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Equality and the mentally retarded.

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EQUALITY AND THE MENTALLY RETARDED

A Thesis Presented

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Equality and the Mentally Retarded

I

Death or banishment would very positively have alleviated the difficulties encountered by society in its dealings with those persons born into that society with what it describes under the heading mental defects or mental deficiencies. But in deference to society's sensitivity to the obvious injustice associated with such radical remedies and the guilt that would inevitably become its legacy, society has opted for a more comfortable alternative in our public facilities for the mentally ill and the mentally retarded.

There had always been a most satisfying simplicity in this approach, which sense of satisfaction was seldom assailed by criticism from those most directly affected. The famed English facility of Bedlam, moreover, stood ever

available as the ultimate evil of its type against which our own facilities could reliably be compared with favor.

Recently, however, public attention has been directed to our facilities; and what had previously been a tolerably comfortable abstraction gradually transformed into the depressing reality we have come to know as Willowbrook, or Belchertown State School, or other such facility in all its concrete ugliness. It was at last being made clear that rather than being comfortable retreats for those not equal to the demands of life in conventional society, these places were in fact nothing but dismal warehouses for society's rejects. Even those in government, finding themselves in positions of authority in such facilities, came to realize increasingly that the only apt adjective for prevailing conditions is 'inhuman.' The Director of New York's Willowbrook State School compared the treatment accorded the mentally retarded at his facility with the treatment traditionally reserved for criminals: "We're treating the mentally retarded as if they have somehow offended society."[1]

The implementation of alternatives to the present typical institutional arrangement gives rise to enormous difficulties, not the least of which is a large, reliable and continuing appropriation of public funds together with responsible patterns and machinery for its distribution.

The more offensive elements of life in the institution are gradually undergoing change for the better. This is not, it seems, the result of a radical shift in philosophical priorities, but rather a belated reaction to growing public pressure. A more selective screening of institutional populations is being undertaken such that in time only those really in need of this kind of structured environment will be institutionalized, while those capable of living in and benefiting (and benefiting from) normal social environments will be required to do so. So long, however, as society produces and counts among its number persons mentally defective or deficient, such institutions will and must continue to exist.

It is probable that those conditions will abate which have characterized our facilities as (in the words of one Massachusetts state official) "snake pits."[2] Nevertheless, it is a matter of first importance to lay the proper foundation for the future structure and role of the institution. The institution's reduced population as well as those discharged from the institution must effectively be guaranteed the equal protection of the laws of our state and federal governments, and must be rendered justice no less than that rendered to the rest of us.

The scope of our present inquiry is both legal and philosophical in nature, dealing as it does with the notion

of equality, with particular emphasis on how that notion is judicially construed within the context of the equal protection clause of the fourteenth amendment of the United States Constitution and the constitutions of the states, and on how that notion so construed relates to the class of mentally retarded persons. I propose to survey the laws of the Commonwealth of Massachusetts that most directly relate to that class, more specifically the Massachusetts Mental Health Act, for the purpose of showing a particular respect in which that statute (which by and large is a model of enlightened legislation of its type) is nevertheless deficient; specifically in its failure to contain a provision for independent supervision of its full and even-handed administration. This arguably could be achieved by the establishment of autonomous legal counsel and advisory services outside the framework of the Massachusetts Department of Mental Health or other state agency.

I further propose against the background of operative state law to survey judicial decisions construing the equal protection clause with an eye to abstracting therefrom the judicially recognized ingredients of the concept of equality as they might be appropriate for any consideration of the mentally retarded as a class.

I shall discuss certain writings of Ch. Perelman and

of Bernard Williams on the subject of equality in an attempt to support my conclusion that legislation essentially similar to House Bill No. 2690 of the 1972 Massachusetts Legislature ought to be enacted into law establishing an autonomous watchdog agency or office, substantially improving the liklihood that justice will not be denied to the mentally retarded through the arbitrary administration of otherwise good laws. (House Bill No. 2690 appears as Appendix A. Appendix B incorporates Chapter 893 of the Acts of the 1973 Massachusetts Legislature, limitedly providing legal assistance to the indigent mentally ill.)

II

But what are the conditions that prevail at such places as the Belchertown State School (which by public report appear not so loathsome as many other facilities both in and out of Massachusetts) which prompt us to allege that the residents of these facilities have been effectively denied justice and the equal protection of the laws? An exhaustive answer to that question would inevitably result in a disproportionate allocation of space, and I shall accordingly give an overview of conditions based in part upon long, direct, personal

observation, in part on the continuing investigations made by an organization of friends and families of the residents, and in part on the reports of public commissions set up for the purpose of investigation of facility conditions.

Recently these efforts prompted a class action suit to be brought in the Federal District Court for the District of Massachusetts, which suit named the Commonwealth of Massachusetts and a number of individuals in or connected with the Department of Mental Health as defendants. The suit made claims founded upon the deprivation of rights, privileges and immunities secured to facility residents by the first, fifth and fourteenth amendments, and the imposition of cruel, unusual and unlawful conditions which were alleged to be in derogation of the rights secured by the eighth amendment. It was also claimed that the residents were denied the equal protection of the laws secured by the fourteenth amendment.

This litigation recently terminated in a consent decree, leaving to implication rather than to judicial finding that there had in fact been a violation of any of the above mentioned rights of residents. While a most desirable result from the point of view of the immediate concerns of the petitioning class and further as an indicator of more enlightened administration in

days to come, nevertheless we are not given the benefit of an exhaustive judicial analysis (or complete record for appeal to higher courts) which might otherwise have become a persuasive precedent for future citation. Compromise and settlement have traditionally characterized consitutional controversy, with notable exception currently evident in the United States House of Representatives. The adoption of consent decrees tends to achieve immediate objectives without however setting bounds to the scope of future judicial resolutions.

On the occasion of the entry of the consent decree in the case referred to, U. S. District Court Judge Joseph L. Tauro acknowledged this point:

> I have been to Belchertown. I know that there is a great deal that needs to be done there. I recognize that this is not the end of the line for Belchertown, and I'm very, very satisfied that the responsible public officials recognize that Belchertown, as all other institutions, has to be under a constant state of review; but I do think that what we have been able to accomplish here is to give some immediate relief to people who absolutely can't help themselves. I think that we have reached down to help those who are helpless in the truest sense of the word.[3] (emphasis added)

The court pleadings in that case include allegations that "the conditions in which the plaintiffs and the class they represent live are so shockingly oppresive, unsanitary, unhealthy and degrading that they are an affront to basic human decency and a violation of fundamental constitutional rights."[4]

In 1964, a special commission was established by the Massachusetts legislature to investigate and study the training facilities for retarded children. Their report appears as 1964 House Bill 3061 in which it was stated (and restated again in the pleadings in this case) that the State School at Belchertown was characterized by "isolated geographic location . . . drab atmosphere. . . a past, present and future state of inertia and somnolence . . . obsolete patient dormitory buildings requiring very extensive modernization . . . the problem of ventilation is critical."[5] This report continued to point out that there was a serious overcrowding condition there resulting in residents being "forced to live in situations far below (the) minimum standards" established by the Massachusetts Department of Public Health. The report cited "the complete inadequacy of the basic medical care and supervision of . . . residents . . . flagrant lack of social service workers, psychologists and psychiatric personnel . . . desperate need for doctors, nurses, licensed practical

nurses . . . conspicuous neglect in the provision of attendants and therapists . . . a manifest shortage of teaching personnel and rehabilitation specialists . . . totally inadequate educational rehabilitation programs . . . marked limitations in services (education)" as instances of the conditions that were brought to light as a result of the investigation of the state schools.

These uncontradicted revelations were the prelude to four years of uninterupted inattention by the state to conditions it could in no administrative or legal way (short of class litigation) be compelled to rectify.

In 1968 The American Association on Mental Deficiency (Division of Special Studies, Institutional Evaluation Project, Final Evaluation for Belchertown State School, May, 1968, Appendix A) issued a report (portions of which were reprinted in the pleadings of the class action suit) which included the following:

> The major weakness in the management is a marked shortage of qualified professional and ward personnel . . . the institution is still seriously overcrowded . . . limited staff precludes a comprehensive diagnostic evaluation prior to admission and sometimes immediately following admission . . . training and staff development are major goals of the institution; but limited activity is present . . . apparently there are no regularly scheduled interdisciplinary conferences for supervisory

personnel of all departments . . . therefore, overall communication is somewhat limited . . . inability to recruit an assistant executive officer prevents the Superintendent from more active participation in the program of the institution . . . absence of an open door policy . . . medical service is handicapped by the shortage of medical personnel . . . the hospital is not accredited by the Joint Commission on Hospital Accreditation . . . because of a shortage of personnel, the institution depends on the services of residents for productive service . . . the insufficient number of attendant personnel makes it difficult to take care of the needs of the residents and almost eliminates time for adequate housekeeping.

. . . . . .

The sleeping areas reflect the serious overcrowding, and the toilet and bathing areas do not offer any privacy . . . most of the buildings are overcrowded with limited bathing and lavatory facilities . . . there are no adequate facilities for the storage of janitorial equipment or for clean and soiled laundry in the residential buildings . . . there is no adequate indoor play area or adequate space for staff, equipment, and counselling in the living

> units . . . all the outdoor recreation areas are fenced in and rather meagerly furnished with equipment . . . there appears to be quite limited freedom of movement of residents about the institution grounds . . . all buildings are locked and most of the recreation areas attached to the buildings are enclosed in high metal fences . . . in general, the attitude towards the residents appears to be primarily that of benevolence with rigid rules and very limited regard for the dignity and pctential self-reliance of the individual.

The pleadings state that the then Assistanct Commissioner of the Department of Mental Health for Mental Retardation, on January 14, 1969, visited the facility and in a written report cited his impressions of nudity, lack of sanitation, poor ventilation, overcrowdedness, restraint, assaults, improper use of discipline, lack of safety and privacy, roaches, staff shortages, and homosexuality.

In 1970, a Special Legislative Commission on Training Facilities Available for Handicapped Children restated the general criticisms of the facility and pointed out that "differences among institutions, and even within institutions, highlight glaring inequities in treatment for certain individuals and raises the question of the unfair distribution of the Commonwealth Treasury."[6] It pointed out that the

the greatest inequity "was demonstrated by prevailing conditions for the large number of residents who are in so-called 'back wards.' . . . Back wards are characterized by . . . repression of individual freedom and personal development through the excessive use of locks and heavy metal doors and by the enormity of buildings and numbers of patients assigned to dormitories . . . day rooms or recreation rooms (are) characterized by overpowering odor. Patients often appear nude or dressed in institutional garb. There is a lack of programs and a lack of purposeful activity, communication or any interaction."[7]

The Legislature in 1971 received a report from the Joint Special Commission on Belchertown State School and Monson State Hospital which stated:

> Belchertown is nearly a total failure and needs immediate and direct attention. . . . At Belchertown the buildings are old, crowded, sparsely furnished and frequently cold. Repairs at times go unattended for months. On occasion, the fire alarm system has been inoperative. Within the past three months, raw sewerage has backed up and overflown portions of the Infirmary. . . . Doors to residential buildings often cannot be opened due to the age of the locking system. . . . At Belchertown there are continuing unnecessary

shortages of sanitation supplies, such as disinfectant, detergents and mops, directly resulting in the daily spread of infection among the residents. . . . Dysentery has been recurrent the last several years, boils and diarrhea occur on a daily basis. Rashes are not uncommon. . . . Staff members have found it necessary to purchase from their own funds such items as disinfectant, detergent, soap, tooth paste, flashlights, deodorant, scissors, shampoo, buttons and thread. . . . There has been no overall professional inspection and evaluation of Belchertown in over a year. . . . The medical laboratory at Belchertown causes delay in needed patient care. . . . In some buildings at Belchertown excrement and urine are constantly visible and unattended. . . . In the past there has been insufficient clothing for the residents resulting in prolonged nakedness and degradation. . . . Cockroaches have been chronic, ever present and in the recent past, have overrun several buildings to the extent of crawling over immobile patients. . . . Parts of the living quarters at Belchertown are in violation of the State Sanitory Code. Because of lack of screens, flies have infested several buildings to the extent that fly larvae (maggots) have been found nested in a sore on

a resident's ear. . . . As to food, until recently, the entire meal was served to many residents mixed in a single metal bowl. . . . There is no semblance of privacy at Belchertown. . . . Psychiatric and psychological treatment is practically non-existent. . . . Punishment has bordered on cruel and abusive treatment. Discipline has been unevenly administered with little relationship to the gravity of the offense. . . . Until recently, Belchertown had the highest reported incidence of physical and chemical restraint of any state school. . . . Unnecessary and incorrect medication has been given to residents. . . . There is no aggressive recruitment program for professionals. The education, vocational education and recreation staffs are insufficient and cannot provide realistic services for the school pupulation. . . . Due to negativism by administration officials, the volunteer program has failed to attract available student participation from surrounding colleges. . . . Prescribed medical care is delayed or ignored for long periods of time. There are frequent shortages of medical supplies and drugs. In many cases, recommended corrective orthopedic surgery, as well as the fitting of eyeglasses and hearing aids has been delayed for several years. These delays further

> reduced the resident's ability to function and in some cases delayed discharge from the institution for years. . . . Appropriated funds for furnishing an addition to the administration building were allowed to lapse delaying the use of the building by twenty-one months. . . . Due to lack of screening, residents have fallen 15 to 20 feet over second story railings to the ground. . . . Because of the lack of initiative, Belchertown State School has failed to fully utilize available Federal funds. . . . The on-ground hospital, responsible for the provision of much of the medical services received by the 1200 residents, is not accredited by the national certification agency, the Joint Commission on Hospital Accreditation.[8]

The conditions reported above are not reflective currently prevailing conditions, for very strenuous ameliorative policies have been mandated by the Federal District Court in the class action suit. These, to some degree, are being achieved. To the degree that they are not, continuing class action litigation remains the sole remedy of persons concerned for the welfare of the retarded residents of the facility. This is prohibitively expensive, slow, and in general a far cry from that adequate watchdog machinery, which constitutional law and justice requires.

Moreover, without such machinery, the welfare of the residents is made to be contingent upon the continuing concern and activity of a few interested members of society, and upon the continuing benevolence and competance of state administrators.

An examination of the operative law in this state will clearly reveal that the power of the Commissioner of the Department of Mental Health is truly plenary; and the above description of conditions reveals how plenary powers have traditionally been exercised at Belchertown.

With regard to the continuing concern of non-official non-residents, while it is gratifying to see how much can be achieved by properly applied and very public pressure, there is no warranted confidence that other concerns and interests will not, as in the past, preempt concern for the retarded.

Other provisions must be made.

III

That branch of our state government charged with responsibility for those of its citizens characterized as mentally retarded is the Department of Mental Health. The Department is a creature of statute, by legislation incorporated into the General Laws of the Commonwealth in

G. L. Chapter 19, which contains 30 sections. From the introductory section (Sec. 1) we are given the following:

> The Department shall take cognizance of all matters affecting the mental health of the citizens of the commonwealth and the welfare of the mentally retarded. . . . The Department shall have supervision and control of all public facilities for mentally ill or mentally retarded persons and of all persons received into any of said facilities and shall have general supervision of all private facilities for such persons. . . . The Department shall have supervision and control of all hospital, state schools, . . . and other mental health facilities.

Sections 16 and 21 embody 1966 legislation creating a mental health advisory council consisting of thirty persons, and a twenty-one member community mental health and retardation area board for each of the departmental regions of the state extablished pursuant to Section 18.

The council is made up of gubanatorial appointees who serve without compensation, is composed of a mixture of area board members and members of designated socially oriented professions, and whose function, suggested by its name, is to "advise . . . participate with the department . . . to obtain the views . . . to review annual plans . . . make recommendations" and in short to be and function

as executive adjunct of the commissioner of the department and to have power solely by his grace. (Appendix C incorporates G. L. Chapter 19, Section 16)

Similarly, the area boards are constituted with specified professional heterogeneity of its members who also serve without compensation and "shall be an agency of the commonwealth, and shall serve in the department." (Appendix D incorporates G. L. Chapter 19, Section 21) None of its members may be employees of the department. Selection of area board members is, notwithstanding advisory contributions of others, strictly the act of the commissioner of the department. The duties and powers of the area board (detailed in Section 23) no more effectively constrain, nor are its decisions and recommendations more binding upon, the commissioner than in the case of the council. The commissioner remains the ultimate and sole repository of all the power and authority legislatively conferred by Chapter 19.

The commissioner of the department is appointed by the governor and must be a psychiatrist. He "shall have had substantial administrative experience in mental health facilities or agencies. . . . (and) may appoint and . . . remove such agents and subordinate officers as he may deem necessary, and may establish such divisions in the department as he deems appropriate from time to time."

(Section 5)

Section 9 authorizes the commissioner to appoint full time legal counsel "to serve as legal counsel to the commissioner."

In addition to the commissioner and the assistant commissioner for mental retardation, Section 19 also establishes the position of regional administrator for mental retardation, who is charged with performing such duties as law and the commissioner may assign. His jurisdiction is limited to one of the six regions set up on the basis of geographic and demographic factors.

Section 12 sets up an advisory council for "the planning, construction, operation or utilization of facilitiés for the mentally retarded, . . ." the commissioner being a member ex officio. The advisory council is charged with consulting and advising the department relative to community needs for such facilities and to the development of programs for their realization.

Section 14 states that at state schools for the mentally retarded the facility "shall establish and maintain, subject to appropriation, research and demonstration projects in vocational rehabilitation in cooperation with the federal vocation rehabilitation program." (emphasis added) The commissioner and subordinate departmental officials have no authority to disregard this legislative mandate,

other than failure of appropriation; and all investigations to date indicate that no such program has been implemented at Belchertown.

The Attorney General of Massachusetts, in a published opinion dated March 10, 1965 (page 237), speaking of the power of the several boards established by or referred to in Chapter 19 (area boards, boards of trustees of the respective facilities, etc.) stated that none of them have the authority to compel any action by the commissioner, but only "to suggest, to recommend, to report and encourage."

The commissioner, under Section 14C, has authority to appoint to the position of Superintendent of the State Schools, and provides only that the appointee be qualified professionally according to specifications detailed by the section.

Section 14B establishes the board of trustees for the individual facility, spelling out the functions of the board in terms of being the legal entity, "a corporation for the purpose of taking and holding "the real estate and personal property given to the institution of which they are trustees. The board of trustees is under the exclusive supervision and control of the commissioner.[9] Nevertheless, it is the board of trustees more than any other branch of the department (or the state) that is charged with watchdog duties: Section 14D states

that the seven member board shall meet at least three times per year, visit and familiarize themselves with the institution, make suggestions to the department to improve the effective, economical and humane administration of the institution, shall have free access to all books, records, and accounts, and at all times shall have free access to the buildings and premises of the facility. Section 14D(e) even provides: "They may at any time cause the superintendent or any officer or employee of their respective public institution to appear before them and answer any questions or produce any books or documents relative to the public institution." In operation this arrangement amounts to self policing in an area where (as is so typically the case with governmental regulatory agencies) experience demonstrates that self policing is unjustifiable and unwarranted. It has not been responsibly achieved in the past, and there is no evidence to believe that these functions can be performed by anybody or any office not having full independence of the department of Mental Health or other state agency with which the department might be expected to have a natural alignment of perspective.

The enabling portion of Chapter 19 appears in Section 26: "The department may from time to time adopt such rules and regulations as it deems necessary to carry out

the provisions of this chapter, and may amend or repeal the same." Characteristically, enabling legislation does not go into detail, but rather sets out the minimum and maximum bounds of proposed activity, establishes general objectives, reposes power and authorizes continuing, amendatory revision. Consequently it is in the body of regulations issued in pursuance of Section 26 that we discover how (in detail but on paper) the department and its subordinated units are actually supposed to function under law.

The department nevertheless must function within the broad bounds of applicable legislative and constitutional provisions, the most notable legislative provision being Chapter 888 of the Laws of the Commonwealth of 1970, embodied into the General Laws as G. L. Chapter 123. The law is commonly called the Massachusetts Mental Health Act.

The Mental Health Act, just as Chapter 19 of the General Laws, enables the department to issue regulations establishing procedures and standards for "the reception, examination, treatment, restraint, transfer and discharge of . . . mentally retarded persons in departmental facilities." (Section 2)

It would at this point be appropriate to restate what is meant by the terms "mental illness" and "mental retardation." Regulation 1 of the DEPARTMENT OF MENTAL HEALTH

REGULATIONS defines (for purposes of involuntary commitment) "mental illness" as a "substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life." Alcoholism is excluded for purposes of involuntary commitment, but available as a basis for voluntary commitment. Regulation 2 of the REGULATIONS defines "mental retardation" as "inadequately developed or impaired intelligence as determined by clinical authorities as described in the regulations hereunder, and which substantially limits a person's ability to function in the community." The regulation correlates different levels of mental retardation with the degree of deficiency in general intellectual functioning and adaptive behavior. It also states that a mentally retarded person may be considered to be mentally ill, as defined in the REGULATIONS, provided that no such person shall be considered to be mentally ill solely by virtue of his mental retardation.

In this paper I will limit my attention to the area of mental retardation, leaving aside the unique difficulties presented by any consideration of mental illness.

As noted above, the Act eliminates involuntary commitment of a mentally retarded person to a state facility. If a person is at least 16 years of age he may apply for

voluntary admission, and a parent or legal guardian may apply on behalf of a person under the age of majority (18) or a person under guardianship. Any person so admitted "shall be free to leave such facility at any time," or may be freely withdrawn by the parent or guardian, upon three days notice to the superintendent of the facility.[10]

The REGULATIONS further provide that an applicant for conditional voluntary admission must be informed of the three day notice provision established by Section 11 of the Act (a precondition of voluntary withdrawal from the facility), and that he "be given an opportunity to inspect and visit the living quarters and wards of the facility if he elects to do so prior to admission," and that he "be informed of the civil rights which he retains after admissionn to the facility, as established in Chapter 123, Sections 23 and 25."[11]

Nothing in the Act or the REGULATIONS prescribes the manner or circumstances of imparting civil rights information, but what is prescribed to be imparted is Section 23 and Section 25 of the Act. It is clear, however, that elsewhere than the two cited sections the Act provides for the civil rights of the facility resident, and limitation to these sections alone is of questionable adequacy. Further, it is inappropriate to consider only the rights retained, since law and justice would seem to require that

all rights otherwise possessed by the individual are retained with certain stated and limited exceptions. These exceptions should perhaps be discussed; and a right not discussed or stated to be limitedly denied should be presumed to be retained, absent a showing of its justified denial on any occasion.

The 'civil rights' of a mentally retarded person specifically referred to in Sec. 23 & 25 include:

1 - To be provided with stationery and postage in reasonable amounts.

2 - To have free and unrestricted mailing privileges.

3 - To be visited at all reasonable times by anyone unless he is ill or incapacitated and the superintendent determines that such a visit would be unreasonable.

4 - To wear his own clothes.

5 - To keep and use his own personal possessions including toilet articles.

6 - To keep and be allowed to spend a reasonable sum of his own money for canteen expenses and small purchases.

7 - To have access to individual storage space for his private use.

8 - To have reasonable access to telephones to make and receive confidential calls.

9 - To refuse shock treatment.

10 - To refuse lobotomy.

11 - Other rights specified in the regulations of the department.

12 - Other rights guaranteed by law. (emphasis added)

13 - No person, solely by reason of his admission or commitment in any capacity to the treatment or care of the department, shall be deemed to be incompetent to manage his (own) affairs,

14 - to contract,

15 - to hold professional or occupational or vehicle operators licenses, or

16 - to make a will.

Departmental regulations shall not restrict the rights listed above as 13 through 16; but according to Section 23, the rights listed above as 1 through 12 may be denied for good cause by the superintendent or his designee and a statement of the reasons for any such denial entered in the treatment record of such person.

It is incredible that any of the individual's "other rights guaranteed by law" may so easily and so autocratically be denied with what amounts to lip service to due process in the procedural formalities which place a very slight burden on the superintendent. In practice, the superintendent's judgment or decision based on that judgment is not usually challenged; or if it is challenged it is only with great loss of time, effort, money and ultimately the

right itself that is sought to be preserved in any such effort. No panel or board of review is established to monitor or pronounce upon the just and constitutional exercise of this awesome authority given to the superintendent; and it is integral to the thesis of this paper that this function is essential to the requirements of justice, and ought to be legislatively mandated to the independent office of counsel for the retarded, or its equivalent.

Regulation MR 102 (which is based upon Chapter 19, Sections 23, 25 and 29) addresses the legal and civil rights of retarded persons with the following language:

> (1) The greatest care shall be taken to protect the civil and legal rights of all retarded persons. All reasonable care shall be given to insuring that residents of all institutions for the mentally retarded are protected, have humane treatment and care, and are allowed such privileges as are their right, with due regard for the welfare of the general public, the limitations imposed by the resident's disability and the rights of other individuals.
>
> (2) No resident of an institution for the mentally retarded shall be discriminated against on the basis of race, creed, sex, or age. Racial segregation shall not be practiced in institutions for

the retarded.

(3) (This section substantially restates the rights listed above as 1 through 12)

(4) The legal and civil rights of the retarded shall include the right to privacy and protection from commercial exploitation; (a) no resident shall be photographed, interviewed, or exposed to public view without the written consent of his custodian and his own consent, if obtainable, and (b) no resident shall be identified publicly by name or address without the written consent of his custodian and his own consent, if obtainable.

(5) The right of worship shall be accorded to all residents who desire it. Provisions for religious worship shall be made available to residents and, as nearly as possible and practical, provisions for religious activities for persons of differing creeds shall be non-discriminatory; however, no individual shall be coerced into engaging in any religious activities.

In notable addition to the above, Section 21 of the Act limits the use of restraint of any kind "which is unnecessary for the safety of the person being transported or other persons likely to come in contact with him." And in the case of residents not being transported, restraint may be

used "only in cases of emergency such as the occurrence of, or serious threat of, extreme violence, personal injury, or attempted suicide." Section 29 of the Act makes it mandatory on the department "in cooperation with other state departments and agencies . . . (to) cause to be given to persons under its care instruction and education as may be appropriate for such persons to undertake, especially persons who are unable to engage in programs for patient-trainees." In addition to this very important right to be educated, the Sections also mandate the establishment of work programs with approved pay scales for participating residents. Section 31 gives the resident the right to obtain free medicine and drugs, with certain reasonable restrictions.

No effort will be made to catalogue all the rights, civil or legal, of the mentally retarded resident of a state facility. It would be a list of enormous length, and would perhaps be nothing more or less than a line by line transcription of the Act and other relevant law, every provision of which might be construed as either directly or indirectly granting to the individual resident a right in the sense of a standing to sue for its enforcement .

This legislation in conjunction with the rules and regulations issued thereunder has established a classification of persons within the jurisdiction of the Common-

wealth of Massachusetts according to their qualities of "inadequately developed or impaired intelligence." This scheme of classification is to correspond to a differentiation of persons in fact along the same lines, and there must be something near consensus that special legislation for this class of persons is appropriate. What must be assumed for purposes of this paper is that no creditable challenge can be levelled against the enactment of legislation simpliciter dealing with this class of persons; what remains as a matter of concern is whether the legislation ought to be in its existing form or whether there ought to be changes in the form of the legislation such that nothing directly therein prescribed or authorized runs afoul of more fundamental concerns of our society. Notable in this regard is the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution, treatment of which will be undertaken at length in this paper. In addition to the equal protection clause, it would not be inappropriate to investigate the applicability of the due process clause, civil rights legislation, and innumerable other legal and moral components of our social structure which, in direct conflict with a given provision of legislation for the retarded, would properly be given preference.

Some preliminary considerations are in order. First, with regard to the voluntariness of the admission, it must

be observed that within the range of those whose mental condition qualifies them for admission a wide spectrum exists ranging from those whose condition is near the borderline of normalcy all the way to those whom the state terms "profoundly retarded." The term "profoundly retarded" is defined in Regulation MR 116 as indicating that the individual designated is "functioning at least 5 standard deviations below the mean of standardized scales (e. g., below 20 IQ on the Stanford-Binet Scale), is very markedly deficient in self help, social and communication skills, and will probably always need protective care." Levels of mental retardation are described in terms of the degree of deficiency in general intellectual functioning and adaptive behavior as determined by clinical authorities within or without the department, as elsewhere detailed in the Regulations. Typically, one or several buildings at a facility will house persons of this segment of the resident population, and such buildings demonstrate to the uninitiated samples of the worst of the conditions to which earlier reference was made. The scope of this paper does not permit in depth survey of these conditions; but what must now be noted in conjunction with voluntary admissions is that only by undue extension in meaning can the term 'voluntary' be appropriately used to such persons. The options available to the profoundly

retarded person and his family are realistically limited. To speak of a profoundly retarded person admitting himself is absurd. His family's opticns include keeping him at home, at great emotional and financial strain (if physically it can be accomplished at all) normally requiring continuous supervision and not untypically being the prelude to the disintegration of the family itself. Or the family might place the person in highly priced private facilities where standards of care and treatment are accorded to the degree of financial accountability of the family. This simply is not available to the average candidate for admission to the state facility. There is, moveover, a higher statistical probability that persons in this classification come from the lower social segments, and least of all can afford alternatives to state facilities. When recourse is had by state personnel to the argument, in defense of charges of misfeasance or malfeasance of legal responsibility, that the individual is 'free to leave whenever he may choose,' the words ring hollow as much as in the statement that the rich man and the poor man are equally 'free' to sleep on the park bench. When circumstances inhibit the adoption of any alternative the use of the term 'freedom' in describing the situation must be qualified accordingly; and in its application to the profoundly retarded member of a poor family the term must be understood to coexist with physical

unfreedom to adopt any alternative to public institutionalization. So qualified, its use in argument is thoroughly disingenuous.

Of concern to the person whom legislation places within a given classification for purposes of that law's operation is not only the substance of the law in question but also its administration. It is to this two pronged question that the equal protection clause of the Fourteenth amendment may be fruitfully applied. For just as a law which arbitrarily classifies for purposes of dispensing benefits or imposing burdens is 'unconstitutional' within the meaning of "equal protection of the laws," so also are a person's rights, guaranteed by this clause, infringed by the unequal administration of otherwise equal laws. The positive laws of the Commonwealth of Massachusetts dealing with the mentally retarded, while nevertheless exposed to the criticisms mentioned above, are perhaps among the more enlightened laws in the country. What more directly touch upon the lives of the residents of the state facility, however, are the acts and decisions of administrative personnel. This is the area where charges of unequal treatment typically arise, and to which the general thrust of this paper is directed.

By the character of the legislation and even the name of the law itself, the Massachusetts Mental Health Act

(together with other related laws such as G. L. Chapter 19) singles out a segment of society as being within the scope of its application, conforming to what legislative draftsmen saw to be a singling out by nature of a segment of that society according to its mental or intellectual characteristics. These characteristics were seen to be at odds with those we have taken to be standard or above standard. Not only is this not violative of our Federal Constitution, but rather we would expect a morally sensitive government to make special provision for those with special needs on the theory, I imagine, that a just government should legislate for each according to his needs.

Notwithstanding the lofty idealism of the draftsmen, statutes and executory regulation fall to less farsighted agents for implementation; and it is in this context that class legislation (of which the Act is typical) can lead to results which are violative of the equal protection clause. When in a given situation it is observed that discrimination is occurring which is seen to be violative of constitutional rights, it must first be determined whether the law that is being implemented is unconstitutional or whether an equal law is being unequally administered. To this end it is proper to survey judicial decisions which purport to construe the notion of 'equality' within its meaning in the equal protection clause.

IV

All persons born or naturalized in the United States are United States citizens and citizens of the state in which they reside; and a state is forbidden to deny any person within its jurisdiction the equal protection of the laws. This is as expressed in the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The phrase 'equal protection of the laws' is virtually mute in guiding the conduct of the states. Cases and controversies resolved before the courts of the states and the courts of the United States have, however, created a pattern of meaning for the phrase, the most interesting for our purposes being the decisions of the courts of Massachusetts. The courts of a state, just as much as its administrative agencies, are the 'state;' and in the statements made in a court's decision we find authoritative commitment to standards which for all other purposes we may legitimately call upon the state to acknowledge as admissions and apply accordingly.

A state in its laws and in its actions may not prescribe or do anything which has the effect of denying to any individual or class of individuals the equal protection

of the laws.[12] Nowhere has the phrase 'equal protection of the laws' been precisely defined,[13] and moreover it is not even susceptible of exact delimitation.[14] No generalization can be laid down that is all-inclusive,[15] rather each case must be decided as it arises, on its own facts.[16]

The guarantee of the equal protection clause has, however, been held to mean, among other things, that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes of persons in 'like circumstances,[17] in their 'life,' 'liberty,' 'property,' and 'pursuit of happiness.'[18] The rights of all persons must rest upon the same rule under the same circumstances.[19]

Most fundamentally stated, the equal protection clause is not limited to state's acts in 'protecting' its citizens; rather it requires that all persons shall be treated alike under like circumstances and conditions, both in privileges conferred and in the liabilities and deprivations imposed. The highest courts of the Commonwealth of Massachusetts, in a long line of cases, have frequently and consistantly subscribed to this principle, elsewhere enunciated at length by the United States Supreme Court.[20] For the state to favor one class but not another similarly situated is to deprive the class of those not so favored. Precision is crucial in characterization of situation, cir-

cumstances or conditions as being 'similar,' and further in the determination that the similarities are relevant, or appropriate, to the purposes of the legislation (or action of the state) under consideration. For the unarticulated concern of the courts which demands relevance to statutory purposes is that given any two articles or objects in the universe, there is some (however small) set of characteristics the possession of which by both of the two renders them 'similar' in circumstances. Conversely, dissimilarity may be established via the same analysis. Classification as 'mentally retarded' for purposes of admission to state institutions classes together all those persons falling below a given level of deficiency in general intellectual functioning and adaptive behavior, undifferentiating the degrees of retardation of the persons within that classification. But identical treatment of a profoundly retarded person and a borderline retarded person cannot be justified simply by pointing out that they are both retarded, but must now somehow take into account and be relevant to the individualizing characteristics of the persons to whom treatment will directed and to the nature of the treatment itself. The departmental regulations acknowledge this in Regulation MR 116 by establishing, for administrative purposes, five levels of retardation: profound, severe, moderate, mild, and borderline. It is

equally clear that in many respects other than those entailed in a person's being retarded, the institutionalized mentally retarded person in a state facility has the same legal posture as all other state citizens with regard to certain legal rights which are not conditioned upon factors of intellectual functioning or adaptive behavior. Many of these are in fact codified in the Mental Health Act and the departmental regulations. It is too frequently the case that these factors which are not relevant to a given law are precisely the factors which prevent a facility resident from fully appreciating the extent to which the treatment accorded to him has the effect of disenfranchising him from his entitled participation in societal functions and privileges to the unhindered extent of his proven or potential ability.

Central to our consideration is the relationship between the observable physical and mental differences and the objects of the classification. Reasonable, non-arbitrary classification requires that different treatment be based upon substantive differences having a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved. In this regard, the courts of Massachusetts have held that the terms 'arbitrary' and 'discriminatory' have the same meaning.

'Invidious discrimination' on any fact situation is forbidden, but the constitutional guarantee does not require identical treatment for all persons without consideration of the difference in relevant circumstances.[21] It might also be pointed out here that in making out a case of a violation of the equal protection clause we have also in all liklihood made out a case of a violation of the due process clause as well, and probably other state and federal civil rights laws. The scope of our present inquiry will intentionally be limited to the equal protection clause.

The Fourteenth Amendment is a charge upon the legislative and other acts of 'a state' - not private individuals within the state except in so far as they act in the official capacity of representative of the state itself. It is state action that must be assessed as affording equal or unequal protection of the laws within the scope of the equal protection clause. The federal government itself is not bound by the equal protection clause.[22] The present inquiry has discussed the Massachusetts Department of Mental Health, an agency of the state, but not itself the state. Are the acts, then, of the department the acts of the state? In an area of the law so technical as this the question is not frivolous. Decisions, however, uniformly construe the clause to be applicable to all the

departments of state government, whether legislative, executive, or judicial,[23] and to all the instrumentalities by which a state acts.[24] It can thus be taken as well founded that the acts of the Department of Mental Health and its personnel and agents are the acts of the state for constitutional purposes.

Acts of the department thought to be violative of the equal protection clause present us with the issue of what to do about it. Cases have indicated that the Fourteenth Amendment is not remedial or punitive, but to the extent possible the action in question will be set aside. The violation may be cited as a basis for a court of equity jurisdiction to grant an injunction against the continuing violation. It cannot be made the basis for damages, since it is presumed that the person affected will seek redress by conventional legal remedies.[25]

As earlier mentioned, the Mental Health Act's provisions relative to admission and discharge are enlightened and reasonable in comparison to other jurisdictions. An individual mentally retarded resident is virtually free at any time to discharge himself. Some have seized upon this point to argue that treatment thought to be discriminatory is really not discrimination, for the reason that any classificatory statute, regulation or act of the state under which those included and those excluded from the class

in question are free to place themselves in the same position as the other is, if discrimination at all, a purely academic form of discrimination. For their authority they cite cases in line with Hunter vs. Colfax Consol. Coal Co., 175 Iowa 245, 154 NW 1037, 157 NW 145. For reasons mentioned earlier such liberty of class inclusion, for the retarded resident, is illusory. His choice is most definitely not to remain in the institution and endure, or to discharge himself and avoid, an arbitrary act or treatment; rather the choice is actually to remain and endure one bit of bad treatment or discharge himself and perish in a society whose demands are beyond his ability. Moreover, the argument based on the free interchangeability of class inclusion and class exclusion limps in that those who register higher than the designated level in the intellectual screening process are simply and absolutely not free to place themselves in the position of the resident toward whom the treatment in question is directed.

Those who argue in this way (the number of whom has fallen off markedly in recent years) either practice a form of self-deception or more probably indulge themselves in outright hypocracy.

The nature of legislation is such that classification is entailed. Statutes and regulations characteristically spell out the scope of their operation, differentiating

those within their scope of operation from those outside that scope.[26] To be classified is to be made or to be recognized as unequal - and a showing of inequality under the law or act in question is not enough to have established its unconstitutionality under the equal protection clause. Classification of persons or things must be 'reasonable for the purposes of the legislation,'[27] must be 'based on proper and justifiable distinctions, considering the purpose of the law,'[28] 'clearly not arbitrary,'[29] and 'must not be a subterfuge to shield one class or unduly burden another class, or to oppress unlawfully in its administration.'[30]

It is in the concrete framework of the administration of the Mental Health Act and related law that we most frequently encounter instances of unconstitutional treatment of the residents. The extension of the equal protection clause to acts, as well as legislation, is of vital importance. What is proscribed by the equal protection clause is discrimination, whether it be embodied in statutory form or in that statute's administration. Discriminatory administration of the law is unconstitutional under this clause.[31] It has been held that the validity of a statute under the equal protection clause often depends on how it is construed and applied.[32] A provision (of a law) not objectionable on its face may be

adjudged unconstitutional because of its effect in actual operation.[33] The Fourteenth Amendment prohibits the unequal enforcement of valid laws as well as the enforcement of invalid laws.[34]

Decisions may be cited in point that actual discrimination arising from the 'administering of a law' is as potent in creating a denial of equality of rights as a discrimination made by a law.[35] Depending on the nature of the law involved, it is not necessary that the discovery of the elements of unconstitutionality among its provisons requires the voiding of the entire law; rather, the unconstitutional elements may be eliminated from the law, and if what remains is a viable law, fulfilling the purposes for which the law was originally enacted, it will to that extent be retained in force. When to a serious degree legislation inadequately insures against abusive administration, it is arguable that unconstitutionality inheres in this insufficiency. To render the law constitutional, we do not in this case need to eliminate provisions, but to add them; or in lieu of further provisions of the particular legislation in question, other legislation designed to make up for the insufficiency of the challenged law (for example, House Bill 2690 supplementing the existing mental health statutes, or its substantial equivalent). Other factors must be considered in this regard such as the

nature of the interests adversely affected. Insufficiency in administrative provisions in legislation dealing with the governance of lives of the mentally retarded must clearly be less tolerable than insufficiency of equal degree in legislation dealing with state highway contracts, with the establishment of a commission to set official holidays, and so on.[37 & 36]

An improper legislative purpose might be the basis for charging that a law is in violation of the equal protections clause; but no one contends that the state's mental laws are contaminated with improper purpose or motive. Nevertheless a long line of cases point out that in addition to a scrutiny of the legislative purpose, regard should be given to the means provided for its administration.[38] Where administrative powers are conferred which permit unjust discrimination between persons otherwise in relevant and similar circumstances, the courts have found there to have been violations of the equal protection clause.[39]

From the foregoing we might be seen to have reached the absurd position of having established all executory legislation unconstitutional by being violative of the equal protection clause. We simply know that our highest appellate courts would never seriously entertain argument citing the above cases as controlling precedent in any

case aimed at the absurd conclusion just mentioned. Instead, when cases come to the court in that posture, they impose the burden on the one making the allegation of unconstitutionality (founded on insufficiency of administrative procedures) to establish facts amounting to an "intentional violation of the essential principle of practical uniformity."[40] This has on occasion been held to mean a "fixed and continuous policy of unjust discrimination."[41]

It is important here to note that we must not only be concerned with state laws dealing directly with the mentally retarded, such as the Mental Health Act, but also all other legislation which designates the scope of its operation (or is so unequally administered) so as to exclude mentally retarded persons, either expressly or (more probably) by implication, without sustaining the burden of demonstrating some relevant difference between the class included and the class of the retarded. Legislation cannot be judged by theoretical standards, but must be tested in the concrete conditions which induced it.[42] Massachusetts courts have in fact held that in passing on the constitutionality of a statute it is important to examine into its effect in operation and the results it is intended to accomplish.[43]

The courts approach any consideration of the constitu-

tionality of a law's formulation or administration with a tendency to impose a very high burden of persuasion on that side of a case or controversy arguing for unconstitutionality. What amounts to a presumption of constitutionality is often supported by recourse to vague and confusing concepts. The Massachusetts courts have held that "a statutory discrimination will not be set aside as the denial of the equal protection of the laws if any state of facts reasonably may be conceived to justify it."[44] (emphasis added) The courts also point out that equal protection of the laws is something which submits to the consideration of degree. The exercise of state police power to classify has been held to admit of a wide scope of discretion and the Fourteenth Amendment may be called upon to avoid what is classified or done only when "it is without any reasonable basis and therefore purely arbitrary."[45] Illustratively there is such language as "practical equality is constitutional equality,"[46] and as stating that the term 'equal' (as used in statutes) is construed to mean "substantially equal and not identical."[47] Arbitrariness is dispelled on a showing of proportionality such that "in the absence of relations or conditions requiring a different result, equity (equal protection of the laws) will treat all members of a class as on an equal footing, and will distribute benefits or

impose burdens and charges equally or in proportion to the several interests, and without preferences."[48] And again, on proportionality, the equal protection of the laws with respect to taxation purposes does "not require identity of treatment, but only (1) that classification rest on real and not feigned differences, (2) that the distinctions have some relevance to the purpose for which the classification is made, and (3) that the different treatments be not so disparate relative to differences in classification as to be wholly arbitrary."[49]

In further construction of the term "equal" and the phrase "equal protection of the law" the courts have had recourse to obscurities such as: "A classification having some reasonable basis does not offend against the equal protection clause because it is not made with mathematical nicety or because in practice it results in some inequality."[50] (emphasis added)

One of the clearest judicial statements made concerning the meaning of the clause was made by a Texas court in the context of a tax suit: "The equal protection clause of the State and Federal Constitutions means that the rights of all persons must rest on the same rule under similar circumstances, and apply to all the powers of the state which can affect the individual, including the power of taxation." [51] (emphasis added)

The foregoing has been an abbreviated effort to survey court decisions in order to abstract therefrom the essential ingredients of the notion of equality as it pertains to the equal protection clause of the Fourteenth Amendment. It is evident that such judicial statements parallel Perelman's definition for 'formal justice,' of which more will be said later. These decisions have not been formulated along lines of philosophical analysis of the concepts that come into play in the controversy before the court: but in effect and without having systematically articulated the reasoning process employed by the deciding judge, the decisions focus in on the same points as Perelman in his more in depth consideration of the subject.

Society has achieved virtual consensus in calling for justice for the mentally retarded (no less than for us all). So long, however, as justice remains an abstraction it can comfortably be championed by all segments of society. Confusion and discord replace emotive unity when we set out to secure justice in the concrete. While no one calls publicly for unjust treatment or policies for the mentally retarded, perhaps one who did so might be seen as possessing a certain redeeming candor and honesty not characterizing another who professes to secure justice to the retarded in ways that, upon analysis, are seen to

lead more to its denial.

Those coming into official professional contact with the institutionalized mentally retarded person undertake a task of enormous difficulty and complexity; it is thus not surprising that disagreements should arise concerning alternative treatments or policies of treatment. The fact alone of disagreement more likely evidences mere difference of honest opinion regarding the means of achieving a commonly held professional objective, rather than disparate views of the objective itself. But it is precisely because justice has been viewed abstractly and because little if any uniformity exists with regard to what is captured within the term's scope and meaning that it becomes necessary to develop a view of justice within the concrete context of the class in question.

I believe that outright bad faith is not so commonly encountered in this inquiry as much as simple neglect, legislatively created and administratively sustained. And it is beyond the scope of this paper to go into the question of motives and personal psychologies of persons in positions of administrative power. But to the extent that we can rectify the continuing neglect through amendatory legislation, and to the extent that such an effort is itself supported by a proper understanding of the notions of justice and equality, specifically within its meaning

in the context of the equal protection clause of the Fourteenth Amendment, then accordingly a discussion of these notions is a proper component of this inquiry, and an apt premise to the thesis that H. B. 2690 or its substantial equivalent ought to be enacted into law.

V

In his work The Idea of Justice and the Problem of Argument, Ch. Perelman analyses the concept of justice as not simple, but as complex, containing a constant formal element and a varying material element. Formal justice is then initially defined as the formal principle requiring one to treat the like alike, while the variable material element provides the criteria according to which a particular respect of likeness is specified. The aforementioned consensus thus appears to reduce to a popular endorsement of formal justice. Disagreement arises characteristically in the determination of criteria, the selection or specification of characteristics which in turn determine 'likeness,' these to be known as 'esential characteristics.' He talks of persons forming (for a given purpose) 'essential categories.' The disagreements which arise among departmental professionals may thus be seen as examples of conflicting concrete formulae of justice, dis-

agreements relative to essential characteristics and essential categories.

Our survey of judicial decisions has revealed that the holdings or dicta in cases discussing the notion of equality in the constituional context are replete with endorsements of formal justice, leaving its application to the facts of the given cases as the court's contribution to a determination of concrete justice. The decisions, being mixtures of law and fact, become part of the body of precedent which (to more or less degree depending on jurisdictional, factual, and other relevant considerations) give support to the slogan "stare decisis."

"Stare decisis" is not, however, the ultimate virtue in these considerations. Justice William O. Douglas, in an interview on the CBS Evening News of September 6, 1972, stated that "in constitutional matters, 'stare decisis' has least standing." We should feel entirely free to choose not to follow precedent in the decisions relating to the treatment of the mentally retarded, nor to follow precedented treatment itself, having sustained, I believe, the burden of persuasion that such treatment offends anybody's pre-analytic sense of justice. For reasons that are part of the problem itself, there has been no direct judicial consideration of the offending conditions until recent days, and even then the judicial resolution was, as earlier indi-

cated, based on compromise and settlement and falls short of becoming a constructive contribution to precedent.

The public call for justice for the retarded forces us to a metajudicial analysis of the relation of equality, for use in relating mentally retarded persons to other both within and without the category of the retarded, as defined in the Mental Health Act. Perelman compares and contrasts the relation of equality with the relation of identity in the following way: A and B are equal if they are interchangeable, if they share properties, and if the same truth value characterizes all propositions concerning each, while A and B are identical if they designate the same object.[52] Justice will clearly employ the relation of equality as distinguished above from identity, and if further understood to be broadly enough construed to encompass persons who, though equal in some respects, are definitely not equal in other respects. How then is a rule of justice than mandates equal treatment for equal beings to deal with beings that strictly viewed are neither identical nor equal? He elsewhere states that typically complaints are registered against alleged unjust treatment in that a person is not being treated like another, or if he is being treated in the same way, that he should be treated differently, or better.[53] With the relation of identity ruled out of consideration, differences of all sorts

are specified in support of the complaint; and it is precisely that differences that ought not to have exercised any influence on the decision (or law, or policy, or act, etc.) did so, or that differences that ought to have operated in one's favor were without effect. "Certain elements, regarded as essential, and nothing else, ought to have been taken into consideration."[54] Failure of reference to relevant factors or reference to irrelevant factors thus renders a decision, for example, unjust. "Injustice, it seems, does not result here from the unequal treatment of identical persons, but the unequal treatment of different persons the differences between whom were irrelevant in the instance."[55] Conversely, the equal treatment of persons who, according to the criteria in question, ought to have been assigned to different categories for which unequal treatment was provided, is also an instance of injustice.

The rule of (formal) justice is in this connection restated as requiring that those who are essentially similar (i.e., having no essential differences) should be treated alike, neither specifying when they are essentially similar nor how, if essentially similar, they are then to be treated. Specification of essential similarity is the function of 'the rule,' whether the rule be expressed in positive law, tradition, administrative regulation or

the like. If the rule specifies A and B as essentially similar then its operation to be formally just must mete out equal treatment.

The notion of "static justice" has had a history of faithful service in places like Belchertown, providing institutional administrations a defense to charges of unjust treatment of residents. When a rule of the facility was challenged as being unjust, it would be humbly submitted in response that because the rule operated on all residents alike it was therefore not unjust. Static justice calls for the observance of an established rule without regard to the rule's content. Conformity to precedent is in this context seen to be not without its hazards; that while being an appropriate factor (or even necessary condition) of rational decision making it can never be its only ingredient (or sufficient condition). Historical perspective reveals that there has often been consensus favoring treatment which was consistently followed at times past but which is now held to be unjust by most.

Rules, acts and men are appropriately characterized as just or unjust. An act is said to be just if it is in conformity with the correct application of a rule, suggesting the patriotic assertion that we are a country of laws and not of men. In the determination of the justness of an act, Perelman points out that we must first agree upon

the appropriate applicable rule, and must then further agree upon its interpretation.[56] What is not in question for this determination is the justness of the rule itself. The process is rational and deductive. It has been pointed out that decisions rendered and actions performed according to rule or precedent satisfy; that it is natural and rational that a decision or action in one case be essentially the same decision or action for other similar cases. Change demands justification.

Persons are said to be just or unjust simply as a function of the justice or injustice of their acts, presenting us with none of the conceptual difficulty that we encounter in the determination of the justice or the injustice of the rule. Is the rule itself just? It can at least be said with confidence and as a necessary condition thereof that a just rule is not arbitrary; it must have some basis in reason, "even if that basis does not command unanimous agreement."[57] Laws (even otherwise good laws, per se) imposed as a mere demonstration of the power and putative authority of those imposing them are paradigmatically arbitrary, and therefore unjust. Reference to "pre-existing reality or to a rational system designed with a view to giving effects to an ideal end"[58] are cited by Perelman as taking the rule out of the realm of the arbitrary.

Where conflicts are encountered in simultaneous application of several rules, recourse must be had either to a rule of a higher order in which the several rules may be reconciled as compatible or reconcilable variables, or else to an equity forum wherein a judge will divert the technical operation of a rule to avoid clear injustice in the immediate and perhaps unanticipated fact situation presented to the court. Equity is thus seen as taking the rough edges off the mechanical operation of the law; but if equity too frequently supercedes law, then in the absence of a change in the law, the law itself is weekened. Notwithstanding the merit of such statements as: "The passage to and fro between certainty and equity, between equity and certainty, is the very life of jurisprudence and determines more particularly the idea we form of the role in the legal system of the supreme court,"[59] rules should by and large be followed and should be just.

Rules of concrete justice are founded in what Perelman originally felt to be the arbitrarily chosen values of the rule-giver; and while the determination of whether a rule of concrete justice flowed logically from the given value was susceptible to deductive reasoning, nevertheless all that could be done, he thought, with regard to the resolution of disagreements concerning competing values was to note the fact that differences existed.

As Hart notes in his introduction to Perelman's book disagreements of this order concerning the characteristics to be taken as essential in the application of formal justice result in different concrete formulae of justice. If a shared and wider moral principle can be brought to light the disagreement might end there; but usually this is not the case. Perelman progresses from a position holding that reason has no part to play in disagreements over values to a position holding that some degree of reasoning about values is attainable in techniques of "actual argument." No argument takes place in a void: "when the disputants approach each other they already owe allegiance to certain common principles of both thought and conduct and are eager to classify the instant case under familiar traditional general rubrics and then treat it as other cases so classified in the past have been treated. Argument most often proceeds by linking a disputed thesis to precedents already acknowledged, and their use in this way is another application of the formal principle that like cases be treated alike."[60]

As the values of a society shift and change and develop so also do its concrete formulae of justice; and Perelman analogizes this to the shifting classification of natural phenomena for inclusion in ever more embracing scientific laws. The inductive procedures of science in

reformulating statements of natural law become the model: just as scientific laws are reformulated to take into account observations of phenomena not in technical conformity with earlier statements of the law, so to some extent do deontic positions yield to reformulation in the process of resolving disagrements at the normative base of justice.

The equal protection clause of the Fourteenth Amendment is essentially a prescription for formal justice, calling for like treatment for persons forming part of the same essential category. Positive law, such at the Massachusetts Mental Health Act and the regulations issued thereunder, establishes the categories, without which the administration of justice is quite impossible.[61] A state which violates a rule of concrete justice which it has itself set is, on that occasion, unjust. The state has made a determination of essential categories with regard to the mentally retarded, implying to some extent the value system of that society as reflected in legislative action and executive performance. While the matter of admission and discharge from state facilities appears to come more within the scope of legislatively determined essential categories, the essential subcategories within that general class, for unnumerable institutional purposes, more directly reflects the value system

of the commissioner, the superintendents, and (within the limits of delegation) the whole line of their subordinates. No effective forum for the resolution of disagreements in their determination of essential categories exists under the present state of the law; furthermore, they in no way constitute an impartial equity tribunal designed to prevent the treating with excessive inequality persons forming part of the same essential category. Where, for example, the superintendent establishes as an essential category all those of the residents able to walk and rules that these and only these shall receive an academic education (citing reasons of self mobility and its attendant administrative convenience), the only court of equity jurisdiction in or above the facility structure itself is the facility superintendent himself or his controlled subordinates. To what extent can one realistically expect their understanding or assistance in handling the simultaneous overlap of the superintendent's established category and a proposed alternative which would prescribe (for example) an academic education for all within that category comprised of those above a certain minimum level of intellectual ability? Incidentally, this later category is expressly provided in the operative positive law, and has never been fully or effectively implemented by the past superintendents. The physical transporting of non-ambulatory residents to and

from the education building has been traditionally elevated to the status of dominant factor.

Rules of the facility, even if they comply with the minimal demands of 'static justice,' too often are arbitrary in classifying residents in ways calculated more to simplify administration and the handling of the resident population than to provide the care and treatment reflected in and required by the positive law. Superintendents have traditionally valued custodial functions higher than habilitative or rehabilitative functions, and this emphasis has inevitably played a part in the formulation of institutional rules and policies.

The rules that are codified in statutes or regulations simply do not and cannot anticipate the innumerable situations that require the establishment of further uncodified rules governing the day to day functioning of the institution; and it is not here suggested that we deprive the administrators of their rule making function, for to do so would impair the effectiveness of the facility to the detriment of the residents themselves. But to the extent that the rule making power is exercised in areas touching on the basic civil and legal rights of the residents, it simply cannot be exercised independently of the checks and balances which could be provided for by the proposed legislation or its substantial equivalent.

In most cases it can be shown that treatments and policies of treatment which have previously been isolated as preanalytically offensive are in fact not in conformity with the correct application of an existing rule of positive law. This is, by definition, unjust. A grouping of the offensive conditions under the heading of appropriate civil or legal rights that have been violated, whether expressly articulated in statute or regulation or incorporated therein by reference, would more clearly demonstrate this nonconformity. And as difficult as it may have been to remedy the inequities of purely institutional rules, so equally are we unequipped at present to remedy the injustice of acts in direct conflict with positive law.

To the suggestion that clearly defined statutory prescriptions give rise to legal rights to secure their enforcement it is answerable that the suggestion fails adequately to take into account the nature of the class of persons affected. The recognition of rights and the intelligent pursuit of remedies for their infringement requires the very abilities, deficiencies in which define the class itself.

If it is seen that simultaneous application of more than one provision of the Act or the departmental regulations, being themselves formulae of concrete justice,

or that the application of the same provision thereof in different circumstances, produces contradictions which make it impossible for the requirements of formal justice ("persons forming part of the same essential category ought to be treated alike") to be met, then we are left with no other recourse than to a forum of equity. But without legislation similar to that we propose, these conflicts would never reach an equity tribunal, but would inevitably be resolved according to the degree of importance attached by the administrator to the competing characteristics. In effect the administrator generates new and complex characteristics having at least as many variables as there are conflicting provisions of the rule, ranked in his particular order of preference.

The population of the Infirmary building, to cite one concrete instance at Belchertown, traditionally is comprised of those whose physical deficiencies and general immobility have quite rationally rendered them a homogeneous category of persons. The building, however, is equipped with a single elevator whose history of reliability is unimpressive. There are two stairwells, which for the limited number of the building's inhabitants able to walk and able to negotiate the heavy locked metal doors are otherwise quite suitable as a means of exiting the building. There are no adequate ramps for the nonambulatory. There have

never been more than a handfull of attendants present to assist in the event of emergency evacuation. But most interestingly, there are state laws requiring adequate ramps and other equipment and building modification for buildings designated and used for such purposes. Why have commissioners and superintendents and stewards and all the other administrative personnel chosen to resolve the conflict between the need for homogeneous housing and a rule of positive law in favor of the former? What made them see a conflict between the two at all? But they have seen it as a conflict and have resolved that conflict in a way that is unjust. We have, in short, in this instance and in innumerable other instances at Belchertown been forced to endure the imposition of one value system over all others.

The process of "actual argument" to which Perelman has ultimate recourse as a means of supporting deontic major premises calling for equal treatment for persons in a given essential category as against a competing essential category usually culminates (and usually in a judicial setting) in statements often used in political argument in which the notion of equality remains unanalyzed and is used in a manner "confusing to the advocates, and encouraging to the enemies, of that ideal."[62] The usual point of departure in any such argument is a dispute between persons relating to the observable differ-

ences among members of the combined classes of persons under discussion. The transition from the uncontradicted assertion of actual observable differences among the members of the combined classes to deontic propositions concerning the sub-classes thereof isolates the point of divergence between the disputants. Any analysis of the notion of equality must therefore focus on this transitional area.

Bernard Williams has generated an analysis operating on the premise that in actual discourse the term 'equality' is used meaningfully, as making a factual claim relative to characteristics properly possessed by two or more persons, being neither construed as trivially true ("all persons share a common humanity") nor as absurdly untrue ("no two persons are really equal"). "When the statement of equality ceases to claim more than is warranted, it rather rapidly reaches the point where it claims less than is interesting."[63]

Preanalytic concensus that men should be treated alike in similar circumstances appears to be the limit of judicial analysis, at least so far as that analysis has been officially reported. A corrolary to the principle of formal justice is that "for every difference in the way men are treated, some general reason or principle of differentiation must be given."[64]

The difficulty in stopping analysis at this point is that the principle makes demands that can simultaneously be satisfied by both disputants, each pointing out actual inequalities that correlate with his own proposed differences in treatment. While precedents state that at this point relevance must be considered, it propels the disputants into evaluative questions with no guidelines on the further resolution of their divergent deontic views.

In the capacity to feel pain, physical or perceptual, in the capacity to experience the happiness of affection or the anguish of its absence, and in the innumerable other natural capacities that characterize human beings, we find substance to the 'trivial' predication of common humanity to <u>all</u> persons in our society, notwithstanding that such capacities can vary widely in degree among actual men. These are among capacities that are possessed by institutionalized retardates no less than by any of us; and perahps because of deprivations in skills and abilities possessed by others in different circumstances, these persons may well have developed and cultivated such fundamental capacities to a degree of sensitivity beyond the so-called normal person. The Belchertown situation was and might continue to be an example of where "political and social arrangements . . . systematically neglect these

characteristics in the case of some groups of men, while being fully aware of them in the case of others."[65]

The moral worth of an individual, as this might be mirrored in differences in treatment accorded him, cannot without a "feeling of outrageous absurdity"[66] be dependent on contingencies such as unequal natural endowment and fortuitously distributed capacities. Persons differentiated and segregated from society by virtue of intellectual deficiencies are exposed to administrative reinforcement of such differentiation by the very social arrangements themselves. The resident is typically not encouraged to concentrate on his points of similarity to others in society, but is through institutional procedures led to believe that the differences, and not the similarities, are of ultimate importance. As Williams points out, "men are at least potentially conscious, to an indeterminate degree, of their situation and of what I have called their 'titles,' are capable of reflectively standing back from the roles and positions in which they are cast; and this reflective consciousness may be enhanced or diminished by their social condition."[67] Persons who believe in the justness and appropriateness of their social placement collectively and in general constitute a more easily managed population; and as previously noted, population management has high standing in the ranking

of administration values. To the extent that the residents reflect on their placement with such belief, and to the extent that they believe such placement to be a necessity of nature with no real opportunities for improvement, the more it takes on the appearance of what Williams terms "the deliberate prevention of growth of consciousness, which is a poisonous element absent from the original ideal."[68]

The consciousness of the resident to the parameters of his situation is relevant to a matter earlier discussed - namely, that person's posture with regard to the securing of civil and legal rights. The Williams analysis makes a critical distinction between a man's rights (the reasons why he should be treated in a certain way) and that man's power to secure those rights (the reasons for and the means of getting what he deserves).[69] He cites the case of a legal right possessed equally by a rich man and a poor man, in which instance the law granting that right (without an affirmative action component) can be said to be fair and equal only by the cynical, owing to the expense associated with its attainment. That case analogizes to our case in point in which consciousness of rights conferred by the Mental Health Act and related law is, as a practical matter, a necessary condition for their attainment. Williams sees the combination

of relevance of reasons for unequal treatment and the operativeness of reasons as a strengthening of the principle of formal justice: that in addition to giving a reason for treating persons differently, the reason should be relevant and socially operative.

It cannot be said that the Massachusetts mental health laws are socially operative. They are, in fact, merely administratively operative, institutionally operative, selectively operative, and in accordance only with the unsupervised discretion of the state and its agents. The existence of civil and legal rights is an abstraction with no power to console those who, for whatever benign motive, have been deprived of such rights; what is of concern is the extent to which those rights govern what actually happens in the lives the institutional residents.[70] Investigations have established that what actually happens is traceable less to operative law and regulation than to administration personality. Such a state of affairs is incompatible with the notion of justice.

Something that must not be overlooked in discussing realistically the opportunities that are available to the institutional resident is that their individual potentials differ in fact from the potentials of others in a given society, as a function of their intellectual or other deficiencies. It would be as wrong to hold out the hope of

higher educational excellence to a mildly retarded person as it would be to deprive him altogether of basic learning skills. Quite obviously we have seldom had to deal with excesses in the former, while the latter has figured prominently in current criticisms of the administration's performance. To what extent must the state provide equality of opportunity to the residents? That concept is very obscure; but notwithstanding the conceptual difficulty encountered in analyzing the concept of equality of opportunity, its denial most nearly characterizes institutional deprivations than any other concept we have dealt with so far. Accordingly, it is worth further discussion.

Williams treats the notion of equality of opportunity in the normal political sense of equality of opportunity for <u>everyone in society</u> to secure certain goods. The goods in question are those which, even if not desired by all, are desired by or <u>for</u> most persons in that society, and are goods which may be said to be earned, but which not all who desire can have. The inability of <u>all</u> in a society to have such goods may be because the goods (1) are by their very nature limited in number, or (2) are contingently limited, in the sense that there are certain conditions of access to them which in fact not everyone satisfies, there being no intrinsic limit to the numbers which might gain access to it by satisfying the conditions,

or (3) are fortuitously limited, such as an inadequacy of supply. The foregoing analysis yields the conclusion that for there to be equality of opportunity a limited good must be allocated on grounds which do not a priori exclude any section of those that desire it, on grounds other than those appropriate or rational for the good in question, where by 'appropriate' grounds is meant grounds that all have an equal chance of satisfying.[71]

The future of the institutions may well be characterized by populations of persons for whom no viable residential alternative exists. The price they must pay for the benefits of residence must not be so high as to entail an involuntary severance from otherwise available opportunities; most especially is this the case where opportunities are minimized or curtailed in the name of smooth institutional management. Equality of opportunity is denied "if the allocation of the good in question in fact works out unequally or disproportionately between different sections of society, if the unsuccessful sections are under a disadvantage which could be removed by further reform or social action."[72] The Williams analysis continues with a discussion as to the extent to which the direct equalling-up of conditions is appropriate to remove the operative disadvantage. There is no logical limit to this process, for persons would have become

"pure subjects or bearers of predicates, everything else about them . . . being regarded as a fortuitous and changeable characteristic."[73] Equality of opportunity and absolute equality converge to identical concepts.

In the context of the state facilities for the retarded we first encounter and must first deal with institutionally created disadvantages; before any program of 'reform or social action' can be effectively initiated we must reach a starting point where no direct infringement of rights and opportunities is being perpetrated upon the resident population by the facility administrators. At very least there can be no overt discrimination and at very best there should be a comprehensive habilitative program (which, by the way, has long been a legislative mandate) aimed at maximizing resident potential within the reasonable limitations of the institutional environment.

Neither Williams nor I opt for a Utopianism which does away with the endless fascinating differences that exist among the persons that make up our entire social community. It is a point well made that overemphasis on equality of opportunity might lead to the destruction of a certain sense of common humanity which is an ideal of equality itself.

But conversely it is the principle point of this paper that programmed reinforcement of natural differences

becomes a malignant growth which feeds on itself until a person's naturally limited abilities are either diminished or totally destroyed.

VI

It has been suggested in this paper that maladministration of the laws that relate to the mentally retarded has often taken the form of excess imposition of custodial protection. Custodial or protective restraint is, nevertheless, as appropriate for the profoundly retarded resident at a state facility as is its absence for those whom society deems to be fully competant. It is then the substantial middle of the spectrum ranging between the two that requires further analysis. To what extent and in what way is restraint upon individual self-determination warranted (or correlatively to what extent is autonomy justifiably denied) when such restraint is effected by the state and directed toward marginally retarded residents? By 'marginally retarded' will be meant essentially a class of all those who are neither profoundly retarded nor fully competant, but who occupy the range between the two.

By the fact of residence, the resident submits to the power of the state administrators. That power is

exercised in ways which might be characterized as mixtures of protection and limited autonomy. The proportions of each are at least theoretically correlated with the degree of mental retardation. More autonomy would in theory be appropriate for the mildly retarded resident than for the severely retarded resident, for whom in theory more custodial protection would be desirable. But this broad brush analysis is clearly inadequate for our purposes; a more critical examination is needed into the characteristics of the entire mid-spectrum class itself.

Departmental regulations have sub-classified the retarded according to placement on a standardized psychometric scale: the retarded, as a class, are thus defined as all those testing below 80 IQ on the Stanford-Binet. The five sub-classes are: (1) profoundly retarded - those testing between 0 and 20 IQ on that scale; (2) severely retarded - those testing between 21 and 35 IQ; (3) moderately retarded - those testing between 36 and 51 IQ; (4) mildly retarded - those testing between 52 and 64 IQ; (5) borderline retarded - those testing between 65 and 79 IQ.

The continuing justification for the very existence of the institution (which is itself not challenged by this paper) is that to some extent every truly mentally retarded person does require the structured protection of society. But in what areas and to what degree the state's protective

power should transform from supervision or advice into restrictions upon the individual's otherwise possessed right of self-determination are questions which can only be answered after comprehensive assessment of the individual's present abilities and his capacity for change and improvement. Failure to adequately protect profoundly retarded residents has in the past often led to serious injury and even death to the individual and other residents. The typical consequences of such inadequacy are immediate, physical and therefore observable. The consequences of overprotection or excessive restraint upon self-determination (considered here as a documented fact aside from the good or bad motives of those effecting it) are typically less observable, more difficult to isolate for discussion and analysis, but no less real or harmful to the persons affected.

The difficulties encountered in determining types and degrees of protection and autonomy for the individual resident are innumerable and complex. There is, for example, a tendency to assume that a diagnosis of 'retarded' is properly retained for life. There is, however, no adequate test for mental retardation the results of which would lend themselves to simple determinations of type or degree of protection and autonomy for the individual tested. There is no adequate test for determining a per-

son's potential at any age; and the giver of the test has only the right to say strictly that at the time of the test the person tested appears to be capable of doing precisely those things that the test purported to test. IQ tests test only specific points in time and only specific areas, skills and abilities. Rules or decisions founded on projections from such tests suffer from the deficiencies possessed by the tests themselves in that the test results speak only of the test subject's skills and abilities at an earlier time. Institutional rules, decisions and programs do operate (and have historically operated) on the assumption that once a person tests as retarded to any degree, then that classification is a proper foundation and basis for all further rules, decisions and programs for him thereafter. The assumption is evident in the lack of ongoing administrative analysis of the resident's actual skills and abilities (intellectual, emotional, physical or social) and a further lack of adequate habilitative programs aimed at maximizing the resident's individual potential in those areas.

An individual once so classified and subsequently institutionalized historically shows more and more the characteristics of the retarded due principally to deprivations in intellectual, emotional, physical and social areas.

A person who has been diagnosed as retarded through testing procedures aimed primarilly at intelligence measurement is typically classified as retarded in all other areas as well - emotionally, physically and socially. Intellectural development is not highly correlated with emotional, physical or social development; and yet for purposes of nearly all administrative decision making the intelligence criterion is usually determinative.

At least four variables contribute to the inadequacy of intelligence measurement in standardized tests; the person being tested, the person giving the test, and location and environment of the test occasion, and the test itself. For example, test questions are read to subjects in different ways and in different accents by different people; inflection, tone, speed and innumerable other speech factors might well affect the test giver's ability to adequately communicate the question; or the test giver might present a threatening appearance to the subject for reasons long lost in the subject's background. The test subject (or for that matter the test giver) might not be feeling physically well on the test occasion, or might temporarily be distracted from the matter of the question by the prospect, for example, of later in the day going to a movie, on a trip, or the like. The immediate environment of the test might give rise to test-invalidating

impact on the subject, for reasons, perhaps, that the test was given in a room in which the subject suffered a severe embarrassment or other distressing episode, or the like. And the test itself, measuring only intelligence, does not address the other components of the entire person that have a direct relationship on the ability to function in society. Mental retardation has traditionally been viewed as the equivalent of intelligence retardation: but intelligence is simply not the only component of the human mind or person.

Moreover, the ongoing effectiveness of habilitative programs (to the extent that the test subject participates therein), growth spurts, and innumerable other factors make necessary frequent reassessment of the resident's retardation, without which no intelligent planning can be had regarding the appropriate type and degree of protection or autonomy to be prescribed for the individual concerned.

It must further be observed that there exists a basic incompatibility between human development and excessive institutional protectiveness. Such excess denies a person a right as a human being to 'self-actualize,' to use Maslow's expression. The deprivation of a normally stimulating social environment unquestionably has a retarding effect on human development. Social and emotional

growth takes place through integration with peer groups, family groups, and groups of countless other social varieties. The institutional resident has historically been deprived of the opportunities for such integration, deeping (or causing) retardation in the specific area of deprivation. The transition, for example, from parallel play to cooperative play is inhibited by the large numbers of persons who (typically for convenience of supervision by limited staff) are herded together for long periods of time in what is neutrally termed 'the day hall.' As Maslow explains regarding the hierarchy of needs, there must be at least partial fulfilment at one level prior to any possibility of advancement to the next level. A person of relatively low 'mental age' (however correlated or uncorrelated with chronological age) will simply not realize his potential in the excessive-restraint environment of the day hall.

Human development has been fruitfully analogized to block building; certain more complex skills and abilities must be sequenced to follow previously mastered skills and abilities. Without prior achievement of the basics there can be no significant development. Moreover with the passage of time during which no progression from one level of development to another takes place, the individual tends to varying degrees to lose the ability itself to develop at all.

The appearance of being retarded seems to be the all too prominent but tacitly operative criterion of retardation for most persons (including many professionals) that come in contact with institutional residents. Having concluded in advance to a theory which establishes a correlation between retardation and appearances, subsequent observation ceases being scientifically objective and becomes, to the detriment of the observed, theory laden and defective. The results are usually inaccurate and always too imprecise to be fruitful in dealing constructively with the retarded.

In times past deaf children have often been viewed as being retarded; performance deficiencies directly attributable to an inability to hear, uncritically accepted as controlling evidence of retardation, might well have been eliminable through an adequate analysis of the individual and the appropriate affirmative action adapted to his remaining senses.

Recourse to appearances as the operative criterion of mental retardation gives us little to criticize but its improbable generality. But when particular appearances are cited then our criticism becomes more promising. For example, in the area of speech development, it can clearly be said that our society so highly regards the ability to communicate through speech that an inability to do so creates

a practical presumption of mental retardation; and at very least, that inability converts directly into lower scores in intelligence testing where the verbal component of the testing procedures is significant. The non-development or under-development of speech is compatible with many forms of mental retardation; but it is also compatible with cerebral palsy and other physical conditions which typically coexist with normal intelligence. In the area of motor development, a person born with a spinal bifida (a knotting and breaking of the nerves of the spinal cord) may be observed as having the same appearances as a severely to moderately retarded child. A number of now retarded persons have endured, to their detriment, such a misdiagnosis, and in consequence been rendered socially and emotionally retarded by the imposed institutional environment. While it is speculative what their original potential might have been at normal functioning, it is not speculative to say that whatever their potential might have been originally, its development was seriously and even permanently retarded. Such persons, as adults, have become foreigners in their own land because as children they were diagnosed as retarded and placed in an institution lacking in opportunities to integrate socially, emotionally, intellectually, and physically into the social mainstream.

While it is true to say that many persons in the intellectually normal range have been institutionalized as 'retarded,' after being judged so on the basis of emotional, social, physical or verbal deficiency, it is conversely the case that many quite retarded persons have achieved quite normal social, emotional or verbal characteristics and are often taken to be not retarded.

In one actual case the same standardized test was given to two individual residents, both girls of approximately the same chronological age. Subject A was socially adept, could relate to adults and peer groups in socially acceptable fashion, and was generally accomplished verbally. She appeared alert, happy and physically average for her age. She was achieving in a classroom for the retarded at a rate superior to others in the same class, in all areas. She seemed in every way as completely self-supportive as any individual of her age. The test, however, showed her to be retarded with an IQ of 72. Subject B acted immature for her age in interacting with both adults and her peers. She appeared dull, functioned at a lower level verbally than others of her age and showed little reaction to her surroundings. She did not progress as well as others in her classroom, in all areas. She demonstrated a need for more supervision in decision making activities. The test showed her to be retarded with an IQ of 72.

Going back to the earlier discussed prohibition of local store visits, such an administrative rule would clearly be more appropriate for Subject B than for Subject A, for whom the restriction of autonomy in such matters would achieve only the further retarding of her ability and potential at normal social intercourse. What the test results should have said to the administrators is that intelligence test results do no lend themselves to a direct determination of appropriate degrees or types of autonomy or restraint; instead, a rule of convenience was framed which was geared to the lowest common denominator. Instead of programs of habilitation aimed at bringing Subject B up to her suggested potential for normal social functioning, programs of restraint and excessive protectiveness were established which had the effect of bringing Subject A to a lower level of social achievement than her suggested potential.

Compounding the administrative sins of non-diagnosis and mis-diagnosis and failure to establish habilitative programs, currently the state administrators feel that the mistakes of years can be absolved in days through virtually immediate discharge of the non-habilitated resident. However unequipped and unprepared to cope with such commonplace demands as are encountered in shopping, renting, travelling, and so on, they are sent off with the

dubious blessing of the state to seek their fortune in a world with which they have been programatically and wrongfully deprived of contact. Society usually expects its young adults to encounter some difficulty in the task of integrating auonomously into adult society, even with the obvious benefits of its being a gradual process, and a process engaged in within the comfortable context of normal family environments. The state, on the other hand, deals with the discharged resident as if he or she should know the behavior appropriate for all conventional social situations, and furthermore to be proficient in it.

Marginally retarded persons can often do many of the things the ability to do which in the aggregate customarily define the fully competent person. What concerns us at this point in the discussion is the substance and the implementation of the state 'rules' to the extent (as indicated earlier in the context of the equal protection clause) that they can affect the individual in his life, liberty, property and pursuit of happiness. The equal protection clause requires that the substance and the implementation of the rules be based on 'proper and justifiable distinctions, considering the purpose of the law.'

The institutional rule, for example, prohibiting the resident from freely visiting local stores is incompatible with the mandate of the equal protection clause which pro-

scribes rules which operate on persons without regard to their relavent differences (in this example in their varying abilities in meeting the demands of store visits). The equal protection clause prohibits the state from affecting the lives of persons in the same class (in this example the appropriate class being 'all those capable of negotiating store visits, or at least with the potential of having that capability') in significantly different ways. An institutional rule prohibiting all residents from making store visits, while having an appropriate effect upon a profoundly retarded person, nevertheless when applied to a borderline retarded (or to a retarded of any other degree who in fact possesses the ability in question) it has the effect of depriving him of developing or improving that ability to a point more nearly that possessed by the fully competent person.

Protective functions exercised by institutional administrators are justified only when there is protective need on the part of the proposed object of those functions.

But many of the protective functions historically exercised by institutional administrators have been aimed at achieving administrative convenience and have been uncorrelated with those protective needs.

Therefore those protective functions that are so uncorrelated are unjustifiable.

It can be said of store visits that they are complex social tasks requiring certain mixed minimum abilities, some of which are physical (to walk distances, to see and hear traffic and other people, etc.), some verbal or social (to relate to and to communicate with storekeepers, etc.), some intellectual (to select store items, to order, read labels, count change), and some emotional or maturational (to perform the task without being sidetracked into other pursuits, or without being disoriented as to the hazards encountered in any contact with a relatively fast moving social setting). The rule of prohibition effectively denies equal protections of the laws to those clearly having the ability to perform such tasks and also to those who have the potential of doing so, who through suitable habilitative programs and an affirmative action by administrators could achieve that ability. Rules which have the effect of depriving the resident of developmental opportunities are violative of the equal protection clause.

To the challenge that the matter of store visits is not in itself significant enough to warrant the imposition constitutional sanctions, it must be indicated that this has been selected as merely one example from a list of frightening proportions. The impact of one such restriction on self-determination might well be minimal; but the impact

of the aggregate of institutional restraints and restrictions touches seriously upon the life, liberty, property and pursuit of happiness of the residents, unquestionably reaching issuable proportions.

Institutional procedures and rules that fail to take into account the complex nature of individual abilities and the complex structure of human endeavors, and which as a consequence retard residents from finding and exercising their individual areas of competence, are unjust and unconstitutional. Having chosen, by law, to operate within the field of mental retardation and to administer facilities for the care and treatment of the mentally retarded, the state has therein chosen to exercise state power over a class of persons defined only, by that law, as being below a given level of intelligence. The manner in which the state has exercised that power has been shown in this paper to have been violative of a theory of justice and violative of the U. S. Constitution.

The current outlines of change in the area of state mental health administration have not adequately incorporated anything like the theoretical framework treated at length above, but appear to be taking the form of a convulsive restaffing of departmental and institutional personnel with the hope of filling positions with more enlightened persons. This approach strikes at symptoms,

not causes.

It must first be established and understood within what conceptual framework the care and treatment of the mentally retarded are to be pursued, and then that framework must be buttressed by appropriate and effective guarantees for implementation. A right granted without its being coupled to an administrative or legal but available remedy for its infringement is empty and a right in name only. An office legislatively created and charged with the duty of overseeing the performance of administrative activities and with measuring those activities against a standard of law and justice comes nearer than any proposed alternative to providing such a guarantee. Being independently answerable to the legislature alone, such an office bypasses that departmental roadblock which has in the past insulated its members from meritorious challenges to the justness of their activities.

FOOTNOTES

[1] "Retardation: Hope and Frustration," Time Magazine, May 8, 1972, pp. 51-56.

[2] Robert Simpson Ricci et al., vs Milton Greenblatt, M.D., etc., et al., United States District Court, District of Massachusetts, Civil Action No. 72-469-T: Statement made by Massachusetts Department of Mental Health Commissioner.

[3] From the official court transcript, as reprinted in The Bell, a publication of the Belchertown State School Friends Association, February, 1974, p. 2. The judge's remarks were made in open court on the entry of the decree in the case referred to in note 2, on November 12, 1973.

[4] Abstracted from the COMPLAINT filed in connection with the case of Ricci vs. Greenblatt (referred to in note 2), at p. 7 of the COMPLAINT.

[5] COMPLAINT, p. 7.

[6] COMPLAINT, p. 10.

[7] COMPLAINT, p. 11.

[8] COMPLAINT, pp. 11-13.

[9] Massachusetts General Laws, Ch. 19, Sec. 14 & Sec. 14B. (Annotation to M.G.L.A. Ch. 19, Sec. 14: Opinion of the Attorney General, March 10, 1965, p. 237.)

[10] M.G.L.A., Ch. 123, Secs. 10-12.

[11] The procedures to be followed in the retention and discharge of patients under the revised Chapter 123 appear as the "Manual of Admission, Retention and Discharge Procedures," published by the Department of Mental Health, dated Nov. 1, 1971, and incorporated into the "Department of Mental Health Regulations."

[12] American Jurisprudence Second Edition: A Modern Comprehensive Text Statement of American Law, (Rochester, N.Y.:

The Lawyers Co-Operative Publishing Company, 1964, as supplemented annually and cumulatively), Vol. 16: "Constitutional Law," p. 846, note 20.

[13] Am. Jur., (ibid.) p. 847, note 9.

[14] Am. Jur., p. 847, note 10.

[15] Am. Jur., p. 848, note 13.

[16] Am. Jur., p. 848, note 14.

[17] Am. Jur., p. 848, note 16.

[18] Am. Jur., p. 848, note 17.

[19] Am. Jur., p. 849, note 20.

[20] Am. Jur., p. 849, note 1.

[21] Am. Jur., p. 850, note 8.

[22] Am. Jur., p. 854, note 19.

[23] Am. Jur., p. 854, notes 20 & 1.

[24] Am. Jur., p. 855, notes 6 & 7.

[25] Am. Jur., Vol. 16, Sec. 491.

[26] Am. Jur., p. 860, note 3.

[27] Am. Jur., p. 861, note 11.

[28] Am. Jur., p. 861, note 12.

[29] Am. Jur., p. 861, note 13.

[30] Am. Jur., p. 861, note 14.

[31] Am. Jur., p. 929, notes 6 & 7: "The purpose of the equal protection clause of the Fourteenth Amendment to the Federal Constitution is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents. An actual discrimination arising from the method of administering a law is as potent in creating a

denial of equality of rights as a discrimination made by law. The validity of a state statute under the equal protection clause therefore often depends on how it is construed and applied." (emphasis added)

[32] Am. Jur., p. 929, note 8.

[33] Am. Jur., p. 929, note 10.
Am. Jur., p. 356, note 4.

[34] Am. Jur., Vol. 16, Sec. 540.

[35] Am. Jur., p. 929, note 6.

[36] Am. Jur., Vol. 16, Sec. 540.

[37] The arbitrary administration of the laws typically arises in the context of criminal law enforcement. The picture that comes immediately to mind is the policeman walking down a line of cars illegally parked and giving out tickets to cars with student stickers on the bumper. Selectivity, however, in enforcement may or may not be improper per se, and can be seen as necessary as a practical matter. If the selectivity is arbitrary, then it is arguably violative of the fourteenth amendment:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Yick Wo vs. Hopkins, 118 U.S. 356 (1868) at 373-374.)

It has also been held that purposeful and intentional selectivity is not invalid so long as the selectivity is based on classifications that are rationally related to proper law enforcement purposes, or "so long as it is based on classifications that the legislature could validly have made. Thus, if a law that expressly incorporated the police enforcement classifications could withstand an equal protection challenge, the police practice of selectivity based on such classifications could likewise withstand an equal protection challenge." (Boston University Law Review, Vol. 53, Number 5, November, 1973: "Procedural Due Process in the Context of Informal Administrative Action: The Requirements for Notice, Hearing and Prospective Standards Relating to Police Selective Enforcement Practice," p. 1044, note 40.)

Further with regard to the nature of the interests adversely affected, it has been pointed out:

> "When the lawfulness of state action by which deprivations are imposed on individuals depends on the propriety of administrative determinations, the threshold applicability of procedural due process to the making of those determinations depends on the nature of the drprivations that may result. When these deprivations cause 'grievous loss' to an individual and affect individual interests which can be characterized as 'life, liberty, or property' within the meaning of the fourteenth amendment, procedural due process will be applicable." (Boston University Law Review, op. cit., pages 1049-1050.)

[38] Am. Jur., p. 930, note 12.

[39] Am. Jur., p. 930, note 13.

[40] Am. Jur., p. 930, note 17.

[41] Am. Jur., p. 930, note. 18.

[42] Am. Jur., p. 358, note 14.

[43] Am. Jur., p. 355, note 17.

[44] Connor v. Metropolitan Dist. Water Supply Commission, 49 N.E.2d, 593, 595, 314 Mass. 33.

[45] Ex parte Tigner, 132 S.W.2d 885, 894, 139 Tex. Cr. 452.

[46] Hudson v. Stuart, 145 So. 611, 612, 166 Miss. 339. Continental Banking Co. v. Woodring, D.C. Kan., 55 F.2d. 347, 351.

[47] Words and Phrases: Permanent Edition, 1658 to Date: (St. Paul, Minn.: West Publishing Co, 1952, as supplemented annually and cumulatively), Vol. 14A: "Equality."

[48] Pearcy v. Citizens Bank & Trust Co. of Bloomington, Ind. App. 96 N.E.2d. 918, 927

[49] U. S. Supreme Court: Walters v. City of St. Louis, Mo. Mo. 74 S. Ct. 505, 509, 347 U.S.231, 98 L. Ed. 660.

[50] Words and Phrases, ibid.

[51] Words and Phrases, ibid.

[52] Ch. Perelman, The Idea of Justice and the Problem of Argument (New York: The Humanities Press, 1963), p. 80.

[53] ibid., p. 81.

[54] ibid.

[55] ibid.

[56] ibid., p. 64.

[57] ibid., p. 70.

[58] ibid.

[59] ibid., p. 76.

[60] ibid., p. xi.

[61] ibid., p. 26.

[62] Bernard Williams, "The Idea of Equality," in Philosophy, Politics and Society, ed. Peter Laslett and Walter Runciman, (New York: Barnes & Noble, 1962 (2d Ser.) and 1967 (3d Ser.)), p. 111.

[63] ibid., p. 111.

[64] ibid., p. 111.

[65] ibid., p. 112.

[66] ibid., p. 115.

[67] ibid., p. 119.

[68] ibid., p. 120.

[69] ibid., p. 122.

[70] ibid., p. 122.

[71] ibid., p. 125.

[72] ibid., p. 127.

[73] ibid., p. 128.

APPENDIX A:

House Bill No. 2690

By Mr. Flaherty of Cambridge, petition of Charles F. Flaherty, Jr., and another for legislation to establish a division of mental health legal assistance under the Massachusetts Defenders Committee. The Judiciary.

"The Commonwealth of Massachusetts: In the Year One Thousand Nine Hundred and Seventy-Two.

"An Act Establishing a Division of Mental Health Legal Assistance Under the Massachusetts Defenders Committee.

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

"Chapter 221 of the General Laws is hereby amended by inserting after section 34D, the following new section: -

"Section 34E. In addition to the functions of the Massachusetts defenders committee under section thirty-four D of chapter two hundred twenty-one, said committee shall establish and maintain a division of mental health legal assistance. The committee shall appoint as director of said division a member of the Massachusetts bar who shall serve under and be directly responsible to the committee and who shall, subject to the approval of the committee, appoint and may remove mental health legal advisers, who shall also be members of the Massachusetts bar. A mental health legal adviser shall perform all duties assigned under the appropriate provisions of chapter one hundred twenty-three and such other duties as may be assigned from time to time by the director. A mental health legal adviser shall assist and advise patients and residents at the Bridgewater State Hospital and patients under court order at other public and private facilities concerning their legal rights as provided under this chapter and shall advise and arrange for appropriate legal representation of such party where otherwise necessary. A mental health legal adviser may consent to represent a patient in court proceedings if requested to so act by the patient and after a finding by the court that such patient is indigent. A mental health legal adviser may examine all necessary patients' records, records of such facilities and records of the department of mental health and may make

such other inquiries as may be necessary to carry out his duties hereunder. Except where disclosure is for the welfare or benefit of the patient, information so obtained shall be confidential and not disclosed to others than the members of the Massachusetts defenders committee appointed under section thirty-four D of chapter two hundred twenty-one and to the director of said division of mental health legal assistance and members of the staff of the division. Said committee shall adopt such rules and regulations as may be necessary for the care of its affairs hereunder and may from time to time amend or revise the same without further approval; provided, however, that in the adoption of such rules and regulations, said committee in instances deemed appropriate by it, may consult with the department of mental health, the department of correction and such other public or private institutions and personnel thereof, as may be of assistance to the effectuation of the purposes hereof. Said director shall, subject to the approval of said committee, appoint such professional or non-professional aides, clerical and other assistants as may be necessary to carry out the duties of the committee hereunder and said committee shall provide suitable accomodations throughout the commonwealth. The director and other employees appointed hereunder shall not be subject to the provisions of chapter thirty-one. Said committee for the purposes hereof, may accept gifts, grants or contributions from any source whether public or private and may expend the same.

"Upon petition of a patient or resident in mental health and retardation facilities of the mental health department, or a patient at the Bridgewater State Hospital, or a patient under court order at other public and private facilities, or the legal guardian or next of kin of said patient, the court to which such petition is addressed, may appoint a member of the Massachusetts bar to represent said patient and to advise said patient in his legal rights."

House Bill No. 2690 was not enacted into law; however, on October 9, 1973, Chapter 893 of the Laws of 1973 was approved, providing legal assistance to the indigent mentally ill. Notwithstanding its failure to meet all the criticisms raised in this paper, Chapter 893 goes a long way toward remedying the deficiencies of exisiting law relating to retarded citizens. Chapter 893 is reprinted as Appendix B.

APPENDIX B:

Chapter 893 - Laws of 1973

An Act providing for legal assistance to the indigent mentally ill.

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

"Chapter 221 of the General Laws is hereby amended by inserting after section 34D the following section:

"Section 34E. The justices of the supreme judicial court shall appoint a mental health legal advisors committee consisting of fourteen attorneys, four of whom shall hold office for a term of four years, four for a term of three years, three for a term of two years and three for a term of one year. Upon completion of each such term of a member, his successor shall be appointed for a term of four years. The unexpired portion of any term which becomes vacant shall be filled by the justices of the supreme judicial court. Members of said committee may be removed by the justices of the supreme judicial court. No member of the committee shall receive any compensation for his services, but each member shall be reimbursed for actual traveling expenses incurred by him in attending the committee meetings. The membership of the committee shall contain a practicing attorney or attorneys from each of the mental health regions of the Commonwealth. The committee shall annually appoint and may at any time remove an executive director who shall be compensated from funds available therefor.

"Any practicing member of the bar of the commonwealth who wishes to serve as a mental health legal advisor shall submit his name, office address and telephone number to the committee, which shall compile a list of all such names submitted, dividing the names into groups of lawyers practicing within each of the mental health regions of the commonwealth. Said list shall be updated quarterly. Said list of mental health legal advisors shall be circulated by the committee to the district courts and municipal courts of the commonwealth and to the department of mental health. The committee shall annually establish and approve a fee schedule for such services as shall be performed by the mental health legal advisors and said mental health legal advisors shall upon certificate of the judge appointing him be compensated in accordance

therewith for services performed for an indigent patient.

"It shall be the duty of the committee to develop a program of volunteer legal assistance. Such program shall utilize the participation of attorneys, professional and nonprofessional aides and all other groups who offer their services on a voluntary basis, to assist and advise indigent patients and residents in Bridgewater state hospital and all other mental health and retardation facilities of the commonwealth concerning their legal rights. Said volunteers may, subject to the approval of the committee, interview and examine all pertinent records of any such patient or resident. In addition, the committee shall appoint such clerical or other non-professional staff assistants as may be necessary to carry out the duties of the committee.

"It shall be the duty of the committee to conduct a continuing program of information with regard to the legal rights of patients and residents at all mental health and retardation facilities in the commonwealth, which information shall be circulated to said patients and residents and their relatives, to the employees of the department of mental health, the members of the bar of the commonwealth and to anyone requesting such information. In addition, such information shall be made available to the public at large.

"Upon petition of an indigent patient or resident in Bridgewater state hospital or any other mental health or retardation facility, private or public, or the legal guardian or a relative or a friend of such patient or resident, to any district or municipal court of the commonwealth, such court shall appoint from the list circulated of mental health legal advisors, a lawyer, practicing in the same or an adjoining mental health region as that in which the court is situated, to advise such patient of his legal rights and to represent such patient.

"A mental health legal advisor so appointed may examine all records pertaining to such patient or resident, including the records of the department of mental health and the department of correction or any other agency of the government of the commonwealth or any other institution operated by the commonwealth or any political subdivision thereof or any hospital situated in the commonwealth. In addition, such advisor may make all necessary inquiries as he deems proper for the carrying out of his duties.

"A mental health legal advisor shall be compensated for legal services performed for an indigent patient by the mental health legal advisor's committee in accordance with the fee schedule established by the mental health legal advisors committee as provided for herein.

"The committee shall be eligible for federal funds and may accept gifts, grants or contributions from any source and may expend the same, for the purpose of compensating said mental health legal advisors. - Approved October 9, 1973."

APPENDIX C:

M.G.L.A. Chapter 19, Section 16

"There shall be a mental health advisory council consisting of thirty persons to be appointed by the governor, of whom at least half shall be members of community mental health and retardation area boards, and of the remaining half at least seven shall be appointed to represent one of the following professions and groups: - state level medical, psychological, nursing, educational, social work, occupational therapy, or bar associations, state level associations for mental health and for mental retardation, industrial and labor groups and the clergy. Upon the expiration of the term of office of any member, his successor shall be appointed for a term of three years. No member shall be appointed to serve more than two consecutive three-year terms. The council shall elect annually a chairman. Members of said council shall serve without compensation, but each member shall be reimbursed by the commonwealth for all expenses incurred in the performance of his official duties.

"Said advisory council shall have the following duties; -
(a) It shall advise the commissioner on policy, program development, and priorities of need in the commonwealth for comprehensive programs in mental health and retardation;
(b) It shall participate with the department in holding a regular series of public hearings throughout the commonwealth to obtain the views of the area boards and other citizens concerning the programs of the department and the needs of the people in mental health and retardation services;
(c) It shall review the annual plans and the proposed annual budget of the department, and shall make recommendations to the commissioner in regard thereto;
(d) It shall hold at least three meetings per year and shall convene special meetings at the call of the chairman of the council, a majority of the council, or the commissioner. - Added St. 1966, Ex. Sess. c. 735, Sec. 1." (emphasis added)

APPENDIX C:

Portions of M.G.L.A. Chapter 19, Section 23

"The area board shall have the following duties and powers:
(a) to act as the representative of . . .
(b) to advise . . .
(c) to advise . . .
(d) to review and approve . . .
(e) to review arrangements and contracts . . .
(f) to consult . . .
(g) to communicate . . .
(h) to receive and administer any gift or bequest . . .
(i) to receive funds . . .
(j) to hold regular meeting . . .
(k) to elect . . .
Added St. 1966, Ex. Sess., c. 735, Sec. 1."

It is interesting to note that advantage was taken of the language appearing in subsection (a) above which authorizes the area board to "act as the representative of the citizens of the area;" when the Franklin County area board joined the class action litigation (Ricci vs. Greenblatt) as an amicus curiae, in its capacity to represent certain of the retarded citizens in its area. But this is a very awkward and unreliable way of achieving the protection of constitutional rights of retarded citizens. Their participation in the suit, however, had symbolic value and thereby aided in achieving the results reached in that case.

APPENDIX D:

M.G.L.A. Chapter 19, Section 21

"In each area established under section eighteen there shall be a community mental health and retardation area board, hereinafter called the area board, which shall be an agency of the commonwealth, and shall serve in the department. The area board shall consist of twenty-one members, who shall be appointed by the commissioner. Two thirds of the members shall live within the area for which they are appointed, and the remaining members shall either live or work within said area. Four members of said board shall be selected from the mental health associations within the area; and four members shall be selected from the associations for the mentally retarded within the area. The commissioner shall include at least one member from each city and if practicable each town in the area, and shall seek to provide proper geographical representation in the membership of the board.

"Two thirds of such members shall be persons other than employees of the commonwealth. No member shall be an employee of the department.

"Upon the expiration of the term of any member of the area board, his successor shall be appointed, in like manner, for a term of three years. In the event of a vacancy, the commissioner may, in like manner, appoint a member who shall serve for the remainder of the unexpired term. Members of the board shall serve without compensation, and shall be sworn to the faithful performance of their duties. The area board shall suggest for consideration by the commissioner one or more names for each such expiring term or vacancy. No member shall be appointed for more than two consecutive three-year terms. - Added St. 1966, Ex. Sess., c. 735, Sec. 1." (emphasis added)

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