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### "Suspect Class" Revisited: An Alternative View of "Handicap"

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## "Suspect Class" Revisited: An Alternative View of "Handicap"

Cover Page Footnote

Illustration by K.M. Spencer

# “SUSPECT CLASS” REVISITED

## *An Alternative View of “Handicap”*

by Nell J. Mohn

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### INTRODUCTION

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The majority of American states either have or did have statutes providing for the involuntary sterilization of mentally “handicapped” and certain physically “handicapped” citizens. Likewise, many states have statutory prohibitions on marriage between “handicapped” persons. A number of states restrict or deny the right of mentally “handicapped” people to enter into contracts. And other rights which most members of our society take for granted are routinely denied “handicapped” persons—including the right to vote, to obtain a driver’s license or a hunting and fishing license, to enter the courts, and to hold public office. According, however, to the Fourteen Amendment to the Constitution, no person within the jurisdiction of any state is to be denied the equal protection of its laws. If a state has engaged in the unequal treatment of its citizens—whether through legislative, administrative, or judicial action—the discriminatory treatment may be challenged under the equal protection clause.

Over the years, the Supreme Court has used various standards for reviewing state acts which discriminate among classes of citizens. Under the “strict scrutiny” test, a classification is upheld only if the state demonstrates that it is necessary to promote a “compelling governmental interest.” This rigorous level of scrutiny is triggered when legislation, or some other form of state action, either (1) contains classifications which are inherently “suspect,” such as those based on race, nationality, religion, and alienage, or (2) affects a fundamental right, such as the right to vote or to have offspring. The second, less demanding level of judicial review is used when neither condition for strict scrutiny is present. Known as the “rational basis”

test, this standard upholds the classification if it is reasonably related to a legal governmental objective.

For “handicapped” persons, some rights have been secured under the general rubric of the equal protection clause, including the equal opportunity for education and free access to public buildings and transportation systems. The Supreme Court has refused, however, in those instances and in other less successful attempts, to consider discrimination on the basis of “handicap” suspect, as it has decided to do for classifications based on race, religion, national origin, and alienage. Unless a fundamental right is involved then, “handicapped” persons are closed out from the higher level of judicial strict scrutiny.

That classifications discriminating against “handicapped” persons should be considered suspect, as a matter of law, is an argument that has been made by several law professionals, perhaps most cogently by Marcia and Robert Burgdorf. In their article, “A History of Unequal Treatment: The Qualifications of Handicapped Persons as a ‘Suspect Class’ Under the Equal Protection Clause” (*Santa Clara Lawyer*, volume 15, page 855), they marshal a wide array of evidence to show that the Court-established criteria for suspect class designation have been met; that is, that “handicapped” persons are saddled with such disabilities, subjected to such a history of purposeful unequal treatment, and relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. Unfortunately, this argument has been to no avail.

The objective of this article is to present some new ways of looking at the situation of “handicapped” persons, their history, society, and the law, and, more specifically, to reconsider the suspect class argument and identify its inherent shortcomings. Much of the analysis proceeds by analogy of the “handicapped” minority to racial minorities. This is for two reasons: (1) adjudication of the Fourteenth Amendment equal protection clause historically, as well as the more recent suspect class formulation, has involved claims of discrimination primarily against race and national origin; and (2) much of what is proposed about our concept

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of "handicap" and "handicapism" springs from nontraditional scholarship in the area of class struggle and race relations.

Central to some of the ideas presented herein is an understanding of the word *handicap* as a culturally created intellectual construct having significant empirical effect. For lack of a better substitute, the "handicap" appellation will be used but enclosed in quotation marks.

The topical scheme of this article is as follows: section I lays out an analytical framework for understanding historical change and current social structures and, in relation thereto, our conceptualization of "handicap." In section II, a parallel is drawn between racism and "handicapism" as ideologies, both serving a protective function within the social order to the detriment of the victims of such attitudes. Section III builds on the groundwork of the first two sections and explores the viability of the suspect class argument for "handicapped" individuals.

### I. WHAT IS A "HANDICAP"?

As far removed as the topic of feudalism may be from contemporary concerns of "handicapped" people, it serves as an illustration of the proposition that the history of Western man be perceived as a series of connected stages, each specifically characterized by the concept known as a mode of production. This concept can be simplistically defined as the way in which man transforms nature so as to sustain himself and reproduce his society. For the purposes of argument, only two such modes of production—feudalism and capitalism—will be dealt with, and the former only summarily, so that, by way of comparison, the latter may be better understood as a historically specific social structure.

#### Feudalism

In the feudal mode of production, the main source of productive wealth is land which is held at the sufferance of the monarch, the only real "owner," by and for the beneficial enjoyment of his or her nobles. Their right to use the land is conditioned upon an oath of loyalty to the sovereign by which they pledge military support in return for land tenure privileges. The majority of the populace are producers who, by swearing allegiance to a lord, become entitled to hold and have protected against external threat a portion of his land, so long as the fruits thereof are divided between the producer's subsistence and payment in kind to the lord. Nonagricultural goods are usually produced by

certain families or small organizations of skilled craftsmen. Feudalism, as thus defined, operated in and organized virtually all of Western Europe in the following ways: society consisted of and reproduced itself through small scale, localized generation of basic necessities and culturally defined luxuries; the social relations attendant upon this economic structure manifested themselves in personal bonds of reciprocal duty between lord and subject; and productive wealth was concentrated in a relatively small number of families who, by virtue of their lineage, could claim certain rights to its use and disposition.

#### Capitalism

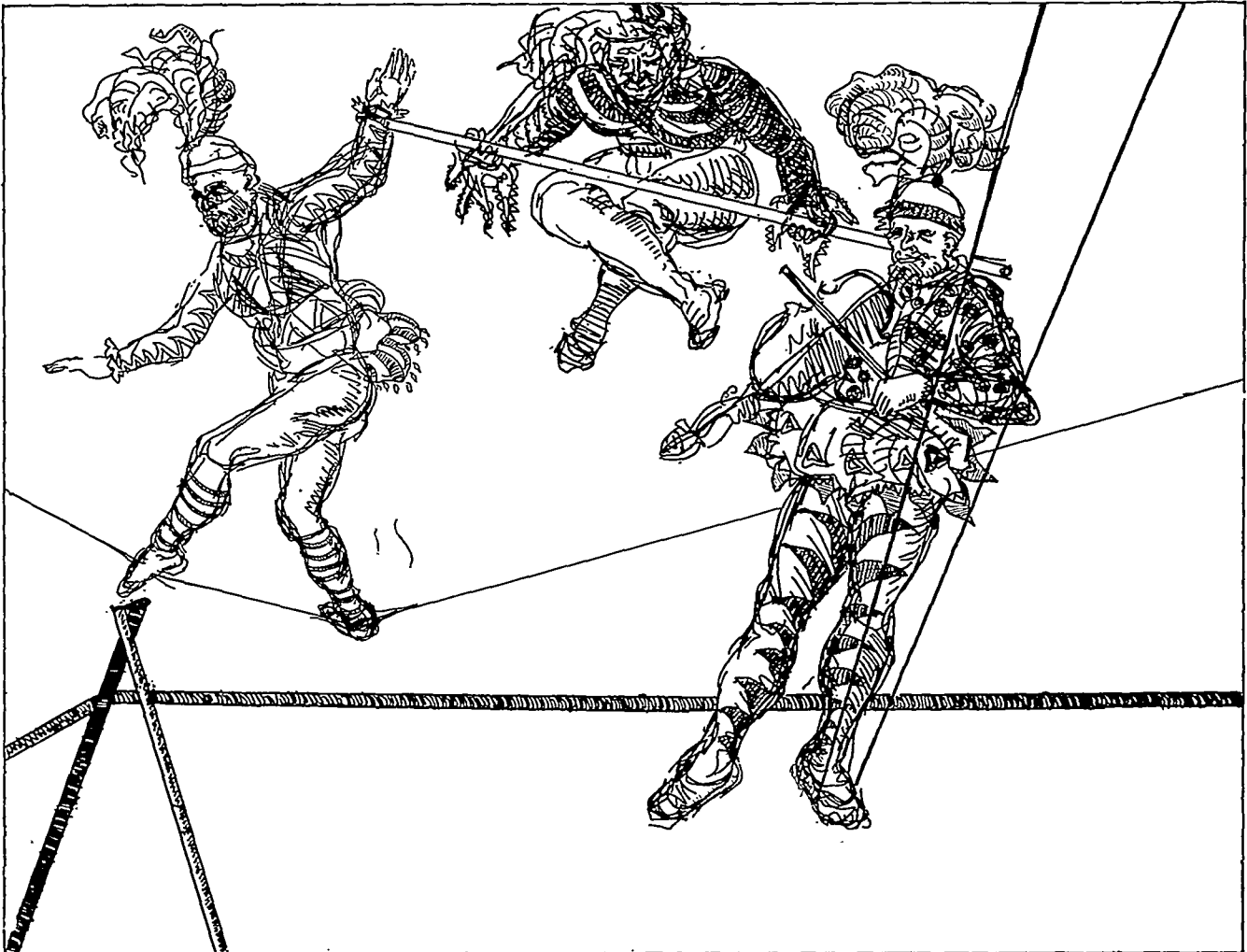
In contrast to the above are the defining characteristics of feudalism's successor: capitalism. In this system, ownership, as a concept, becomes prevailing reality. Access to and control over productive resources is no longer maintained because of one's status or pedigree ancestry; rights to use and dispose of these resources are exchanged not for oaths of personal commitment and service but for an impersonal and allegedly value-equalizing medium, money. The distribution of resources in society is such, however, that all ingredients other than labor necessary for the production process are owned by a minority. Consequently, the remainder of the population, whose only resource is their own labor, must submit their command over this resource to the demands of an acquisitive, powerful class.

Although the foregoing is true of capitalism in general, a more detailed analysis of the system's industrial phase as it evolved in America in the nineteenth century and continued into the twentieth century will prove of relevance below. The following have been proposed by Guy Hunter in his book, *Industrialization and Race Relations* (1965), as structural requirements or logical imperatives of the industrialization process:

The first of these structural requirements is a commitment to a rational and secular outlook. It is contended that the needs of productive efficiency and profitable operation force and fashion a rational perspective on the participants in industry. Under this perspective matters are judged not in terms of traditional, sentimental, or sacred concerns, but in terms of their contributory role to the successful operation of the productive enterprise. . . .

Second, industrialism is regarded as demanding and forging contractual relations in

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place of status relations. The employees of the industrial enterprise, whether in the labour force or in management, are judged in terms of productive need and productive efficiency. . . .

Third, as a result of the two foregoing features, industrialism brings into being a number of impersonal markets. Of these, the labour market has special significance. Having freedom to hire, assign and dismiss employees on the basis solely of industrial needs and being guided in doing so by the criterion of productive efficiency, employers fall into a rational, detached and non-obligatory relation to the labour force. In their turn, employees, having no personal or

social claim to employment are put in the position of competing with one another on the basis of possible productivity which they may bring to available jobs and positions. . . .

A fourth significant characteristic of industrialism, following from those which have been mentioned, is the physical mobility of its components. . . . Employees must seek jobs and positions and are free to respond to the attraction of better ones. . . .

Similarly, as a fifth characteristic, industrialism allows and promotes social mobility. Since jobs and positions in industry are arranged hierarchically in terms of differential compensation

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and reward and since they are filled impersonally by employees possessing the requisite skills and experience, the doors are opened to upward movement by those who have or develop the essential skills or experience. . . .

### "Handicap" Defined

The above analysis of capitalism is necessary because it serves as a frame of reference for the next proposition which is (a) generally, that a particular mode of production establishes certain norms according to which individuals have to act in order to survive, and (b) specifically, that "handicap," as we use the word today, derives conceptual origin and meaning from these norms. From the foregoing description of capitalism and industrialization, there can be extrapolated a social norm which can be viewed as capital accumulation in the aggregate and economic self-sufficiency on the individual level. Because claims to a share of the economic pie no longer stem from noble birth, the system theoretically places each member in society on equal footing at the starting line. However, the trade-off is that, in exchange for individual command over one's resources, unfettered by familial ties and feudal obligations, one is forced to accept and pursue economic self-sufficiency even if it means, as it does for the wage-earner population, dependence on the needs of capital for the opportunity to employ one's labor.

Given a particular norm—here, economic independence—there follows one conclusion with respect to how people will relate to that norm: either they will be capable of adhering to it or they won't. The norm is a positive construct, an expectation or code of behavior; but by its creation, it carries its own negative—that is, the implication of nonfulfillment, nonattainment. People's position within the social structure and their relationships to each other will, to a good extent, depend upon the closeness of fit between this systemic norm and their own predisposition toward it—mentally, in conscious and unconscious ways, and physically. For those persons possessed of a mental or physical impairment, this nexus will logically be less than perfect. The person will be "disadvantaged," "handicapped." Thus we arrive at the standard definition provided by Webster: "handicap—a disadvantage that makes achievement unusually difficult." The system, then, because it posits certain objectives, creates, or at least defines, a handicap. And as capitalist society grows more complex—that is, as labor becomes increasingly divided and specialized—the spectrum of knowledge and ability which is requisite thereto is correspondingly broadened. The other side of the coin, though,

is that the list of labels for "handicaps" also, by definition, lengthens.

The point in this section is not that society, or that capitalism as a mode of production, is the only social organization ever to treat human biological abnormalities as handicapping conditions vis a vis some societal norm. Nor is it being argued that any or all social phenomena can be explained away simplistically or exclusively by resort to an economic determinist approach. What is being suggested, though, is that certain norms or values are products of particular objective conditions—conditions which are not universal or eternal but geographically and temporally specific. In addition, our empirical experience informs the way we think, so that language, too, becomes a culturally specific construct. Hence, an achievement-oriented society will have to deal with those of its members who can't achieve according to the prevailing means for so doing. This reality is then reflected in the meaning ascribed to "handicap."

### II. "HANDICAPISM"

Building on the foregoing theory regarding the concept of "handicap," this section explores how the fact of a "handicap," as it is created by prevailing systemic conditions, is perceived and translated into attitudes and behavior. An analogy to race and racism is made here, using a model that is Marxist in orientation. In general, this approach posits that racism is an ideology necessary to and protective of the underlying economic base. After this theory is outlined below, a comparable argument for "handicapism" is considered.

#### Class Approach to Ethnicity and Race

Advocates of this model contend that the field of ethnic and race relations is "dominated by an assumption that race and ethnicity are 'primordial' bases of affiliation rooted in human nature; and that, while "race and ethnicity may appear to be primordial attachments, in fact they represent a deeper reality, namely class relations and dynamics" (Edna Bonacich, "Class Approaches to Ethnicity and Race" in *The Insurgent Sociologist*, Fall 1980). Racism is thus viewed as rooted in the economic system and not in exogenously determined attitudes. It is also argued that racism serves as a valuable tool in the hands of an expanding capitalist nation. In order to mobilize its own working class, nationalistic sentiments are fostered utilizing the fact of ethnic differences between colonizer and colonized to disguise the im-

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perialist nation's intentions and reduce the possibility that the working class of both countries will identify with each other and unite along class lines. "The survival of class society depends on the reproduction of material conditions and the consent of the people. The latter is secured by the ruling class's attempt at ideological hegemony whereby all classes accept and internalize as their 'common sense' those ideas, beliefs, and attitudes which serve the interests of the ruling class" (Margaret Marshment, "Racist Ideology and Popular Fiction" in *Race and Class*, Spring 1978, p. 331). Such is the power of ideology.

The above is true for Western European capitalist expansion. Europe colonized the rest of the world so as to accumulate capital more effectively, to integrate into a growing capitalist world market those areas still characterized by pre-capitalist and feudal conditions. "The ideology of racism grew as a justification for the exploitation of colonized peoples: they were 'naturally' inferior and needed Europeans to 'help' them move into the modern world" (Bonacich).

Once a society becomes multi-ethnic, the perpetuation of racist attitudes continues to serve several functions for the capitalist class:

- the minority can be used as a reserve army of labor to cushion fluctuations in the business cycle;
- it allows employers to fill diverse labor needs, such as the "dual" requirements of a stable, skilled labor force in the monopoly and state sectors of the economy, and a flexible, unskilled, low-wage labor force in the competitive sector;
- it helps in the accumulation of capital because wealth is extracted from the "underdeveloped" sector or ethnic group and passed on to the bourgeoisie of the dominant group; and
- it helps to stabilize the system by keeping the working class fragmented and disorganized.

### An Ideology of Handicapism

Racism is thus considered above as a socially created phenomenon, feeding on perceptions of shared ancestry, but functioning in a much more powerful, ideological way. The question now is: can this model be applied in an examination of the societal treatment of "handicapped" persons? The following parallels can be made:

1. Like ethnic affiliations, the act of identifying with "normal," "nonhandicapped" persons can be viewed as grounded in assumptions of primordial attachment—that impairments, like race, are accidents of birth and immuta-

ble. Therefore, it is only natural to classify and discriminate along lines of ability.

2. However, as was suggested in section I, whereas an impairment may be biologically immutable (and even this is a tenuous conclusion given the advances in medical science and technology), a "handicap" is relative to a particular historical, social norm. Thus a "handicap" is immutable only to the extent that the system can't or won't bend to accommodate it; a biological difference becomes a handicapping condition only in relation to established procedures which, by virtue of their make-up, create and make relevant categories such as "advantaged" and "disadvantaged." Thus, as with the traditional assumptions about the source and nature of racist attitudes, the underlying economic reality is again ignored. The systemic norms (capital accumulation, self-sufficiency, economic efficiency) and the accompanying mechanisms for their attainment create an unconscious perception that the way things are is the way they have always been and should be.

3. Like racism, thus, there is an ideology of handicapism, a particular mindset which is socially shaped, that controls its owner's interaction with "handicapped" persons, often producing prejudice and discriminatory behavior. However, if handicapism is validly to be considered an ideology, it must function the way racism does to protect and perpetuate the underlying capitalist base and class structure. In this respect, the following comparisons can be noted:

(a) Historically, the capitalist class of Western Europe found it necessary to search out new markets in order to acquire cheaper labor and natural resources and have an outlet for the increasing volume of material goods. The social structures of traditional groups, based on kinship, barter, and communalism, were thereby submerged within an encroaching industrial order. The history of "handicapped" persons in America can be viewed similarly in this way: up until the nineteenth century, although excluded from meaningful participation in many activities, "handicapped" persons could at least experience an integrated life with their families. However, by mid-nineteenth century, there was an alternative: institutionalization. Family businesses were giving way to large manufacturing concerns and people were forced to adapt their abilities to the rigid demand of a mechanized work process; consequently, the list of labels for "deviant" types unable to fit in for whatever reasons expanded. The initial societal response to this situation was to delineate explicitly between those able and unable, relegating the latter to their own colonies. However, and this is where the experience of colonized ethnic groups is particularly apposite, the institutions, although

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physically separated from the mainstream of society, were not outside the reach of the economy's needs. As they came to be viewed as an undesirable drain on public financial resources, residential facilities were made to enter into the production process by becoming farm- and factory-like productive units. If an institution's individual members were incapable of self-maintenance, there was no reason why, collectively, they couldn't pool their less-than-whole abilities and create a self-sufficient productive institution. An early twentieth-century professional is quoted as saying:

The only hope that I can see of the state taking complete care and responsibility of all idiots and imbeciles is that all those who have been trained, those of the higher grade who are susceptible of training, who have been trained to the highest degree possible for them, shall be so usefully employed that they may be practically self-supporting. We need a great deal of low grade labor, and a great deal of labor can be performed by laborers of a low degree of intelligence. In the care of the lowest custodial grade of imbeciles, in the care of epileptics of low grade, there is a great deal of labor available among our trained imbeciles; and they can do no better work than to exercise such care in an institution. [Quoted in Wolf Wolfensberger, *The Origin and Nature of Our Institutional Models*, 1975]

There seems then to be some similarity in the way that ethnic and "deviant" minorities were drawn upon to satisfy the needs of the economic system.

(b) A "disabled" minority, like an ethnic minority, can, as outlined previously, function as:

- a reserve army of labor: the above section (a) provides support for this proposition in the way that capitalism's needs dictated including institutionalized labor in production. In addition, such recent legislation as section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706, making employment discrimination based on handicap illegal, is testament to the historical exclusion from the labor force of noninstitutionalized "handicapped" persons, who are only now being considered employable.

- a source of unskilled labor: by virtue of the definition of "handicap," those persons so labeled will lack the skills required by certain established production processes that were originally structured to engage nonhandicapped persons.

- a class desperate for work for whom doing society's "dirty work" may be their only option: the possibility raised in *Gurmankin v. Costanzo*, 556 F. 2d 184 (3rd Circuit, 1977), must be kept in mind—that "handicapist" attitudes by employers can result in a narrower range of job opportunities being presented to comparably qualified "handicapped" persons than is available to their "non-handicapped" counterparts.

- as a device to keep the system stable by fragmenting the working class: any prejudice which functions as an ideology to mask the underlying relationship between owners of the means of production and wage earners abrogates the potential for solidarity along class lines. Consider Michael Reich's statement: "Capitalist society . . . encourages the persistence of racism. Whatever the origins of racism, it is likely to take root firmly in a society which breeds an individualistic and competitive ethos, status fears among marginal groups, and the need for visible scapegoats on which to blame the alienating quality of life in America." It seems that the same could easily be said with respect to "handicapism."

The actual content of "handicapism" has been viewed by authors Robert Bogdan and Douglas Biklen in their article, "Handicapism" (*Social Policy*, March/April 1977), as consisting of three elements:

*Prejudice*—which is an oversimplification and over-generalized belief about the characteristics of a group. When directed toward "handicapped" persons, prejudice is indicated by the following typical assumptions: they are inately incapable; they are naturally inferior; they have more in common with each other than with nonhandicapped persons and, therefore, they like to be with their own kind.

*Stereotype*—the specific content of prejudice aimed at specific groups. For example, that the mentally retarded are childlike, or oversexed.

*Discrimination*—or the behavioral aspect of "handicap-



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ism." An example of the power of stereotypes and how they translate into discriminatory behavior that has harmful effects on the victims is provided by Wolfensberger. His thesis is that societal attitudes toward the mentally retarded influenced the architectural design of residential facilities. In particular, these attitudes ranging over time viewed the retarded person as sick, subhuman, an object of pity, a menace, the burden of charity, a holy innocent, and (thankfully) as a developing individual. Each of these attitudes then had different implications for institutional structure. In turn, the stereotype reflected in the housing facility often worked to foster among the inhabitants some of the feared behavioral characteristics, thereby reinforcing society's condemnation of them.

### III. SUSPECT CLASS TREATMENT

In this last section, the suspect class doctrine and its relationship to "handicapped" persons is examined. Using the traditional suspect class criteria, an argument will be advanced for the designation of "handicapped" individuals as a suspect class. The analysis will then be carried a level deeper, though, to show why, structurally, the suspect class argument has not, and probably will not, work for "handicapped" people.

In *San Antonio Independent School District v. Rodriguez* (1973), the Supreme Court indicated what it considered the indicia of suspectness to be, stating that classification based on a group characteristic would invoke strict scrutiny if that group was:

- saddled with such disabilities,
- subject to such a history of purposeful unequal treatment, or
- relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Instead of citing the instances of discrimination pleaded already by authors such as the Burgdorfs in support of the suspect class argument, the "ammunition" here flows from the ideas advanced in this article and can be mapped to the three criteria for suspectness in the following way:

First, by virtue of the position advanced in section I—that persons with impairments are handicapped by the system—such persons can certainly be said to be "saddled with disabilities."

Second, following from the position articulated in section II—that "handicapism," as ideology and stereotype, has effectuated much discrimination against "handicapped" persons—it is also evident that they have been subjects of

"purposeful unequal treatment."

Third, that "handicapped" persons have also been "relegated to a position of political powerlessness" would seem almost self-evident from all that has been suggested above. However, the following discrete supporting arguments can be made:

1. Discrimination which takes the form of exclusion as alluded to above leads to an "out of sight, out of mind" social mentality that spells powerlessness for the victims. "Man's historical tendency to remove handicapped people from the mainstream of society through institutionalization and other means has minimized the average person's exposure to them. . . . This reduced public awareness has led to an artificially deflated level of advocacy in the political system on behalf of the handicapped" (Krass, *The Right to Education for Handicapped Children*, 1976).

2. The above cited proposition that social avoidance of "handicapped" people contributes to their political ineffectiveness is bolstered by the fact that often, by nature of their impairment, certain persons who are mentally or psychologically different from the rest of us will be ill-equipped even to recognize discrimination, much less demand its eradication. This will be especially true when, as Wolfensberger suggests, the nature of the "handicapped" person's intellectual capacity is such that he or she unwittingly assumes stereotyped behavior.

Thus, it would seem that not only one but all of the indicia of suspectness are met in the case of "handicapped" persons.

However, although the above argument may work on some level, it is not complete. What is left out are two very important considerations: the relationship of the law to capitalism and the relationship of "handicap" to capitalism. These are dealt with successively below.

The function of law within a capitalist social structure is aptly illustrated by a brief look at the history of the Fourteenth Amendment and the suspect class doctrine.

In 1868, the Fourteenth Amendment was added to the Constitution securing to all persons equal protection of the laws. It came in the wake of a civil war that was waged on more than one level. Moral differences certainly separated the North and the South, but, as Eugene Genovese suggests in his book, *The Political Economy of Slavery* (1967), economic considerations also motivated the North to take up the Abolitionist's banner, and for this reason: the institution of slavery was hampering national economic progress. As a means of utilizing labor, slavery contained certain inherent limitations on growth. For example, a slave holder was not as free as a factory owner to adjust the size of his labor force in accordance with business fluctuations;

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custom and community pressure often made the separation of families difficult. Thus in times of weak demand, the slave holder was saddled with unproductive labor which he was forced to maintain at his own expense. The resulting inflexibility and artificially inflated production costs affected the production process further down the line at the point where Northern mill owners became involved, thereby jeopardizing their competitive position in the world market.

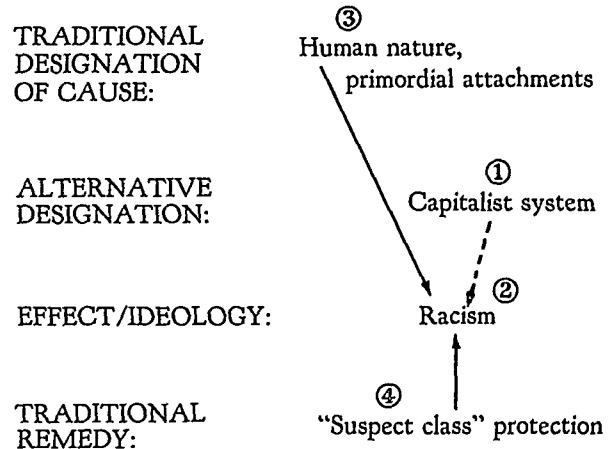
The legislative proclamation ending slavery and guaranteeing equal protection was a political/legal response to a particular moral and economic situation which had reached crisis proportions. However, as was suggested by the class approach to ethnicity above, the structure of capitalism generates a protective agent in the guise of racist ideology. Thus, although the postwar amendments may have abolished slavery, they obviously did not do away with capitalism or the potential for racist attitudes to persist. After all, the consequence of eliminating one or two societal forms of labor utilization implies that the remaining form will have to absorb the now unplaced workers. Freeing the slaves thus meant entrance into the wage labor market of a significant number of people, and racist ideology, informing the social consciousnesses of white workers, determined that this influx would be perceived by them as a threat. In this respect then, the law apparently resolved one aspect of a problem, and to the benefit of the ruling class in society, without calling into question the root, class-based cause of the problem.

That the Fourteenth Amendment by itself was an incomplete panacea for dealing with inequality is evidenced by the eighty-year history of separate-but-equal philosophy that followed and which was in *Brown v. Board of Education*, 347 U.S. 483 (1954), essentially declared to be an inadequate guarantor of equality. It was there decided that the Fourteenth Amendment needed judicial filling in. One elaboration of the equal protection clause evolved in the mid-1940s and crystallized into a constitutional test in the ensuing years by the Supreme Court's formulation of the suspect class doctrine. As such, it carved out of the general constitutional guarantee of equal protection the potential for increased judicial solicitation if the alleged discrimination had been directed against a suspect class.

The point of this scenario is that law, while purportedly an agent of justice, has upon closer inspection a dual role. True, it is the source for some measure of remedy, an apologetic for a social ill; but at the same time, by not revealing the real source of a given problem—that is, class conflict—it legitimizes the status quo, and thus ameliorates without eradicating. Thus, resort to the law to effect social change

carries certain inherent limitations.

The role of law in the area of racial discrimination can be represented schematically as such:



Solid lines indicate the relationship between categories as traditionally understood. Dotted lines suggest an alternative view of these arguments.

First, certain economic conditions give rise to the creation of a minority. For instance, the drive of the American ruling class to accumulate led to the introduction of cheap African slave labor into the production process.

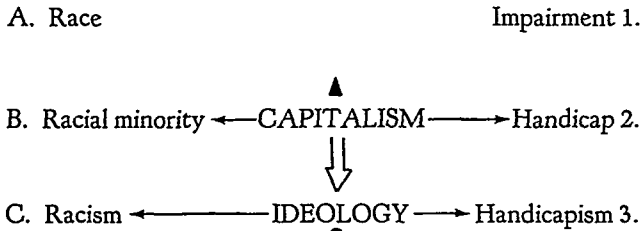
Second, it is of advantage to the ruling class that ideologies, such as racism, function to hide economic reality and thereby perpetuate the existing order.

Third, the orthodox explanation for discriminatory behavior is that it is grounded in human nature and some sense of primordial affinity (that is, to an ethnic group) and thus unchangeable.

Fourth, the law is an attack on and partial rectification of discriminatory practices but is generally not disintegrative of the underlying class structure. In other words, labeling suspect classifications based on race, although affording racial minorities maximum constitutional protection, has represented no real cost to the underlying system. True, programs such as Affirmative Action, for example, have forced some changes in hiring practices. But the logic of the capitalist system remains intact; production continues the way it has whether a white or black person is involved. Thus the higher standard of judicial review represented by the strict scrutiny test can operate effectively to eliminate racist attitudes and behavior, but it does not require that the system of production itself change, only the social relations surrounding production.

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Extending "handicapped" persons suspect class status, however, implies a potentially greater threat to the system. This, again, stems from the relationship of "handicap" to capitalism and can be represented diagrammatically:



In section I, it was argued that "handicap," as a concept, has social and historical specificity, and that impairment becomes a "handicap" under a system such as ours where survival depends on a clean bill of productive fitness. Thus the biological fact of an impairment (1) is translated through the economic base (▲) into a social and legal construct known as a "handicap" (2). Prejudicial attitudes then evolve in the ideological form (●) of "handicapism" (3).

The left side of the diagram suggests that the biological fact of race (A), when "acted upon" by capitalism (▲), does not disadvantage that race in the same way that disabled people become "handicapped." True, the introduction of African blacks into white America made the former a minority (B); but the distinction there is quantitative, whereas the contention here is that the relationship of disabled persons to capitalism is of qualitative significance. Racism (C) operates to discriminate against blacks, but, although "handicapism" also has discriminatory effect on "handicapped" persons, it is the physical arrangement of the production process itself which handicaps them. A manufacturing process which requires the laborer to stand and assemble parts moving along a track at eye level does not, in and of itself, prohibit the participation of a black person; it excludes a person in a wheelchair. And therein lies the difference between the "plight" of "handicapped" persons and racial minorities—a difference endemic to the system. Another illustration is aptly provided by New York Judge Nathaniel Sorkin: "The physically handicapped are de facto barred from using the city's subways and to an only slighter degree from the city's surface transportation system. They are not merely relegated to the back of the bus, they are totally excluded."

Designating "handicapped" persons a suspect class would require, in an instance of alleged discrimination, that the state advance a "compelling governmental interest" as reason for the exclusionary practice. For example, assume a claim is brought against the state alleging that one of its

agencies discriminates against "handicapped" persons because many of the jobs there cannot be held by a person in a wheelchair. If "handicap" were, like race, religion, nationality, and alienage, considered suspect, the state would have to demonstrate that, in the interest of public health, welfare, or safety, it could not make any accommodations to extend employment opportunities to "handicapped" individuals. This places a high burden on states, and whether an agency could preclude "handicapped" persons from employment because, otherwise, the public welfare would be jeopardized, seems questionable. It becomes apparent, then, that the level of judicial scrutiny implied by suspect class treatment might, when applied to "handicapped" persons, require serious changes in the American workplace, a result not effectuated when racial discrimination is subjected to this more rigorous standard.

The standard invoked now by courts when a "handicapped" individual brings an equal protection claim is the rational basis test. This allows for discriminatory behavior on the part of a state to continue if it can show merely that the classification is rational—that it is based on factors which justify disparate treatment. This is usually satisfied so long as the classification is not patently arbitrary. In fact, under this test, classifications are generally presumed reasonable—that is, if any facts can reasonably be conceived that would justify the classification, the existence of those facts will be assumed by the Court to be the basis of the classifications in order to uphold the statute, regulation, policy, etc.

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### IV. CONCLUSION

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Essentially, this article has involved the setting up and then striking down of the suspect class doctrine as it relates to "handicapped" persons. Although many arguments can be advanced for why such individuals should qualify as a suspect class, the arguments will not work given the structural limitations of capitalism. The idea here is not to discourage but to make clear all the parameters of our social structure, what is at stake and who stands to lose, and the inadequacy of the legal system for instituting radical alteration. Change, then, must be promoted on many fronts: surely, within the courts, still, but in the workplace, too. Mass production, individualism, and profit maximization all act to inhibit and prohibit human fulfillment and development on the job. If all people, "handicapped" and "non-handicapped" alike, are to be truly happy and productive in their lives, it seems that the character of work must change and all barriers to full participation broken down.