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THE RIGHTS OF THE PHYSICALLY AND MENTALLY HANDICAPPED:

AMENDMENTS NECESSARY TO GUARANTEE PROTECTION THROUGH THE CIVIL RIGHTS ACT OF 1964

INTRODUCTION

SINGLE STROKES of the government's pen can seldom alone accomplish social goals. To insure vitality, legislation requires review, revision and *amendment*. Though worthy of praise for initial and continuing contributions towards social betterment, the Civil Rights Act of 1964¹ falls into this classification. Its scope is too narrow because it fails to include a significant group of persons sorely in need of its protection. This legislation needs the depth evoked by its title rather than the limitations of its present language. Amendment is required to protect the rights of the physically and mentally handicapped.

Areas in which the handicapped person's rights have either been infringed upon or denied completely include: "forced sterilization, . . . restriction on the rights to marry, enter contracts, vote, obtain drivers' licenses, . . . enter the courts, hold public offices, obtain adequate education, and . . . access to public transportation facilities, as well as access to buildings held open to the public in general."² As a result, the handicapped have been denied opportunity and justice under law. "The handicapped are one part of our Nation that have been denied these fundamental rights for too long."³ Recent statutes have expanded the rights of the handicapped which are

¹ Pub. L. No. 88-352, 78 Stat. 241-68 (relevant sections codified at 42 U.S.C. §§ 1971, 1975a-1975d and 2000 (1970 and Supp. V 1975).

² Comment, *Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. CHI. L.J. 814, 816 (1977). There are still a number of statutes which infringe upon the handicapped person's rights. Such statutes are similar to the following:

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

CHICAGO, ILL., MUN. CODE § 36-34 (1966) (repealed 1974); see Achtenberg, *Law and the Physically Disabled: An Update with Constitutional Implications*, 8 SW. U.L. REV. 847, 851 n.9 (1976).

³ 118 CONG. REC. 3322 (1972) (remarks of Sen. Williams).

protected by law.⁴ Unfortunately, these statutes do not go far enough. While they broaden those rights which are protected by law, they do not guarantee equal opportunity and equal justice for the handicapped. It is important to anyone's well-being that he be able to exercise the full spectrum of his rights. Restrictions on the handicapped person's rights force him to "see himself as an anachronism, for virtually everything his culture offers him is designed to reinforce his sense of inferiority, to point out to him that he is tolerated in spite of his stigma. . . ."⁵ This has a debilitating effect on the handicapped person because "[s]tigma results in discrimination in the form of ostracism, feelings of inferiority on the part of the stigmatized persons, and tendencies by professed normals to 'impute a wide range of imperfections on the basis of the original one.'"⁶

The actual stigma placed upon the handicapped person is usually unrelated to the physical handicap. Instead, it is a consequence of the infringement and denial of the individual's civil rights.

For the most part it is the *cultural definition* of disability, rather than the scientific or medical definition, which is instrumental in the ascription of capacities and incapacities, roles and rights, status and security. Thus a meaningful distinction may be made between "disability" and "handicap"—that is, between the *physical disability* measured in objective scientific terms and the *social handicap* imposed upon the disabled by the cultural definition of their estate.⁷

Thus, the real handicap is caused by society's "unwillingness to permit the disabled to engage in the entire range of possible jobs and the refusal to grant them 'normal' social interaction that would allow them to become integrated into the 'normal' society."⁸

Just as society imposes the handicap upon the disabled, it should accept the responsibility of eliminating the handicap. Congress recognized this when it determined that "it is essential that recommendations be made to assure that all individuals with handicaps are able to live their lives inde-

⁴ See, e.g., 20 U.S.C. §§ 1401-1461 (1976); 29 U.S.C. §§ 701-794 (Supp. V 1975); 42 U.S.C. §§ 4151-4156 (1970).

⁵ Kriegel, *Uncle Tom and Tiny Tim — Some Reflections on the Cripple as Negro*, 38 AM. SCHOLAR 412, 426 (1969).

⁶ Hull, *The Spector of Equality: Reflections on the Civil Rights of Physically Handicapped Persons*, 50 TEMP. L.Q. 944, 946-47 (1977) (quoting E. GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963)).

⁷ tenBroek & Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 814 (1966).

⁸ Hull, *supra* note 6, at 946 (quoting C. SAFILIOS-ROTHSCHILD, *THE SOCIOLOGY AND SOCIAL PSYCHOLOGY OF DISABILITY AND REHABILITATION* 4 (1970)).

pendently and with dignity, and that the complete integration of all individuals with handicaps into normal community living, working, and service patterns be held as the final objective. . . ."⁹ Statutes enacted thus far have not assured handicapped individuals that they could live independently and with dignity in normal society. This congressional mandate can only be fulfilled by amending the Civil Rights Act of 1964 to include the disabled under its protection.

Current statutes fail to protect the rights of the handicapped in the areas of access to public facilities, equal employment and education. The obvious inadequacies of present laws necessitate immediate action, which could most easily be accomplished through amendment of the Civil Rights Act of 1964.

RIGHTS OF ACCESS TO PUBLIC FACILITIES

Access to buildings, transportation systems, and other facilities necessary in everyday life is essential to all individuals. Opportunities to be employed, entertained, educated, and independent revolve around the ability to move in society. "Movement . . . is a law of animal life. As to man, in any event, nothing could be more essential . . . than the physical capacity, the public approval, and the legal right to be abroad in the land."¹⁰ Liberty itself consists of the ability to go where one pleases, unfettered by barriers and restrictions.¹¹ Recent statutes and court decisions have limited, but have hardly eliminated, the restraints to access rights which may affect the mobility of handicapped individuals.

One of the most significant statutes designed to insure the handicapped individual's right to access is the Rehabilitation Act of 1973.¹² Portions of the Act are designed to "enforce statutory and regulatory standards and requirements regarding barrier-free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals."¹³ The regulations which deal with the Rehabilitation Act require that:

Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such man-

⁹ White House Conference on Handicapped Individuals Act, Pub. L. No. 93-516, tit. III, § 301(6), 88 Stat. 1631 (1974).

¹⁰ tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966).

¹¹ See Achtenberg, *supra* note 2, at 865 (quoting I.W. BLACKSTONE, COMMENTARIES 230-31 (Jones ed. 1916)).

¹² 29 U.S.C. §§ 701-94 (Supp. V 1975).

¹³ 29 U.S.C. § 701 (11) (Supp. V 1975). See *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1286 (7th Cir. 1977).

ner that [it] is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.¹⁴

This mandate is deficient in at least two aspects. First, although all new federal and federally assisted facilities must be designed so they are readily accessible to the handicapped individual, there is no corresponding provision for structures built prior to the Act, unless they are altered for federal use or altered with federal funds.¹⁵ Second, the regulation only applies to federal or federally assisted buildings;¹⁶ most state and all private facilities are excluded.

State statutes are deficient for similar reasons. Many state statutes require newly built state buildings and new buildings constructed with state funds to be accessible to the handicapped. However, these statutes impose less stringent access requirements upon existing facilities. Few states have statutes which require the renovation of existing buildings to make them accessible,¹⁷ while others have statutes which do not specifically require accessibility when alteration of existing buildings is done.¹⁸ Some do impose standards which require a limited degree of accessibility when an existing structure is altered.¹⁹

Some state statutes are weakened because they require modification only if economically feasible and uncomplicated.²⁰ Still others require that only one entrance to a building be accessible to the handicapped,²¹ a situation which infringes upon the handicapped individual's civil rights and presents

¹⁴ 45 C.F.R. § 84.23(a) (1977). The cost of providing barrier-free design in new construction has been estimated to be under one-half of one percent of the total cost of the structure. When structures are renovated, the additional cost is approximately .66 to 2.4%. See Comment, *Access to Buildings and Equal Employment Opportunity for the Disabled: Survey of State Statutes*, 50 TEMP. L.Q. 1067, 1068 (1977).

¹⁵ Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall . . . be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

45 C.F.R. § 84.23(b) (1977).

¹⁶ For a definition of the term "building" as covered by this act, see 42 U.S.C. § 4151 (1970).

¹⁷ E.g., N.D. CENT. CODE § 48-02-19 (1977); PA. STAT. ANN. tit. 71, § 1455.1 (Purdon Supp. 1978).

¹⁸ E.g., VT. STAT. ANN. tit. 18, § 1322 (Supp. 1978); W. VA. CODE ANN. § 18-10f-2(a) (1977).

¹⁹ E.g., CAL. GOV'T. CODE § 4456 (West Supp. 1978); N.Y. PUB. BLDGS. LAW § 50-51 (McKinney Supp. 1977); OHIO REV. CODE ANN. § 3781.111 (Page Supp. 1977). See also Comment, *supra* note 14, at 1071.

²⁰ Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1509 (1973).

²¹ *Id.*

grave danger to the safety of handicapped persons if a fire or other emergency arises.

Access to these buildings, constructed prior to enactment of state access statutes, is often more important to the handicapped person than access to many newer buildings. These older buildings are frequently the repositories of a wide range of government services and agencies. Those states which do not require the modification of older buildings effectively deny the handicapped access to a wide variety of government services.²²

In those states which do not require modification by statute, the alterations can sometimes be accomplished through the courts. In Ohio, a city councilman was successful in a suit to remove barriers from courthouses and health and welfare buildings, even though the buildings were built prior to enactment of the architectural barrier state; his confinement to a wheelchair had precluded his access to his own office.²³ In a somewhat similar case, an elevator was erected in a courthouse upon suit by a resident of the county.²⁴

Access problems go far beyond the elimination of barriers in buildings. Not only must buildings be accessible, but transportation systems must also be accessible for the handicapped person to commute to the buildings. Only a few states include transportation facilities in their access statutes.²⁵

Some courts have held that federally assisted transportation systems must be accessible to the handicapped. In *Bartels v. Biernat*,²⁶ the court held that "by operating a mass transit system which is currently effectively inaccessible to mobility handicapped individuals and by attempting to purchase one hundred new effectively inaccessible buses so as to knowingly exclude mobility handicapped individuals from participating in the benefits of the federally assisted mass transit program, . . ." the city of Milwaukee violated the nondiscrimination rights of mobility handicapped persons as declared in the Rehabilitation Act of 1973.²⁷

²² *Id.*

²³ *Friedman v. County of Cuyahoga*, Case No. 895961 (Cuyahoga County Ct., Ohio, 1972).

²⁴ *Wargowsky v. Novak*, Civil No. c-72-138 (N.D. Ohio 1973) (consent decree).

²⁵ *E.g.*, MD. PUBLIC WORKS CODE ANN. art. 78A, § 51(i) (1975); MASS. GEN. LAWS ANN. ch. 22, § 13A (West Supp. 1977); see also Comment, *supra* note 14, at 1073. Approximately 13,370,000 people have mobility problems. Of those with mobility problems a little over 5,000,000 cannot use transportation systems as they are now constructed. See Achtenberg, *supra* note 2, at 866 (citing URBAN MASS TRANSPORTATION SYSTEMS CENTER, U.S. DEPT. OF TRANSPORTATION, THE HANDICAPPED AND ELDERLY MARKET FOR URBAN MASS TRANSIT 6,7 (1973)). The transbus is a creation of current technology for the effective transportation of the handicapped. See Hull, *supra* note 6, at 951.

²⁶ 427 F. Supp. 226 (E.D.Wis. 1977).

²⁷ *Id.* at 231.

To be successful in meeting the needs of the handicapped, a transportation system must be totally integrated. This includes not only accessible transportation vehicles but also parking facilities and curb ramping.²⁸ For example, Ohio provides special parking spots for the handicapped near state buildings and in publicly owned parking garages, and all new and reconstructed curbs must be ramped.²⁹

If statutes do not require accessible transportation systems, the handicapped individual can attempt to make the system accessible through an equal protection argument. Interstate travel has been held to be a fundamental right.³⁰ The Second Circuit has gone one step further, holding that *intrastate* travel is also a fundamental right.³¹ Under *Shapiro v. Thompson*,³² the Supreme Court rejects the rational basis test in determining whether the Equal Protection Clause has been violated when a fundamental right is involved. Instead, the Court demands the use of the compelling state interest test because "appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."³³

By arguing (1) that a fundamental right (*i.e.*, the right to travel) has been abridged because of the inaccessibility of the transportation system, or (2) that a suspect class has been established (*i.e.*, those who do not have access to the transportation system because of a handicap),³⁴ and (3) that the requisite state action is present,³⁵ exclusion of the handicapped must be based upon a compelling state interest rather than upon the easier to justify rational basis.

²⁸ Comment, *supra* note 14, at 1073.

²⁹ OHIO REV. CODE ANN. § 729.12 (Page 1976) provides for ramped curbing; OHIO REV. CODE ANN. § 4511.69(e) & (f) provide for parking locations for the handicapped near buildings of the state or its political subdivisions and in publicly owned parking garages.

³⁰ United States v. Guest, 383 U.S. 745, 757-58 (1966).

³¹ Frazier v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971). The court explained, "It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state...."

³² 394 U.S. 618 (1969).

³³ *Id.* at 634. When a fundamental right is not involved, the handicapped may still make successful use of an equal protection argument. The compelling state interest test is also mandated when a suspect class is involved. For a treatment of the handicapped as a suspect class, see Burgdorf & Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975).

³⁴ See Note, *supra* note 20, at 1508.

³⁵ State action must be present for the Equal Protection Clause to apply. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

For the effective integration of the handicapped into society, it is essential that all barriers be removed. "More people are forced into limited lives and made to suffer by these man-made obstacles than by any specific physical or mental disability."³⁶ Though current statutes have proven insufficient to remove these barriers, inclusion of the handicapped within the protection of the Civil Rights Act of 1964 would be successful. Amendment of Title II of the Civil Rights Act³⁷ would give the handicapped access to myriad facilities associated with travel and entertainment.³⁸ "[Section 2000a] declares the basic right to access to places of public accommodation. . . ."³⁹

Title II would confer three other benefits which the handicapped do not currently possess. First, the reach of Title II is as broad as the commerce power.⁴⁰ Present statutes generally only apply to federally or state owned or financed buildings. Protection under Title II would broaden the number of buildings which would have to be accessible to the handicapped.⁴¹ Second, Title II would permit the Attorney General to bring a civil action to enforce compliance with Title II's requirements.⁴¹ Third, the protection of Title II would enable the handicapped to recover attorney's fees.⁴² The handicapped should receive these basic benefits. Title II should be amended to include the handicapped within its protection.

EQUALIZING EMPLOYMENT RIGHTS

A number of federal statutes aid in the employment of the handicapped.⁴³ However, the Rehabilitation Act of 1973⁴⁴ is probably the most significant statute concerning the employment rights of the handicapped. Section 503(a) of that Act states:

Any contract in excess of \$2500 entered into by any Federal department or agency for the procurement of personal property and non-personal services (including construction) for the United States shall

³⁶ Achtenberg, *supra* note 2, at 848 (quoting *Report of the United Nations Expert Group Meeting on Barrier Free Design*, 26 INTERNATIONAL REHABILITATION REV. 3 (1975)).

³⁷ 42 U.S.C. §§ 2000a to a-6 (1970).

³⁸ 42 U.S.C. § 2000a(b) (1970). Some of the facilities which are within the purview of the Act include hotels, restaurants, theaters, arenas, and gasoline stations, due to their effect on interstate commerce.

³⁹ STATUTORY HISTORY OF THE UNITED STATES 1065 (B. Schwartz ed. 1970) (quoting *Report of the House Committee on the Judiciary*, 88th Cong., 1st Sess. (1963) (statement of Rep. Rodino)).

⁴⁰ 42 U.S.C. § 2000a(b) & (c) (1970).

⁴¹ 42 U.S.C. § 2000a-5 (1970).

⁴² 42 U.S.C. § 2000a-3(b) (1970).

⁴³ See Comment, *supra* note 2, at 830-33.

⁴⁴ 29 U.S.C. §§ 701-94 (Supp. V 1975).

contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals. . . .⁴⁵

The most important aspect of this legislation is that instead of requiring merely nondiscrimination on the part of employers, it requires affirmative action toward the employment of the handicapped. This affirmative action mandate of the Rehabilitation Act requires federal contractors to make reasonable accommodation to the mental and physical limitations of their employees or applicants for employment.⁴⁶ Furthermore, these affirmative action practices must extend to all levels of employment, including the executive level.⁴⁷ All employment practices must be included in the affirmative action program, including hiring, upgrading, and forms of compensation.⁴⁸

The affirmative action requirement mandates that the handicapped not be placed at a competitive disadvantage. The contractor is responsible for making accommodations in the work environment in order that any competitive disadvantage resulting from the employee's handicap is eliminated.⁴⁹ The required changes will vary from worksite to worksite, depending largely on the nature of the employee's handicap.⁵⁰

The regulations which implement the Rehabilitation Act impose further affirmative action requirements on those contractors with the federal government who hold a contract for \$50,000 or more and who employ 50 or more employees. These contractors are required to prepare and maintain an affirmative program, setting forth the contractor's policies and procedures.⁵¹ If followed, this regulation would be an effective method of insuring that these contractors were following the affirmative action mandate of the Act and not following a mere nondiscrimination formula. However, effectiveness of this regulation may be nil as evidenced by a study which discovered that of a possible 275,000 institutions and corporations which could be affected by this requirement, less than 300 had filed affirmative action plans.⁵²

⁴⁵ 29 U.S.C. § 793 (Supp. V 1975).

⁴⁶ 41 C.F.R. § 60-741.6(d) (1977).

⁴⁷ 41 C.F.R. § 60-741.6(a) (1977).

⁴⁸ *Id.*

⁴⁹ Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S. CAL. L. REV. 785, 805 (1976).

⁵⁰ *Id.* at 809.

⁵¹ 41 C.F.R. § 60-741.5(a) (1977).

⁵² Achtenberg, *supra* note 2, at 882.

The Act is further weakened in two other ways. First, contracts for less than \$2500 are not covered by the Act.⁵⁸ Second, the affirmative action requirements can be waived when it is deemed that "special circumstances in the national interest so require."⁵⁴

Section 504 of the Rehabilitation Act provides protection for the handicapped person in employment and other areas; it is a broad nondiscrimination provision which states: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁵⁵

The Act further provides that no qualified handicapped person shall be discriminated against in regard to, or excluded from, receipt of any Federal funds on the basis of inaccessibility.⁵⁶ If the facility or program is not accessible to the handicapped, the Act requires that only a "reasonable accommodation" be made so the handicapped can participate.⁵⁷ These sections of the Act can hardly protect the rights of the handicapped; only Federal programs are included, and no reasonable accommodation is necessary if the accommodation would "impose undue hardship on the operation of [the] program."⁵⁸

Nor do state statutes concerning employment of the handicapped fully protect the rights of handicapped individuals. Some states have no statutes dealing with employment of the handicapped.⁵⁹ Others merely reflect a policy of employment of the handicapped, but do not include any nondiscrimination requirements.⁶⁰ Even the state statutes that do contain nondiscrimination requirements may not be effective because of "exception clauses" which effectively negate the nondiscrimination requirements.⁶¹

State statutes fail to protect the employment rights of the handicapped

⁵⁸ 41 C.F.R. § 60-741.3(a) (1977).

⁵⁴ 41 C.F.R. § 60-741.3(b) (1977).

⁵⁵ 29 U.S.C. § 794 (Supp. V 1975).

⁵⁶ 45 C.F.R. § 84.21 (1977).

⁵⁷ 45 C.F.R. § 84.12 (1977).

⁵⁸ *Id.*

⁵⁹ Delaware and Colorado are among the states which do not have statutes dealing with employment of the handicapped. *But see* GA. CODE ANN. § 89-1702(a)(3) (Supp. 1978) for an example of a state which recently amended its statutes to protect the employment rights of the handicapped.

⁶⁰ *See* Note, *supra* note 20, at 1514; *see, e.g.*, KY. REV. STAT. ANN. § 195.180 (Baldwin 1975).

⁶¹ *E.g.*, MASS. GEN. LAWS ANN. ch. 149, § 24K (West Supp. 1976) and TENN. CODE ANN. § 8-4131 (Supp. 1976) both of which give the employer considerable discretion in his determination of a handicapped individual's ability.

in three other areas. First, enforcement of the statutes is uneven.⁶² Second, only a few states have laws which prohibit private employment discrimination.⁶³ Third, even in those states where the handicapped person's employment rights are covered by statute, the coverage may be inadequate, some state statutes being of such limited scope that only a few categories of handicaps are included in their coverage.⁶⁴ State statutes are also inadequate to protect the employment rights of the handicapped because of the great difference in the effectiveness and content of the statutes. No individual's civil rights should be dependent upon his choice of residence.

In attempting to secure employment rights, the handicapped person may employ three other arguments. First, an action may be maintained under 42 U.S.C. Section 1983 if there is arbitrary employment discrimination which (1) deprives the handicapped individual of rights secured by the Constitution and laws of the United States, and (2) the deprivation is under color of state law.⁶⁵ Second, a "due process/irrebuttable presumption" argument may secure relief. In *Cleveland Board of Education v. LaFleur*,⁶⁶ the United States Supreme Court declared that permanent irrebuttable presumptions (*i.e.*, physical incompetency based on handicap) are disfavored under the Due Process Clause.⁶⁷ When an applicant is refused employment because of misconceptions on the part of the employer which are based upon stereotypes and not on the unique characteristics of the applicant, discrimination under this test exists. This analysis would bring the handicapped individual under the protection of Section 504 of the Rehabilitation Act. Section 504 prohibits discrimination *on the basis of handicap*.⁶⁸ Thus while an employer does not have to hire a handicapped person simply because the person is handicapped, the employer cannot refuse to hire that person based on stereotypes concerning his handicap. "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."⁶⁹

⁶² See Comment, *supra* note 14, at 1079-81.

⁶³ *E.g.*, OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1977), which prohibits employment discrimination against the handicapped by "any employer."

⁶⁴ *E.g.*, W. VA. CODE ANN. § 5-11-9 (Supp. 1978), which protects blind individuals, but offers no protection to any other handicapped persons.

⁶⁵ See Note, *supra* note 20, at 1520.

⁶⁶ 414 U.S. 632 (1974).

⁶⁷ *Id.* at 644-46. The Court stated that when an irrebuttable presumption "is neither necessarily [nor] universally true", the Due Process Clause is violated if the presumption is used to infringe upon an individual's right by denying employment. See Comment, *supra* note 2, at 828-29.

⁶⁸ 45 C.F.R. § 84.4 (1977).

⁶⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

Finally, the two-tiered analysis of the Equal Protection Clause, as used to protect access rights, may be used in an attempt to secure employment rights. However, the handicapped individual will not prevail using this argument in the area of employment unless he can establish himself as a member of a suspect class. Employment is not a fundamental right; therefore, if the handicapped do not establish themselves as a suspect class, employers will be able to justify discrimination using the rational basis test.⁷⁰

The handicapped need increased protection to guarantee equal employment rights. Employers are unwilling to hire the handicapped for two reasons. First, employers fear a loss of productivity, though numerous studies have shown that the handicapped worker, given a suitable position, performs as well or better than his nonhandicapped coworker.⁷¹ Second, employers fear an increase in their workmen's compensation rates if they hire the handicapped, though studies have shown that workmen's compensation rates are not adversely affected by employment of the handicapped.⁷² In fact, Ohio uses its workmen's compensation statute so that "employers shall be encouraged to employ and retain in their employment handicapped employees."⁷³

The chief inadequacy of the Rehabilitation Act is that it applies only to public employment or employment with federal contractors.⁷⁴ Therefore, handicapped individuals are not protected from discrimination by employers in the private sector. "In view of the fact that presumably the same system of values regarding civil liberties operates today as in 1964 when the Civil Rights Act was passed . . . it is difficult to fathom the lack of congressional action."⁷⁵

The Rehabilitation Act is inadequate in other areas also. First, there is no authorization in the Act which would provide for a federal agency to bring suit on behalf of handicapped individuals who have been discriminated against. In contrast, Title VII permits the individual, the Equal Employment Opportunity Commission, and the Attorney General to institute

⁷⁰ See Comment, *supra* note 2, at 825-26.

⁷¹ See Note, *supra* note 20, at 1513 (citing *U.S. Bureau of Labor Standards, Dept. of Labor Bull. No. 234, Workmen's Compensation and the Physically Handicapped Worker* 6-8 (1961)).

⁷² Statistics indicate that an employer can actually lower insurance rates by hiring handicapped workers, as they have had eight percent fewer reported accidents than nonhandicapped employees. Note, *supra* note 20, at 1513 n.84.

⁷³ OHIO REV. CODE ANN. § 4123.343 (1973 & Page Supp. 1977). Under this statute, the employer's workmen's compensation rates are not increased if an accident or disease results because the employee is handicapped. Instead, the employee is compensated out of a special fund, and the employer's rates are not increased.

⁷⁴ 29 U.S.C. § 793 (Supp. V 1975).

⁷⁵ Comment, *supra* note 2, at 835.

a civil action to protect employment rights. Further, Title VII permits an award for attorney's fees;⁷⁶ the Rehabilitation Act does not. An amendment to Title VII would also cure another deficiency common to both the Rehabilitation Act and state statutes; while the Rehabilitation Act applies only to those employers associated in some way with the federal government, Title VII's scope is as broad as the commerce power.⁷⁷ Also, under this same provision, Title VII would protect those handicapped individuals who reside in states that do not have statutes which protect their employment rights adequately. Title VII would give equal protection to the handicapped individual, regardless of his state of residence. No longer would the handicapped individual's civil rights be dependent upon his choice of residence.

PROTECTION OF EDUCATION RIGHTS

[E]ducation is perhaps the most important function of state and local governments. . . . 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.⁷⁸

Despite this mandate, several states still permit the exclusion of the handicapped from public education.⁷⁹ The handicapped may rely on federal statutes to insure their right to a public education, but the statutes do not guarantee this right in every situation.

The main source on which the handicapped may rely to secure their right to an education is section 504 of the Rehabilitation Act. While this Act was originally intended to protect only the handicapped person's employment rights, the scope of the Act was extended by the Rehabilitation Act Amendments so that it "became clear that section 504 was intended to forbid discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational rehabilitation services."⁸⁰

Section 504 now requires that any locality that receives federal funds must provide "a free appropriate public education" at both the elementary and secondary level to every qualified handicapped individual within the jurisdiction of the locality.⁸¹ Ohio also provides for an appropriate education

⁷⁶ 42 U.S.C. § 2000e-5(f) (Supp. V 1975).

⁷⁷ 42 U.S.C. § 2000e(b) (Supp. V 1975). See note 40 and accompanying text *supra*.

⁷⁸ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

⁷⁹ 118 CONG. REC. 3320 (1972) (remarks of Sen. Williams).

⁸⁰ 42 Fed. Reg. 22,676 (1977).

⁸¹ 45 C.F.R. § 84.33(a) (1977).

for all handicapped individuals.⁸² State statutes, such as Ohio's, may at times be necessary to protect the handicapped person's right to an education, as the federal statute only applies to federal facilities or federally financed facilities.⁸³ An "appropriate education" as defined by section 504 is "the provision of regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. . . ."⁸⁴

Two examples of special aids and services which must be provided to the handicapped under the Rehabilitation Act are taped texts as means of aiding students with hearing impairments and readers for students with visual impairments.⁸⁵ Regardless of the additional expenditures needed to provide these services to the handicapped, the tuition for the handicapped student cannot exceed the tuition of the nonhandicapped student.⁸⁶

Court decisions have also enforced the education rights of the handicapped student. In *Mills v. Board of Education*,⁸⁷ the court ruled that the Constitution requires exceptional children to be publicly educated. However, this decision did not require that handicapped students be educated in the same environment as nonhandicapped students.⁸⁸ All that is required is that "adequate alternative educational services" be provided for the handicapped.⁸⁹ Under this rationale the handicapped could be educated in complete isolation from the nonhandicapped. This would eliminate the social integration of the handicapped, though social integration is the only means available to erase the stigma which society places on the handicapped.⁹⁰ The Rehabilitation Act rectifies this problem by requiring that handicapped students be educated in "the regular educational environment operated by the recipient . . ."⁹¹ unless education in the regular environment, using special aids, cannot be achieved satisfactorily.⁹²

Another court has held that mentally retarded individuals must have

⁸² OHIO REV. CODE ANN. § 3323.02 (Page Supp. 1977). See *Cuyahoga County Ass'n for Retarded Children v. Essex*, 411 F. Supp. 46 (N.D. Ohio 1976).

⁸³ 29 U.S.C. § 794 (Supp. V 1975).

⁸⁴ 45 C.F.R. § 84.33 (1977).

⁸⁵ 45 C.F.R. § 84.44 (1977).

⁸⁶ 45 C.F.R. § 84.33(c) (1977). See also *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); *Mills v. Board of Education*, 348 F. Supp. 866, 876 (D.D.C. 1972).

⁸⁷ 348 F. Supp. 866.

⁸⁸ See *Achtenberg*, *supra* note 2, at 876.

⁸⁹ 348 F. Supp. at 878.

⁹⁰ See notes 7-9, *supra*.

⁹¹ 45 C.F.R. § 84.34 (1977).

⁹² *Id.*

access to free public programs of education.⁹³ This decision, combined with the *Mills* requirement of publicly supported education for the handicapped wherever public education is supplied to others,⁹⁴ further protect the rights of the handicapped to a public education.

Additional federal assistance for the education of the handicapped is contained in the Education of All Handicapped Children Act.⁹⁵ The most helpful aspect of this Act is the ability of the states to participate in a program of federal aid to defray the additional costs associated with educating the handicapped, the education of the handicapped in the "least restrictive environment," and the improvement of programs for handicapped children aged three through five.⁹⁶

Another method which can be used to secure the education rights of the handicapped involves the two-tiered equal protection analysis.⁹⁷ The *Rodriguez* decision,⁹⁸ on its face, would seem to say that education is not a fundamental right; therefore, discrimination would be permitted if the minimal rational basis test was met.⁹⁹ However, *Rodriguez* has been interpreted to mean that there is a fundamental right to a *minimum level* of education.¹⁰⁰ Where a minimum level of education is not available to the handicapped, a fundamental right is involved, and the compelling state interest test must be used. Furthermore, the compelling state interest test must be used when retarded children are involved, since it has been determined that they are a suspect class as a result of their exclusion from the political process and neglect of their rights by the legislatures.¹⁰¹ *Frederick L. v. Thomas*¹⁰² combined these theories, holding 1) that education is a quasi-fundamental right, and 2) that disabled children have some of the characteristics of a suspect class. A "strict rationality" test was used to determine if the rights of the handicapped were violated.¹⁰³

⁹³ *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971).

⁹⁴ 348 F. Supp. at 875.

⁹⁵ 20 U.S.C. §§ 1401-61 (1976).

⁹⁶ 45 C.F.R. § 121-121j (1977); Bureau of Education for the Handicapped, U.S. Dept. of Health, Education and Welfare, *CLOSER LOOK 1* (1977).

⁹⁷ See notes 30-35 and accompanying text, *supra*; see also Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 967-80 (1977).

⁹⁸ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁹⁹ *Id.* at 33-35, 40.

¹⁰⁰ *Fialkowski v. Shapp*, 405 F. Supp. 946, 958 (E.D.Pa. 1975); see Haggerty & Sacks, *supra* note 97, at 977.

¹⁰¹ Haggerty & Sacks, *supra* note 97, at 977.

¹⁰² 408 F. Supp. 832 (E.D.Pa. 1976); See Haggerty & Sacks, *supra* note 97, at 979.

¹⁰³ 408 F. Supp. at 836.

There are instances when the education rights of the handicapped are guaranteed. The compelling state interest test will be used instead of the easier to meet rational basis test if the handicapped persons can be classified as a member of a suspect class (*i.e.*, retarded children) or if a fundamental right is violated (*i.e.*, a minimal education is absent). Also, the Education for All Handicapped Children Act and the Rehabilitation Act protect education rights if a federal program is involved. Some state statutes aid in this protection.

Nevertheless, Title IV of the Civil Rights Act¹⁰⁴ should be amended to include the handicapped. Such an amendment would further guarantee the handicapped of their education rights. First, inclusion of the handicapped in Title IV would insure the social integration of handicapped students into a normal education atmosphere because, under section 401 of Title IV, the handicapped would be assigned to schools without regard to their handicap.¹⁰⁵ Second, by including the handicapped student under the protection of Title IV, those students who live in states which do not currently guarantee the right to a public education in a normal atmosphere would be protected.¹⁰⁶ Third, Title IV authorizes the Attorney General to institute a civil action to protect the rights of those individuals who cannot "initiate and maintain appropriate legal proceedings."¹⁰⁷

THE NEED FOR CIVIL RIGHTS ACT PROTECTION

"Man is the only animal that laughs and weeps: for he is the only animal that is struck with the difference between what things are and what they ought to be."¹⁰⁸ The rights of the handicapped in the areas of access, employment, and education are dependent on matters which are extraneous to the exercise of a person's civil rights. The exercise of one's civil rights should not be dependent upon the existence of federal buildings or federal contracts, nor upon the individual's state of residence. To correct these deficiencies, the Civil Rights Act should be amended to include the handicapped within its coverage.

Congress has determined that the Rehabilitation Act reflects a national commitment to end discrimination on the basis of handicap.¹⁰⁹ Because of

¹⁰⁴ 42 U.S.C. §§ 2000c to c-9 (1970 & Supp. V 1975).

¹⁰⁵ 42 U.S.C. § 2000c(b) (1970 & Supp. V 1975).

¹⁰⁶ 42 U.S.C. § 2000c(c) (1970 & Supp. V 1975).

¹⁰⁷ 42 U.S.C. § 2000c-6(a) (1970 & Supp. V 1975).

¹⁰⁸ See Achtenberg, *supra* note 2, at 849 (quoting FINAL REPORT OF WISCONSIN TASK FORCE ON PROBLEMS OF PEOPLE WITH PHYSICAL HANDICAPS, at 3 (1974)).

¹⁰⁹ Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 301, 88 Stat. 1617, 1631 (1974).

its aforementioned weaknesses, the Rehabilitation Act is incapable of carrying out this national commitment. The best and most feasible means to immediately eradicate this discrimination is through an amendment to the Civil Rights Act, adding the handicapped to the litany of classes already protected by the Act.¹¹⁰

The handicapped should be included under Civil Rights Act protection for several reasons. Discrimination on the basis of race is forbidden by the Civil Rights Act. The similarities between racial and handicapped discrimination dictate that the handicapped be included within the Act. The conditions are so similar that to afford one of them the protection of the Civil Rights Act and not the other would be unjust.¹¹¹ One court stated that the label "retarded" carries as great a stigma as derogatory racial remarks.¹¹² Studies have found a significant correlation between negative attitudes toward the blind and negative racial attitudes.¹¹³

Analogies between blacks and the handicapped exist in access, employment, and education areas. While there was a political and legal upheaval in the 1960's because blacks and other minorities had to sit at the back of the bus, "[t]oday, it is realized that a significant minority cannot even get on the bus" because of access problems.¹¹⁴ Similarly, blacks fought to put an end to segregated schools because of the inequality that segregated schools engendered; today, the handicapped seek "the right to obtain the confidence and productivity which the school systems allowed only to the nonhandicapped."¹¹⁵ Finally, just as it is necessary for blacks and whites to interact in a wide spectrum of social relationships and environments, it is necessary for the handicapped and the nonhandicapped to interact in these social settings, including the employment and educational spheres. Segregation of the handicapped from these spheres creates the impression among the nonhandicapped that the handicapped are inferior.¹¹⁶ Because of these similarities between the plight of the black and the handicapped, it has been said that "Uncle Tom and Tiny Tim are brothers under the skin."¹¹⁷

¹¹⁰ See Note, *supra* note 20, at 1502 nn. 8 & 9. Congress has had proposals before it which would have amended Titles VI and VII for the benefit of the handicapped. No action was taken on these bills. See H.R. 12,154, 92nd Cong., 1st Sess. (1971) (proposed amendment to Title VI) and H.R. 10,962, 92nd Cong., 1st Sess. (1972) (proposed amendment to Title VII).

¹¹¹ Kriegel, *supra* note 5, at 416 & 421.

¹¹² 405 F. Supp. at 959.

¹¹³ Cowen, Underberg & Verrillo, *The Development and Testing of an Attitude to Blindness Scale*, 48 J. OF SOCIAL PSYCHOLOGY, 297, 304 (1958).

¹¹⁴ Achtenberg, *supra* note 2, at 850.

¹¹⁵ Haggerty & Sacks, *supra* note 97, at 963.

¹¹⁶ Hull, *supra* note 6, at 947.

¹¹⁷ Kriegel, *supra* note 5, at 414.

Besides the similarities between the experiences of the black and the handicapped, there are other reasons which support the inclusion of the handicapped within the coverage of the Civil Rights Act. "The language of section 504 (of the Rehabilitation Act) is almost identical to the comparable non-discrimination provisions of Title VI of the Civil Rights Act of 1964. . . . It establishes a mandate to end discrimination and to bring the handicapped persons into the mainstream of American life."¹¹⁸ Section 504 is not capable of fulfilling this mandate. Since section 504 is so similar to portions of the Civil Rights Act, it is logical to amend the Civil Rights Act in order that the mandate of the Rehabilitation Act be carried out.

The Civil Rights Act was designed so that it would "package" the American ideal of equal opportunity into one convenient container."¹¹⁹ The American ideal of equal opportunity is not met unless that "package" includes the handicapped. There exists precedent for amending the Civil Rights Act to broaden the classes within its coverage; a 1972 amendment brought discrimination on the basis of sex into its purview.¹²⁰

CONCLUSION

Federal and state provisions designed to insure equal opportunity for the handicapped are not capable of fulfilling that purpose. These provisions are pregnant with exceptions, exclusions, and limitations. Only by amending the Civil Rights Act can the handicapped be guaranteed equal opportunity.

Title II should be amended so that the handicapped person's access rights to public accommodations are protected. Title VII should be amended so that employment rights are guaranteed. Title IV should be amended so that the right to a normal, public education is assured. Also, Title VI should be amended to insure the protection of the handicapped in federal programs. The amending process itself would be relatively easy; it would simply involve, for the most part, the insertion of the word handicapped into the litany of protected classes. The Civil Rights Act would then prohibit discrimination in regard to "race, color, religion, sex, national origin, or handicap."

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¹¹⁸ 42 Fed. Reg. 22,676 (1977).

¹¹⁹ Schmidt, Jr., *Title VII: Coverage and Comments*, 7 B.C. INDUS. & COM. L. REV. 459, 460 (1966).

¹²⁰ See, e.g., 42 U.S.C. §§ 2000c, 2000c-6, and 2000c-9 (Supp. V 1975).

