The Suspect Context: A New Suspect Classification Doctrine For The Mentally Handicapped

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INTRODUCTION

Mentally disabled[1] people have been the object of the severest forms of discrimination[2] since ancient times.[3] In Sparta, for example, "mentally and physically defective children were left on mountainsides or in pits to fend for themselves."[4]

During the years following the adoption of the United States Constitution, the mentally handicapped were "treated" by banishment or con-

1. Mentally handicapped and mentally disabled are used in this Note as collective terms for mentally ill and/or mentally retarded and developmentally disabled. While the use of collective terms for such a diverse population may seem dangerously imprecise, it is not so for the purposes of this paper. The theory of discrimination against the disabled which is developed in this Note is that the State often discriminates invidiously by categorizing the disabled instead of examining their precise functional limitations, if any. *See* D. POWELL, B. SALES, R. VAN DUIZEND, DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 8 (1982) [hereinafter cited as D. POWELL]. It is the discriminatory and stigmatizing effects of being categorized and labelled which all disabled persons share. Since stigma and prejudice are the common social disability—whether the functional disability is primarily cognitive or emotional in origin—all mentally disabled will be grouped together for purposes of this Note, unless the type of disability is viewed as important to the discussion of the particular case or legal issue. For a further discussion of the semantic and normative problems inherent in the labelling process, see R. BURGDORF, THE LEGAL RIGHTS OF HANDICAPPED PERSONS, 1-48 (1980); S. HAAVIK & K. MENNINGER, SEXUALITY, LAW AND THE DEVELOPMENTALLY DISABLED PERSON 3 (1981).

2. Discrimination is used very generally in this Note to describe treating people with differences differently. Only the use of the most general definition of discrimination can demonstrate the relevance of historical acts of prejudice against the handicapped to modern day state action. For example, a history of discriminatory action against a particular group is one of the hallmarks of a suspect class. *See* Spece, *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049, 1076 (1979). The following discussion is not meant to suggest that the genocidal acts of the ancient Greeks are equivalent to the revocation of the driver's license of a catatonic mental patient. It is also not meant to endorse in theory the United States Supreme Court's proclivity to characterize state action as a violation of equal protection rather than as a deprivation of due process or basic human rights. The use of the term "discrimination" very generally does, however, establish a continuum of acts of singling-out. How to distinguish between presumptively illegitimate acts of discrimination with respect to the mentally handicapped is addressed by the "suspect context" theory developed in this Note. *See infra* text accompanying notes 31-40.

3. Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualification of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 883 (1975).

4. *Id.* at 883-84.

finement.[5] Whether the person was sent to prison, an asylum, or an almshouse, "[t]he common denominator inherent in the various forms of incarceration in early America . . . was total exclusion of the disabled person from society."[6] Even with the reforms initiated by Dorothea Dix, the Boston schoolmistress who testified before numerous governmental bodies to change the horrendous conditions endured by the insane in the nineteenth century, no thought was given to medical treatment, let alone equal treatment, of these individuals.[7] The Darwinian revolution that spurred an upsurge in theories of racial dominance and exclusion also generated eugenic restrictions against the handicapped. Restrictive marriage laws, sterilization, and preventive segregation became the dominant modes of dealing with this embarrassing minority.[8]

At a time when state action toward the mentally handicapped was acquiring the proportions of a national scandal,[9] the Warren Court made its historic decision in *Brown v. Board of Education*,[10] signaling a new era in equal protection for blacks. By the early 1970's, other stigmatized groups attempted to gain the protection now categorically afforded blacks.[11] It is not surprising, therefore, that the early 1970's saw an explosion in litigation and a new scholarly interest in the rights of the mentally handicapped.[12] Several commentators in the 1970's made convincing arguments for adding the mentally handicapped to the ranks of judicially recognized suspect classes.[13]

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5. *Id.* at 885.
6. *Id.* at 886.
7. *See id.* at 886-89.
8. *Id.* at 887-88.
9. *See, e.g.*, D. ROEDERER, STATE RESPONSIBILITIES TO THE MENTALLY DISABLED (1976): "From 1900-50, state hospitals and schools for the retarded were characterized by overcrowding, inadequate funding, minimum public concern, and long-term custodial care." *Id.* at 3. Another commentator has noted:

> At the beginning of this decade, mentally retarded residents of public institutions were subjected to extraordinary neglect, overcrowding, and abuse. They were given insufficient food and medical care and virtually no education or vocational training. Untrained staff, too few even to control the residents, used straitjackets, solitary confinement, and physical intimidation to sustain order. . . . The less competent residents were simply abandoned, their lives often shortened by malnutrition or untreated disease.

Halpern, *Introduction* to P. FRIEDMAN, LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 23 (1979).

10. 347 U.S. 483 (1954).

11. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1052, 1060, 1063, 1077 (1978), for a recounting of the attempts by aliens, illegitimates, women, children, and the handicapped to gain recognition of their status as "suspect." *See also* Graham v. Richardson, 403 U.S. 365 (1971) (aliens); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (illegitimates); Frontiero v. Richardson, 411 U.S. 677 (1973) (gender).

12. For an excellent review of the landmark cases involving the mentally handicapped, *see* R. BURGDORF, *supra* note 1. For a review of the suspect classification cases involving mentally disabled persons, see *infra* text accompanying notes 14-24, 41-73.

13. One commentator has argued that the mentally ill share the characteristics of suspect groups, such as the attachment of a stigma to the group and the immutability or relative permanence of the characteristic defining the group. In addition, the author postulates relative political powerlessness as an indicium of a suspect class. Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974). *See also* Burgdorf & Burgdorf, *supra* note 3, for a similarly convincing argument for analogizing the handicapped to other recognized suspect groups. *Compare* Spece, *supra* note 2, where the limitations of suspect classification doctrine in the involuntary commitment of the mentally ill are discussed.

In 1974 the doctrine of suspect classification[14] was first argued in a case dealing with the mentally disabled. In *In re G.H.*, the North Dakota Supreme Court accepted the doctrine in the belief that the United States Supreme Court would have done so;[15]

> We are confident that the [United States Supreme] Court would have held that G.H.'s terrible handicaps were just the sort of "immutable characteristic determined solely by the accident of birth" to which the "inherently suspect" classification would be applied, and that depriving her of a meaningful educational opportunity would be just the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy and sex.[16]

The court seemed to accept the argument that the mentally retarded are suspect if they have suffered discrimination not related to their actual disabilities.[17] The court found a kind of indirect or quasi-suspect class without explicitly agreeing to grant suspect class status to the mentally retarded.

Since *In re G.H.*, many plaintiffs in state and federal courts have attempted to obtain special recognition of a party or class on the basis of a mental disability.[18] In none of these cases has any court expressly recognized the disabled party as a member of a suspect class. Three Pennsylvania cases, however, parallel the reasoning of the North Dakota court in *In re G.H.*[19] In *Frederick L. v. Thomas*, the federal district court concluded, "[a]lthough learning disabled children are not a suspect class they do exhibit some of the essential characteristics of suspect classes—minority status and powerlessness."[20] In *Halderman v. Pennhurst*, the federal district court was impressed with the argument that "any state program that segregates mentally retarded citizens as such from others is highly suspect. . . ."[21] Similarly, the Third Circuit Court of Appeals found in *Medora v. Colautti* that a Pennsylvania State Department of Public Welfare regulation that distinguished between the non-disabled needy and the disabled needy, "providing aid to the former and denying it to the latter,"

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14. Suspect classification doctrine has grown out of the Supreme Court's concern to counterbalance the effect of prejudice by the majority against historically despised groups in the majoritarian political process. The origin of suspect classification doctrine is found in Justice Stone's suggestion in United States v. Carolene Products Co., 304 U.S. 144 (1938), that the presumption of rationality which operated in commercial cases may not be appropriate when a civil rights violation is at issue or "a discrete and insular minority" is involved. In the latter instances "a . . . more searching judicial inquiry" may be called for. *Id.* at 152-53 n.4. While the term "discrete and insular minority" is more graphic, the term "suspect class" will be used in this Note for brevity.

15. 218 N.W.2d 441 (N.D. 1974). The first modern use of an equal protection analysis to fight educational discrimination against the mentally handicapped had occurred only five years earlier in Wolf v. Legislature of the State of Utah, Civil No. 182646 (D. Utah Jan. 8, 1969). *See* R. BURGDORF, *supra* note 1, at 72-73.

16. *In re* G.H., 218 N.W.2d at 447.

17. *Id.* at 446-47.

18. *See infra* notes 41-73 and accompanying text.

19. Medora v. Colautti, 602 F.2d 1149 (3d Cir. 1979); Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part and rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981); Frederick L. v. Thomas, 408 F. Supp. 832 (E.D. Pa. 1976).

20. 408 F.Supp. at 836.

21. 446 F.Supp. at 1321-22.

violated the equal protection clause.[22] However, the court made no declaration of a suspect class.

A federal district court case in Illinois, *Sterling v. Harris*, is the sole decision to hold explicitly that the mentally disabled are members of a quasi-suspect class.[23] When *Sterling* reached the United States Supreme Court, however, the Court did not address the issue whether the mentally ill plaintiffs were a suspect class.[24] Thus, while numerous cases over the last decade have utilized the suspect classification argument,[25] only a few courts have been even minimally receptive to the argument as applied to the mentally disabled.[26]

This review of the cases suggests that the problem perceived by the courts in extending suspect classification doctrine to the mentally handicapped is complicated by two complementary assumptions: while the handicapped may well have been subjected historically to invidious or unfair discrimination, not every state act with respect to the mentally disabled can be characterized as irrelevant or as inhumane treatment.[27] Some state action is directed toward ameliorating the very real disabilities of the handicapped.

Suspect classification doctrine has not developed with the sensitivity to distinguish those contexts where state action is presumptively valid from those where it is not. Rather, it has focused on the nature of the group alleging discrimination.[28] While the mentally handicapped meet the usual indicia of a suspect class, they are clearly not always the object of invidious discrimination when singled out by the state. Mental disability is not a

22. 602 F.2d at 1152.

23. 478 F.Supp. 1046, 1053-54 (N.D. Ill. 1979), *rev'd on other grounds sub nom.* Schweiker v. Wilson, 450 U.S. 221 (1981).

24. Schweiker v. Wilson, 450 U.S. 221 (1981), *rev'g* Sterling v. Harris, 478 F.Supp. 1046 (N.D. Ill. 1979). "We have no occasion to reach this issue because we conclude that this statute does not classify directly on the basis of mental health." *Id.* at 231.

25. *See infra* notes 42-73 and accompanying text.

26. *See supra* notes 14-23 and accompanying text.

27. The problematic relationship between the very real functional problems of the disabled and the unfair prejudice often reflected in the application of stereotypes to them is best expressed in the Pennsylvania court opinion, Doe v. Colautti, 592 F.2d 704 (3rd Cir. 1979). In this case the court refused to find a suspect class and therefore, on the rational basis standard, upheld a Pennsylvania statute which limited the duration of benefits for private psychiatric hospitalization but not for physical illnesses in private general hospitals. In so doing, the court stated, "[a]lthough the mentally ill have been the victim of stereotypes, the disabilities imposed on them have often reflected that many of the mentally ill do have reduced ability for personal relations, for economic activity, and for political choice. This is not to say that the legal disabilities have precisely fit the actual incapacities of the mentally ill individuals whom the law has burdened, but is important that the legal disabilities have been related even if imperfectly, to real inabilities from which many of the mentally ill suffer." *Id.* at 711. In *Doe v. Colautti*, the Pennsylvania court seemed satisfied with an imprecise fit between actual incapacities and legal disabilities. *Id.* This Note argues that when a court admits that an individual, as the member of an identifiable sub-group, has been subjected historically to abuse and prejudicial treatment by the majority, he deserves a legal theory which will effect a more precise fit.

28. The "traditional indicia of suspectness" were set out in San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973): saddled with disabilities, subjected to a history of purposeful unequal treatment, or relegated to a position of political powerlessness. Classifications of race, alienage and gender have been declared suspect on the basis of these indicia. *See supra* note 11 for leading cases.

virtual irrelevancy[29] when the state exercises its police or *parens patriae* power.

To test the legitimacy of any questioned acts of the state, legal theory must develop a useable doctrine. A viable suspect classification doctrine must have the capacity to show the trial courts when the state's use of the label "mentally ill/disabled/retarded/ handicapped" is presumptively valid and when it is not. Once a court identifies a presumptively invalid use, it should then evaluate the state action by an invigorated level of scrutiny. For the mentally handicapped, the context in which they are singled out by the state is crucial to deciding whether a presumption of validity should be accorded the state action or more careful scrutiny is needed.

This Note proposes a two-step analysis for courts to employ when a mentally handicapped plaintiff raises an equal protection question.[30] In the first step, the court will decide whether or not the *context* in which the constitutional question is raised is suspect. Under this "suspect context" approach, the defining characteristic of the disabled—their functional disability—becomes the touchstone for differentiating presumptively valid from presumptively invalid state action. "Suspect context" grants presumptive validity only to those contexts in which amelioration of the specific disability is the expressed purpose of the state.

Contexts in which amelioration of the disability is not the state end, such as zoning discrimination or denial of economic benefits, are presumptively invalid. In the second step, the court will invoke a rational basis or higher standard of scrutiny, depending on whether the context is deemed suspect or not. If invigorated scrutiny is required, only an important or compelling state interest could justify the state action. This Note applies the suspect context approach to the types of mentally handicapped cases in which traditional suspect classification doctrine has been argued over the last decade. Supplementation of suspect classification doctrine with the suspect context approach is shown to be superior because it provides the courts with a clear, yet sensitive, guideline.

A New Doctrine of Suspect Classification: The Suspect Context

A. *The Suspect Context Approach*

The need for the suspect context theory arises out of the courts' reluc-

29. *See* San Antonio School District v. Rodriguez, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting); "[m]oreover, race, nationality, or alienage is ' "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, Hirabayashi v. United States, 320 U.S. 81, 100.' McLaughlin v. Florida, 379 U.S. at 192."

30. The Equal Protection Clause of the fourteenth amendment embodies the principle that "all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). A mentally disabled person is different from the general population only with respect to his/her disability. But is this difference one in which the state has a legitimate interest? Suspect context theory, after reviewing all the situations in which the state has chosen to classify by mental disability, directly or indirectly, has determined that treatment of the disability itself is the only presumptively valid state interest in this discrete and insular minority. Only when treatment is the state end can the means of classification by mental disability avoid being under- or overinclusive.

tance to recognize new categories of suspect classes.[31] Few courts would be willing to declare a class suspect in one context when that ruling could be used to require strict scrutiny in another, legitimate context.[32] Suspect classification doctrine as it has developed has not been sensitive to these contextual differences.[33] Rather, it has been a theory of virtual *per se* irrelevancy—the paradigm case being classification by race.[34]

Suspect context theory, in contrast, incorporates the realization that the singling out of this stigmatized minority can be legitimate in certain fact situations.[35] The defining characteristic of the mentally handicapped—their functional disability—would determine the existence of a suspect class under "suspect context" doctrine. Specifically, all contexts unrelated to amelioration of the functioning of the mentally disabled would be presumed suspect. All contexts in which the habilitation of the disabled group was the object of the classification would be judged by standards of mere rationality.

Application of the suspect context approach introduces a critical first step into the judicial process. Suspect context theory, in contrast to traditional suspect classification doctrine, requires that a court first examine the questioned state law, rule, or action. If the functional amelioration of the disabled is the clear object of the state action, the court would declare it presumptively valid and scrutinize it under the rational basis test. If habilitation of the disabled is absent from the statute, rule or action, the court

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31. The Fifth Circuit typifies this attitude:

> The Supreme Court in evaluating classifications concerning involuntary commitment in the Baxtrom, Humphrey, and Jackson cases has employed the language and basic analysis, albeit probably with 'a sharper focus' . . . of the rational basis test. . . . Although these cases do hold in favor of the persons challenging the classifications, as a court of appeals we are reluctant to extend strict scrutiny to an area where the Supreme Court, despite three opportunities to do so, has not invoked this standard of review.

Benham v. Edwards, 678 F.2d 511, 515-16 n.9 (5th Cir. 1982). *Benham* involved a challenge of differential commitment and release procedures for insanity acquittees and civil committees.

32. A related problem is the diversity of the class. All mentally ill are clearly not disabled in the same way. Nor is every mentally retarded person necessarily disabled in any way that might be of concern to the State. *See* Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979): "The Supreme Court, moreover, has been reluctant to grant extraordinary judicial protections to a class that is 'large, diverse, [and] amorphous.'. . . . The concept of 'mental illness' is susceptible to much dispute, and the category encompasses a whole range of disorders, varying in character and effects." *Id.* at 711 (citation omitted).

33. This lack of sensitivity has resulted in the carving out of sometimes unsatisfactory exceptions to a suspect classification such as alienage. *See, e.g.*, Justice Stewart's concurrence in Foley v. Connelie, 435 U.S. 291 (1978): "[I]t is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions." *Id.* at 301 (Stewart, J., concurring).

The culmination of dissatisfaction with the way suspect classification doctrine has developed in alienage cases is found in Justice Rehnquist's dissent in Toll v. Moreno, 458 U.S. 1 (1982). "In my view, these decisions merely reflect the judgment that alienage . . . is for certain important state purposes a constitutionally relevant characteristic and therefore cannot always be considered invidious in the same manner as race or national origin." *Id.* at 41-42 (Rehnquist, J., dissenting).

34. See *supra* note 10.

35. Professor Tribe seems to call for the kind of contextual sensitivity in the application of suspect classification doctrine proposed in this Note when he describes an emerging Model VII—"a model consciously concerned with contextually matching decisional structures to substantive ends . . . [perceiving] freedom as best served in some contexts by putting the matter beyond governmental reach, and in others by precisely the opposite approach." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1137 (1978).

would presume invalidity and examine it with invigorated scrutiny. No blanket recognition of the mentally handicapped as a suspect or quasi-suspect class is necessary; instead, the disability model[36] divides all state action into two groups: presumptively suspect invidious and presumptively valid or legitimate.

B. *Application of the Threshold Test of Suspect Contexts to the Mentally Handicapped*

The suspect context approach has developed out of a survey of numerous cases litigated by the mentally handicapped under the traditional suspect classification doctrine.[37] Since 1974, the first year a suspect class was argued with respect to a mentally handicapped party, several contexts in which litigation is frequent have emerged: education, institutionalization, zoning, and criminal commitment. Depending upon whether or not amelioration of the handicapped is intended, these contexts can be classified as suspect or valid. In addition, all of the cases fall into two basic traditional categories, the benefit cases[38] and the burden cases.[39] The benefit cases occur in two major contexts: social welfare and education. The burden group presents a wider range of contexts: criminal commitment, civil commitment (institutionalization), and police power and *parens patriae* regulations—termination of parental rights, sterilization, and quasi-family zoning restrictions.

These are virtually all the contexts in which state action singles out the mentally handicapped; however, the suspect context approach can easily incorporate additional areas into its logic. Some of these areas may already have legislative protection: for example, employment discrimination is an additional context where considerable statutory protection already exists.[40]

The application of the suspect context distinction to the numerous

36. The disability or functional model examines the behavior of the allegedly disabled person, focusing on what the person does or can do. Its goal is normalization. For a discussion of emerging ideologies and models applicable to disability (specifically, mental retardation), see P. FRIEDMAN, LEGAL RIGHTS OF MENTALLY DISABLED PERSONS, 133-38 (1979).

37. The survey of cases in this paper dealing with the mentally handicapped was restricted to state or federal cases in which suspect classification doctrine was specifically mentioned. In many of these cases, suspect classification was only alluded to by the court, *e.g.*, Colin K. v. Schmidt, 536 F. Supp. 1375 (D. R.I. 1982); Doe v. Laconia Supervisory Union No. 30, 396 F.Supp. 1291, (D. N.H. 1975); Romero v. Scheuer, 386 F.Supp. 851 (D. Col. 1974).

In a few cases, suspect classification doctrine was specifically argued and dealt with by the court: *e.g.*, Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981); Association for Retarded Citizens of N.D. v. Olson, Civil No. :A1-80-141 (D. N.D. August 31, 1982); Levine v. Institutions and Agencies Dept. of N.J. 84 N.J. 234, 418 A.2d 229 (1980).

38. *E.g.*, Schweiker v. Wilson, 450 U.S. 221 (1981) (denial of supplemental security income benefits to inmates of public mental institutions not receiving Medicare) *rev'g* Sterling v. Harris, 478 F.Supp. 1046 (N.D. Ill. 1979); Doe v. Colautti, 592 F.2d 704 (3rd Cir. 1979) (granting of Medicaid benefits differentially to inmates of private mental hospitals and not to patients in public mental hospitals) Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975) (denial by state and local school officials of an appropriate education to retarded children).

39. E.g.m Benham v. Edwards, 678 F.2d 511 (5th Cir. 1982) (commitment procedures for insanity acquittees); Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981) (neutral restrictive zoning ordinance); North Carolina Ass'n for Retarded Children v. State of N.C., 420 F.Supp. 451 (M.D.N.C. 1976) (involuntary sterilization of mentally incompetent).

40. *See* The Rehabilitation Act of 1973, 29 U.S.C. § 701 (1977 & Supp. V 1982). For an

cases where traditional suspect classification doctrine has been argued demonstrates a more useful approach. This modification of the suspect classification doctrine gives the courts a flexible and sensitive, yet practical tool.

1. *Burden Cases*

a. *Prison Context: Insanity Acquittees and In-Prison Rights*

1. *Insanity Acquittees*

Five cases have dealt with the mentally disabled in the context of prison commitment, release, or living conditions.[41] In no case was the argument for designation as a suspect class successful, and in only one case was the theory given any encouragement.[42] From the point of view of the interests of the mentally ill in these cases, some refinement or alteration of suspect classification doctrine is needed.

Two cases, *Benham v. Edwards*[43] and *People v. Chavez*,[44] illustrate the inadequacy of traditional suspect classification doctrine. *Benham*, originating in Georgia, arrived at a result opposite from *Chavez*, a Colorado case, although the cases involved similar facts. Both cases challenged a disparity between criminal and civil commitment procedures. The Fifth Circuit Court of Appeals found that the Georgia procedures violated equal protection, but the Colorado Supreme Court found no violation. Recognition of the mentally ill as a suspect class was argued in both cases. The *Chavez* court summarily rejected the theory.[45] In a more lengthy discussion, the *Benham* court also declined to recognize the involuntary committee as a member of a suspect class. *Benham* thus arrived at a different result, not by accepting the suspect classification doctrine, but rather by side-stepping the entire question of whether a suspect class (or a fundamental right) was indeed present. The *Benham* court addressed the scrutiny question directly without first deciding whether the traditional prerequisites for invigorated scrutiny were present: "We conclude that we need not decide what level of scrutiny the Constitution mandates, except that we do hold that traditional strict scrutiny is not required."[46] The Fifth

extended discussion of fair employment and the handicapped, see Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. 953 (1978).

41. Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980) (class action challenging the disparate commitment procedures afforded persons acquitted of criminal charges by reason of insanity and persons undergoing civil commitment for mental disability, *aff'd in part*, 678 F.2d 511 (5th Cir. 1982); Romero v. Schauer, 386 F.Supp. 851 (D. Colo. 1974) (class action by state hospital patients who had been transferred to state penitentiary after determination of dangerousness beyond ability of hospital to handle); Delafose v. Manson, 385 F. Supp. 1115 (D. Conn. 1974) (class action by prisoners transferred to mental hospital who were denied "hospital pay" while inmates treated for physical ailments received the "incentive pay"); People v. Feagley, 14 Cal. 3d 338, 121 Cal. Rptr. 509, 535 P.2d 373 (1975) (sex offender committed to California Medical Facility on a 9-3 jury verdict claimed entitlement to unanimous jury verdict); People v. Chavez, 629 P.2d 1040 (Colo. 1981) (insanity acquittee challenged automatic commitment to mental institution).

42. Benham v. Edwards, 678 F.2d 511, 515 n. 9 (5th Cir. 1982). *See infra* text accompanying notes 43-47.

43. 678 F.2d 511 (5th Cir. 1982).

44. 629 P.2d 1040 (Colo. 1981).

45. The court stated simply: "No suspect classification is involved here." *Id.* at 1051.

46. 678 F.2d at 516.

Circuit admitted, however, that, with respect to some of the procedural differences in civil and criminal commitment, "heightened but not strict scrutiny does apply."[47]

As a result of *Benham*, Georgia must provide the same state-initiated commitment hearing for criminal insanity acquittees as the state had previously provided for civil committees. In Colorado, however, following *Chavez*, no parity of procedure is required. The difference in outcome is inevitable because the Colorado Supreme Court found the rational basis test with its minimal scrutiny to be appropriate, while the Fifth Circuit opted for invigorated scrutiny. If suspect context theory were invoked in these cases, the *Benham* holding requiring parity of procedures would be the more likely result in both cases. Suspect context theory would require careful scrutiny of the disparate provisions if treatment of the disability was not built into the commitment law or act. Courts would closely examine legislatures' assumptions concerning differences between the criminal insanity acquittee and the civil committee as to their amenability to treatment and degree of dangerousness. The probable result would be procedures, in both the civil and the criminal contexts, that are carefully tailored to be truly protective of the public safety and of the mentally ill person's rights, regardless of his criminaility.

2. *In-Prison Rights*

The second group of prison context cases deals with treatment of mentally disabled prisoners once they are in the prison. In *Romero v. Schauer*, the federal district court found neither a suspect class nor a fundamental right; nevertheless, it ordered equal treatment of mentally ill prisoners, whether confined to a hospital or a prison, based on the explicit grant of a right to treatment by state statute.[48] The court could find no rational relationship between the state's affirmatively granted right to psychiatric treatment and the state's subsequent transfer of a mentally ill prisoner from a state psychiatric facility to an admittedly inferior treatment setting at the penitentiary.

Fortunately for the plaintiff Romero and his class, the state right provided a sufficient basis for finding a denial of equal protection. But not all plaintiffs may find their state law so helpful. And federal courts may find it difficult in such cases in the future to order an injunctive remedy based exclusively upon a state statute.[49] Suspect context theory would require invigorated scrutiny of any state action which has as its object incarceration of the mentally ill rather than treatment.

Similarly, in *Delafose v. Manson*, the mentally disabled parties emerged victorious, but only because the court struck down the state action as irrational.[50] In *Delafose*, mentally ill prisoners argued that denial of

47. *Id.*

48. 386 F.Supp. 851 (D. Colo. 1974).

49. In Pennhurst State School and Hospital v. Halderman, No. 81-2010, slip op. (U.S. 1984) the United States Supreme Court held that the Eleventh Amendment prohibits the District Court from ordering the state official's conduct to conform to state law.

50. 385 F.Supp. 1115 (D. Conn. 1974).

"incentive pay" to prisoners in mental hospitals while granting that pay to prisoners in non-mental hospitals was a denial of equal protection.[51] Suspect context theory would begin with the threshold recognition that denial of incentive pay is unrelated to the treatment of a disability. The withholding of economic benefits in a hospital setting would be regarded as suspect, and invigorated scrutiny thus would be required.

b. *Police Power or Parens Patriae Deprivations: Termination of Parental Rights, Sterilization, Incompetency, and Zoning*

Eight cases which mention the possible treatment of the mentally disabled as a suspect class can be classified as involving the exercise of the police or *parens patriae* power of the state.[52] In only one case, which involved zoning, *Penobscot Area Housing Development Corporation v. City of Brewer*, the exercise of the police power was facially neutral.[53] In the remainder, the exercise of the police or *parens patriae* power in the challenged statute singled out the mentally disabled individual.[54] In each of these seven cases, the class was discretely drawn. For example, in one case, only the mentally incompetent were subject to sterilization;[55] in two cases, the challenged statute provided that only the children of mentally ill or retarded parents could be taken away.[56] Despite this blatantly differential treatment, the courts upheld all but one of the statutes.[57] Discreteness of the class therefore does not seem critical when the state's police or *parens patriae* power is at issue.

1. *Termination of Parental Rights*

The designation of the mentally disabled as a suspect class would not provide the key to success if a New York case[58] and a California case[59] are any guide. In both cases, mentally disabled parents challenged statutes empowering the state to terminate their parental rights. In almost identical opinions, the New York and California courts went beyond the explicit

51. *Id.* at 1116.

52. North Carolina Ass'n for Retarded Children v. State of N.C., 420 F. Supp. 451 (M.D. N.C. 1976); Vecchione v. Wohlgemuth, 377 F.Supp. 1361 (E.D. Pa. 1974); *In re* Terry D., 83 Cal. App. 3d 890, 148 Cal. Rptr. 221 (1978); Rawlings v. Department of Enforcement, 73 Ill. App. 3d 267, 391 N.E.2d 758 (1979); Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981); *In re* Kasuba Estate, 401 Mich. 560, 258 N.W.2d 731 (1977); *In re* Daniel A.D., 106 Misc. 2d 370, 431 N.Y.S.2d 936 (1980); Foundation for the Handicapped v. Department of Social and Health Services of Washington State, 97 Wash. 2d 691, 648 P.2d 884 (1982).

53. 434 A.2d 14 (Me. 1981).

54. *See supra* note 52.

55. *North Carolina Ass'n for Retarded Children*, 420 F.Supp. 451 (M.D. N.C. 1976).

56. *In re* Terry D., 83 Cal. App. 3d 890, 148 Cal. Rptr. 221 (1978); *In re* Daniel A.D., 106 Misc. 2d 370, 431 N.Y.S.2d 936 (1980).

57. Vecchione v. Wohlgemuth, 377 F.Supp. 1361 (E.D. Pa. 1974). The Commonwealth of Pennsylvania conceded that "mental patients are, barring an adjudication of incompetency, capable of managing their financial affairs." *Id.* at 1367. This argument may not be so easily conceded by other states since psychiatric testimony is usually available for both sides of most questions dealing with the mentally impaired.

58. *In re* Daniel A.D., 106 Misc. 2d 370, 431 N.Y.S.2d 936 (1980).

59. *In re* Terry D., 83 Cal. App. 3d 890, 148 Cal. Rptr. 221 (1978).

rejection of the plaintiffs' suspect class arguments and carefully scrutinized the statutes at issue. In both cases, the state's interest in the welfare of the child was deemed sufficient to survive the court's invigorated scrutiny.[60]

Even the suspect context approach could not decide these cases in favor of the handicapped. Termination of parental rights is clearly a suspect context under the theory advanced in this Note. Suspect context doctrine would require invigorated scrutiny of the state's action, with an increased probability that the state's action would fall. Yet when scrutiny was raised *arguendo* in the noted cases, both the New York and the California courts upheld the termination of parental rights.

2. *Incompetency*

While suspect context theory may not make the critical difference in the dependency context, two incompetency cases illustrate the advantage of the suspect context approach. In *Foundation for the Handicapped v. Department of Social and Health Services*, the Washington Supreme Court upheld differential notice provisions to mental patients based on whether the patients were adjudged legally incompetent.[61] The court found that the classification did not discriminate solely on the basis of mental illness.[62] For suspect context theory, however, the important point would be that the state action discriminated among classes of the mentally ill on a presumptively invalid basis, since the only valid objective—therapeutic intervention—was not stated. Under suspect context theory, a higher level of scrutiny would be required in all non-therapeutic contexts such as this because of the presumption of invalidity.

Vecchione v. Wohlgemuth involved a Pennsylvania statute which allowed the summary deprivation of property owned by institutionalized mental patients not adjudged legally competent, for the purpose of deducting from the seized assets the amount chargeable for their care and treatment.[63] Only those adjudged legally incompetent could avoid the summary dispossession. The federal district court struck down as irrational this ironic and invidious statute.[64] Because all discrimination by the state among classes of the mentally handicapped will not be so obviously irrational, traditional suspect classification doctrine falls far short of providing full protection to the handicapped. Suspect context doctrine, however, would require that any state law depriving any category of mentally disabled of its assets be submitted to careful examination.

3. *Zoning*

The superiority of the suspect context approach is best illustrated by police power cases within the zoning context. The usual method of discrimination in zoning against the mentally handicapped is to create a

60. *Id.* at 896, 148 Cal. Rptr. at 224; *In re* Daniel A.D., 106 Misc. 2d 370, 377-78, 431 N.Y.S.2d 936, 941-42 (1980).
61. 97 Wash. 2d 691, 648 P.2d 884 (1982).
62. *Id.* at 696, 648 P.2d at 888.
63. 377 F.Supp. 1361 (E.D. Pa. 1974).
64. *Id.* at 1369.

facially neutral statute which limits the single-family residence classification to occupation by related persons and/or a small number of unrelated "family members."[65] "Quasi-families"—individuals unrelated by a familial or domestic bond—would not meet the literal requirement of the statute in most cases.

The application of a facially neutral statute to a group of mentally handicapped persons would be carefully scrutinized under the suspect context theory. Since quasi-family zoning has no relationship to the defining characteristic of the group—illness or disability—the zoning would receive heightened scrutiny. Thus the court in *Penobscot Area Housing Development Corporation v. City of Brewer*[66] probably would have reached a different result with the proposed suspect context approach than it did under the traditional suspect classification method.

In *Penobscot*, a private, non-profit corporation attempted unsuccessfully to obtain an occupancy permit for a single-family home. Denial of the permit was based on the fact that prospective residents would be six unrelated adults with two adult supervisors. This group of individuals did not meet the local zoning ordinance's requirement that the residents be tied by a "domestic bond." Plaintiffs argued a denial of equal protection on the basis that the ordinance discriminated against the mentally retarded prospective residents and that the mentally retarded represented a suspect class. The court found it unnecessary, however, to decide the issue whether the plaintiffs were a suspect class; it upheld the permit denial, using a rational basis standard.[67]

Admittedly, discrimination against the mentally retarded may not be as much of a problem as is discrimination against other quasi-families. A survey of all quasi-family cases involving group homes for the retarded and handicapped since *Village of Belle Terre v. Boraas*[68] (upholding restriction of single family residential zoning to individuals related by family ties) reveals that permits were granted in twenty-two cases and were denied in only four.[69] Even so, suspect context doctrine would quickly dispose of the few cases where communities might try to exclude this stigmatized group.[70] Under the suspect context approach, denial of a permit to the mentally handicapped would be presumptively suspect since the zoning ordinance would intend no amelioration of any disability. This

65. *See, e.g.*, Roundup Foundation v. Board of Adjustment of Denver, 626 P.2d 1154 (Colo. App. 1981) (court held that use of residence in R.2 zoned district as group home does not, under language of ordinance defining single unit dwelling in terms of familial relationships, constitute use as single dwelling unit).

66. 434 A.2d 14 (Me. 1981).

67. *Id.* at 25.

68. 416 U.S. 1 (1974).

69. N. WILLIAMS, QUASI-FAMILIES—CASES SINCE BELLE TERRE (UNPUBLISHED STUDY, 1982) (ON FILE WITH THE *Arizona Law Review*).

70. Suspect context theory is more likely to expose invidious intent by triggering a higher level of scrutiny in a larger number of cases. In the case of a facially neutral law, however, it is conceded that some demonstration of invidious intent as well as impact would be required, given the trend in recent Supreme Court decisions. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1028 (1978).

approach thus would require invigorated scrutiny and a substantial or compelling state interest to uphold the state's action.

2. *From Burden to Benefit: Institutionalization with Education*

The cases dealing with the institutionalized mentally disabled bridge the gap between burden and benefit. While most institutionalized citizens are involuntarily committed and thus are subject to the police power of the state, they retain entitlements to care and training.[71] Equal protection claims in the institutional context are of two types: positive claims asserting a right to care or education equivalent to what is provided non-institutionalized persons generally or to mentally disabled living outside institutions, and negative claims arguing against an overly restrictive environment.[72]

An examination of cases in which suspect classification was argued by the institutionalized individual reveals the need for a refined doctrine. Two cases in particular demonstrate the usefulness of attention to the context as suspicious.

In *Association for Retarded Citizens of North Dakota v. Olson*, plaintiffs alleged two different suspect classes: all mentally retarded in North Dakota and all mentally retarded in institutions.[73] The first class, according to the plaintiffs, was denied equal protection in education in comparison with nonretarded children of school age. The second class, in plaintiffs' view, was denied equal treatment for its disability compared to

71. The United States Supreme Court has declared in Youngberg v. Romeo, 102 S.Ct. 2452 (1982) concerning the substantive rights of an institutionalized, mentally retarded man: "We repeat that the state concedes a duty to provide adequate food, shelter, clothing and medical care. . . . The state also has the unquestioned duty to provide reasonable safety. . . . the state is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. *Id.* at 2462.

72. Levine v. Institutions and Agencies Dept. of N.J., 84 N.J. 234, 418 A.2d 229 (1980) (arguing an equal protection violation in differential state support of institutionalized mentally retarded and home based mentally retarded); Association for Retarded Citizens of N.D. v. Olson, Civil No.:A1-80-141 (M.D. N.D. August 31, 1982) (arguing an equal protection violation in differential education of mentally retarded and non-mentally retarded and in the differential level of treatment of institutionalized mentally retarded and community-based mentally retarded); Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979) (asserting an equal protection violation in confining mentally handicapped to a separate but unequal facility); Santana v. Collazo, 533 F. Supp. 966 (D.P.R. 1982) (arguing due process violations in the confinement of mentally handicapped delinquent youth); Developmental Disabilities Advocacy Center v. Jack Melton, 521 F.Supp. 365 (D. N.H. 1981) (arguing burdening of privacy interests of mentally handicapped at a state school); Garrity v. Galler, 522 F.Supp. 171 (D. N.H. 1981) (arguing for entitlement to least restrictive environment by residents of state school); Philipp v. Carey, 517 F.Supp. 513 (N.D.N.Y. 1981) (assertion of an equal protection violation by residents of a developmental center; differential distribution of public services to mentally retarded residents versus all non-handicapped extra-institutional persons and differential services to residents of the center and the mentally retarded in the New York area); New York State Ass'n for Retarded Children v. Carey, 466 F.Supp. 487 (E.D.N.Y. 1979) (arguing a violation of section 504 of the Rehabilitation Act of 1973 to segregate within public schools all mentally handicapped children epidemiologically classified as hepatitis B carriers); Medley v. Ginsberg, 492 F.Supp. 1294 (S.D. W.Va. 1980) (arguing right to equal educational and social opportunities appropriate to one's needs by residents of a community mental health and mental retardation center).

73. Civil No. :A1-80-141 (D. N.D. August 31, 1982). The Association for Retarded Citizens of North Dakota argued an equal education claim for all mentally retarded and an equal treatment claim on behalf of the institutionalized mentally retarded. *Id.*

the mentally retarded in community placement centers. The federal district court denied that a suspect class existed in either instance under the United States Constitution. The court invoked the rational basis test to evaluate plaintiffs' treatment claim; however, with respect to the unequal education claim, the *Olson* court applied intermediate scrutiny, while expressly recognizing that education is not a fundamental right under the United States Constitution.[74]

Although the *Olson* court arrived at a point consistent with the proposed suspect context approach, it did so at the expense of predictable judicial decisionmaking. Under suspect context theory, the court would simply recognize that education is not primarily a health-related activity and is therefore a suspect context when the state purportedly acts on behalf of a minority defined by mental disability. The court would thus apply invigorated scrutiny and make the decision on the basis of a predictable, pragmatic, and fair principle.

In *Levine v. Institutions and Agencies of New Jersey*, the New Jersey Supreme Court decided that profoundly retarded children in institutions were not entitled to the same educational benefits as retarded children living at home and receiving educational services in community centers.[75] The court found no denial of equal protection where retarded children outside institutions received day care programming valued at $5500 per year, while institutionalized "subtrainables" received a stipulated $309.68 value in education per year. The majority's rationale was that the state constitutional provision for free education, while a fundamental right, did not include school-age children who, in the eyes of the court, were "unable to absorb or benefit from education."[76] The court arrived at this shocking conclusion by asserting that the rationale of the free education clause was to foster an educated citizenry.[77] Since the court had concluded that these "sub-trainables" in institutions could never be such citizens, they were not entitled to educational benefits.[78]

The *Levine* court's decision further dramatizes the need for an altered suspect classification doctrine. Only the most activist court will examine the parallel between the mentally handicapped and recognized suspect classes, and such a court or judge would probably increase scrutiny even in the absence of such a parallel.[79] If certain contextual applications of clas-

74. *Id.*

75. 84 N.J. 234, 244, 418 A.2d 229, 263 (1980). The court stated: "Plaintiffs have not been subjected to unequal protection of the laws by the requirement to pay in accordance with their financial ability a substantial part of the costs of the total residential care, inclusive of educational services, that is provided to their profoundly institutionalized children." *Id.*

76. *Id.* at 250, 418 A.2d at 237.

77. *Id.*

78. *Id.* at 251, 418 A.2d at 237.

79. This Note assumes that judicial decisionmaking is normative, i.e. a process whereby values are weighed and chosen. A working normative theory might identify two value systems interacting: the legal and the personal. The legal system has two components: the doctrinal and the jurisprudential. The doctrinal component weighs the merits of competing legal doctrines. In the equal protection area, for example, the jurist is faced with a two-tiered, a three-tiered or a sliding scale model. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting) for a discussion of the doctrinal alternatives. The jurisprudential value system is concerned with making choices among competing theories of the law, justice and the role of the

sification are presumptively illegitimate, it is fairer, more efficient, and less arbitrary to declare what those contexts are at the outset. Suspect context theory is one approach to refining suspect classification doctrine into a just and powerful tool for use by the mentally handicapped.

3. *Benefits: New Property Rights*

The only United States Supreme Court case where suspect classification of the mentally disabled has been argued, *Schweiker v. Wilson*,[80] makes clear the inadequacy of conventional doctrine to expose invidious discrimination in the economic benefits context. At issue in *Wilson* was the denial by Congress of a comfort allowance to adults residing in Illinois mental institutions which did not receive Medicaid funds.[81] The suspect context approach would require a determination initially whether the state action at issue involved a habilitation matter. Since a "comfort allowance" is by definition for pleasure, not therapy, under the rationale of the suspect context approach, the allowance could not be denied to the mentally ill and be given to other institutionalized persons unless the denial could pass invigorated scrutiny.

The thrust of the *Wilson* majority (5-4) opinion by Justice Blackmun was that the statutory provisions did not classify discretely and directly by mental disability.[82] Justice Powell, for the dissent, countered that it was undeniable that "appellees [were] denied the benefit because they [were] patients in mental institutions."[83] Justice Powell would have struck down the discriminatory provisions on rational basis grounds; Justices Brennan, Marshall, and Stevens agreed.[84]

Although the handicapped did not prevail in *Wilson*, the majority opinion provides clues as to what would be necessary for the handicapped to win. In Justice Blackmun's opinion, the group excluded was not congruent with appellees' class.[85] One can safely assume, therefore, that if a statute deprived the mentally handicapped solely or even disproportionately, the statute would most likely be found irrational. Justice Blackmun also stated that the indirect nature of the deprivation "does not without

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judiciary. The jurisprudential value system weighs the relative importance of federalism, comity, separation of powers and questions of judicial activism or judicial restraint.

The personal value system also has two components: individual ethics and social values. The legal value system can be seen to vary to the degree and in the manner to which it is influenced by the personal and social values of the decisionmaker. A model of decisionmaking such as this can help to explain how a majority and dissent can arrive at completely opposite conclusions on seemingly identical facts. Contrast, for example, the majority's holding in *Levine* that "sub-trainable," institutionalized children are not entitled to a free public education under New Jersey law, 84 N.J. at 254-55, 418 A.2d at 237 with the dissent's assertion, "Linda Guempel and Maxwell Levine have been denied the free education afforded their peers because they are institutionalized—not because they are uneducable." *Id.* at 284, 418 A.2d at 256.

80. 450 U.S. 221 (1981), *rev'g* Sterling v. Harris, 478 F. Supp. 1046 (N.D. Ill. 1979).

81. The federal government's purpose for denying this small comfort allowance was to avoid spending federal resources on behalf of individuals whose care and treatment were fully provided by state and local government. *Id.* at 237.

82. Schweiker v. Wilson, at 231.

83. *Id.* at 241 n.2 (Powell, J., dissenting).

84. *Id.* at 247 (Powell, J., dissenting).

85. *Id.* at 232.

more move us to regard it with a heightened scrutiny."[86] The implication might be that intent to discriminate, whether further evidenced in the form of direct *de jure* classification or legislative history, could trigger a higher level of scrutiny.

Ironically, Justice Blackmun may be the most likely of the Justices to take a future activist stance, in spite of his opinion for the majority in *Wilson*. One commentator has argued that the key to change in Justice Blackmun's opinions has been his concern for vulnerable individuals.[87] He has responded to exploitation or abuse of "the little guy" in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[88] *Rizzo v. Goode*,[89] and *Plyler v. Doe*.[90] Influenced by his years at the Mayo Clinic, Blackmun seems to have adopted the organic model inherent in medicine; empiricism[91] and a respect for science mark his judicial approach. Given a discrete class of the mentally handicapped, subject to a direct deprivation, Justice Blackmun could provide the crucial swing vote. It is even possible, in light of Justice Blackmun's empiricism, that he might respond to the suspect context theory urged in this Note.

CONCLUSION

The promise of the early cases which argued suspect classification doctrine on behalf of the mentally handicapped has not been fulfilled. A modification of the traditional doctrine or a new approach is needed.

Suspect context theory offers new hope for success to the handicapped and the promise of a sensitive, workable guideline to the courts. The suspect context approach calls for an *a priori* determination of the suspect classification question based on whether or not the objective of the state's action is the amelioration of the defining disability. Ameliorative state action toward the mentally handicapped is presumptively valid, and neutral or non-ameliorative state action toward the handicapped is presumptively illegitimate. All contexts of state action declared presumptively valid by this test would be scrutinized only by the rational basis standard. All other contexts would receive invigorated scrutiny with the related requirement that the state use means related to a substantial or compelling state interest.

Suspect context theory recognizes that classification by mental disability is not *per se* impermissible. A recognition that discriminatory behavior toward the mentally disabled is not on the same footing as racial classification does not, however, close the door to viewing a state's action as suspect. The history of discrimination against the mentally disabled demands a

86. *Id.* at 234.

87. Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983).

88. 425 U.S. 748, 763 (1976). ("Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged.")

89. 423 U.S. 362, 381 (1976) (Blackmun, J., dissenting) "One properly may wonder how many more instances actually existed but were unproved . . . because of a despairing belief . . . that nothing can be done about it anyway. . . ." *Id.* at 384.

90. 457 U.S. 202 (1982) (Blackmun, J., concurring). "Like Justice Powell, I believe that the children involved in this litigation 'should not be left in the streets uneducated.'" *Id.* at 2402.

91. *See* Note, *supra* note 87, at 735.

close examination of any state action that seems to curtail the rights of this minority. Three generations of imbecility is enough.[92]

92. Almost three score years have passed since Justice Oliver Wendell Holmes upheld an involuntary sterilization on the following rationale:

> We have seen more than once that the public welfare may call upon the best citizens for their lives [in wartime]. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

Buck v. Bell, 274 U.S. 200, 207 (1927). This case has never been explicitly overruled. *See* D. POWELL *supra* note 1, at 65-71.