wisconsin).

plaintiffs also allege denial of equal protection and due process under the federal constitution.[84] The burgeoning litigation in this field not only prevents exclusion, but also establishes due process procedures for the identification, classification, and placement of mentally retarded children.

The same theories underlie suits brought to establish a right to treatment of the institutionalized mentally retarded and mentally ill. The foremost of these is *Wyatt v. Stickney*,[85] in which a federal district court granted relief, affirming that mentally retarded persons who are civilly committed have a constitutional right to treatment which includes the right to education.

Thus, the principle that there is no justification for denying education to the mentally retarded is being established both in theory and in litigation. If, then, education is required, for all children the crucial question becomes, how is the *Brown* requirement of "equal educational opportunity" for all to be reconciled with the *Rodriguez* minimum requirement of "at least an adequate program of education" for all?

IV. The Contours of the Right to Education of the Mentally Retarded

> 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.[86]

In these words, the Supreme Court recognized a right to "equal educational opportunity" for all. But the Court did not make clear what a state would be required to provide in order to meet the equality standard. The Topeka children of *Brown* enjoyed schools that were "substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers,"[87] yet the Court found them unequal with respect to educational opportunity. Since 1954, the courts have been struggling with the content of the term "equal educational opportunity," and so far have provided at least the negative rule that a state cannot operate racially dual systems of public schools, no matter how "equal" the facilities or the expenditures.[88] How balanced the racial composition must be to provide equality of opportunity has not yet been established.[89] The courts' concern in the inter-

[84] It will be remembered that *Serrano v. Priest*, *supra* note 56, the important California school financing case, was decided under both state and federal constitutional theories, and thus remains viable after *Rodriguez* because it rests on independent state grounds.

[85] 344 F. Supp. 387. This case is now on appeal *sub. nom. Wyatt v. Aderbolt*, and was argued Dec. 6, 1972, before the Fifth Circuit Court of Appeals.

[86] Brown v. Board of Education, 347 U.S. 483, 493 (1954).

[87] *Id.* at 486, n.1.

[88] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. School Bd. of New Kent County, 391 U.S. 430 (1968).

[89] Winston-Salem/Forsyth County Bd. of Educ. v. Scott, 404 U.S. 1221 (1971). Mr.

vening years, however, has been that a racial minority has received an inferior educational opportunity and is thus denied the equal protection of the laws which the fourteenth amendment guarantees.

Equality cannot be measured by expenditures of money for each child. Equal expenditures were being made in Topeka, Kansas, prior to 1954, and it was not enough to ensure "equality." And although equal expenditures were not being made in Texas in 1973, the Court found no denial of equal protection based on this inequity.[90]

Neither can equality be measured in terms of achievement; common sense tells us that children have widely differing potentials for achievement in school. A state could not require that a child be allowed to remain in school until he is able, for example, to read or do computations with a prescribed facility. Some individuals will never be capable of meeting that standard. Nor would it be desirable from society's point of view for an educational system to produce a homogeneous set of individuals who had all met merely a certain minimum standard.

Assuming equality should not be judged solely by the resources poured into education nor by the resulting "product" of the educational system, how should it be measured? The word "opportunity" is crucial. The theory that has found favor with educators is that equal opportunity means the state should provide means for every child to develop according to his own potential, to advance as far as his capabilities will allow. "A much more realistic and moderate notion of equality would recognize that there are real and significant differences in talent, ability, and inclination, and that each person should be treated according to talents and preference."[91]

This theory of education is particularly well suited to a discussion of the education of the mentally retarded. If equality is measured in terms of achievement, a state can never offer equal educational opportunity to those who cannot reach a level of accomplishment which the ordinary child can reach. If on the other hand, it is measured in terms of development of potential, then providing means to enable each child to learn as much as he is able is appropriate to the widely varying capabilities in the population. Precisely what a state must provide to ensure this equal opportunity to its citizens who are less well endowed intellectually than the "normal" citizen has yet to be determined.

Chief Justic Burger, sitting as Circuit Justice, suggested that there may have been a misreading of the *Swann* opinion: "If the Court of Appeals or the District Court read this Court's opinion as requiring a fixed racial balance or quota, they would appear to have overlooked specific language of the opinion in the *Swann* case to the contrary." *Id.* at 1227.

[90] Rodriguez, 93 S. Ct. 1278.

[91] A. DEXTER, THE TYRANNY OF SCHOOLING: AN INQUIRY INTO THE PROBLEM OF STUPIDITY 6-7 (1964).

Rodriguez requires that at least an adequate minimum must be provided every child in every school district. But the Court made no attempt to define what it meant by adequate; and the question of the educational standard necessary for the mentally retarded population has never been before the Supreme Court. Lower federal courts have considered the issue, however, and some have established relatively detailed guidelines which, might portend the Supreme Court's resolution of the issue.

An Alabama federal district court held in 1972 that institutionalized mentally retarded citizens have a right to "habilitation."[92] The court defined the term as follows:

> . . . the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to programs of formal, structured education and treatment.[93]

Thus, in addition to a previously-recognized right of the mentally ill to treatment,[94] this Alabama court recognized a right to education, which it defined as "the process of formal training and instruction to facilitate the intellectual and emotional development of residents."[95] This habilitative ideal is elaborately developed by the court with specific minimum constitutional standards set forth in the appendix to its April 13, 1972, opinion.[96]

Habilitation includes medical treatment, education, and care suited to the individual's needs, regardless of degree of retardation. An overriding concern of the court is that the "least restrictive alternative" be applied to the retardate:

> Residents shall have a right to the least restrictive conditions necessary to achieve the purposes of habilitation. To this end, the institution shall make every attempt to move residents from (1) more to less structured living; (2) larger to smaller facilities; (3) larger to smaller living units; (4) group to individual residence; (5) segregated from the community to integrated into the community living; (6) dependent to independent living.[97]

The institution must establish an educational program in light of this ideal. Specifically, it must meet the following minimum standards:[98]

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[92] Wyatt v. Stickney, 344 F. Supp. 387.

[93] *Id.* at 395.

[94] Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

[95] Wyatt v. Stickney, 344 F. Supp. at 395.

[96] *Id.* at 395-407.

[97] *Id.* at 396.

[98] *Id.* at 397.

	Mild[99]	Moderate	Severe/ Profound
(1) Class Size	12	9	6
(2) Length of school year (in months)	9-10	9-10	11-12
(3) Minimum length of school day (in hours)	6	6	6

Whereas the *Wyatt* court was concerned with providing education to institutionalized individuals, the courts in *Mills* and *PARC* had the same concern for the educational needs of the noninstitutionalized retardate. In their decrees they too established far-reaching guidelines to meet these needs. However, having established the central right of all children to education, they focused more on the procedural implementation of this right. Thus, their concern was for methods of identification, notification, assessment, placement, and periodic re-evaluation that guaranteed due process safeguards. In contrast to *Wyatt*, both courts leave to the respective departments of education the precise working out of their court-approved plans; nevertheless, they unequivocally ordered that educational services be provided forthwith to these children regardless of their degree of retardation. Further, they again enunciated the idea of the least restrictive alternative by stipulating that homebound instruction was to be the last educational resort; it was to be considered, short of institutionalization, the "least preferable of the programs of education and training."[100] In *PARC*, the court appointed special masters to oversee the plans, whereas, the court in *Mills* ordered that comprehensive plans be submitted to it for approval. In contrast to the Supreme Court's reluctance in *Rodriguez* to involve itself in the educational system's "intractable" problems, the *Mills* court declared its intention to supervise closely such matters as curriculum, educational objectives, teacher qualifications, and compensatory education for children previously excluded.

The principle of the least restrictive alternative, relied on by these courts in arriving at minimum standards for the education of mentally retarded children, bears close resemblance to the "normalization principle" espoused by some educational theorists. "Normalization" means "making available to the mentally retarded patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society."[101] When a court orders that children be educated in school rather than at home, or at home rather than in an institution wherever possible, it is seeking to "normalize" that child's experience. The logical application of this normalization principle to the educable mentally re-

[99] The court contemplated that no mildly retarded individuals would be institutionalized. However, it has made these temporary provisions for those presently institutionalized.

[100] PARC, 343 F. Supp. at 312.

[101] CHANGING PATTERNS, *supra* note 19, at 181.

tarded is their integration into regular public classrooms. It is the consideration of the legal status of this group to which we now turn.

V. The Rights of EMR Children to Integration into the Public School System

The EMR have an anomalous position in the educational system. Of all mentally retarded children the EMR are most like "normal" children. They do not always suffer outright exclusion; however, when they are admitted into the public schools, it is typically on a segregated basis. The Supreme Court in *Brown*[102] did not in any substantive way state what constituted equal educational opportunity for blacks; however, it did decide that *whatever* such a term meant, it did not mean separate facilities, even if these were equal in resources. Thus, there was enunciated the idea that for blacks as a class, separation was inherently unequal. The question then arises whether the "separate as unequal" doctrine does not have application to classifications other than race.

> While this statement [separate educational facilities are inherently unequal] was made with regard to race, the evidence on which it was made applies with great force to separate educational facilities on any basis where one group is regarded as superior and another group is inferior.[103]

The normal group is certainly regarded as superior to the mentally retarded. Thus the doctrine may have an equally valid and justifiable application to the educable mentally retarded. It may be that the proliferating use of self-contained special classes for EMR children raises some of the same serious education and civil rights issues as were raised in *Brown*. The answer to this question seems to depend on defining this group, pinpointing the tools used to distinguish EMR children from the "normal" school population, and most importantly, analyzing the legitimacy of this process of definition and classification.

A. Rationale for the Segregation of the Mentally Retarded

Historically, the rationale for segregating the mentally retarded from those children seen as nonretarded was for the protection of the "normal" children, an idea aptly expressed by the Wisconsin Supreme Court in 1919. In this case, a thirteen-year old boy who was "afflicted with a form of paralysis which affects his whole physical and nervous make-up" (apparently cerebral palsy) brought suit to compel the public schools to readmit him.[104] The child, though normal mentally and able to keep pace with his classmates, was said to produce a "depressing and nauseating effect up-

[102] Brown v. Bd. of Educ., 347 U.S. 483.

[103] R. Hurley, Poverty and Mental Retardation: A Causal Relationship 105-6 (1969).

[104] State *ex. rel.* Beattie v. Bd. of Educ. of the City of Antigo, 169 Wis. 231, 232 (1919).

on the teacher and school children; that by reason of his physical condition he takes up an undue portion of the teacher's time and attention, distracts the attention of other pupils, and interferes generally with the discipline and progress of the school."[105] The court held that the child's right to attend school, "like other individual rights, must be subordinated to the general welfare."[106] Though recognizing his right to education under the state constitution, the court held this right must be denied because his presence was "harmful to the best interests of the school."[107] The significant point is not that the standard set by the court is one of harm to the general welfare, but rather the *factor* considered to be harmful—the "depressing and nauseating effect" on others. As the dissenting judge noted, there was no actual evidence that the boy's presence did have a "harmful" influence.[108]

Whereas in 1919 the exceptional child was segregated for the "general welfare," today he is more likely to be segregated "for his own good."[109] The theory is that segregation provides a haven in which teaching and treatment suitable to the retarded child's real needs can be provided by specially trained teachers who will provide individualized attention. Some theorists warn that to place such children in regular classes would be to expose them to continuous, harmful pressure, causing feelings of frustration and failure.[110]

It is further argued that there is a pedagogical dilemma inherent in teaching heterogeneous groups. If the level of the class is adjusted to the "slow learner," then the other students will become bored, lazy, and perhaps undereducated. On the other hand, if the level is adjusted to those of average or above average ability, then the slow learner becomes isolated, frustrated, and depressed. This reasoning leads to the conclusion that homogeneous groupings are desirable, if not necessary, in that they allow level-adapted teaching programs to be set up so that, theoretically, each child is challenged according to his ability. Such a theory assumes that there is only one appropriate teaching method: the lecture presentation geared to one ability level. This assumption should certainly be questioned in light of evolving educational techniques such as open classrooms, program learning, and pupil-to-pupil tutoring.

Despite the theoretical benefits of segregation, there is serious question whether it does actually achieve these practical results. Instead, it may

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105 *Id.*

106 *Id.* at 234.

107 *Id.*

108 *Id.* at 236.

109 However, the general welfare rationale still lingers. The idea has become one of relief, "relieving the normal child from the 'dragging anchor' effect of the retarded child . . . " Goldberg, *supra* note 11, at 5.

110 Gjessing, *Integration of the Handicapped: What Demands Will Be Made?* 19 THE SLOW LEARNER 29, 30 (1972).

have become merely a way for the school system to avoid its responsibilities to the retarded child.[111] It allows teachers to use the special class as nothing more than a "dumping place" to discard the "difficult" teaching problem or the disruptive influence in the classroom.[112] The teacher can thereby devote himself to what he conceives to be his real task—instructing children who are able to learn. The irony is that many of the children remaining could probably learn a great deal on their own, whereas the "misfits" unquestionably need the teacher's help. Rather than being made part of the mainstream of the educational process, such children become rather its flotsam.

To be thus screened out of the mainstream of education is one of the worst fates a child can suffer because it has an impact far beyond the school environment. The school is the first social institution with which the child comes into contact and thus the first that labels him EMR.[113] Mental retardation may be the most destructive of all stigma because a person so labelled is thought by many to be completely lacking in basic competence. One educator has ironically expressed the popular belief in this way: "As everyone 'knows' mental retardation is irremediable. There is no cure, no hope, no future. If you are once a mental retardate, you remain one always."[114] Such a myth creates the possibility that children will be "locked" into a disability category and thus locked into a stigmatized life style.[115] As the *PARC* court noted, recent empirical studies have shown that "stigmatization is a major concern among parents of retarded children. Some parents liken it to a 'sentence of death.' "[116]

1. Stigma

> *Of all the attributes of man, mind is the quintessence; to be found wanting in mental capacity—general intellectual competence—is the most devastating of all possible stigmata.*[117]

The etymology of the word "stigma" is revealing for the present discussion. In its archaic sense, a stigma was a mark made on the skin by burning with a hot iron as a token of infamy or subjugation. It is therefore not only a mark of inferiority, but is also a permanent brand from which

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111 Tuckman, *The Placement of Pseudo-Retarded Children in Classes for Mentally Retarded*, 7 ACADEMIC THERAPY 165, 168 (1972).

112 Dunn, *Special Education for the Mildly Retarded—Is Much of It Justified?* 35 EXCEPTIONAL CHILDREN 5 (1968).

113 PARC, 343 F. Supp. at 295.

114 R. B. EDGERTON, THE CLOAK OF COMPETENCE 207 (1967).

115 Blatt, *Public Policy and the Education of Children with Special Needs*, 38 EXCEPTIONAL CHILDREN 537, 541 (1972).

116 PARC, 343 F. Supp. at 295, *citing* J. MERCER, THE USE AND MISUSE OF LABELLING HUMAN BEINGS (1972).

117 R. B. EDGERTON, *supra* note 114, at vii.

one never escapes. The word is used pervasively in the literature regarding the mentally retarded.[118] The stigma seems to brand a person entirely inferior, connoting total incapacity and even blameworthiness.

> The error lies in the assumption that a person who lacks the ability to adapt to the particular demands of the schooling system lacks the ability to adapt to most other demands made upon him. We do not say of a person who is incompetent in school: "He is stupid at *reading*." Rather, we say, "He is stupid," meaning, "He is (or is destined to be) a failure."[119]

If we do not actually believe that intelligence is virtuous, we act as though we do; conversely, we treat lack of intelligence with contempt. The *PARC* court underscored the decisive role the school plays in stigmatizing the retarded child:

> Experts agree that it is primarily the *school* which imposes the mentally retarded label and concomitant stigmatization upon children, either initially or later on through a change in educational assignment. This follows from the fact that the school constitutes the first social institution with which the child comes into contact.[120]

2. Self-fulfilling Prophecy

> *If you treat an individual as he is, he will stay as he is, but if you treat him as if he were what he ought to be, he will become what he ought to be and could be.* Goethe.

Once a child is classified as "retarded," the chances are very great that he will in fact become retarded.[121] This functional academic retardation is the result of a process often documented in the literature and the case law as educational self-fulfilling prophecy.[122] When a child is "treated as if he is uneducable because he has a low test score, he becomes uneducable and the low test score is thereby reinforced."[123] Because of the low score, he is placed in a special class with less challenging work and often less competent teachers. His teachers, expecting less, demand less, and in response the child produces less. One noted expert, relied on by the court in *Hobson v. Hansen*, describes this teacher-pupil relationship—an interaction he terms "teacher expectation":

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118 Han, *"Special Miseducation"—The Politics of Special Education*, 3&4 INEQUALITY IN EDUCATION 17 (1972); Blatt, *supra* note 115; Tuckman, *supra* note 111; Goldberg, *supra* note 11.

119 A. DEXTER, *supra* note 91, at 2.

120 PARC, 343 F. Supp. at 295.

121 Han, *supra* note 118.

122 Hobson v. Hansen, 269 F. Supp. 401, 484 (D.D.C. 1967). *See* Rosenthal & Jacobsen, *Self-Fulfilling Prophecies in the Classroom: Teachers' Expectations as Unintended Determinants of Pupils' Intellectual Competence* in M. DEUTCH, SOCIAL CLASS, RACE, AND PSYCHOLOGICAL DEVELOPMENT (1967).

123 Hobson v. Hansen, 269 F. Supp. at 484.

> The horrible consequence of a teacher's low expectation is that it tends to be a self-fulfilling prophecy. The unfortunate students, treated as if they were subnormal, come to accept as a fact that they *are* subnormal. They act out in their school behavior and in the testing situation what they have been conditioned to believe is their true status in life; and in conforming to expectations, they "confirm" the original judgment.[124]

Re-evaluation of this child will merely serve to reflect what was once only the teacher's expectation and has now become the child's expectation as well.

Central to the process is the fact that, in contrast to regular classes, special education courses are nonsequential. This means these classes tend to receive a cyclic treatment of the same material, whereas the regular classes are taught with a sequential progression of ever-more sophisticated material. The result of this substantive difference in teaching is that a child placed in a special class is locked there, because on re-testing he will continually be compared with children of his chronological age who by the very operation of the system are necessarily more advanced than he is. Every year he falls further behind.[125] Kenneth Clark expresses the irony of this "Catch-22" situation: If a child scores low on an intelligence test because he cannot read and then is not taught to read because he has a low test score, then such a child is being imprisoned in an iron circle and becomes the victim of an educational self-fulfilling prophecy.[126]

The most important facet of the self-fulfilling prophecy is the peer group interaction in the special class environment. Of all the factors which contribute to a child's achievement in school—facilities, curriculum, teacher competence, background of fellow students—one prominent commentator found that intelligence and verbal ability of one's classmates is the single most important factor which affects school achievement and academic progress.[127] A child is challenged in large measure by his peers. They determine the intellectual environment created in the classroom. Despite the importance of protecting a child from excessive frustration, his "happiness," or the contentment which he may feel when surrounded by retarded children only, is not the decisive consideration. More important, he needs to be "stimulated and challenged toward integration in school and society even if this is initially unpleasant for him."[128]

An atmosphere of low expectation is established by a confluence of

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[124] *Id.*

[125] Tuckman, *supra* note 111, at 167. The situation exemplifies Xenon's paradox: Presented with half the material of a regular class each year, even a child who is at the top of his special class can never close the gap.

[126] Hobson v. Hansen, 269 F. Supp. at 484, citing Clark, *Educational Stimulation of Racially Disadvantaged Children* in EDUCATION IN DEPRESSED AREAS 142, 150 (A. H. Passow ed., 1963).

[127] J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (1969).

[128] Gjessing, *supra* note 110, at 31.

all these factors. A child who is viewed by his teachers and peers as retarded, i.e., incapable of "normal" learning, "soon becomes socialized to play the role successfully and to meet the lesser demands of his retarded status."[129] He has begun the inevitable "regression toward the mean"—the often seen phenomenon that a person's functioning and behavior tend to approximate those of the group to which [he] belongs."[130]

3. Misabelling and Misdiagnosis

The stigma of bearing the label 'retarded' is bad enough, but to bear the label when placement is questionable or outright erroneous is an intolerable situation.[131]

The I.Q. score is used to identify the EMR and to justify segregating the EMR from those who have higher scores. Those children who are generally referred to as "educable mentally retarded" usually have an I.Q. range beginning at 50-55 and ending around 75-79.[132] The determination of any individual child's I.Q. is derived from a psychological test administered by a state approved, certified, or licensed psychologist. In addition, some states require certain other supporting data such as physical examinations, social work case studies, and school counselor and teacher reports. But for the most part, placement of a child in an EMR class rests on the results of a single, school-administered I.Q. test.

Perhaps the most well-known and widely-used test is the Stanford-Binet; a brief consideration of its origins and purpose will illustrate the danger of using it to determine a child's classification within the school system. First developed in the early 1900's by Alfred Binet and Theodore Simon, the test was not conceived as a measurement of intelligence *per se*. Rather, the two men had been commissioned by the Ministry of Public Instruction in France to devise a method for distinguishing those children who could not benefit from the instruction in the schools from those who could. It was essentially a selection device for the schools, having no real relationship to any theory of intelligence. Although the Binet test has been revised and standardized, it still serves merely to measure a child's present academic achievement rather than his potential for growth.

Despite the obvious limitations of such instruments, I.Q. tests have not been used in a correspondingly limited way. In many school systems, they have a broad and far-reaching impact on the type of schooling a child receives. They determine in which class he will be placed, who

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129 Bauer & Yamamoto, *Designing Instructional Settings for Children Labelled Retarded: Some Reflections*, ELEMENTARY SCHOOL J. (1972).

130 Tuckman, *supra* note 111, at 166.

131 Garrison & Hammill, *Who Are the Retarded?*, 38 EXCEPTIONAL CHILDREN 13, 20 (1971).

132 Goldberg, *supra* note 11.

will teach him, and what and how he will be taught.[133] Inadequate treatment of the mentally retarded results from the misuse of the I.Q. test by the school system, which views it as a definition of intelligence.

A noted psychologist stresses that it is a misconception to believe that aptitude or intelligence tests measure something called "native ability"—"something fixed and immutable within the person that determines his level of expectation for all time."[134] Conceding that an entity such as innate ability *may* exist, this psychologist maintains that "intelligence or aptitude tests do not measure such an entity—at least not directly; and certainly not in any interpretable manner."[135] What I.Q. tests do measure is the experience with and exposure to a particular cultural body of knowledge, specifically, the verbal and cognitive skills peculiar to white, middle class society.[136] Thus, they indicate what one *has* learned rather than what one could learn.

Therefore, when the school system uses the I.Q. measurement as a basis for classifying and placing children, it is using a blunt instrument as though it were a finely-honed scalpel. The resulting possibilities for error are staggering. Recent research indicates that there are a variety of factors other than actual retardation that can cause poor performance on I.Q. tests, including unfamiliarity with the language of the test, racial and socio-economic factors, insufficient pre-academic experience, emotional-social inadequacy or disturbance, minimal impairments of speech, hearing, conceptualization, perception, or other fundamental processes.[137] More glaringly, a 1969 study revealed that children were more frequently placed in special classes because of "negative attitudinal characteristics" than because of "factual evidence of intellectual deficits."[138] Special classes are not the place for children with such problems.

> No one in special education views the educable class placement as appropriate for underachieving, dull, educationally lagging, emotionally disturbed, or intellectually normal or near normal children. Yet the findings of this study suggest the presence of a large percentage of these children in today's educable classes.[139]

The study referred to above was that relied on by the court in *PARC*. The researchers found that of 378 EMR students from 36 individual school districts in the five-county greater Philadelphia area, 25 percent were errone-

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133 Han, *supra* note 118.

134 Dyer, *Is Testing a Menace to Education?*, 49 N.Y. STATE EDUCATION 16 (1961).

135 *Id.*

136 Ross, Young, & Cohen, *Confrontation: Special Education Placement and the Law*, 38 EXCEPTIONAL CHILDREN 5 (1971).

137 Garrison & Hammill, *supra* note 131, at 13.

138 Tuckman, *supra* note 111, at 168. Many times extremely bright but emotionally disturbed children score low enough on I.Q. tests to be classified as "educable" or "trainable."

139 Garrison & Hammill, *supra* note 131, at 19-20.

ously diagnosed as EMR. The diagnoses of another 43 percent were questionable. Thus, as many as 68 percent of those then in EMR classes in Philadelphia may have been misplaced. The researchers indicated that the findings should be valid for all major metropolitan areas.[140] This is supported by a study done in Boston by the Harvard Center for Law and Education[141] which determined that based on the 3 percent incidence of mental retardation in the general population, approximately 1500 Boston children ought to qualify for special classes. However, there are currently 2700 children that have been so placed and another 1100 who have been placed on a waiting list for these classes.[142] This means that the school system has already classified for special placement more than double the number which should properly be so classified.

Considering the enormous possibilities for error in labelling and diagnosis and the destructive effect of the stigma and resulting self-fulfilling prophecy, it is no wonder that one observer has termed the I.Q. test the "lethal label."[143] Another expert wrote in similar terms of the deadly impact of the I.Q. label:

> By the end of the century the psychologists had evolved a new and secular version of infant damnation. It was the low I.Q. If they could be tagged with this it was the same as if the Good Lord had done it. . . . Hence, the society was not responsible for their plight. Providence had intervened in their lives.[144]

B. Legal Theories for the Integration of the EMR

The furor that has raged at various times over the use of I.Q. tests has recently become more than an educational dispute. It has increasingly become a legal problem because of the effect these tests can have on the rights of children in the educational system. Parents and others concerned with the civil rights of the mentally retarded are turning to the courts to vindicate the right to equal educational opportunity for these children.

There can be no question but that today the ability-group placement of children based primarily on I.Q. tests works to the disadvantage of cultural minorities and low socio-economic classes. The first case to consider the legal effects of this kind of ability grouping was *Hobson v. Hansen*,[145] in which the court struck down the "tracking" system of the District of Columbia public schools. The tracking system classified and placed students according to "ability," ranging from "basic" (EMR) to "honors." Although the system was designed to allow inter-track mobility, Judge

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[140] *Id.* at 18.

[141] Han, *supra* note 118.

[142] *Id.* at 18.

[143] Mercer, *I.Q.: The Lethal Label*, 1972 PSYCHOLOGY TODAY 44.

[144] Tuckman, *supra* note 111, at 168.

[145] 269 F. Supp. 401.

Skelly Wright found that in practice it was inflexible, with more than 90 percent of the children locked into the track in which they were originally placed. He found that the "four-track system [had] degenerated into a four-rut system."[146] The most important single aspect of the track system, says Judge Wright, is the process by which the school system sorts students into the various tracks. The keystone, the fundamental premise of the entire system, is: "[That] school personnel can with reasonable accuracy ascertain the maximum potential of each sudent and fix the content and pace of his education accordingly. If this premise proves false, the theory of the track system collapses."[147] Relying on expert testimony, the court found that the standardized aptitude tests used in this sorting process created a "substantial risk of being wrongly labelled."[148] Consequently, the court found that such tests are

> completely inappropriate for use with a large segment of the student body. Because these tests are primarily standardized on and are relevant to a white middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability.[149]

The court concluded that the significant feature of the District of Columbia's track system was the sorting of students into rigid, inflexible tracks, causing both physical segregation and disparity of educational opportunity. Most importantly, it meant that the lower track student, rather than getting an "enriched educational experience," suffered what was essentially a "limited or watered-down curriculum."[150]

Hobson presaged a host of litigation brought recently to enjoin permanently the use of I.Q. tests as a basis for EMR placement. Most of these suits were specifically concerned with the effect these tests have on cultural minorities.

In *Diana v. State Board of Education*,[151] Mexican-American plaintiffs alleged that they had been improperly placed in EMR classes, and noted that although Mexican-American children made up 13 percent of the school population, they comprised almost 30 percent of the students in the program for the mentally retarded. The plaintiffs alleged that the I.Q. tests had an inherent cultural bias which discriminated against Mexican-American persons, based as they were on English verbal skills and standardized

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[146] *Id.* at 464.

[147] *Id.* at 474.

[148] *Id.* at 489.

[149] *Id.* at 514.

[150] *Id.* at 513.

[151] Diana v. State Bd. of Educ., C-7037 RFP, District for Northern California (Feb., 1970).

on a sample population made up entirely of white, native-born Americans.[152] In a stipulated settlement, defendant school board agreed to test all children in their primary language in the future, to re-test those currently placed in EMR classes, and to submit a written report explaining any disparity between the percentages of Mexican-American students in regular classes and in EMR classes.[153]

Black citizens in Claifornia brought a similar suit seeking even more far-reaching relief based on the invalidity of the I.Q. tests. Plaintiffs in *Larry P. v. Riles*[154] asked for an injunction restraining defendants from further placement of black children into mentally retarded classes on the basis of present I.Q. tests, and immediate return to regular classes of children presently in EMR classes unless they can be re-tested and re-evaluated by means of a nondiscriminatory test. In demanding the hiring of black psychologists and psychometrists, the plaintiffs were attacking not only the test *per se*, but the test as administered, noting that the results are invalid because of the cultural disparities in test, testor, and testee. The parties are presently involved in discovery, but in June 1972 the court granted a preliminary injunction against California's use of I.Q. tests for placing black children in EMR classes.[155]

A Boston case has extended the legal theories of *Diana* and *Riles* by including in its class of plaintiffs not just racially but also socio-economically disadvantaged children. In so doing, the plaintiffs in *Stewart v. Philips*[156] have accepted the analysis made by Judge Wright in *Hobson*,[157] recognizing the influence not only of black culture but also of poverty in determining test performance.[158] Again, the suit is based on the invalidity of the I.Q. test as a tool for placement, but the named plaintiffs, who had already been placed in EMR classes, were subsequently tested by independent psychologists and found not to be retarded. In addition to damages, the plaintiffs seek the establishment of a state Commission of Individual and Educational Needs to devise new tests and programs.[159]

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152 In an earlier case, *Spangler v. Bd. of Educ.*, 311 F. Supp. 501 (C.D. Cal. 1970), a defendant board of education had admitted that the intelligence tests used were inaccurate, unfair, and racially discriminatory.

153 Diana v. State Bd. of Educ., C-7037 RFP, District for Northern California (Feb., 1970).

154 Larry P. v. Riles, Civil Action No. C-71-2270 (N.D. Cal.). *See also* Lebanks v. Spears, Civil Action No. 71-2897 (E.D. La., New Orleans Division), a similar suit in which the black plaintiffs also asked for money damages. In an interesting development, the defendant State Department of Education filed a third party complaint against the United States Department of Health, Education, and Welfare and the United States Commissioner of Education alleging that the primary duty to educate all children according to their needs rests on the federal government. HEW, MENTAL RETARDATION AND THE LAW 24 (1973).

155 HEW, MENTAL RETARDATION AND THE LAW 24 (1973).

156 Stewart v. Philips, Civil Action No. 70-1199-F (D. Mass. 1970).

157 Hobson v. Hansen, 269 F. Supp. at 451-492, Findings of Fact IV-D & F. *See also* R. HURLEY, *supra* note 103.

158 Ross, Young, & Cohen, *supra* note 136, at 9.

159 HEW, *supra* note 155, at 18.

This line of cases attacks the use of I.Q. tests for EMR placement as a denial of due process and equal protection. Due process is denied when persons are summarily classified and stigmatized by the state without provision for notice, hearing, and educationally valid evaluation procedures. Further, equal protection is denied when persons so classified receive opportunities definitely inferior to those provided other students. The equal protection problems are compounded by the fact that the procedural irregularities especially disadvantage certain racial and socio-economic groups. Such constitutional violations are most egregious for those erroneously classified.

At a minimum, procedural safeguards must be provided to ensure proper classification of the moderately, severely, and profoundly retarded. But for the EMR class, comprising the vast majority of the mentally retarded, such classification procedures alone may not be sufficient to guarantee equal educational opportunity. EMR children apparently learn most efficiently when they are challenged by progressively more difficult material and by their peers in the classroom. Modern experts in "special education" have been arguing for several years that EMR children not only learn better with, but do not impede the progress of, normal children when placed in regular classrooms.[160] If this is so, then the segregation of the EMR into special classes when they could learn better in regular classes is a denial of equal educational opportunity if such is measured in terms of capability for learning. The "separate as unequal" doctrine seems to apply as readily to the EMR classification as it does to race. Furthermore, any sharp line between "retarded" and "normal" is a necessarily arbitrary division on a continuum, and the possibility for misjudgment is considerable. Because of the inadequacy and inaccuracy of devices used for measuring the capacity for learning, outright error occurs frequently and weighs especially heavily on cultural minorities. Finally, the stigma and the self-fulfilling prophecy which result from placement in separate classes labeled "retarded" are destructive to all children, even those who are truly "slow learners."

Equal protection of the law requires that all children be provided an education by the state. It should be considered a matter of right, and not a gift generously bestowed by the state. Furthermore, the EMR class of children have a viable equal protection claim for integration into the regular classes in the public schools as a means to achieve equal educational opportunity.

Suzanne K. Richards
Lois G. Williams

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[160] Dunn, *supra* note 112.