

# Right of Handicapped Children to an Education: The Phoenix of Rodriguez

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## NOTE

### THE RIGHT OF HANDICAPPED CHILDREN TO AN EDUCATION: THE PHOENIX OF *RODRIGUEZ*

There are six million "handicapped" children in the United States.<sup>1</sup> They suffer from an assortment of disabilities including

<sup>1</sup> Wall St. J., March 22, 1972, at 1, col. 1 (eastern ed.). Precise definitions of "handicapped" are somewhat elusive. Compare the following legislative attempts.

A "handicapped child" is one who, because of mental, physical or emotional reasons, cannot be educated in regular classes but can benefit by special services and programs to include, but not limited to, transportation, the payment of tuition to boards of cooperative educational services and public school districts, home teaching, special classes, special teachers, and resource rooms.

N.Y. EDUC. LAW § 4401(1) (McKinney 1970).

The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education and related services.

20 U.S.C. § 1401(1) (Supp. 1973). Prevalence data tend to vary widely from one study to another, and these differences may be attributed to variations in definition, identification criteria, and methodology. Frohreich, *Costing Programs for Exceptional Children: Dimensions and Indices*, 39 EXCEPTIONAL CHILDREN 517, 521 (1972). One estimate follows:

Estimates of the Prevalence of Various Types of Exceptionality  
in the United States

Category of exceptionality	Estimates of Prevalence (percentages)			
	A <sup>1</sup>	B	C	D
Gifted	NE <sup>2</sup>	NE	2.70	2.00
Educable mentally retarded	1.30	1.28	1.10	1.30
Trainable mentally retarded	0.187	0.18	0.24	0.24
Auditorily handicapped	0.10	0.08	0.10	0.10
Visually handicapped	0.05	0.03	0.05	0.05
Speech handicapped	1.98	2.40	3.60	3.60
Physically handicapped	0.028	0.028	0.21	0.21
Neurological and special learning disorders	NE	0.026	1.12	1.12
Emotionally disturbed	0.50	0.50	0.58	2.00
Multiply handicapped	0.07	0.029	0.029	0.07
TOTAL	4.215	4.103	9.729	10.69

<sup>1</sup> Column heads A, B, C, and D mean the following:

- A: Estimates developed from information contained in "Statewide Summary of Annual Reports on Handicapped Minors Not Participating in Special Education Programs," California State Department of Education, 1968. (Mimeo.)
- B: Estimates developed from information contained in "1969-70 Summary of Special Education Services of Bureau for Special Education," Division for Handicapped Children, Wisconsin Department of Public Instruction, 1970 (Mimeo.)
- C: Estimates based on data regarding pupils enrolled and pupils eligible but not being served in the school districts which comprised the sample in this study.
- D: Estimates used as a basis for population and cost projections in this study.

<sup>2</sup> NE means no estimate was made.

*Id.* at 522.

A term which is closely related to the term handicapped child is the term exceptional child. A child is considered exceptional only when it is necessary to alter the educational program to meet his needs. S. KIRK, *EDUCATING EXCEPTIONAL CHILDREN* 5 (2d ed. 1972).

physical incapacities, mental retardation, and mental and emotional disorders. Because of their handicaps they are frequently unable to benefit from the regular public school curriculum, and their behavior patterns may distract their fellow students.

These exceptional children need a variety of special educational services.<sup>2</sup> Yet less than one-half of them are receiving special education,<sup>3</sup> and over one million handicapped children are totally excluded from a system of free public education.<sup>4</sup> The failure of the public schools to provide an adequate education to exceptional children most seriously affects the poor. Not only are the poor unable to finance private schooling, but the incidence of handicaps among children of low income families is appreciably higher than the rate among children of middle and upper income families.<sup>5</sup>

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<sup>2</sup> Deno, *Special Education as Developmental Capital*, 37 EXCEPTIONAL CHILDREN 229, 235 (1970).

<sup>3</sup> Martin, *Individualism and Behaviorism as Future Trends in Educating Handicapped Children*, 38 EXCEPTIONAL CHILDREN 517, 523 (1972).

<sup>4</sup> Wall St. J., March 22, 1972, at 1, col. 1 (eastern ed.); see TASK FORCE ON CHILDREN OUT OF SCHOOL, *THE WAY WE GO TO SCHOOL: THE EXCLUSION OF CHILDREN IN BOSTON* (1970) (documenting variety of exclusionary practices). Exclusion often occurs in urban areas because of the shortage of space in special education classes or because of delays in testing and diagnosing pupils who have already been identified by their teachers as not functioning well in regular classrooms. While children are awaiting appropriate placement they may be dismissed from the regular classroom if they are a behavior problem. *Hearings on Mentally Ill and Handicapped Children Before the House Comm. on the District of Columbia*, 92d Cong., 2d Sess. 29 (1972) [hereinafter cited as 1972 *Hearings*].

Most children are effectively excluded because local communities have decided under optional state laws not to provide special education. A 1962 study showed that only 16 states had mandatory legislation regarding public school classes for educable mentally retarded children, and 13 had such legislation for trainable mentally retarded. Roos, *Trends and Issues in Special Education for the Mentally Retarded*, 5 EDUC. & TRAINING OF THE MENTALLY RETARDED 51 (1970).

<sup>5</sup> The incidence of disability in disadvantaged homes has been estimated to be three times that of other households. Remarks of Harrold Russell, Chairman of the President's Committee on Employment of the Handicapped, Region VII Conference of the National Rehabilitation Association, Oklahoma City, Okla., June 7-9, 1970. Malnutrition, lead poisoning, poor health care during pregnancy, poor health care for children, and inadequate parental supervision leading to accidents are some of the reasons that the incidence of handicaps is greater among the poor. See Young, *Poverty, Intelligence and Life in the Inner City*, 7 MENTAL RETARDATION 24, 24-25 (April 1969). See also PRESIDENT'S COMM. ON MENTAL RETARDATION, *THE DECISIVE DECADE* 4 (1970) (malnutrition); PRESIDENT'S COMM. ON MENTAL RETARDATION, *THE EDGE OF CHANGE* 19 (1968) (lack of prenatal care); PRESIDENT'S COMM. ON MENTAL RETARDATION, *ENTERING THE ERA OF HUMAN ECOLOGY* 23 (1971) (lead poisoning). The incidence of mental illness and emotional disturbances is also probably higher among the poor. 1972 *Hearings* 67-69, 71. Moreover, the poor are much less likely to receive proper treatment for their emotional disorders. *Id.* at 69-70.

Prevalence of mental retardation according to socioeconomic status has been reported as follows:

The crux of the problem is cost. Educating handicapped children is inevitably more expensive than educating other children.<sup>6</sup> Under the pressure of many competing priorities, public school systems throughout the nation have responded in an uneven and disappointing way to the needs of exceptional children.<sup>7</sup>

Prevalence of low IQ in white children  
in relation to socioeconomic status

Socioeconomic status	Percent of MR below an IQ of 75
High 1	0.5
2	0.8
3	2.1
4	3.1
Low 5	7.8

S. KIRK, *supra* note 1, at 185.

<sup>6</sup> The special education cost index is an empirical derivation, based on a formula which accounts for the greater costs of programs for exceptional children. It is multiplied by the regular per pupil expenditure to obtain the cost of educating a child in each category of exceptionality. Such a formula is used by most governmental units and policy groups. 1972 Hearings 44.

As reported by one major study, the cost of special educational programs for a school district having 20,000 pupils and a regular program expenditure of \$850 per pupil has been estimated as follows:

Category of exceptional program	A Prevalence rate (%)	B District ADM	C Special program population (A × B)	D Special program cost index	E Expenditure per pupil in regular program	Special program cost (C × D × E)
Educable mentally retarded	1.30	20,000	260	1.87	\$850	\$ 413,270
Trainable mentally retarded	0.24	20,000	48	2.10	850	85,680
Auditorily handicapped	0.10	20,000	20	2.99	850	50,830
Visually handicapped	0.05	20,000	10	2.97	850	25,245
Speech handicapped	3.60	20,000	720	1.18	850	722,160
Physically handicapped	0.21	20,000	42	3.64	850	129,948
Special learning disorder	1.12	20,000	224	2.16	850	411,564
Emotionally disturbed	2.00	20,000	400	2.83	850	962,200
Homebound hospital	0.22	20,000	44	1.42	850	53,118
Multiply handicapped	0.07	20,000	14	2.73	850	32,487
TOTAL			1,782			\$2,886,502

Frohreich, *supra* note 1, at 523.

<sup>7</sup> Address by S. Marland, Commissioner of Education, 31st Annual Convention of the

State constitutions generally require that a free public education be provided to all children within the state.<sup>8</sup> In addition, forty-nine states have enacted mandatory school attendance statutes;<sup>9</sup> however, the right of an individual citizen to attend school is not absolute.<sup>10</sup> Rather, it is a right qualified by the state's police power to provide the greatest good for the greatest number. The practice of excluding handicapped children arises from this power,<sup>11</sup> and children whose physical or mental handicaps prevent them from profiting from instruction are often excluded from public education by statute.<sup>12</sup> Even a child who is mentally normal and keeps pace with his peers may be excluded from regular classes because his presence is thought to be detrimental to the best interests of the school.<sup>13</sup> Indeed, some states require local school districts to provide special education classes, but reference to such classes in the statutes of other states often is so vague as to be unenforceable.<sup>14</sup>

In light of the recognized importance of education in American society, it is not surprising that the constitutionality of these exclusionary practices would become a subject of litigation. There are two avenues of constitutional attack against such practices. One approach focuses on procedural due process. It requires an investigation into the procedures for categorizing a child as handicapped and hence excludable from public education.<sup>15</sup> Another area

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National School Boards Ass'n, Philadelphia, Penn., April 5, 1971. For a graphic portrayal of the uneven responses to the needs of the mentally retarded, see PRESIDENT'S COMM. ON MENTAL RETARDATION, TOWARD PROGRESS: THE STORY OF A DECADE 18 (1969).

<sup>8</sup> Cannon, *A Child's Right to a Free Public Education*, 5 CLEARINGHOUSE REV. 65 (1971).

<sup>9</sup> A. STEINHILBER & C. SOKOLOWSKI, STATE LAW ON COMPULSORY ATTENDANCE 11 (1966). These authors cite two states, Mississippi and South Carolina, as not having compulsory attendance statutes. South Carolina has since enacted such a statute. See S.C. CODE ANN. § 21-757 (Supp. 1971).

<sup>10</sup> L. PETERSON, R. ROSSMILLER & M. VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION 333 (1969).

<sup>11</sup> *Id.*

<sup>12</sup> A. STEINHILBER & C. SOKOLOWSKI, *supra* note 9, at 11.

<sup>13</sup> *Beattie v. Board of Educ.*, 169 Wis. 231, 172 N.W. 153 (1919). The plaintiff in *Beattie* was a 13-year-old child who had been excluded from regular public school classes. He was slow and hesitating in speech, had a high, rasping, and disturbing tone of voice accompanied with uncontrollable facial distortions, and he drooled. He was normal mentally and kept pace with his fellow students. However, the school board claimed that his physical condition produced a depressing and nauseating effect upon the teachers and school children. The Supreme Court of Wisconsin dismissed the child's petition for reinstatement in the absence of a showing that the action of the school board was illegal or unreasonable.

<sup>14</sup> 1972 Hearings 30.

<sup>15</sup> See Kirp, *Schools as Sorters: Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705 (1973). In *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), the court spelled out in detail the rights of a student to procedural due process which must

of inquiry involves equal protection considerations. The question, dealt with in this Note, is whether the equal protection clause prohibits the exclusion of a child from a publicly supported education solely on the basis of physical or mental handicaps.<sup>16</sup>

## I

## PROGNOSIS FOR THE MENTALLY RETARDED

At the outset, it will be useful to examine the role education can play for the handicapped, particularly the mentally retarded.<sup>17</sup>

For educational purposes, a mentally retarded child is one whose limited capacity prevents him from profiting from an ordinary school curriculum.<sup>18</sup> However, retarded children should not be considered as a homogenous group since the prognosis for social and occupational adjustment varies widely depending on the degree of retardation. Generally speaking, children with intelligence quotients of 55 to 69 are educable.<sup>19</sup> The incidence of such a handicap varies from 10 to 50 per 1000 children,<sup>20</sup> depending upon the socioeconomic level of the community. Educable children constitute 89 percent of all retarded children.<sup>21</sup> Although there is some dispute as to whether these children should be placed in special classrooms or in regular classrooms with special help,<sup>22</sup> they

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be observed whenever a child is placed in a special education classroom. The issue of the cultural bias of intelligence quotient tests is a related one. *See, e.g.,* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

<sup>16</sup> The term exclusion is meant to include the situation in which a child is not offered a curriculum from which he can benefit as well as the situation in which he is not allowed to attend school. *See* notes 120-25 and accompanying text *infra*.

<sup>17</sup> Other categories of handicapped children have been excluded from this discussion for several reasons. The needs of the physically handicapped have, in general, been more fully met by the states. *See 1972 Hearings* 61. Moreover, any discussion of their needs is difficult because they require more detailed categorization with individual consideration given to each. *See, e.g.,* Rossmiller, *Dimensions of Need for Educational Programs for Exceptional Children*, in R. JOHNS, K. ALEXANDER & R. ROSSMILLER, NATIONAL EDUCATIONAL FINANCE PROJECT, DIMENSION OF EDUCATIONAL NEED 72-85 (1969). Emotionally disturbed children are not included because of the absence of a generally accepted definition of such children and because provisions for such children raise an extremely difficult problem regarding the school's responsibility for the mental health of its pupils. *Id.* at 82; *see* notes 120-25 and accompanying text *infra*.

<sup>18</sup> PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON EDUCATION AND REHABILITATION 33 (1962).

<sup>19</sup> *Id.* at 34.

<sup>20</sup> Rossmiller, *supra* note 17, at 74; *see* note 5 *supra*.

<sup>21</sup> S. KIRK, EDUCATING EXCEPTIONAL CHILDREN 92 (1st ed. 1962).

<sup>22</sup> Rossmiller, *supra* note 17, at 73.

have the potential for leaving school to work, to marry, to raise families, and to make meaningful contributions to society.<sup>23</sup>

The trainable mentally retarded have intelligence quotients of 25 to 54.<sup>24</sup> The incidence of such children is 4 per 1000 children.<sup>25</sup> The prognosis for such children is sheltered living in a workshop, an occupational center, a residential facility, or a home. They have the potential to learn to take care of themselves in certain routine activities, to adjust to a home or neighborhood, and to develop limited economic usefulness in simple and closely supervised work activities.<sup>26</sup>

The totally dependent retard is one with an intelligence quotient of 24 or less.<sup>27</sup> The incidence of such children is 1 per 1000.<sup>28</sup> They are unable to survive without close supervision and assistance in the most routine activities,<sup>29</sup> and retention in an institution is generally considered appropriate for the dependent retard.<sup>30</sup> Although they have some capacity for growth and learning, it is unclear whether such children can or should be enrolled in regular public schools.<sup>31</sup> Generally, continued institutionalization will be necessary for these children no matter what family and community resources are available to them.<sup>32</sup>

For the overwhelming majority of mentally retarded children an appropriate education can be meaningful in preparing them for lives as self-supporting and productive citizens. Their level of mental retardation and even their status as mentally retarded may

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<sup>23</sup> PRESIDENT'S PANEL ON MENTAL RETARDATION, *supra* note 18, at 34. Of 30 mentally retarded children, 29 are capable of achieving self sufficiency—25 in the ordinary way in the marketplace, 4 in a sheltered environment. The remaining 1 in 30 is capable, with proper education and training, of achieving a significant degree of self care. Speech by Thomas K. Gilhool, National Topical Conference on Career Education for Exceptional Children and Youth, Feb. 11-14, 1973, in 39 EXCEPTIONAL CHILDREN 597, 603 (1973).

<sup>24</sup> PRESIDENT'S PANEL ON MENTAL RETARDATION, *supra* note 18, at 34.

<sup>25</sup> Rossmiller, *supra* note 17, at 74.

<sup>26</sup> PRESIDENT'S PANEL ON MENTAL RETARDATION, *supra* note 18, at 34.

<sup>27</sup> *Id.*

<sup>28</sup> Rossmiller, *supra* note 17, at 74.

<sup>29</sup> *Id.* at 72.

<sup>30</sup> See NEW YORK DEP'T OF MENTAL HYGIENE, APPROPRIATENESS OF THE CONTINUED INSTITUTIONALIZATION OF THE STATE SCHOOL POPULATION IN NEW YORK STATE 13 (1969).

<sup>31</sup> L. DUNN, EXCEPTIONAL CHILDREN IN THE SCHOOLS 151-57 (1963). Professor Dunn cites studies which suggest that cut-offs should be established at intelligence quotient levels which would completely exclude the totally dependent retard. However, the court in Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 343 F. Supp. 279, 296 (E.D. Pa. 1972), was convinced by expert testimony that *any* retarded child could benefit from an appropriate education.

<sup>32</sup> NEW YORK DEP'T OF MENTAL HYGIENE, *supra* note 30, at 32.

change with appropriate treatment and education.<sup>33</sup> The goal of education of a mentally retarded child is to develop his level of adaptive behavior to its full potential. Stated in these terms the mentally retarded child has at least the same personal interest in education as any other child.

## II

### A GUARANTEE OF EQUAL ACCESS TO EDUCATION FOR THE HANDICAPPED UNDER THE EQUAL PROTECTION CLAUSE

The standard of review in equal protection cases depends upon both the nature of the classification involved and the importance of the interest affected. In most situations, equal protection requires only that the legislation meet the test of minimum rationality.<sup>34</sup> This requires a showing that (1) the ends sought constitute a legitimate state purpose and (2) there is a substantial relationship between the ends sought and the classificatory scheme employed.<sup>35</sup> When a classification is based upon a "suspect" trait or when fundamental interests are affected, however, the legislation is subjected to a stricter standard of review, to a more "rigid scrutiny."<sup>36</sup> In these cases, an overriding social justification must be established before equal protection requirements are satisfied.<sup>37</sup> In other words, the state system involved is no longer entitled to the usual presumption of validity.<sup>38</sup> Instead, the state carries a "heavy burden of justification" and must show that its system has been structured with "precision," narrowly tailored to serve legitimate

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<sup>33</sup> Such changes may occur as a result of increased age, day-to-day variations in intellectual functioning, and training programs which increase levels of adaptive behavior. See PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 12 (1963).

<sup>34</sup> See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969).

<sup>35</sup> The Supreme Court recently reiterated its interpretation of the rational basis test, observing that "[u]nder 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>36</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); Tussman & tenBroek, *supra* note 34, at 356; *Developments in the Law—Equal Protection*, *supra* note 34, at 1088.

<sup>37</sup> See *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Under this test, the burden is on the state to establish that the public interest involved outweighs the disadvantages imposed on the affected groups.

<sup>38</sup> *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, J., concurring).

objectives, and that it has selected the "least drastic means" for effectuating its objectives.<sup>39</sup>

"Suspect" classifications include those based upon race, which are almost always suspect,<sup>40</sup> as well as those based upon wealth,<sup>41</sup> national origin,<sup>42</sup> alienage,<sup>43</sup> or illegitimacy,<sup>44</sup> which are suspect only under certain circumstances.<sup>45</sup> A right may be deemed fundamental if it is explicitly guaranteed by the Constitution.<sup>46</sup> Alternatively, a right may be fundamental if it is implicitly guaranteed by virtue of its close nexus with other rights which enjoy explicit constitutional protection.<sup>47</sup>

In attempting to vindicate the rights of handicapped children excluded from the public school system, a litigant might try to make out an equal protection claim by showing that the state's method of pupil placement abridges a fundamental right or is based upon a suspect classification. This could be accomplished by establishing any of the following propositions: (1) a minimum quantum of education is a fundamental right;<sup>48</sup> (2) individual handicaps are a suspect classification when used to exclude children from public education;<sup>49</sup> or (3) the exclusion of handicapped children from public education amounts to discrimination based on wealth, and wealth is a suspect classification.<sup>50</sup> The state would then be forced to show that its classificatory scheme was based on a compelling state interest.

<sup>39</sup> See *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972), and cases cited therein.

<sup>40</sup> *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964). Racial classifications may be used to achieve equality by giving preferential treatment to groups that have suffered discrimination in the past. When racial classifications are employed to promote rather than to deny equality, they may be characterized as "benign." *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

<sup>41</sup> See *Griffin v. Illinois*, 351 U.S. 12 (1956).

<sup>42</sup> See *Oyama v. California*, 332 U.S. 633, 644-46 (1948).

<sup>43</sup> *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

<sup>44</sup> See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

<sup>45</sup> *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, J., concurring).

<sup>46</sup> See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (free speech); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) ("liberty" protected by due process clause of fourteenth amendment).

<sup>47</sup> *Dunn v. Blumstein*, 405 U.S. 330 (1972). *Dunn* reviews the Supreme Court's opinions in voting rights cases and explains that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.* at 336. The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though "the right to vote in state elections is nowhere expressly mentioned." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966).

<sup>48</sup> See notes 52-75 and accompanying text *infra*.

<sup>49</sup> See notes 76-84 and accompanying text *infra*.

<sup>50</sup> See notes 85-100 and accompanying text *infra*.

If the state's system could not be subjected to strict scrutiny, the plaintiff would have to overcome the state's exclusionary scheme under the rational basis test, which places a substantial burden on the plaintiff. It is possible, however, that certain exclusionary schemes might be considered to be "patently arbitrary" and without any rational relationship to a legitimate governmental interest.<sup>51</sup>

### A. *The Right to a Minimum Quantum of Education*

The United States Supreme Court addressed the issue of the right to education for the first time in *Rodriguez v. San Antonio Independent School District*.<sup>52</sup> In its opinion, the Court distinguished between the right to an equal education and the right to some "minimum quantum" of education. While it clearly held that the right to an equal education is not a fundamental right, the Court reserved decision on whether some minimum quantum of education is fundamental.<sup>53</sup>

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<sup>51</sup> See notes 101-19 and accompanying text *infra*.

<sup>52</sup> 411 U.S. 1 (1973).

<sup>53</sup> This distinction is not particularly surprising. For example, one of the staunchest critics of the equal protection cases which led up to the *Rodriguez* decision was Professor Philip B. Kurland. See Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968). Nevertheless, Professor Kurland has subsequently written that:

It is not equality but quality with which we are concerned. For equality can be secured on a low level no less than a high one. The claim that will have to be developed will be a claim to *adequate and appropriate educational opportunity*.

Kurland, *The Privilege or Immunities Clause: "Its Hour Come Round At Last?"*, 1972 WASH. U.L.Q. 405, 419 (emphasis added); see Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355 (1971). At least four federal courts have agreed that there is an implied substantive right not to be excluded from a public school education. See *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (requiring public school education for all handicapped children in District of Columbia); *Moore v. Board of Trustees*, 344 F. Supp. 682 (D.S.C. 1972) (dictum) (substantive right to education implicit in due process clause); *Cook v. Edwards*, 341 F. Supp. 307 (D.N.H. 1972) (indefinite expulsion for appearing intoxicated at school enjoined on substantive due process grounds); *Ordway v. Hargraves*, 323 F. Supp. 1155, 1158 (D. Mass. 1971) (requiring readmission of pregnant high school student). *Contra Fleming v. Adams*, 377 F.2d 975 (10th Cir. 1967).

The argument that some minimum quantum of education is a fundamental right is also implicitly supported by dictum in *Rodriguez* and other cases which indicate that discrimination in education based on wealth is unconstitutional. See notes 85-93 and accompanying text *infra*. See also *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 88 (1973) (Marshall, J., dissenting). The converse argument that wealth discrimination in the context of exclusion from education does not invoke strict scrutiny because some minimum quantum of education is not a fundamental right is substantially weakened by precedent to the contrary. See notes 85-93 and accompanying text *infra*.

In *McMillan v. Board of Educ.*, 430 F.2d 1145 (2d Cir. 1970), indigent parents sued the Board of Education of the City of New York for failing to provide an appropriate education

In *Rodriguez*, the plaintiffs had attacked, as violative of the equal protection clause, Texas's system of financing public education, under which per pupil expenditures varied according to the wealth of each school district within the state. A three-judge district court had upheld the plaintiffs' claim, holding in part that equal education was a fundamental right and that Texas had failed to demonstrate a compelling state interest for its spending scheme.<sup>54</sup> In their arguments to the Supreme Court, the plaintiffs sought to establish that equal education was a fundamental right because of its close nexus to rights explicitly protected by the Constitution.<sup>55</sup> The Court conceded that some identifiable quantum of education might be a constitutionally protected prerequisite to the meaningful exercise of recognized constitutional rights.<sup>56</sup> But the Court said that it could not be inferred from such a concession that a system providing for relative differences in spending levels for education within a state was unconstitutional.<sup>57</sup> In reversing the decision below, the Court noted that it was sufficient that Texas had provided "an adequate base education for *all* children."<sup>58</sup>

As the Court recognized in *Rodriguez*, its holding that a state

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for their handicapped children. Under New York law, the Commissioner of Education was authorized to contract with private schools for the education of handicapped children for whom there were no adequate public facilities for instruction. The maximum amount authorized, \$2,000, was insufficient to cover full tuition costs at some schools. Therefore, parents were required to supplement this amount from their own resources. One group of plaintiffs argued that this violated their right to equal protection, because the benefit of the grant was arbitrarily denied to them on the ground that they could not pay the additional tuition. The court held that these allegations raised a substantial constitutional question and consequently remanded the case to the district judge so that he could convene a three-judge court. *Id.* at 1150. The court said that the state could choose not to provide tuition grants, but having chosen to do so, it became subject to the equal protection clause. *Id.* at 1149.

In subsequent cases, the Second Circuit has distinguished the facts in *McMillan* because the plaintiffs "received nothing . . . while others received large sums in cash or equivalent services." See, e.g., *Johnson v. New York State Educ. Dep't*, 449 F.2d 871, 879 (2d Cir. 1971), *vacated on other grounds*, 409 U.S. 75 (1972). It has therefore been made clear that the holding in *McMillan* supports the dictum in *Rodriguez* that wealth discrimination in the context of exclusion from primary and secondary education triggers strict scrutiny under the equal protection clause. See *Moore v. Board of Trustees*, 344 F. Supp. 682 (D.S.C. 1972). Higher education would probably fall within the orbit of social and economic services and as such would invoke the less rigorous judicial scrutiny of the rational basis test.

<sup>54</sup> *Rodriguez v. San Antonio Ind. School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

<sup>55</sup> *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). As the Court noted in *Rodriguez*, education is not among those rights explicitly protected under the Constitution. *Id.* Therefore, the plaintiffs sought to show that it was implicitly protected. See note 47 and accompanying text *supra*.

<sup>56</sup> 411 U.S. at 36.

<sup>57</sup> *Id.* at 37.

<sup>58</sup> *Id.* at 25 n.60; see *id.* at 24, 49.

need not provide equal educational opportunities for all children within its borders was not meant to foreclose a later finding that at least a minimum quantum of education must be provided by a state for all its children.<sup>59</sup> Indeed, the argument that there is a fundamental right to education because of the close nexus between education and recognized constitutional rights is far more persuasive in the case of total exclusion from education than it was in the situation presented by *Rodriguez*. A minimum quantum of education should be considered a fundamental right for all children because of its especially close relationship to one or more recognized constitutional rights such as voting and free speech.<sup>60</sup> Additionally, a minimum education is particularly important for handicapped children because it may be the only avenue by which they might avoid institutionalization.<sup>61</sup> Therefore, it can be cogently argued that once a state enters into the business of offering primary and secondary education to its children, it must provide every child—and especially the handicapped child—with some minimum quantum of education.

### 1. *The Nexus Between Education and Other Fundamental Rights*

There are two recognized constitutional rights which are threatened whenever any child is excluded from educational opportunities. First, illiteracy may be a proper basis for precluding a citizen's participation in state elections.<sup>62</sup> Thus, exclusion from education is a clear threat to the right to vote. Second, education is essential to the meaningful exercise of first amendment rights. In a fundamental sense education teaches children communicative skills. The first amendment guarantee of free speech protects even uninformed, unpersuasive, and possibly unintelligible speech, but the meaningful exercise of the right, enabling the speaker to convince and persuade, is dependent upon his ability to speak intelligently and knowledgeably.<sup>63</sup> However, the argument in favor

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<sup>59</sup> *Id.* at 36.

<sup>60</sup> See notes 62-63 and accompanying text *infra*.

<sup>61</sup> See notes 65-66 and accompanying text *infra*.

<sup>62</sup> *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

<sup>63</sup> The handicapped person's meaningful exercise of his first amendment rights is frustrated by his failure to acquire basic communicative skills, and his right to vote might conceivably be denied because of his illiteracy. Exclusion of the handicapped from education threatens their enjoyment of these rights, which could not otherwise be denied to them. The state could not, for example, deny the vote to persons merely because they were physically handicapped. Conceivably, some of the mentally retarded and emotionally disturbed could be denied the right to vote (see *Rodriguez v. San Antonio Ind. School Dist.*, 411 U.S. 1, 36 n.79 (1973)) which they generally enjoy at present. See D. MCINTYRE & F. LINDMAN, *THE MENTALLY DISABLED AND THE LAW* 111, 268 (1961). However, such a denial ought to be by

of education for the handicapped does not stop there. The question of whether or not the handicapped can obtain a free public education often affects an additional constitutional right—the right not to be institutionalized which is found in the fifth and fourteenth amendment concepts of liberty.<sup>64</sup>

## 2. *The Right of Handicapped Children Not To Be Institutionalized*

Both the fifth and fourteenth amendments to the Constitution protect the individual against the deprivation of his liberty without due process of law. This protection extends to those who may be institutionalized because they are insane or mentally retarded. It is clear that this protection includes both substantive and procedural guarantees.

In *Jackson v. Indiana*,<sup>65</sup> the Supreme Court considered the institutionalization of a mentally defective deaf-mute who had been declared incompetent to stand trial. In holding that the indefinite commitment of a criminal defendant because of his incompetency to stand trial violated due process, the Court observed:

The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. . . . Considering the number of persons affected, it is perhaps remarkable that the *substantive constitutional limitations* on this power have not been more frequently litigated.<sup>66</sup>

The clear import of this opinion is that there are substantive limitations on the exercise of a state's power to institutionalize which correspond to the individual's right not to be institutionalized.<sup>67</sup> Such a right is inherent in the concept of liberty as

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direct legislation capable of judicial review, and not indirectly by administrative exclusion from education. As for those rights guaranteed by the first amendment, there is no basis for distinguishing persons because of their disabilities or handicaps.

<sup>64</sup> According to 1960 census information, almost three times as many children are institutionalized for mental disabilities as for physical disabilities. S. Low, *AMERICA'S CHILDREN AND YOUTH IN INSTITUTIONS* 30 (1965). However, there is a sizeable number of both categories of handicaps represented in institutions. *Id.* Of course, there may be children who would be appropriately institutionalized regardless of the availability of community resources. NEW YORK DEP'T OF MENTAL HYGIENE, *supra* note 30, at 32-37. Thus, the argument may be inapplicable to severely handicapped children. See notes 65-74 and accompanying text *infra*. Concern over institutionalization comes at a time when the incidence of institutionalization, at least of the mentally retarded, has increased steadily. PRESIDENT'S COMM. ON MENTAL RETARDATION: *THE EDGE OF CHANGE*, *supra* note 5, at 4.

<sup>65</sup> 406 U.S. 715 (1972).

<sup>66</sup> *Id.* at 736-37 (emphasis added).

<sup>67</sup> According to its reasoning under the due process clause the Court held that:

it is used to refer to freedom from bodily restraint.<sup>68</sup> The evolving right to treatment, which has been held to apply to institutionalized mentally retarded children,<sup>69</sup> is premised upon the right not to be institutionalized.<sup>70</sup> According to this doctrine, "effective treatment must be the *quid pro quo* for society's right to exercise its *parens patriae* controls."<sup>71</sup>

The right not to be institutionalized and the emerging doctrine of the right to treatment support the proposition that handicapped children have a right to an appropriate education. Education is critical to the right of many handicapped children not to be institutionalized, for the lack of opportunity to obtain an appropriate public school education is apt to lead to institutionalization of the handicapped for two reasons. First, unavailability of an appropriate education in the child's community is frequently used as a criterion in the decision to institutionalize<sup>72</sup> or to continue

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a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than a reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceedings that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

*Id.* at 738.

<sup>68</sup> See *Meyers v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>69</sup> *Wyatt v. Stickney*, 344 F. Supp. 387, 396 (M.D. Ala. 1972).

<sup>70</sup> *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971). *Contra*, *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335 (N.D. Ga. 1972).

<sup>71</sup> *Martarella v. Kelley*, 349 F. Supp. 575, 600 (S.D.N.Y. 1972).

<sup>72</sup> In California, a questionnaire was sent to parents who had placed their children in an institution or on the waiting list for an institution. When asked what services might have helped keep their child out of the state hospital, 47% cited special education. ARTHUR BOLTON ASSOCIATES, A REPORT TO THE ASSEMBLY SELECT COMMITTEE ON MENTALLY ILL AND HANDICAPPED CHILDREN 93 (1970); see GOVERNOR'S ADVISORY COMM. ON MENTAL RETARDATION, MENTAL RETARDATION—A COMPREHENSIVE PLAN FOR UTAH 44 (1965) (listing nonavailability of special education as criterion for institutionalization).

The following editorial in a publication supported by the Bureau of Education for the Handicapped of the United States Department of Health, Education, and Welfare (HEW) points out the type of duress which leads many parents to place their children in institutions:

A small but steady stream of letters continues to flow in from parents whose children are in institutions for the retarded or mentally ill or who are contemplating commitment. We would be hard pressed to judge which express the most distress—those written before the child is placed in the institution or those written after placement. But it seems safe to say that most decisions to commit to a large institution are made only because no other choices are available. When parents are obliged to keep their children at home 24 hours a day, seven days a week because no education or treatment programs will accept them, they are usually desperate

institutionalization.<sup>73</sup> Second, the prognosis for economic and personal independence outlined above is predicated upon the child's receiving appropriate education and training.<sup>74</sup> Finally, if an appropriate education is not provided in a community setting, but is provided in an institution as part of the emerging right to treatment, parents may be unduly encouraged to institutionalize their handicapped children, thus perverting the values underlying the developing right to treatment.<sup>75</sup>

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for relief from an impossible burden of care. When they "choose" to place their child in an institution where conditions will work against the child rather than for him it is only because no other public alternatives are available and the cost of private residential schools or treatment centers is prohibitive.

1 SPECIAL EDUCATION INFORMATION CENTER, CLOSER LOOK NEWSLETTER 1 (1972), *quoted in* Blatt, *The Legal Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 991, 999 n.23 (1972).

The exceptional child without an education is not merely in jeopardy "of success," as the Supreme Court put it, but liberty and life itself. You know very well that the rate of institutionalization among those children who have been deprived of a public education is considerably higher. And you know as well that the death rate at those institutions among children who have not had the opportunity of an education which would produce for them those self help skills that enable them, for example, to avoid scalding hot water, has resulted in a higher rate of death itself.

Speech by Thomas K. Gilhool, *supra* note 23.

Although California had mandated programs for the educable and trainable retarded by the early 1960's, it was not providing a day program for a significant number of more severely and physically handicapped children. Those parents who did not wish to place their children in private or state-funded residential facilities were forced to choose between paying for their children's placement in a day training program sponsored by a parents' association or keeping their children at home and providing them with 24-hour care. The latter decision was more common for three reasons: many parents were unable to afford the tuition for the day training program; many could not find transportation for their children; and some parents discovered that such programs were nonexistent in their communities. Therefore, faced with the tremendous burden of total care and training of their children, many such families eventually applied for state institutional placement.

Koch & Okada, *Educational Services for the Mentally Retarded Individual in California*, 23 SYRACUSE L. REV. 1075, 1078-79 (1972).

<sup>73</sup> See NEW YORK DEP'T OF MENTAL HYGIENE, *supra* note 30, at 21-22 (indicating availability of special education as criterion for release from New York State institutions).

<sup>74</sup> The National Advisory Committee on Handicapped Children has declared that the future economic independence of a handicapped child depends on whether he receives proper training and education. See Rossmiller, *supra* note 17, at 86.

<sup>75</sup> Treatment, including education for those who have been institutionalized, is laudatory and appears to be constitutionally required. Nevertheless, mustering resources for the handicapped within institutions without concurrently marshalling resources within the community may achieve the anomalous result of encouraging institutionalization. It has been argued that federal and state governments already place too much emphasis on placement in institutions and not enough on residentially based treatment. Kaiser, *Developing the Advocacy Role In Environmental Design*, 23 SYRACUSE L. REV. 1119, 1123-24 (1972). Whatever may be the merits of this argument, it would seem desirable that judicial intervention not have the effect of encouraging institutionalization of children who would be better served through community based programs. The development of a right to an appropriate education would tend to neutralize the impact of the right to treatment. See note 70 and accompanying text *supra*.

B. *Individual Handicaps as the Basis for a Suspect Classification*

Even if a minimum quantum of education is not found to be a fundamental right for either normal or handicapped children, an argument can be made that a classification based upon individual handicaps is suspect when used to exclude a child from education. Whether the handicapped constitute a suspect class depends on whether "the class . . . is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."<sup>76</sup>

To exclude the handicapped from education is to saddle those already incapacitated with further disabilities. The handicapped are often those closest to losing their constitutionally protected rights through no fault of their own.<sup>77</sup> Exclusion of the handicapped may imperil protected rights which are not even at stake for the average individual. In the case of education, this includes liberty in the sense of freedom from institutionalization.<sup>78</sup> Of course, these are only the constitutionally recognized rights which are affected. In addition, exclusion from education may mean the loss of the opportunity to attain any degree of economic or personal self-sufficiency.<sup>79</sup>

As a minority, the handicapped suffer under a majoritarian governmental system. Their disadvantage in the political process is compounded by two factors. First, most handicaps traditionally

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If education is not offered until after institutionalization it may simply be too late. "We firmly believe the sooner that mentally retarded children are exposed to a structured program of education and training, the more likely they will achieve social and financial sufficiency." Shapp, *The Right to an Education for the Retarded in Pennsylvania*, 23 SYRACUSE L. REV. 1085, 1087 (1972). An appropriate education may be a prerequisite to another constitutionally recognized right, namely privacy. Both the handicapped child and his parents suffer an enormous loss of privacy when the child is excluded from appropriate education and training. A child may suffer the loss of bodily privacy in that he is unable to acquire self-help skills such as bathing and toilet training except through formal training. Compare *Roe v. Wade*, 410 U.S. 113 (1973). Likewise, parents may suffer a loss of privacy in that they must bear the arduous burden of lifelong care of their handicapped child. Such obligations severely limit their privacy in the sense that it relates to associational activity. Moreover, in the case of the parent the obligation to support his handicapped adult child is state imposed and goes beyond the normal responsibility of parent for child which terminates upon adulthood. The imposition of this prolonged family relationship may come within the principles enunciated in *Bodie v. Connecticut*, 401 U.S. 371 (1971).

<sup>76</sup> *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>77</sup> Handicaps are comparable to race and lineage in that the individual may be unable to alter his condition at least in the absence of the assistance of others.

<sup>78</sup> See notes 65-75 and accompanying text *supra*.

<sup>79</sup> See note 74 *supra*.

have been regarded as a stigma,<sup>80</sup> and parents are often reluctant to fight for their children's needs in the political arena because of the attendant publicity and embarrassment involved.<sup>81</sup> Second, the handicapped are a fragmented group lacking political cohesion. Traditionally, legislative programs for the handicapped have not fared well unless they could be tagged with a label that had public appeal.<sup>82</sup> As a result, children whose handicaps cannot be easily labeled or categorized often slip through the cracks.<sup>83</sup>

<sup>80</sup> ARTHUR BOLTON ASSOCIATES, *supra* note 72, at 16-17, 50-53.

<sup>81</sup> In a recent speech given to the National Topical Conference on Career Education for Exceptional Children and Youth, the significance of being handicapped was described as follows:

It is the experience of being on the wrong end of the judgment made so widely in our society that *we* are superior and that *they* . . . are inferior. There are other consequences as well. When that judgment is being fed back to those of us who are on the wrong end of it; we come to believe as the retarded and their families have come to believe, that indeed we are inferior. We then tend to feel ashamed, to feel guilty and to be most timid in the face of authority, to be timid too often in asserting our rights.

Speech by Thomas K. Gilhool, *supra* note 23. Expert testimony provided in *Pennsylvania Association for Retarded Children* indicated that the general public still attaches a stigma to mental retardation and that according to empirical studies stigmatization is a major concern among parents of retarded children. *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Sup. 279, 294-95 (E.D. Pa. 1972). Despite attempts by some persons to use mass media techniques to alter public attitudes about the handicapped, no meaningful change has resulted. L. LIPPMAN, *ATTITUDES TOWARD THE HANDICAPPED* 88-91 (1972).

<sup>82</sup> ARTHUR BOLTON ASSOCIATES, *supra* note 72, at 16-17.

<sup>83</sup> *Id.*; see Blatt, *Public Policy and the Education of Children With Special Needs*, 38 *EXCEPTIONAL CHILDREN* 537, 537 (1972). Another factor which tends to place the retarded at a disadvantage in the political process is the failure of institutional bodies to represent them effectively. Several factors have contributed to this failure. First, there is a tendency to separate the handicapped from society to minimize public awareness of their needs. Second, the deplorable conditions in some existing facilities tend to focus attention on the quality of institutional care. Thus, the legislature can provide immediate relief from public pressures by providing resources for amelioration of these visible deficiencies while other areas of services go unnoticed and unimproved. Third, emphasis on placement in an institution tends to be a recurrent theme in the recommendations of federal and state governments and has resulted in a concentration of resources in residential institutional facilities. Understandably, then, continuing reliance on specialized facilities which concentrate individuals in isolation from the community has encountered little resistance from those agencies and citizens groups which society has chosen to be official spokesmen for the needs and desires of the retarded. Kaiser, *supra* note 75, at 1122-23.

An example of how governmental emphasis on institutionalization can discourage agencies and citizens' groups from effectively representing the handicapped has been noted in New York. Section 4407 of the New York Education Law provides \$2,000 per year per child to educate handicapped children for whom there is no program available in the public schools. N.Y. EDUC. LAW § 4407 (McKinney 1970). This law has led some communities to discontinue their special programs for the handicapped, thus encouraging institutionalization of the handicapped. At the same time, local associations for retarded children benefit from the law by operating school programs for which they receive \$2,000 per child per year. This income provides the economic stability and the major source of income for associations for retarded children. The local associations are therefore in the awkward position of facing

Extraordinary protection from the majoritarian political process is particularly appropriate in the setting of public school education. Exclusion on the basis of handicaps perverts any acceptable purpose of public education and is actually repugnant to recognized constitutional values. Deliberate attempts to educate only nonhandicapped or gifted children are antithetical to our common understanding of education or human worth.<sup>84</sup>

C. *Exclusion of Handicapped Children From Public Education as Discrimination Based on Wealth*

A finding of discrimination based on wealth in primary and secondary education may invoke strict scrutiny. The law in this area is in a state of flux since the Supreme Court seems to have viewed wealth as a suspect classification in some cases but not in others.<sup>85</sup> The *Rodriguez* opinion does offer some guidance, how-

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economic ruin whenever they seek too vigorously the placement of the mentally retarded in the public schools or advocate the creation of new and expanded programs for them in the public schools. Blatt, *supra* at 540.

<sup>84</sup> When the state of Nebraska and 21 other states tried to forbid teaching German immigrants in their mother tongue, the Supreme Court declared that the police power of the state could not be used to exclude the weakest and most helpless:

[T]he individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all . . . .

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both the letter and spirit of the Constitution.

*Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1922).

Insofar as the working of our public school system can be characterized as "chaotic and unjust," it may be questionable whether the state should be allowed to exclude any child who does not endanger the right of his fellow students to be educated. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring). But the basic presumption in favor of constitutional validity is even more doubtful as it relates to the exclusion of the handicapped. Even in states which have not totally neglected the education of the handicapped, programs have been developed for various categories of handicapped persons who can be tagged with a specific label that has public appeal. As a result, children who cannot be easily classified or labelled do not receive an appropriate education. Such fragmented programs remain unevaluated in terms of societal or individual needs. ARTHUR BOLTON ASSOCIATES, *supra* note 72, at 19-20, 35-36, 57-58.

<sup>85</sup> Compare *Shapiro v. Thompson*, 394 U.S. 618 (1969), with *James v. Valtierra*, 402 U.S.

ever. Among the arguments advanced by the plaintiffs in that case was that the Texas system of school financing discriminated against them on the basis of wealth.<sup>86</sup> The plaintiffs drew an analogy between the right to education on the one hand and the right to appeal a criminal conviction<sup>87</sup> and the right to vote<sup>88</sup> on the other. In the cases pertaining to the latter rights, the Supreme Court had struck down fees which had precluded their enjoyment by indigents. In so doing, it applied a strict standard of judicial review. In *Rodriguez*, the Supreme Court rejected the conclusion that these precedents could be properly applied under the facts of that case. At the same time, it suggested that the analogy between education and criminal appeal or voting would be appropriate in certain circumstances.<sup>89</sup>

The Court found two flaws with the plaintiffs' argument urging the application of these analogous cases. First, the previous cases had involved *absolute deprivation* of the right in question and the Court felt that an "adequate substitute" was being provided under the facts of *Rodriguez*.<sup>90</sup> Second, there was no evidence that the Texas financing system discriminated against any definable category of "poor" people because the plaintiffs had failed to define the injured class with reference to any absolute or functional level of impecunty.<sup>91</sup>

It is readily apparent that the exclusion of handicapped children from public education constitutes an absolute deprivation. The second doctrinal hurdle imposed by *Rodriguez*—the precise definition of an injured class—is more difficult to overcome. The *Rodriguez* court hypothesized a scheme in which the state imposed tuition requirements for its public schools. This, the court said,

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137 (1971). In *Valtierra*, the Supreme Court considered a California constitutional amendment which discriminated on the basis of wealth by requiring referendum approval of any low-rent public housing. The Court distinguished the factually similar case of *Hunter v. Erickson*, 393 U.S. 385 (1969), which had involved racial discrimination. One possible inference from this decision was that, unlike race, wealth was not a suspect classification. Since all the previous "wealth discrimination" cases had arguably involved a fundamental right, it would be possible to conclude that wealth discrimination was an unnecessary appendage to the holdings in those cases. See, e.g., *Harper v. Board of Elections*, 383 U.S. 663 (1966) (voting); *Griffin v. Illinois*, 351 U.S. 12 (1965) (transcript in order to appeal).

<sup>86</sup> *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973).

<sup>87</sup> *Mayer v. Chicago*, 404 U.S. 189 (1971); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Draper v. Washington*, 372 U.S. 487 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

<sup>88</sup> *Bullock v. Carter*, 405 U.S. 134 (1972); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969); *Harper v. Board of Elections*, 383 U.S. 663 (1966).

<sup>89</sup> See notes 90-93 and accompanying text *infra*.

<sup>90</sup> *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 23-24 (1973).

<sup>91</sup> *Id.*

would result in "a clearly defined class of 'poor' people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education."<sup>92</sup> But absolute exclusion based on wealth does not occur only when a fee is the mechanism for that exclusion. Whenever there is a sufficient correlation between family wealth and the incidence of exclusion, the courts will conclude that the mechanism for exclusion operates to the peculiar disadvantage of the comparatively poor and is therefore unconstitutional.<sup>93</sup>

The actual correlation between the incidence of exclusion of handicapped children from public schools and their families' wealth is substantial.<sup>94</sup> It is well known that a child's socioeconomic level affects his chances of bearing a handicap.<sup>95</sup> An economically deprived child is three to five times as likely to suffer from some of the more common handicaps.<sup>96</sup> Moreover, it has been noted that exclusionary practices are endemic to the center cities.<sup>97</sup> While more mobile and affluent families with handicapped children are

<sup>92</sup> An educational finance system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.

*Id.* at 25 n.60; see *McMillan v. Board of Educ.*, 430 F.2d 1145 (2d Cir. 1970).

<sup>93</sup> In addressing the issue of relative discrimination, the *Rodriguez* Court said that even if a correlation could be shown between expenditures on education and individual wealth, [a]ppellee's comparative discrimination theory would still face serious unanswered questions, including whether a *bare positive correlation or some higher degree of correlation* is necessary to provide a basis for concluding that the financing system is designed to operate to the peculiar disadvantage of the comparatively poor.

*San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 26 (1973) (emphasis added). It can be concluded from this and other statements in *Rodriguez* that de facto discrimination in the setting of education is unconstitutional if a sufficiently high correlation can be shown between those who are discriminated against and individual wealth. *Id.*; cf. *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972) (en banc).

<sup>94</sup> Unfortunately, exact statistical data regarding who is being excluded from public schools may not be available. In both Washington, D.C., and Pennsylvania, school officials were required to take a census of the number of exceptional children in local school districts. However, no such census was ever taken and the number of excluded children could only be made on a best guess basis. See *Mills v. Board of Educ.*, 348 F. Supp. 866, 868 (D.D.C. 1972); *Pennsylvania Ass'n of Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279, 296 (E.D. Pa. 1972).

<sup>95</sup> See note 5 and accompanying text *supra*.

<sup>96</sup> See note 20 and accompanying text *supra*. See also Remarks of Harrold Russell, *supra* note 5.

<sup>97</sup> See, e.g., TASK FORCE ON CHILDREN OUT OF SCHOOL, *supra* note 4, at iii: "[T]he problem of exclusion is endemic to most urban school systems in the nation."

observed to be concentrated in school districts which offer programs to help their children,<sup>98</sup> the immobile, poor, urban families must remain where exclusion is still practiced. Unfortunately, it is not yet certain what degree of correlation must be shown to invoke strict scrutiny.<sup>99</sup> But the possibility exists that the exclusion of handicapped children amounts to discrimination based on wealth.<sup>100</sup>

#### D. *Exclusion of Handicapped Children From Education Under the Rational Basis Test*

Aside from the question of whether exclusion of the handicapped from public schools affects a fundamental interest or is based upon a suspect classification, such exclusion may be unconstitutional under the rational basis test of the equal protection clause. In *Pennsylvania Association for Retarded Children v. Pennsylvania*,<sup>101</sup> the state association and parents of retarded children brought a class action seeking a declaratory judgment that the statute under which certain retarded children were being excluded from training and education in the state public schools was unconstitutional. According to the statute, mentally retarded children could be certified as uneducable and untrainable and, as a result, be excluded from public schools.<sup>102</sup> In addition, children who had

<sup>98</sup> NATIONAL EDUCATIONAL FINANCE PROJECT, FUTURE DIRECTIONS FOR SCHOOL FINANCING 24 (1971).

<sup>99</sup> See note 93 *supra*.

<sup>100</sup> In *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), the court held that the equal protection clause, as incorporated into the due process clause of the fifth amendment, created a duty upon the school board to provide handicapped children with an appropriate education. Although the court did not classify *Mills* as a wealth discrimination case, it carefully described the plaintiffs as unable to afford alternative private education. Furthermore, the court relied upon *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1969), for its holding that the denial to poor public school children of educational opportunities equal to those available to students in more affluent areas of the city was violative of due process and equal protection. Thus, at least implicitly, *Mills* stands for the proposition that the exclusion of handicapped children represents discrimination based on wealth which compels strict judicial scrutiny. This analysis of *Mills* is further supported by the conclusion that the asserted defense, namely limited financial resources, would probably be a sufficient defense under the rational basis test of the equal protection clause.

<sup>101</sup> 343 F. Supp. 279 (E.D. Pa. 1972). See generally L. LIPPMAN & I. GOLDBERG, THE RIGHT TO AN EDUCATION—ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATION FOR EXCEPTIONAL CHILDREN (1973).

<sup>102</sup> The statutory formulation was as follows:

The State Board of Education shall establish standards for temporary or permanent exclusion from the public school of children who are found to be uneducable and untrainable in the public schools. Any child who is reported by a person who is certified as a public school psychologist as being uneducable and untrainable in the public schools, may be reported by the board of school directors to the Superinten-

not attained a mental age of five could be refused admission to public schools.<sup>103</sup> In effect, this scheme resulted in the permanent exclusion of children with intelligence quotients below thirty-five.<sup>104</sup>

During litigation, the parties entered into a final consent agreement, agreeing that because

[T]he Commonwealth of Pennsylvania has undertaken to provide a free public education for all of its children between the ages of six and twenty-one years . . . it is the Commonwealth's obligation to place each mentally retarded child in a *free, public program of education and training appropriate to the child's capacity*.<sup>105</sup>

In view of these events, the district court did not decide the merits of the plaintiffs' claims. However, in assuming jurisdiction over the consent agreement, it held that the plaintiffs' claims were not "wholly insubstantial and frivolous."<sup>106</sup> In dictum, the court went beyond this narrow holding to say that the evidence had raised "serious" doubts as to the existence of a rational basis for such exclusion.<sup>107</sup> The court reached its conclusions by applying the rational basis test.<sup>108</sup> In so doing, it seems to have been most impressed with the evidence that all mentally retarded children could benefit from a program of education and training and that the earlier this training was provided, the more thoroughly and efficiently would the mentally retarded person benefit from it.<sup>109</sup>

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dent of Public Instruction and when approved by him, in accordance with the standards of the State Board of Education, shall be certified to the Department of Public Welfare as a child who is uneducable and untrainable in the public schools. When a child is thus certified, the public schools shall be relieved of the obligation of providing education or training for such child.

PA. STAT. ANN. tit. 24, § 13-1375 (Supp. 1973-74).

<sup>103</sup> *Id.* § 13-1304. The relevant provision stated: "Admission of beginners . . . . The board of school directors may refuse to accept or retain beginners who have not attained a mental age of five years . . . ."

<sup>104</sup> In certain instances this statute results in permanent exclusion since it is theoretically possible for a child with an I.Q. of 35 or below (the I.Q. intelligence test is normally relied upon to establish a mental age) never to achieve a mental age of five years. This result occurs because the I.Q. ratio levels off at chronological age 15.

*Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 282 n.4 (E.D. Pa. 1972).

<sup>105</sup> *Id.* at 285 (emphasis in original). This decision seems to have been politically popular. See Shapp, *supra* note 75, at 1085.

<sup>106</sup> *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 293 (E.D. Pa. 1972).

<sup>107</sup> *Id.* at 297.

<sup>108</sup> *Id.* at 283 n.8.

<sup>109</sup> The court summarized the evidence as follows:

[A]ll mentally retarded persons are capable of benefitting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency and the remaining

Assuming these findings of fact are correct, the Pennsylvania statutes, or any similar statutes, may lack a reasonable basis in fact and may therefore be unconstitutional under the rational basis test.<sup>110</sup> A more troublesome issue arises when the state asserts that it has chosen to limit its curriculum offering in order to preserve its fiscal resources. Although "preservation of the fisc" does not normally constitute a compelling state interest,<sup>111</sup> courts have held it to be a legitimate state interest under the traditional equal protection analysis.<sup>112</sup>

There are two possible tacks which the state might take to try to demonstrate that exclusion of the handicapped from the normal public school is a rational way of preserving its fiscal resources. The

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few, with such education and training are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education.

*Id.* at 296 (footnotes omitted).

<sup>110</sup> One author has concluded, however, that [t]here is little evidence that special day classes, as presently constituted, which emphasize the development of self-care and socialization by informal group instruction are effective for homogeneous groups of trainable children with IQ's over the full range from 25-50.

L. DUNN, *supra* note 31, at 155.

<sup>111</sup> *Shapiro v. Thompson*, 394 U.S. 618 (1969). Some qualification to this general rule might be required under exceptional circumstances where, for example, economies of scale are lost due to low population density and topography. See, e.g., *T. MAYEDA, DELIVERY OF SERVICES TO MENTALLY RETARDED CHILDREN AND ADULTS IN FIVE STATES* 76 (1971) (Colorado). In such situations, the state would still be obliged to develop the least drastic approach to this problem.

<sup>112</sup> *Dandridge v. Williams*, 397 U.S. 471 (1970).

Educating handicapped children has always been considered by the public educational system to be a "frill" to take care of after every other school need. The reasons used for the denial of educational services to handicapped children are many. They include such statements as the handicapped cannot learn, their presence in school will negatively affect the learning of normal children, these children make nonhandicapped children and adults uncomfortable, the cost of their education is too great, and the teachers and facilities are in short supply. Most of these reasons are mere "wives tales." Those relating to the additional resources necessary are reality.

Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1057-58 (1972). Another author has noted that the higher cost of educating the exceptional child is the reason most often given for unequal access to educational opportunity. Thomas, *Finance: Without Which There Is no Special Education*, 39 EXCEPTIONAL CHILDREN 475, 475 (1973).

Not only the cost but the efficacy of special education may be an issue:

The dearth of reliable data on the cost of exceptional child programs is surpassed by the lack of conclusive research with regard to the efficacy of special education programs. . . . The complete picture on the efficacy of educational programs may be an enigma that will always plague educators due to the uniqueness of programs and people, who by nature may be too diverse and unprogrammable to respond in the same way to the same treatment and teaching techniques.

Frohreich, *supra* note 1, at 524.

first is to argue that in light of their limited productivity, education of the handicapped is not a good investment.<sup>113</sup> In response to this, proponents of education for the handicapped reply that failure to educate not only leads to lost productivity but also to increased institutionalization costs. Measured in these terms, education of the handicapped must be regarded as a good investment.<sup>114</sup>

The second approach for the state is to argue that the task of reconciling the needs of its citizens with the finite resources available requires it to select the most pressing from among many important social goals. The state would urge that this should not be a judicial decision, and many courts have been reluctant to disturb the choice which a state has made between competing needs for public funds.<sup>115</sup> In *Lau v. Nichols*,<sup>116</sup> for example, the Ninth Circuit held that the state could refuse to teach Chinese students in their native tongue so long as it provided them with the same basic curriculum which it offered to all other students.<sup>117</sup> The court

<sup>113</sup> L. DUNN, *supra* note 31, at 158-59.

<sup>114</sup> Rossmiller, *supra* note 17, at 86. According to the President's Committee on Mental Retardation, institutional care for the retarded costs approximately \$40,000 per bed in construction costs, and the yearly costs for maintenance of the retarded range from \$2,000 to \$10,000. THE PRESIDENT'S COMM. ON MENTAL RETARDATION, THESE TOO MUST BE EQUAL: AMERICA'S NEEDS IN HABILITATION AND EMPLOYMENT OF THE MENTALLY RETARDED 14 (1969). The Department of Health, Education, and Welfare states that the cost of assistance to a handicapped child either in the form of institutionalization or welfare is \$250,000. Wall St. J., March 22, 1972, at 22, col. 1 (eastern ed.).

<sup>115</sup> Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

<sup>116</sup> 483 F.2d 791, rehearing en banc denied, 483 F.2d 805 (9th Cir. 1973).

<sup>117</sup> *Id.* at 798-99. On request of a member of the court who was not a member of the *Lau* panel, an unsuccessful attempt was made to have the Ninth Circuit consider the case en banc. There was a dissenting opinion filed as well as a concurring opinion. In the dissenting opinion, Judge Hufstедler wrote:

The Chinese children have met prima facie even the rigorous standards of *San Antonio Independent School District v. Rodriguez* . . . :

(1) They are a member of a class precisely identifiable, (2) the state has participated in discriminating against them, (3) the children who speak no English and are taught none are absolutely deprived of education and it has not been shown that those who are taught some English have a meaningful access to an adequate education. *San Antonio Independent School District v. Rodriguez* is the most recent pronouncement in a lengthy chain of equal protection cases. But even if it stood alone, *San Antonio Independent School District* would compel reversal.

*Id.* at 808. Concurring with the decision to reject the request for an en banc hearing, Judge Trask, who wrote the majority opinion in *Lau*, attempted to square that opinion with *Rodriguez*. He argued along the following lines:

A basic misapprehension of the factual situation seems to color, if not pervade, the dissent from the court's refusal to grant en banc consideration. This appears from the statement that "the majority opinion concedes that the children who speak no English receive no education . . ." The stipulation upon which the case was submitted for decision . . . refers to 2,856 Chinese-speaking students in the school district "who need special instruction in English." It continues by dividing those

reasoned that the determination of what forms of remedial education to provide was a "complex decision, calling for significant amounts of executive and legislative experience and *non-judicial* value judgments."<sup>118</sup> This argument represents a significant hurdle for a litigant challenging the exclusion of handicapped children from public education under the rational basis test.<sup>119</sup>

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students into one group who receive designated amounts of special help in English and those who do not.

. . . Those who do not, however, are not assumed "to receive no education."

Although some do not receive special help, there is no indication that they are not exposed to whatever English courses are afforded. The majority opinion does not equate the need for "special help" in English with receiving no education.

. . . As the Court recognized in *Rodriguez* the Equal Protection Clause does not, where wealth is involved, "require absolute equality or precisely equal advantages."

*Id.* at 808 (emphasis in original). Thus, even the concurring opinion does not dispute the proposition that according to *Rodriguez* the state may not exclude a child from the public schools so that he receives "no education." Rather the dispute appears to be over what constitutes exclusion. See notes 120-25 and accompanying text *infra*.

<sup>118</sup> *Lau v. Nichols*, 483 F.2d 791, *rehearing en banc denied*, 483 F.2d 805 (9th Cir. 1973) (emphasis added). For an explanation of the theoretical underpinning of this doctrine, see Schoettle, *supra* note 53, at 1389-93.

<sup>119</sup> *But see* Schwartz, *The Education of Handicapped Children: Emerging Legal Doctrines*, 7 CLEARINGHOUSE REV. 125, 126-27 (1973). Mr. Schwartz concludes that exclusion of the handicapped is unconstitutional under the rational basis test. He bases his conclusion on two precedents: *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), and *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). According to the argument he advances, these cases, taken together, reject the only state interests that can be offered to justify the exclusion: (1) the factual assertion that retarded children are not educable and (2) the legal defense of a lack of sufficient government resources. Schwartz, *supra*, at 127. Unfortunately, the opinion in *Mills* is very cryptic, and there is room for confusion as to what standard was applied. However, it is probably incorrect to conclude that the court was applying the rational basis test. The cases which it cited in reaching its decisions were *Brown v. Board of Educ.*, 349 U.S. 294 (1954), and *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1969). Insofar as these are cases in which a suspect classification was found, it appears that the *Mills* court was applying the rigid scrutiny test. Thus, advocates representing handicapped children must face the likelihood that unless rigid scrutiny is applied, the defense of lack of governmental resources may be upheld.

Another case which constitutes a hurdle for handicapped children is *McMillan v. Board of Educ.*, 430 F.2d 1145 (2d Cir. 1970). In that case, the Second Circuit remarked: We begin by agreeing with the district court that a state does not deny equal protection merely by making the same grant to persons of varying economic need. . . . We add that if New York had determined to limit its financing of educational activities at the elementary level to maintaining public schools and to make no grants to further the education of children whose handicaps prevented them from participating in classes there, we would perceive no substantial basis for a claim of denial of equal protection.

*Id.* at 1149; see *Johnson v. New York State Educ. Dep't*, 449 F.2d 871 (2d Cir. 1971), *vacated on other grounds*, 409 U.S. 75 (1972). In *McMillan*, the court distinguished the case in which some handicapped children were being provided an appropriate education, but others similarly situated were not. The court held that in such a situation there was a substantial claim under the equal protection clause. *McMillan v. Board of Educ.*, *supra*, at 1150.

Upon remand, the court below disposed of the case on other grounds. *McMillan v.*

## III

THE SCOPE OF THE STATE'S RESPONSIBILITY  
TO EDUCATE

Having once determined that the handicapped enjoy a right to public education, there is a need to define the scope of the education which the state must provide. What, for example, is the responsibility of an educational system towards the mental health of its students? It has been held by the courts of Illinois that institutional care does not fall within the system of public schools guaranteed by the Illinois Constitution.<sup>120</sup> On the other hand, it is clear that the concept of public education is one which has evolved to include a broad range of curriculum offerings and services.<sup>121</sup> Certainly, not everything which would be helpful to a physically or mentally handicapped child falls under the rubric of education.<sup>122</sup>

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Board of Educ., 331 F. Supp. 302 (S.D.N.Y. 1971). Therefore, the issue of whether the state could develop sufficient reason for its actions was not explored. It appears, however, that when a particular category of handicapped children is not receiving an education while others similarly handicapped are, judicial intervention under the rational basis test may be appropriate. Also, it is clear, regardless of equal protection considerations, that due process requires that there be a fair and orderly procedure based on ascertainable standards for selecting children for a limited number of spaces and that selection from among children equally qualified be made in some reasonable manner. *Holmes v. New York City Housing Auth.*, 398 F.2d 262 (2d Cir. 1968).

<sup>120</sup> *Department of Pub. Welfare v. Haas*, 15 Ill. 2d 204, 213-14, 154 N.E.2d 265, 270-71 (1958).

<sup>121</sup> School student services can now include such diverse functions as programs for emergency, preventive, and medical care, health, guidance, psychologists, psychiatrists, social work, municipal recreational, remedial, retarded therapy, and adjustive special services for physically handicapped, mentally retarded, and emotionally disturbed, referrals to community agencies, assistance for migrants and transients, incentives for youths to remain in school, student-to-student encouragement, and special counseling for students eligible to leave school after graduation. See generally G. COLLINS, *THE CONSTITUTIONAL AND LEGAL BASES FOR STATE ACTION IN EDUCATION 1900-1968* (1968).

<sup>122</sup> Some educators have maintained that the trainable mentally retarded ought not to be the responsibility of the public schools:

They have based their position on the following arguments. . . . The unique function of the schools is to educate children who can learn academically and the trainable mentally retarded can neither acquire appreciable skills in the three R's nor can they do abstract reasoning, make abstract judgments, or solve adult problems. . . . [T]he prime argument has centered around *educability* versus *trainability*. Most authorities averse to these special day classes have hinged their argument on the position that the school's responsibility, as a social institution, is to educate children first of all in the tool subjects and then in the conventional academic subjects. Thus, trainable children should be excluded since they cannot hope to accomplish these goals.

L. DUNN, *supra* note 31, at 157-58 (emphasis in original). It has been argued that such a position confuses the responsibility of the teachers as a professional group with the responsibility of the public schools as a social institution. Assuming that there is a responsibility on the part of society to instruct the trainable mentally retarded in basic skills, it is

The responsibility of educators to handicapped children would be best decided as a question of fact based on what are customary educational practices. In light of the widespread development of special education, there exists a substantial body of expert opinion upon which the courts can rely in determining the scope of the duty to educate.

In providing a minimum quantum of education for exceptional children, the state is not limited to any standardized educational offering, but has the discretion to provide an alternate curriculum which is appropriate to the needs of the handicapped child.<sup>123</sup> Nevertheless judicial supervision might be required in two instances. First, in the case of the most extreme degree of handicaps, the court might be called upon to determine whether there was a recognized educational technique which was appropriate in light of the child's handicaps. Only in the absence of a recognized educational technique would the state be absolved of its duty to educate.<sup>124</sup> Second, the courts would have to decide in what instances a child was being effectively excluded by a curriculum which was inappropriate to his needs. Effective exclusion would be actionable only when the child's unmet needs fell within the scope of the responsibility to educate.<sup>125</sup>

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recognized that the public school system, as a social institution, is the most appropriate social agency to provide such skills. *Id.* at 159.

<sup>123</sup> *Britt v. North Carolina*, 404 U.S. 226 (1971). In that case the state was not required to provide a transcript because the plaintiff had an "adequate substitute."

<sup>124</sup> It should be noted that the modern concept of special education is a pervasive one. For example, it has been suggested that "[o]ne of the general aims of special education is first to ameliorate the deficit by medicine, training, or whatever means are feasible, and then to compensate for the residual deficit by strengthening other abilities and providing specially adapted materials." S. KIRK, *supra* note 1, at 36.

<sup>125</sup> Once it is determined that a child's needs are within the scope of the responsibility to educate, a court must apply some standard of adequacy to the education which he is receiving. A standard which has been formulated in the related field of the right to treatment is that the state is bound to make "a bona fide effort" to cure or improve. *Martarella v. Kelley*, 349 F. Supp. 575, 601 (S.D.N.Y. 1972).

*Lau v. Nichols*, 483 F.2d 791, *rehearing en banc denied*, 483 F.2d 805 (9th Cir. 1973), provides a fact pattern which presents the issue of effective exclusion by the limited curriculum which a child is offered. As noted in the dissenting opinion, it was argued that for the plaintiff children education had become "mere physical presence as audience to a strange play which they [did] not understand." *Id.* at 801. Concurring in the decision to reject *en banc* consideration, Judge Trask argued that characterization of the case as one of exclusion was inappropriate. According to the stipulations upon which the case was submitted for decision, the plaintiffs were children who needed special instruction "but it could not be assumed from this that they were receiving 'no education.'" *Id.* at 808. Thus, the issue may have been avoided by virtue of the fact that the stipulations by the parties failed to anticipate the applicable rule of law.

## CONCLUSION

*Rodriguez* was the first case in which the Supreme Court faced the issue of a substantive right to an education. That case has been described as a setback for reformers, and so it may be. It was a case of tremendous practical difficulty, which threatened to immerse the federal courts in complex administrative problems. Nevertheless, the Court's opinion suggested two theories under which it is possible to conclude that the exclusion of the handicapped from education is unconstitutional. First, the Court suggested that the Constitution guarantees some minimum quantum of education for every child. Second, it apparently accepted the analogy between exclusion from education and exclusion from other fundamental activities such as voting and criminal appeal. Proceeding from this analogy, exclusion from education because a child cannot afford to pay a fee is clearly unconstitutional. So also is a pattern of exclusion in which there is a sufficient correlation between those who are excluded from education and those who are poor.

In addition to these two theories, it is possible that a child's handicap is a "suspect" trait when used to exclude him from public school. Both because of their stake in acquiring the skills necessary for independence, and their political ineffectiveness, the handicapped warrant protection from the majoritarian political process. Public school education is a particularly appropriate setting in which to consider a child's handicaps as a "suspect" basis for exclusion. Exclusion of the weakest and most helpless is repugnant to any acceptable purpose of our system of public education. Finally, exclusionary practices will fail even to pass the rational basis test when they are based upon patently arbitrary statutes.

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