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The Constitutional Right to Education:
The Quiet Revolution

By PAUL R. DIMOND*

There has already been much talk of a crisis in American education, perhaps too much talk. There are continuing and loud debates about the effects of schooling, permissiveness, freedom, student rights, choice, diversity, aid to parochial schools, community control, equality of educational opportunity, and quality education. In recent years, however, the debates have increasingly focused upon, or more accurately have been wholly enveloped by, the heat generated by the battles over desegregation, busing, neighborhood schools, school finance, and local control. Perhaps, it is a mark of our constitutional democracy, or the litigious nature of the American people, or their lawyers, that each has been the subject of recent constitutional adjudication. Yet all of these

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conflicting and emotional currents\(^2\) should pale before the undeniable fact that hundreds of thousands of youngsters are excluded from all publicly supported schooling, are wrongly assigned to special education classes, or are confined without proper treatment in residential institutions. For these largely ignored children, the crisis in American education is more fundamental; it is a matter of total noneducation or mis-education.

It is the purpose of this article to show, first, the precise contours of the limited constitutional right to education which can be invoked to protect these heretofore neglected children. It will also be shown how the vindication of this right by courts, and its implementation by public officials under pressure from citizens, can effect a revolution in American education. Such a revolution holds a realistic promise of benefit not only to the excluded child directly, but to all children by reforming the entire system of American public education.\(^3\)


3. In the face of such grandiose claims, the reader does not need the author's warning to be skeptical of what follows. See, e.g., Kurland, supra note 2, at 596-600. The reader, however, should be aware that I am involved in litigation to secure the constitutional right to education here defined. Commentators, more in the academic tradition, may therefore chide my bias, if not scholarship. Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny, 120 U. Pa. L. Rev. 504, 512 (1972) [hereinafter cited as Goldstein]. Opposing counsel no doubt may inform their clients and courts that what follows is...
Those who doubt the reality of this latest "crisis" in American education should consider the following evidence suggesting the deprivation of all educational opportunity to some children. In Pennsylvania, as many as 50,000 retarded children were excluded from school entirely at the time of filing suit; in New Orleans, school authorities admit that over 500 "mentally handicapped" children received no education from any public agency, while, quite literally, countless others are denied access to education. Across the country, as many as 60 percent of school age children who are retarded may not be receiving an education. In Washington, D.C., more than 12,000 and perhaps as many as 18,000 youngsters, with various real or school-imagined handicaps, were denied all education at the time of filing suit; in Massachusetts, several hundred emotionally disturbed children sit only on waiting lists and countless others are excluded from all education and merely another polemic on behalf of the latest "cause." In any event, the issue for every reader who happens upon this article remains: what, if anything, said herein is right enough to require action by the reader in the forum in which he operates. Some of these thoughts, and cruel facts, have already required courts to grant relief. E.g., Lebanks v. Spears, Civil No. 71-2897 (E.D. La. 1973); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), modifying, 334 F. Supp. 1341 (M.D. Ala.), modifying, 325 F. Supp. 781 (M.D. Ala. 1971); Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972), modifying, 334 F. Supp. 1257 (E.D. Pa. 1971); Hosier v. Evans, 314 F. Supp. 316 (D.V.I. 1970); Knight v. Board of Educ., 48 F.R.D. 115 (E.D.N.Y. 1969), modifying, 48 F.R.D. 108 (E.D.N.Y. 1969).

4. There is a crisis for a child denied an education, even if he is the only one in such position.

5. Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279, 296 n.53 (E.D. Pa. 1972). Figures on how many children are effectively excluded from school are only estimates, primarily because local and state officials fail to count all the children of school-age in any community. Excluded children, especially, are so neglected that they usually are not even counted. The figures here cited, therefore, are based either on admissions contained in defendant school authorities' reports, or on estimates derived by subtracting the number of children counted as provided an education from the federal census, or on various incidence rate figures. See, e.g., D. STEDMAN & D. SHERWOOD, HYPOTHETICAL COMMUNITY (1967).

6. New Orleans' school authorities reported that as of January 1, 1972, some 655 "mentally handicapped" children were "legally excluded" from the schools of Orleans Parish school district and were not provided an alternative, publicly supported education. Lebanks v. Spears, Civil No. 71-2897 (E.D. La. 1973). After surveying children recommended, but not placed in "special classes," New Orleans school officials reported another 2,000 school age children were without schooling. March 18, 1973 Proposal for Expansion of Special Classes, Orleans Parish, on file with Paul R. Dimond.


treatment. Exclusion of children from school is a national problem and scandal.

Countless other children in special schools and institutions across the land receive no education or treatment, while others are provided a wholly inappropriate "special education." For example, many severely retarded persons from Pennsylvania to Alabama have been institutionalized without provision for any program of education and training, and perhaps in environments unfit for living things. At the same time, some special education classes are filled with children who are not retarded and are only learning that their place in life is to be retarded.

In Boston, for example, black, poor and Spanish-speaking youngsters were placed disproportionately in "special" classes. When they were re-evaluated by sound methods of diagnosis by competent child psychiatrists and psychologists, over 50 percent were found to be normal. Similar discoveries were made upon examination and re-evalu-

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10. An HEW study team concluded: "Through legal, quasi-legal and extra-legal devices, or through apathy, schools cause, encourage and welcome the lack of attendance in school of millions of American youngsters. Such activity by the educational system serves as a denial of civil rights as massive as the separate school systems maintained by law in prior years." J. REGAL, R. ELLIOT, H. GROSSMAN & W. MORSE, THE SYSTEMATIC EXCLUSION OF CHILDREN FROM SCHOOL 8 (1971). Throughout this article, the term "exclusion" is used in a nontechnical sense to refer to any continued absence from publicly supported educational opportunity.

Preliminary analysis of the 1970 United States Census suggests that of children ages 7-15 from 700 thousand to 1.2 million children (1.9 to 3.2% of all children) were neither enrolled in any school or institution for the spring of 1970. Michelson, "Children Not in School—Preliminary Estimate" (Feb. 1973), on file with Paul R. Dimond.


14. E.g., President's Comm. on Mental Retardation, The Six Hour Retarded Child (1970). This title refers to the many children who are labeled, and apparently act, "retarded" only at school; in the real environment outside the school, many are as adaptive and innovative as the rest of our children.

ation of the disproportionate placement of Spanish-speaking and black children in San Francisco.\textsuperscript{16} In Washington, D.C., upon retesting the children assigned to the basic tracks, over two-thirds were found to be misclassified.\textsuperscript{17} Based on a recent examination of several school systems in metropolitan Philadelphia, at least 25 percent and perhaps as many as 68 percent of the children assigned to classes for the "Educable Mentally Retarded" should be in regular classes.\textsuperscript{18} Finally, many children with quite specific and devastating medical problems are lumped into various special education classes or are excluded from school altogether instead of being given the medical evaluation and treatment necessary to provide a cure.\textsuperscript{19}

\textsuperscript{16} Diana v. California State Bd. of Educ., C-70-37 R.F.D. (N.D. Cal., filed Feb. 1970) (consent decree); Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); see, Classification Materials, supra note 15, at 292, 321. Some view these cases as attacks on the tyranny of the verbal portion of I.Q. tests, which are "biased" against minority groups unfamiliar with the "primary language." Such a narrow view of these cases is wrong. The courts in these cases prevented disproportionate placement of minority groups in the category "retarded" only if the nonverbal portions of the tests were also included as part of the illegitimate "primary language"; these decisions reform school placement practices more generally only if a broad sensitivity to varying personal and cultural conditions is substituted for sole reliance on any test. See Stewart v. Phillips, Civil No. 70-1199-F (D. Mass., filed Oct. 1970). At a minimum, no child should be labelled or viewed as "retarded" unless he has significantly lower intellectual function (more than two standard deviations below the norm on individually administered I.Q. tests) and is impaired in actual, nonschool social behavior relative to the child's cultural context. Both should be measured by a competent child psychologist and only in conjunction with other professionals, including a qualified clinical social worker and developmental disability teacher. The "school psychologist" should not be permitted to make these decisions in isolation from other views of the child. See generally Grossman, Manual on Terminology and Classification in Mental Retardation (1973); Mercer affidavit, Classification Materials, supra note 15; L. Terman & T. Merrill, Stanford Binet Intelligence Scale (1960); U.S. Dept of Health, Education & Welfare, The Problem of Mental Retardation (1969); D. Wechsler, The Measurement and Appraisal of Adult Intelligence (1969); Herber, A Manual of Terminology and Classification in Mental Retardation, 65 AM. J. MENT. DEF. 1961 (1964).

\textsuperscript{17} Smuck v. Hobson, 408 F.2d 175, 187 (D.C. Cir. 1969).


\textsuperscript{19} As simple examples, consider the reading and comprehension difficulties accompanying bad eyesight or hearing and the potential "miracle" cures of glasses or hearing aids which are possible upon detection of the problem. As another possible example, consider the complex controversy over drug-prescribed cures for "hyperactivity." E.g., 8 Inequality in Education 2-24 (1971).
For all these children, the asserted birthright of every American child to a decent educational opportunity is a total myth; whatever education these children may ask for or need, they get nothing. Yet we now have the knowledge and capacity to provide every child a minimally adequate program of treatment, education, training, and care. With the exception of a miniscule number of children who die before adolescence, every child given education and training is capable of some development. That makes the present plight of these children not only an outrage, but also unacceptable and wasteful as a matter of public policy. The major issue to be addressed in this article is whether the present neglect of these children is prohibited by the constitution as well.

The Constitutional Right to Education

Some of the children denied an education may be disadvantaged to some extent by their own inherited or acquired mental, emotional, or physical handicap, but they are twice disabled by the affirmative acts and omissions of public authority. These disabilities result from the affirming acts of public authority. These disabilities result

20. The phrases "educable" and "trainable" are sometimes used as "technical" labels supposedly related to the relative capacity of different children for development. These phrases are used here only to describe the fact that all children with programs of education, instruction, and/or training are capable of some development. Recent developments and evidence suggest that the pessimistic views, which have been so widely and so long entertained regarding the ineducability of the mentally defective are unwarranted. Many of those who might be classified as feeble-minded because of their I.Q. can live in financial and social independence under present economic circumstances provided favorable environmental conditions are present. A. YATES, BEHAVIOR THERAPY 324, 339 (1970); N. O'CONNOR & J. TIZARD, THE SOCIAL PROBLEM OF MENTAL DEFICIENCY (1956). "[T]he remaining few, with such education and training, are capable of achieving some degree of self care." Pennsylvania Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971), modified by 343 F. Supp. 279 (E.D. Pa. 1972). See also President's Comm. on Mental Retardation, The Six Hour Retarded Child (1970); President's Comm. on Mental Retardation, These, Too, Must be Equal: America's Needs in Habilitation and Employment of the Mentally Retarded (1969).

21. For example, institutional care costs about $40,000 per bed in construction costs, and yearly maintenance of the retarded ranges from $2,000 to $10,000. President's Comm. on Mental Retardation, These, Too, Must be Equal: America's Needs in Habilitation and Employment of the Mentally Retarded 14 (1969). Consider in contrast the earnings potential of millions of persons capable of learning to support themselves, but who have not yet been taught. Such dollar cost-benefit analysis fails to include the human value for the individual of a life of independence which results from education, as compared with the abject dependence which so often accompanies noneducation of the handicapped.

22. As noted, only some of the excluded children suffer from any real handicap; others are only the subject of misclassification. See notes 14 & 16 supra.
first from the effective exclusion of these children from access to all publicly supported education and, second, from the arbitrary and capricious process by which they are identified, labeled, and placed. Across the country, various groups on behalf of such plaintiff children seek the aid of the judiciary in eradicating, root and branch, these two state imposed disabilities. Their narrow claim is that the Fourteenth Amendment requires the total eradication of these two state imposed disabilities.

The constitutional framework for this claim is straightforward, if not elegant. First, the unjustified exclusion of any child from all public schooling denies to that child the equal protection of the laws when the state makes the opportunity freely available to other children. Second, the operation of an unfair procedure in the stigmatization by public authority of any person or the denial to him of any public good denies the process due each person under the Fourteenth Amendment. Such a stigmatization and denial is involved in labeling children as "exceptional," "retarded," or "handicapped," and placing them in "special" classes or excluding them from schooling entirely. These two rights, equal protection and due process, merge to form the emerging constitutional right to an education, which guarantees to every child a minimally adequate, publicly supported educational opportunity.

The Equal Protection Right to Some Education: Prying Open the School House Door

In this section only the extreme case is discussed—total exclusion from all public education. Any subtleties arising from claims of unfair or illegitimate tracking within schools are removed. Issues of differ-

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27. These constitutional arguments have been accepted fully in Mills v. Board of Educ., 348 F. Supp. 866, 865-76 (D.D.C. 1972), and have been found to create sufficiently colorable constitutional claims to confer jurisdiction on a federal court to order and enforce a consent agreement establishing the right to education. Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279, 293-97 (E.D. Pa. 1972). In Harrison v. Michigan, 350 F. Supp. 846, 848 (E.D. Mich. 1972), a district court, even while dismissing a case based on the strained and simultaneous application of the doctrines of mootness and prematurity, declared that "[t]he problem presented to the court by this case is compelling . . . . [P]roviding education for some children, while not providing education for others [in this instance, handicapped children] is a denial of equal protection."
28. For example, in Stewart v. Phillips, Civil No. 70-1199-F (D. Mass., filed
ential education fit for the child's special needs similarly are cast aside. The ever-lurking claim of racial discrimination inherent in school classifications which overrepresent black and other minority children in "inferior" ability groups and underrepresent them in "superior" groups and curricula are basically irrelevant. Even the simple right to acquire useful knowledge while in school is beside the point. The classification here considered is simple: one group of children is effectively excluded by various state actions from all publicly supported education, while the states regularly make the opportunity of some education available free to others. The issue is whether the states, having undertaken to provide public education to some children, may justify its total denial to others.

**Standards for Judicial Review of Challenged Classifications**

The standards of review applied by the Supreme Court to various challenged classifications have long been the subject of commentary. Generally, constitutional scholars suggest that there is now a dichotomy in judicial review depending upon the nature and impact of the classi-

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29. In Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972), the court approved the consent agreement stating: "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, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class . . . ." See notes 110-24 and accompanying text infra.


31. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Thus, even the troublesome issue of the propriety of disciplinary exclusion is omitted. The child, arguendo, may be banished from a particular school or classroom; the issue is whether he may also be entirely denied access to homework, tutoring, correspondence courses, rehabilitation and the like.

32. The term "education" refers to any developmental training, instruction, or indoctrination to which children are or can be subjected in public and private schools and agencies—ranging from the three R's to communication to toilet training.


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Oct. 1970), defendants' motion to dismiss a complaint attempting to reform special education placements was denied on the ground that a fair hearing was required before labeling a child retarded or placing him in any special class. See notes 74-106 and accompanying text infra.
fication challenged. Restrained review—a search only for a rational relationship to a legitimate state purpose—usually finds sufficient justification to sustain a classification. But where the classification is “suspect” or impacts upon a “fundamental interest,” especially a constitutionally protected freedom, strict scrutiny—a search for the necessity of promoting a compelling state interest—is required.

The decisions of the Supreme Court, however, are neither so neatly defined nor so woodenly made. Rather, as Professor Michelman first suggested, judicial review of classifications challenged under the Fourteenth Amendment is more akin to a chemistry than a calculus. Stated another way, the standard of review applied does not


34. The majority decision in San Antonio Independent School Dist. v. Rodriguez, 41 U.S.L.W. 4407 (U.S. March 21, 1973), however, uses the language and framework of traditional equal protection dichotomy. The majority argues that discrimination resulting from existing school finance schemes is justifiable because (1) the classification does not involve a suspect criterion nor have a heavy impact against an identifiable group of persons subject to majoritarian abuse and in need of judicial protection; (2) the classification does not involve a fundamental interest for, as it was conceded that a minimally adequate education was provided every child, the Court held that education was not generally a constitutionally protected interest; and (3) the challenged school finance system was rationally related to the state's legitimate interest in local control and broad discretion in fiscal affairs. Interestingly, Justice White came to the opposite conclusion on a purported “rational basis” test.

Justice Marshall's dissent ably describes how the majority’s framework and labels used in its equal protection analysis in Rodriguez only mask what the Court has actually done in many of the cases cited immediately above. That which is the “restrained review” of one judge in one opinion is a mutation of “stricter scrutiny” of another judge in another opinion. It is time that members of the Court begin to apply the warning in Swann that “substance, not semantics, must govern.” Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971). As long as the Justices try to write within a two pronged equal protection dichotomy, they will be guilty of hiding substance with semantics, or worse, will be in danger of determining substance from semantics. Regardless, of the merits of the Rodriguez decision, Justice Marshall's dissent contains not only greater judicial honesty but also, hopefully, the prod to more enlightening judicial analysis in the future.

35. Michelman, The Supreme Court, 1968 Term, Foreword: On Protecting the Poor through the Fourteenth Amendment, 83 HARV. L. REV. 7, 36 (1969) [hereinafter cited as Michelman]. See also Comment, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103, 105 (1972); Gunther, The Supreme Court, 1971 Term, Foreword: In
determine the result in any particular case; rather, the interests at stake, coupled with the facts, are weighed by the Court in a synergistic fashion. It is the purpose of this article to explore these interests and to present the facts so that the result, regardless of the semantics employed, is apparent.36

The Burden of Justification

The inquiry begins with Brown v. Board of Education:

[The] opportunity [of an education] where the state has undertaken to provide it, is a right which must be made available to all on equal terms.37

The issue here is not just deprivation of "equal educational opportunity" as in Brown on a racial basis,38 but deprivation of all educational opportunity39 on a variety of bases, all falling under the category of the "uneducability" of the excluded child. Unless the burden of justifying the classification is substantially altered because of the assumed nonracial nature of total exclusion from school, as compared with school segregation, "a fortiori [such] conduct . . . is violative of the [Constitution]."40 In any event, at a minimum, "the burden of justi-


38. That Brown is primarily a racial classification, not an "equal educational opportunity" case is accepted by the author. See, School Segregation, supra note 36, at 2-3.


ing any school rule or regulation . . . terminating [the right to receive a public school education] is on the school authorities.\(^\text{41}\)

**Justifications**

In determining what chemistry will lead to the court's ultimate decision on this issue, consider initially the justifications offered by the state for denying all educational opportunity to some children. First, unlike *Tinker*\(^\text{42}\) or even *Brown*, there is *no* issue of whether the excluded child will disrupt the regular classroom or whether he can be segregated from his fellows;\(^\text{43}\) it is assumed, arguendo, that the disruptive, retarded, exceptional, or otherwise handicapped child may be constitutionally separated from his peers and placed in special classes, special institutions, community programs, and the like. The availability of such a "less drastic alternative" to exclusion for serving the state's legitimate interest in educating all its children renders the present practice of exclusion senseless; the state practice of exclusion is simply not "adequately tailored" to the state's legitimate purpose to withstand judicial review.\(^\text{44}\)

Second, there is *no* factual merit to the blanket claim that the excluded children are in any objective sense uneducable or untrainable. Rather, it is the state which has decided to give up on the excluded child and provide *no* educational program. The state's self-imposed choice in this regard cannot serve to make the child what he is not; the educability of every child is a matter of fact to be proven by evidence, *not* by the very state action being challenged. Since every child is capable of benefiting from education and training,\(^\text{45}\) the "classifying

\(^{41}\) Ordway v. Hargraves, 323 F. Supp. 1155, 1158 (D. Mass. 1971). *Ordway* involved the partial exclusion of a woman from high school solely by reason of her pregnancy; the court required that the plaintiff be immediately reinstated in good standing. *See also* Richards v. Thurston, 424 F.2d 1281, 1286 (1st Cir. 1970).


\(^{43}\) John W. Davis in opening argument for South Carolina in *Brown* said: "May it please the Court, I think if appellants' construction of the Fourteenth Amendment . . . should prevail, I am unable to see why a state would have any further right to segregate its pupils on the ground of sex or on the ground of age or on the ground of mental capacity." And a very strong case can be made—given the long history of invidious discrimination to which, for example, the mentally retarded have been subjected—that the segregation of retarded children into separate residential institutions, schools, or classes is at least "suspect."


\(^{45}\) "Without exception, expert opinion indicates that: 'All mentally retarded persons are capable of benefiting from a program of education and training;
fact"—the total incapacity of the child excluded—provides no justification.

Third, there is no danger of involving the judiciary in the unmanageable, nonjusticiable task of providing for differential needs and the interminable debate about input and output standards for evaluating what constitutes an equal educational opportunity. Whatever the merit of these justifications for restraining judicial intervention into school affairs, the extreme case considered here presents no such concern. The children out of school receive nothing; they ask only for something.

Thus, the only real justifications are only the now familiar cries of administrative convenience and money. These justifications have been explicitly rejected in many cases, while arguably being accepted in a few others, as adequate to justify a challenged classification.

that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency and the remaining 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.” Pennsylvania Ass’n of Retarded Children v. Pennsylvania, 343 F. Supp. 279, 295-97 (E.D. Pa. 1972) (footnotes omitted). In the footnotes to this finding, the court cited the trial testimony of experts in the field, Drs. Goldberg, Gallagher, Steadman, Blatt, and Mann, and the studies cited in note 20 supra.

46. See, e.g., McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff’d sub nom. mem., McInnis v. Ogilvie, 394 U.S. 322 (1969); Kurland, supra note 2, at 597-98. The concerns there expressed for judicial restraint, however, relate primarily to revolutionizing school finance structures in order to reallocate dollars among children already receiving some education. Compare School Segregation, supra note 36, at 19-20, with Dimond, Serrano: A Victory of Sorts for Ethics, Not Necessarily for Education, 2 YALE REV. OF LAW & SOCIAL ACTION 132, 134-36 and n. 31 & 48, (1972) [hereinafter cited as Serrano]. Unlike the school finance cases, the case of the child excluded from all education involves a total deprivation and, therefore, does not involve such complex fiscal, and educational policy issues. San Antonio Independent School Dist. v. Rodriguez, 41 U.S.L.W. 4407, 4419-20 (U.S. March 21, 1973). Tax structures are not at issue and no experts claim that children (especially the handicapped) should go without the opportunity of education entirely.

47. Assuming that 2 percent of the school age children are excluded from school, and that their education would cost the state two times the average cost per pupil, “money” still means less than 5 percent of the school budget. And even that cost should be offset by the alternative costs and losses incurred from failure to provide education. See note 21 supra.


49. I use the term “arguably” advisedly. First, I am unaware of any cases
There is no independently rational basis for the exclusion of children from education.\(^5\)

Faced with only these frankly pedestrian justifications, not much should be required to tip the decision against the state imposed exclusion of some children from all publicly supported educational opportunity.\(^2\) Yet quite an array of judicially recognized reasons compel the total eradication of this particular discrimination.

**Suspect Classification**

The Court has strictly scrutinized several classifications which are based upon, or have an impact most heavily on, for example, race,\(^5\)

where a pattern of systematic discrimination and total deprivation—as with exclusion of some children from the schooling available to other children—has been adequately justified as an understandable product of administrative convenience. \(^5\)

\(E.g.,\) Shapiro v. Thompson, 394 U.S. 618 (1969); Hosier v. Evans, 314 F. Supp. 316 (D.V.I. 1970); \(^c.f.\) Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968). Second, \(Dandridge v. Williams\) did not hold that the extra costs, or reallocation of present monies, required to cure the discrimination there challenged, constitute adequate justification. While the Court noted the "difficult responsibility of allocating limited public welfare funds," it upheld the maximum grant welfare plan on the independent, "non-financial" basis that the state had a "legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the working poor." 397 U.S. 471, 486-87 (1970). If any similar, independent rational basis exists for excluding some children entirely from the opportunity to obtain an education and training, it escapes me. To the contrary, as noted by the district court in \(Hosier\), "It is manifestly contrary to the public good in this territory to develop and foster a ghetto of ignorance, with countless untrained, untutored and perhaps untended children. ... [T]he most compelling of public concern militates in favor of the prompt admission of these [excluded children] to the public schools." 314 F. Supp. at 321. \(^5\) It should also be noted that in \(Dandridge\), the Court was not confronted with total deprivation "for some aid [was] provided to all eligible families and all eligible children." 397 U.S. at 481 (emphasis added).


poverty, alienage or ancestry, and religion. These “suspect” classifications have several things in common: they stigmatize certain persons by implying popular or official belief in their inherent inferiority or undeservingness. Historically they have been used for oppressive purposes, namely the systematic devaluation of the claims of these persons to nondiscriminatory sharing of the burdens and benefits of social existence. They often single out these persons by requiring them to overcome special burdens before enjoying the social goods more freely made available to all others. Moreover, these classifications involve classes of persons who constitute “discrete and insular minorities” which historically have been unable to participate fully in the political process and, therefore, are fit subjects of particular judicial protection.

Judged by these standards, the classification here involved is “suspect.” First, children excluded from schooling do represent a vulnerable, discrete and insular minority. As children, they are foreclosed from all participation in the political process by their very minority: they lack the franchise. As variously handicapped and labeled children, historically, they have been special subjects for state neglect or lifetime institutionalization, the subjects of social ridicule or social disdain. Moreover, inborn, acquired or school imposed mental, physical or behavioral handicaps often deprive them of the public and family

56. Sherbert v. Verner, 374 U.S. 398 (1963). It is not my intention to rationalize any of these decisions with the results reached in, for example, Jefferson v. Hackney, 406 U.S. 535 (1972); Palmer v. Thompson, 403 U.S. 217 (1971); James v. Valtierra, 402 U.S. 137 (1971). I only mean to suggest that whatever the Court's “suspicion” of these classifications, it should be present in full measure with respect to children excluded from education.
57. See Michelman, supra note 35, at 20 (articulation of the components of an “invidious” classification). In Rodriguez, the opinion of the Court adopts a similar approach in defining what constitutes a suspect classification in the negative: “The system of alleged discrimination and the class it defines [with respect to school finance] have none of the traditional indicia of suspectness: the class is not 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.” 41 U.S.L.W. at 4415; cf. case cited note 58 infra.
solicitude shown all other children. For the states and many families, the excluded child is more easily forgotten, excluded, or set aside than served.

Second, many of these children are classified as “emotionally disturbed,” “retarded,” and otherwise “unfit,” adjudged by school authorities as inherently of inferior mental and emotional capacity, undeserving of even that education provided and compelled upon other children. This second classifying act, exclusion, has the effect of adding the stigma of uneducability to that of any other label already applied to the child. Not race, poverty, alienage and ancestry, nor religion have been so clearly used by the state and the majority to stigmatize a class of persons as unfit to enjoy the benefits usually accorded others. Often, the very basis for the classification is mental, emotional and physical inferiority; that classification has been used in an oppressive way to deny to the excluded children an educational opportunity freely made available to others.

Third, the classification bears little relationship to the child’s ability to profit from schooling. Although a child classified as retarded or disturbed may be “less able” to learn anything from a calculus or physics class than some of his peers, he is just as “able,” with schooling, to learn some skills, gain some measure of competence, and improve himself some. To the extent therefore that all children are educable or trainable, their relative learning capacity is basically unrelated to every child’s identical stake in having the opportunity of at least some education. Where the issue is the legitimacy of total deprivation of educational opportunity, all children share in common a single attribute, the ability to learn.60

Finally, excluded children are required to purchase at private schools any educational opportunity they are to obtain, whereas the states make education freely available to other children. Thus, this classification by exclusion from schooling does not bear even the superficial neutrality of the faulty wealth classifications held illegal in the

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60. See notes 20 & 45 and accompanying text supra. I am not arguing that physical, mental or emotional classifications are inherently suspect in every context. For example, I have already suggested that such criteria may in some instances form the basis for separating children within or between schools into different groups. See notes 28-32 & 43 and accompanying text supra. The stigmatizing and limiting nature of classifications based on such traits, however, must be scrutinized closely where they are used by the state for purposes and in contexts which both extend beyond their meaning and impose extraordinary handicaps ill-suited to the criteria.
criminal process and voting cases. In those cases all persons were charged a uniform price for the transcript or the right to vote, but the differential impact on the indigent made a suspect classification. Here, one class of persons is required to pay for any education while the states offer an education free to all others. The conjunction of all these factors requires the Court to treat the classification challenged as suspect.

Impact on a Fundamental Interest

Although the Supreme Court recently held in Rodriguez, in the context of school finance litigation, that education is not per se a constitutionally guaranteed right, the debate over the “fundamentality” of education for equal protection analysis for all cases involving education has yet to be resolved by the Court. Even the slim five man majority in Rodriguez eschewed holding that education is never of more significance than, for example, recreational facilities in evaluating the constitutionality of challenged classifications. Uniformly, theretofore, the lower courts had required that states bear a higher burden of justification for classifications which affect education.


62. It is the poor, therefore, who are unable to purchase education, who lose all opportunity to be educated. They are entitled at least to the “minimum protection” necessary to obtain the opportunity. See Michelman, supra note 35. I think it fair to add, however, that the deprivation of all education does not depend solely on family poverty. Professor Michelman no doubt would argue that every child is constitutionally entitled to access to education. See id. at 9-13.

62A. Unlike Rodriguez, the exclusion of children presents (1) a definable class of persons, (2) “saddled with such disabilities, subjected to such a history of purposeful unequal treatment, and relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,” and (3) who are effectively and completely excluded from the opportunity of a publicly supported education. Compare note 57 supra.


64. A comparison of Griffin v. Prince Edward County, 377 U.S. 218 (1964), with Palmer v. Thompson, 403 U.S. 217 (1971) and Evans v. Abney, 396 U.S. 435 (1970), suggests that education—at least compared with recreational facilities—may be an interest treated with more weight by the Court. But see Goldstein, supra note 3, at n.118. The commentary on whether education is a fundamental interest has gone both ways. Compare Coons supra note 32, with Goldstein supra note 3. Education is arguably in some middle ground, below race, speech and voting, but above social, economic, welfare, and business regulation. See Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065 (1969); Comment, 7 HARV. CIV. RIGHTS—CIV. L.J. L. REV. 103 (1972).

65. See, e.g., Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Ord-
Rodriguez, whatever its political implications about the willingness of the Court to intervene, we have learned again that simple labels do not fit either complex social institutions nor nine justices. To draw the conclusion that the impact of a classification on education is never of special constitutional relevance is to allow the semantics and form of Rodriguez to govern the substance of constitutional adjudication hereafter.\(^6\) Indeed, it is difficult to believe that the Court's prior encomia to education, saluted again by the Rodriguez majority, are now to be treated as only ancient rhetoric. After all, the Court in Brown did state:

Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.\(^7\)

The Rodriguez majority did not reject that judgment; it merely held that the relationship between differences in education and differences in taxable wealth, property taxes and expenditures among districts were not dramatic enough to justify judicial intervention of uncertain impact into the financing structures which now support education in every state of the Union except Hawaii. The issue of the fundamentality of education in other cases still must be assessed by the particular facts presented in each case.\(^8\)

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\(^6\) See note 34 supra.


\(^8\) Rodriguez did not face the issue of the fundamentality of education in the context of a total denial, and the majority so indicated explicitly: "Even if it were
After pouring billions into the enterprise and compelling children's attendance upon an education for one-sixth of their lives, states are virtually estopped from denying that education not only undergirds the individual's chance for economic and social independence, but also enhances his ability to exercise all other basic constitutional rights. As the Court has previously noted, education is "an indispensable ingredient for achieving the kind of nation, and the kind of citizenry" necessary to a free society. "Our public educational system is the genius of our democracy." Even discounting for judicial hyperbole, it is fair to argue that such factors do show the unique importance of education, at least in cases involving total deprivation—as compared with food, shelter, clothing, recreation, police protection, and sewers.

Education always has been an aspect of, and in tension with, the First Amendment freedoms. It is in large part an intellectual and political activity whose impact affects the exercise of all other rights; it is for this reason that education is vital to the maintenance of democratic institutions and has long been the subject of special judicial protection. That education is political, a method of passing our culture and "way of life" from one generation to the next, is obvious; indeed, it is this very political aspect of schooling with its compulsory over-

71. In the context of the school finance cases, some have argued that the discussion of the fundamentality of education is more the result of some need to remind schoolmen and children of the importance of their tasks than of some measurable impact of schooling and dollars for education on the fate of the children in adult life. See, e.g., Goldstein, supra note 3, at 534-36, 538; Brest, Book Review, 23 STAN. L. REV. 591 (1971). See also Serrano, supra note 46, at 132, 137 & n.48. Whatever the merit of these arguments in the context of cases involving gross revenue raising and spending differentials, the "fundamentality" in exclusion cases is directly related to the classification: exclusion of the handicapped from education is directly related to loss of income, independence, self respect, and even years of life. E.g., Kirk, Research in Education, in MENTAL RETARDATION 63-67 (Stevens & Heber 1964).
tones" which has so often been in tension with the rights to know, express, and freely exercise religious belief. Thus, education in some cases surely may be of special constitutional relevance: the child's mind, especially as shaped by the school, is of more constitutional significance than his stomach. This is especially true where the issue is whether the child's mind will be affected by any schooling at all. In the case of exclusion from educational opportunity, we deal with a system of public education which does deny to some children all opportunity to acquire the basic minimal skills necessary to citizenship, and even freedom from later state institutionalization: therefore we deal with state regulation directly affecting freedoms guaranteed by the Constitution.

The Balance of Public and Private Interests

Included in the chemistry of any decision is consideration of the "interests of those who are disadvantaged by the classification." The question is "whether all those excluded are in fact substantially less interested or affected than those included." At a minimum, it is now clear that excluded children regardless of handicap share in common with all other children some capacity for development and gaining skill from education and training. As noted, any distinction premised on

77. See Dandridge v. Williams, 397 U.S. 471, 484 (1970). Once again in the case of exclusion—unlike disparities in allocating school resources or differential ability to raise dollars to support education—there is a direct relationship between the challenged classification and the freedoms affected. Recognition of this difference supports the argument that the "fundamentality" of education may well vary with the other circumstances presented by the particular case. At a minimum, exclusion from all education shares fully in whatever the Court may conclude is of special significance about education in any case.
the ineducability and untrainability of excluded children fails upon examination of the facts. Indeed, for many excluded children who do suffer real as opposed to school-imagined handicaps, publicly supported education is even more important than for the normal child; development and learning are unlikely to come to the handicapped child without education. For every Bobby Fischer or Thomas A. Edison who thrives without school, there are countless handicapped children whose exclusion from education seals a lifetime fate of dependence, eventual institutionalization, loss of liberty or worse. Such result is contrary to express state policies of developing all citizens for free, independent and self-supporting participation in the burdens and benefits of life in the Republic.81 The state's legitimate purpose is education of children. Hence, in the circumstances set forth above, the exclusion of children from that opportunity is not rationally related to the state's own expressed, legitimate interests; nor does it counterbalance the interests of those children.82

Against this background, the judgment of the courts should be uniform and is predictable:

[Quite apart from the individual child's interest in education, the state's own] interest in educating the excluded children clearly must outweigh its interest in preserving financial resources. If sufficient funds are not available to finance all of these services and programs that are needed and desirable in the system, then available funds must be expended equitably in such manner that no child is entirely excluded from a publicly supported education. . . . The inadequacies of [a state's system of public schooling], whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.83


81. See note 21 supra.

82. Any proffered justification that children are excluded so that resources for the education of regular children may be maximized should be summarily dismissed. First, for every excluded child, a counterpart in all material respects may be found who receives a publicly supported education; and second, no such interest is expressed in the policy of any state's system of education of which I am aware. Such an asserted justification, therefore, does not represent a "real state interest [but rather an] advocate invention for purposes of litigation." School Segregation, supra note 36, at 6 n.22.


For those who prefer the structural framework of the "New Equal Protection," the same result is reached. For if the court views the classification of some children
In the years to come, therefore, I believe that the Constitution, as interpreted and enforced by the courts, will be held to prevent the states from denying to some children all publicly supported educational opportunity. It should be unconstitutional for school authorities to wholly banish from education a class of children.  

At a minimum, the door to schooling will be held ajar, upon default by school authorities, by judicial intervention to protect the constitutional right of every child to some education. Where the state chooses to provide

as handicapped and excluded from all public schooling as suspect (see notes 53-58 and accompanying text supra) or as affecting a fundamental interest (see notes 63-77 and accompanying text supra), closer scrutiny is appropriate: the state must show that the classification is necessary to promote a compelling interest. 

Cf. Michelman, supra note 35, at 20 n.4. The state will not be able to meet this burden (see notes 38-47, 66-70 and accompanying text supra). Indeed, if the court accepts the argument in the text above (see notes 43-82 and accompanying text supra), the state may be unable to show that such classification is even reasonably related to a legitimate state purpose. The classification, therefore, should be struck down under this analysis as well.

84. And that is a long way to come from Justice Holmes' remarks approving sterilization in Buck v. Bell, 274 U.S. 200, 207 (1927): "Three generations of imbeciles is enough." That is, however, no further than Brown came from Plessy v. Ferguson, 163 U.S. 537 (1896) and Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856). See Brunson v. Board of Trustees, 429 F.2d 820, 826 (4th Cir. 1970) (Sobeloff, J. concurring).

85. In many states the substantive right to some educational opportunity, or an education suited to the child's needs, is explicitly guaranteed by state constitutional and statutory provisions. See, e.g., Utah Const. art. X, § 1; cf. Utah Code Ann., § 53-4-7 (Supp. 1967); New Mexico Const., art. XII, § 1. With the recognition of the problem, legislatures, under pressure from pending suits, are responding by adopting legislation providing for the right to some education. E.g., 17 La. Rev. Stat. § 1942 (1972); Massachusetts Special Education Act of 1972, ch. 766, H.B. 6164. In these states the federal constitutional analysis is mere surplusage, for the state law provides an adequate basis for relief and will be enforced. See, e.g., Wolf v. Legislature of the State of Utah, Civil No. 182646 (3d Dist. Ct., Salt Lake Co., Utah, filed Jan. 1969) (Classification Materials, supra note 15, at 171); Doe v. Board of School Directors (Milwaukee Co. Cir. Ct., filed April 13, 1970) (Classification Materials, supra note 15, at 182). Moreover, diverse state laws which apparently provide for the exclusion of children from school can, and should be, read to apply only to reassignment from a particular school or classroom into an alternative educational program, not exclusion from all public education. See Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972). Similarly, state law provisions relieving parents of the compulsory obligation to send certain handicapped children to school should not relieve school authorities of their obligations under state law to continue to make the opportunity of education available to the child. See id.

This panoply of possible state law bases for securing the right to some education should make the state court forum attractive to litigants. However, it also raises the prospect of abstention by the federal courts upon application by defendants if the state law is uncertain, pending resolution by state courts. See Reid v. New York, 453 F.2d 238 (2d Cir. 1971); Pennsylvania Ass'n for Retarded Children v. Commonwealth, supra. Yet the case for immediate relief is so compelling that the propriety of abstena-
its children an education, that opportunity may not be entirely withheld from any child.\footnote{88} The issue remains whether the education offered each child must be minimally adequate.\footnote{87}

**Procedural Due Process: The More Justiciable Way to Guarantee a Minimally Adequate Education for Every Child**

Assuming that the Supreme Court concludes that the door to public schooling must remain open to all if open to any, a variation of the ever-lurking McInnis-Kurland justiciability issue\footnote{88} is waiting at the doorstep: how is a court ever to determine what educational program is appropriate for each child's varying needs?\footnote{89} For those more worried about the fate of the children, the question may be stated another way: what good will it really do the formerly excluded retardation will vary with the particular circumstances present in each case. See, e.g., Lebanks v. Spears, Civil No. 71-2897 (E.D. La. 1973); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Commonwealth, \textit{supra} at 298-300. \textit{See also} H. Hart & H. Wechsler, \textit{The Federal Courts and the Federal System} 858-90 (1953). In particular, where state law is clear, exercise of pendent jurisdiction over state law claims, not abstention, is appropriate. \textit{Cf.} Askew v. Hargraves, 401 U.S. 476 (1971); UMW v. Gibbs, 383 U.S. 715 (1966). In any event, even if the federal court abstains, it should retain jurisdiction to hear plaintiffs' federal claims on demand of plaintiffs. Zwickler v. Koota, 389 U.S. 241, 244, n.4 (1967); England v. Louisiana State Bd., 375 U.S. 411, 416 (1964).

\footnote{86. To enforce this right to \textit{some} education, a court may simply enjoin the exclusion of any child from the regular school and classroom unless adequate alternative facilities and programs are provided. \textit{See, e.g.}, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972). See notes 112-27 and accompanying text \textit{infra}.}

\footnote{87. In the next two sections this issue is addressed in detail. It should be noted, however, that "exclusion" may be only one variety of deprivation of all educational opportunity. Proof may show that children incarcerated in various institutions—juvenile homes, reform schools, hospitals or residential institutions for the handicapped—also fail to receive any education. \textit{Cf.} Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971). Similar showings could be made with respect to certain regular schools, perhaps on behalf of a severely retarded child placed in an advanced class or a wholly non-English speaking child in a typical American schoolhouse. Although proving such denials might be difficult, such effective exclusion should be prohibited by the constitutional right to \textit{some} education posited above.}

\footnote{88. \textit{See} McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968); Kurland, \textit{supra} note 2.}

\footnote{89. In the next section, it will be shown how this concern over justiciability—first made in the context of allocating dollars between school districts on the basis of different aggregate needs of the children within each school district—loses much of its force when considering individual educational plans for individual children's varying needs. In this section there is discussed only a way for the courts to avoid the issue entirely by imposing strict procedural safeguards for placement of children in special classes, thereby removing the courts entirely from the substantive decisions.}
thirteen years old, 5½ feet tall, 150 pounds—or his new classmates, to be placed in a regular second grade classroom? The most obvious answer to the latter question is that there is no established evidence that such placement will harm any of the children; with a subtle restructuring of the class, such placement might benefit all the children by permitting the regular children to learn by teaching their slower peer. The equally obvious rejoinder to that answer is that most teachers and most regular students are not tolerant, creative, or humane enough to attempt, let alone succeed, at such an endeavor.

The unreceptive classroom argument reflects the fundamental problem which this article is addressing. Teachers, administrators, school boards, unions, parents and students are now so paranoid about dealing with diversity—in age, intelligence, ability, character, and culture—in the same classroom that the far greater danger is that the normal child will be labeled “slow” and placed in a “special” class. Upon opening the school door, then, the greater problem of differential education suited to the child’s needs is not too “high” a placement for the child’s achievement or ability, but too “low.” The primary danger is too much special education (in the sense of wholly separate classes and groupings), not too little; too many children labeled retarded, for example, not too few.

The effective remedy for this problem, therefore, does not rest with courts affirmatively requiring the schools to provide more special education as a matter of substantive right under the Fourteenth Amendment. Rather, the minimally acceptable remedy to be imposed...
by judicial action is a fair procedure for assigning children to various educational programs.\textsuperscript{93} Thus, courts need never determine what education is appropriate for any child; they need only determine the minimally required procedures by which school authorities make such decisions.\textsuperscript{93A} The issues to be discussed in this section, then, are (1) whether, under the Constitution, process is due children in their school placements; and (2) if so, given the circumstances of school classifications, of what must the "hearing" consist to accord due process of law?\textsuperscript{94}

**Governmental Imposition of Stigma**

In *Wisconsin v. Constantineau*,\textsuperscript{95} the Supreme Court considered the need for procedural fairness in any state action which arguably affixes a stigma, or badge of disgrace, on an individual. The police, without notice or prior hearing, had posted a notice in all retail liquor establishments forbidding sales of liquor to Constantineau because of "excessive drinking." The Court held that such action failed to accord the procedural fairness due under the Constitution. Speaking for the Court, Mr. Justice Douglas stated:

> The only issue present here is whether the label or characterization given a person by "posting", though a mark of illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. . . . We agree with the district court that the private interest is such that those requirements . . . must be met.

> It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.

> Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.\textsuperscript{96}

\textsuperscript{93} Such a procedure presumably also could solve the occasional problem of too "high" a placement as well if a hearing on such placement were triggered by parental demand, as well as the usual demand by teachers.

\textsuperscript{93A} The fair procedures, discussed hereafter under a due process rubric may also be ordered as the means by which an equity court can enforce the right to some education. As such, the fair procedures would merely be one type of auxiliary relief available to an equity court both to root out the affects of prior unconstitutional practices and prevent their occurrence in the future.


\textsuperscript{95} 400 U.S. 433 (1971).

\textsuperscript{96} Id. at 436 (emphasis added).
Classifying a child as retarded, emotionally disturbed, slow, dumb, bad, “excluded,” “uneducable,” “untrainable,” or any of the other labels applied to children denied education or placed in special classes, constitutes at least as great a “stigma” or “badge of disgrace” as being posted a drunk. If anything, the public significance of the school environment and the impressionability of school children—as compared with the liquor store and its patrons—make it greater. Such drastic action imposes on the child a stigma which may last a lifetime on his record. The child excluded from school or placed in special classes or institutions “is told . . . that he is unfit to be where society has determined all acceptable citizens of his age should be.” That such judgments have so often proven incorrect increases the child’s personal stake in fair procedures throughout the entire school classification process. Thus, even if the only issue present is the school’s pinning an unfavorable label on the child, the Fourteenth Amendment should command that a full measure of fair procedure is required.

**Governmental Imposition of Restraint on Essential Interest**

The Supreme Court has also consistently held that where a person’s essential interests are at stake, final government action must await

97. In Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972), one of the students was excluded from schooling because of a “behavior problem.” He was called “dumb” by his teachers and “fat lips” by his classmates. Neither label struck a responsive chord in the child, except as a trigger for withdrawal and minor aggression. A stigma has an effect in the bearer’s mind as well as in the minds of others. This is a typical example of how school classification can rarely be viewed as simple “discipline” actions. In Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), the court gave lip service to the need for procedural fairness, but refused to disturb the school authorities’ unbridled prerogative to transfer a student to a special discipline school. See Buss, supra note 95, at 580-82.

98. For a discussion of the stigma our society has historically placed on the retarded see Pennsylvania Ass’n for Retarded Children v. Commonwealth, 343 F. Supp. 279, 293-95 (E.D. Pa. 1972); cf. Buck v. Bell, 274 U.S. 200 (1927). Professor Kirp deals at length with the issue of how various school classifications are stigmatizing in his forthcoming article, “Schools as Sorters.”


100. Buss, supra note 94, at 577.

101. See notes 14-19 and accompanying text supra.

opportunity for a hearing. Where an important public good is denied or where a significant burden imposed on "life, liberty, or property" by "state action," process is due.\textsuperscript{103} The alternative is to consign those interests to "the play and action of a purely personal and arbitrary power."\textsuperscript{104} From the previous discussion of the importance of education for the individual and society, it should be clear that public education constitutes such a weighty interest and benefit, at least for purposes of requiring some continuing procedural fairness in the decisions which might lead to its termination or significant limitation.\textsuperscript{105} Unfortunately, the interests of too many children have been subject to procedures so arbitrary as to betray both the express interests of the state and the merit of the individual child in countless instances.\textsuperscript{106} In recent years, lower courts have consistently concluded that the guarantee of due process of law applies to expulsion, exclusion, or long-term sus-

\textsuperscript{103} Thus, in the following circumstances, inter alia, due process has been held to require notice and a hearing before essential interests are disturbed by government action: Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (prejudgment garnishment); Armstrong v. Manzo, 380 U.S. 545 (1965) (deprivation of parental rights); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (right to take bar examination); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (dismissal from employment); Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926) (accountant's qualifications to practice before the Board of Tax Appeals). Recently in Goldberg v. Kelley, 397 U.S. 254 (1970) (public assistance benefits), the importance of a full hearing prior to termination of a benefit granted by the state was reaffirmed; hence, if there ever was a doubt, there is no merit to the "right-privilege" distinction in the context of fair procedure.

\textsuperscript{104} Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

\textsuperscript{105} See notes 61-63 and accompanying text supra. Consider also: "It goes without saying, and needs no elaboration, that a record of expulsion from high school constitutes a lifetime stigma. It would seem that in taking an action of such drastic nature the Board of Education would have been interested in providing plaintiff with the opportunity to offer his explanation of the circumstances prior to the actual expulsion action by the Board." Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1393 (E.D. Mich., 1969). "I find that to deny a 16 year old eleventh-grade male and a 17 year old twelfth-grade male access to a public high school in Wisconsin is to inflict upon each of them irreparable injury for which no remedy at law is adequate. I make this finding by taking judicial notice of the social, economic, and psychological value and importance today of receiving a public education through twelfth grade." Breen v. Kahl, 296 F. Supp. 702, 704 (E.D. Wis.), aff'd, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970). It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Ordway v. Hargraves, 323 F. Supp. 1153, 1158 (D. Mass. 1971). "I take notice that in the present day, suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term may well be, and often is in fact, a more severe sanction than a monetary fine or confinement imposed by a court in a criminal proceeding." Soglin v. Kaufman, 295 F. Supp. 978, 988 (W.D. Wis. 1968).

\textsuperscript{106} For a discussion of the total miseducation of children see notes 1-21 and note 84 and accompanying text supra.
pension from schooling and placement in special or other than regular classes.

The Context and Balance of Interests in School Classification:
A Minimally Adequate Education for Every Child

In view of these two distinct, yet cumulative bases for according due process of law to school classifications, the unresolved issue is not whether due process of law applies, but what procedures that elusive concept requires in the name of fundamental fairness. The answer depends on the particular context and the balance of the interests between the school and the child.

The primary interests of the school and each child are identical: securing an adequate education, avoiding unnecessary stigmatization, insuring that any necessary stigmatization is both accurate and justly affixed, and providing some educational benefit appropriate to the classification. The interests of both diverge in practice in many respects, however. Teachers recommend troublesome or different children for placement in special classes or other special treatment regardless of benefit to the child. Schools, and their psychologists, test children for their school preparedness and "intelligence" and place them in various tracks or none at all, as much for the asserted benefit of the other


109. In the context of sanctions for misconduct in school, Professor Buss has already made the point that "[a]ny substantial impairment of this interest [the student's interest in obtaining an education] should result only after utilization of procedures satisfying the requirements of due process of law." Buss, supra, note 94, at 550.

children in school as the child specially placed. These school interests
are inimical to the interest of the child classified as exceptional in any
respect.

The child's interests, if he is to be the potential subject of the
exceptional label and placement in other than regular class, are a fair
and accurate diagnosis. He should be matched to a program which
will actually benefit him, and placed as close to the regular curriculum
and classmates as possible. There should be periodic review and
evaluation of both the child's progress and the value of the educational
program to which he is assigned. The school's secondary interests
are in conflict with those of the child: preservation of a regular school
population conveniently taught by the classroom teacher, maintenance
of the prerogatives of schoolmen over the educational decisions which
affect children's lives, avoidance of evaluation procedures which take
time, are costly, and subject school programs to scrutiny. Given this
divergence of interests, there is sufficient cause for adversity, as well
as evidence of danger of misclassification by school authorities,1 to
require a broad panoply of procedural rights in the school classification
process.

The issues to be resolved in hearings on educational placements,
as compared to meting out discipline, are sufficiently different to re-
quire different procedural safeguards.112 In the case of discipline, the
primary issues relate to whether the accused student is guilty of the
offense charged and what penalty is appropriate. In the case of edu-
cational classifications, the issues are much more complex and con-
tinuing in nature. What is "wrong" with the child? What does the
child need? Will he receive adequate education in a regular classroom,
with special support? What available educational program will benefit
the child? Must a new curriculum or support service be developed?
After placement for a period of time, has a particular special educa-
tion program actually benefited the child? If not, what alteration
should be made in the program or placement of the child? If the child
has benefited, when can he return to the regular class? If the child
can benefit as much from regular class, are there overriding educa-
tional interests which make some other placement appropriate? When
and how can the child be returned to the mainstream of education?

111. See notes 4-21 and accompanying text supra.
112. See Buss, supra note 94, at 589-639 for an excellent discussion of the pro-
cedures required in discipline cases. See also Lines, The Case Against Short Suspen-
sions, 12 INEQUALITY IN EDUCATION 39 (1972).
The Procedures Required to Guarantee Due Process of Law

In *Pennsylvania Association for Retarded Children v. Commonwealth* and *Mills v. Board of Education* district courts have been forced to confront the issue of what procedures are necessary for insuring that children are treated fairly in school. These courts have faced the extreme case: how to fit a child into an education program when he has already been wrongfully excluded, and consequently harmed, in the face of present classification practices which assign children to special classes both arbitrarily and too often erroneously. With...
the aid of the parties, these two courts spelled out constitutionally ac-
ceptable procedures for prior evaluation, periodic review after place-
ment and ascertainable standards for the entire process. Each court
determined that no child shall be labelled handicapped, recommended
for special class, excluded from a regular class or subjected to other
significant change in education status without a "constitutionally ade-
quate prior hearing and periodic review of the child's status, progress,
and the adequacy of any educational alternatives." The parameters
of these procedures are:

1. Timely evaluation and placement upon identification of
any child denied all education;

2. Public notification by the media, and personal notice to
known children effected, of the newly enforceable rights to some
education and hearing to determine appropriate educational pro-
grams;

3. A full evaluation of the child's needs by competent ex-
perts and development of a specific plan—including (a) specific
diagnostic results, (b) a specific prescription for meeting diag-
nosed needs, (c) and specific goals and benchmarks over time to
assist in measuring the success or failure of the prescription and
accuracy of diagnosis—prior to placement, or recommendation of
placement, in other than a regular class.

identifying the needs of children and matching them to programs. Cf. Holmes v.
New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968): "It hardly
need be said that the existence of an absolute and uncontrolled discretion in an agency
of government vested with the administration of a vast program, such as public hous-
ing, would be an intolerable invitation to abuse. See Hornsby v. Allen, 326 F.2d 605,
609-10 (5th Cir. 1964). For this reason alone due process requires that selections
among applicants be made in accordance with 'ascertainable standards,' and, in cases
where many candidates are equally qualified under these standards, that further selec-
tions be made in some reasonable manner such as 'by lot or on the bases of the
chronological order of application.'" Id. at 612; Hornsby v. Allen, 330 F.2d 55, 56
(5th Cir. 1964) (on petition for rehearing). Among the due process deficiencies cited
in Holmes were failure to make available to prospective tenants the regulations on
admissions, failure to process applications chronologically or in accordance with ascer-
tainable standards, automatic expiration of all applications within two years, failure to
accord credit for past time on waiting lists to renewals of applications, no public wait-
ing list by which an applicant could gauge the progress of his case or his status, and
failure to inform applicants of determinations of ineligibility. Almost all of these de-
ficiencies are characteristic of the administration of all too many special education
programs.

118. See notes 14-19 and accompanying text supra.
1972). A similar procedure has been adopted by the Commonwealth of Massachu-
setts by legislation (Mass. H.B. 6184), effective 1973-74 school year, and accepted by
the parties and approved by the court pursuant to a preliminary consent agreement in
4. Submission of the proposed placement, and reasons therefore, to the family with notice of opportunity for hearing before placement by a hearing officer and availability of assistance necessary in evaluating the proposal and preparing for a hearing;  

5. Expungement, and clarification of any statements by the family, of records made in the course of prior determinations in the absence of fair procedures;  

6. At the hearing, the burden of proof on school authorities as to all facts and as to the appropriateness of placement in other than a regular class—all in the context of a presumption that placement in a regular public school class, with appropriate ancillary services, if necessary, is preferable to any other placement;  

7. The hearing promptly held, upon request of the family, at a time and place reasonably convenient to the family;  

8. The right to a representative of the student's choice, including legal counsel;  

9. The hearing, open or closed, at the discretion of the parent or guardian;  

10. The hearing recorded;  

11. The hearing officer independent of the local school system;  

12. Prior to hearing, access to all public school system

120. Both Pennsylvania Association for Retarded Children v. Commonwealth and Mills v. Board of Education make it clear that the notice must actually inform the family of all their rights and the proposed placement and reasons therefore. Educational jargon must be made understandable to the family. In Mills, for example, the court ordered that "such notice shall: (a) describe the proposed action in detail; (b) clearly state the specific and complete reasons for the proposed action, including the specification of any tests or reports upon which such action is proposed; (c) describe any alternative educational opportunities available on a permanent or temporary basis; (d) inform the parent or guardian of the right to object to the proposed action at a hearing before the Hearing Officer; (e) inform the parent or guardian that the child is eligible to receive, at no charge, the services of a federally or locally funded diagnostic center for an independent medical, psychological and educational evaluation and shall specify the name, address and telephone number of an appropriate local diagnostic center; (f) inform the parent or guardian of the right to be represented at the hearing by legal counsel; to examine the child's school records before the hearing (any tests or reports upon which the proposed action may be based, to present evidence, including expert medical, psychological and educational testimony); and, to confront and cross-examine any school official, employee, or agent of the school district or public department who may have evidence upon which the proposed action was based." 348 F. Supp. at 880-81.


122. In Pennsylvania Ass'n for Retarded Children, the hearing officer was a designee of the State Secretary of Education; in Mills, he was a nonschool employee of the District of Columbia.
records pertaining to the child, including any tests or reports upon which the proposed action may be based;

13. The opportunity to cross-examine any witness testifying for school authorities;

14. The opportunity to present evidence (including an alternative evaluation, proposed placement, and other expert testimony) and to compel the attendance of school officials or their agents who may have relevant evidence;

15. The hearing officer's determination in writing, stating the reasons therefor by specific findings of fact and conclusions of law;

16. Pending resolution by hearing, the child's educational status not to be changed unless the parents consent;

17. Not less than every two years, the placement of a child in other than a regular class reviewed as set forth above and appropriate modifications made in the child's specific plan.  

That, in substance, constitutes the procedural guarantees promulgated by two courts to insure that every child will be treated fairly in the school classification process.  

The Procedural Road to Adequate Education

These specific procedures are suggested with the hope that they could guarantee every child a minimally adequate education within the context of services available to all children in any state. At this point in time, the issue of whether such fair procedure will insure adequate education remains, frankly, untested. We do not know whether families will respond to procedural guarantees by exercising their

123. In Mills, similar procedures were required for disciplinary actions denying access to regular instruction for more than two days. In Pennsylvania Association for Retarded Children v. Commonwealth, at least for the initial period of implementation, two masters were appointed by the court to assist in overseeing the implementation of the process. In Lebanks v. Spears, Civ. No. 2897 (E.D. La. 1973), by consent decree and order a modification of all these procedures was made to fit the local situation.

124. Mills and Pennsylvania Association for Retarded Children, however, may place too much reliance (and burden) on the family. First, it is unclear that the interests of parent and child in the school classification process are as one; the child's interest may not only be different, but also independent. Second, parental demand for hearings may be an ineffective way to secure the fair evaluation and placement required. It may well be, therefore, that (1) prior hearings, like periodic review, should be mandatory and cannot be waived by the parent or child; (2) the child's interests should be represented separately from the parent's, and (3) continuing court appointed "visitation committee" is necessary to oversee and evaluate the content of programs and adequacy of the school classification process.

125. In Pennsylvania Association for Retarded Children, the state, as well as local school authorities, are given responsibility for both enforcing the court orders and providing a constitutionally adequate system of education.
rights, especially in conjunction with existing community and consumer groups (of whom the various associations for exceptional children are merely the most obvious) to challenge programs as well as placements. We do not know whether school, health, and welfare officials will respond creatively with new support services for children in regular classes, special classes, and community programs, which actually benefit children and prepare them for full participation in life as adults and responsible citizens. We do not know whether the scrupulous procedures will focus attention on the present inadequacy of many aspects of schooling. In summary, we cannot know for certain whether fair procedure will mean an improvement in every child's education.

We can be reasonably sure, however, that such procedures, operating in conjunction with the right to some education, will serve as a prophylactic against the worst education malpractices. No child will be excluded entirely from education; no child will be placed in an institution or special class and thereafter forgotten or given no education; attention will be turned to providing educational benefit, as well as meting out stigma justly; and every child will be guaranteed the opportunity to challenge before an independent tribunal not only the arbitrary school practices, but the adequacy of his education program. As schooling is so much process, the judicial imposition of fair procedures fits the task. We can be sure that we are, at least in part, addressing the right problem.

There are few substantive rules about what does constitute a "quality education" for a child, and fewer for a system of public education. At a minimum, the self-analysis forced upon public policy makers, teachers, families, and students by procedural fairness in the school classification process insures that schools will begin to attend precisely to real rather than imagined needs. The entire system of delivering educational services will become the subject of special attention. As a matter of public policy, that seems the best way to insure that no child is denied a minimally adequate education.126

Such a procedural road to securing a minimally adequate education for every child avoids substituting the judiciary as the schoolmasters for the children of the nation. The court never has to define what an appropriate education is for any child. Rather, all the present par-

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ties to the process of educating students are required only to treat the
children served with fairness and due deliberation. Judicial action be-
gins and ends with determining fair procedure and enforcing the right
to some education. Previously unexamined and often arbitrary classi-
fication decisions are thereby made justiciable, and by a hearing officer
instead of a court. As a matter of constitutional adjudication, that
process seems the best way to insure that no child is denied a minimally
adequate education.

School issues which formerly were hidden to all—along with hun-
dreds of thousands of youngsters who, by any standard, were receiving
no education or total miseducation—are brought to public attention
by the judicial establishment of such a right to education. With
that revelation will also come the time to shift from the sterile inquiry
into “quality” and “inequality” in education and the general impact
of dollar inputs on school outcomes to the uniquely individual pro-
cess of allocating old and new resources to real children. We might
even hope that the continuing inquiry required by these new procedures
will serve to inform the allocation of resources more fully than all the
political rhetoric, and nonsense, about “leveling,” “lighthouse districts,”
“power-equalizing,” “local control,” and the like. It is through system-
matic, state-wide procedures to serve every child fairly that we can be-
gin to know, and serve, every child’s interests more fully. Procedure,
for a change, is a road to substantial reform of education for all our
children.

Additional elements necessary to insure this result include (1) systematic
evaluation of substantially disproportionate assignment of any racial, ethnic, sexual, or
wealth group to a particular curriculum; (2) systematic evaluation of the post-school
effects of school decisions and programs, and (3) the opportunity for a family to
contest the propriety of a regular class placement annually. See Mass. H.B. 6184.
These three additional procedural safeguards would permit full reckoning with the new
dogma—that schools do not matter much in providing training for and access to “suc-
cess” after formal education ends—and society’s responsibility to prepare each new
generation of children in an effective but nondiscriminatory fashion for a world never
before known.

Aside from the merits of his unholy trinity, perhaps even Professor Kurland
would agree that the constitutional right here postulated meets all three parts of his
two-thirds requirement for success, “for the Court’s will to prevail beyond its effect on
the immediate parties to the lawsuit.” Kurland, supra note 2, at 592. The apparent
foundation for Kurland’s three criteria is the “dismal picture of what must be acknowl-
The Substantive Right of an Education Appropriate to the Child's Needs: A Somewhat Less Honest Road to an Adequate Education, Supposedly Suited to Each Child's Needs

In Mills v. Board of Education of the District of Columbia, Judge Waddy ordered, inter alia, "that no child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment . . . unless such child is provided . . . adequate alternative educational services suited to the child's needs." It has been argued in the previous two sections that such an order is no more, and no less, than an alternative statement of the constitutional rights to some education and procedural fairness before placement in other than a regular class. An alternative reading, however, is that such order constitutes a single substantive right to a minimally adequate education suited to the child's needs. This section will examine the potential impact of such a "needs" standard and the constitutional bases for it.

As noted, the "needs" question originated with the early school finance cases which sought, under an equal protection theory, to allocate to be the Supreme Court's failure" with respect to the desegregation cases. Id. at 594. The professor's judgement, however, was premature; he failed to gauge the actual desegregation flowing from Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); and Green v. County School Board, 391 U.S. 430 (1968). Worse, his primary criteria for success—public acquiescence—is an invitation to the Court to stay its hand, simply because the unconstitutional conduct has public support. Such a view is anathema to any concept of the supremacy of the Constitution and rule by law rather than fiat. See Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968); Cooper v. Aaron, 358 U.S. 1, 19 (1958); Brown v. Board of Educ., 349 U.S. 294, 300 (1955); School Segregation, supra note 36.

130. 348 F. Supp. 866, 878.
131. The issue of whether this substantive right is more properly ascribed to a new substantive due process rubric or the new equal protection, I want to leave to the Constitutional pundits. See, e.g., Kurland, supra note 2, at 591; Michelman, supra note 35, at 33. I feel constrained, however, to explore briefly those analytic gymnastics; I feel free to do so because any actual differences matter not in the context of the right to education articulated in this article.

cate revenues within a state among school districts in accord with the differing aggregate needs of students in different school districts. Relief was denied in these cases, assertedly on the ground that there was no manageable standard by which any court could determine what differential revenues were required to finance an educational program suited to the differing needs of various school districts. The validity of such a judgment is not here questioned: as educators cannot now, and likely never will uncover the relationship between dollar inputs in schooling and achievement test scores, actual learning, and success after graduation, the courts should not be expected to be able to invent the answer.

Nonetheless, it is worth repeating that any concern over the precise allocation of dollars to fit the aggregate, or individual, needs of students is basically irrelevant to the constitutional right to education, no matter how framed. In the context of the individual's right to an education, even a substantive "needs" requirement can only be implemented by individual evaluations, assignment to a "special" program, re-evaluation of the individual's needs and effectiveness of the program, and appropriate reassignment. The issue, therefore, is not an abstract allocation of dollars among districts or even schools, but an appropriate matching of the individual child to a specific program of education. Hence, the only issue raised by the alternative statement of the right to education is whether this process is required primarily by constitutional guarantee of fair procedure or a substantive right to education suited to the child's needs. In most school contexts the source and statement of the right to education does not alter the actual impact of judicial intervention into school affairs and the fate of children.

**Constitutional Bases of the Needs Standard**

There are three interrelated bases for the substantive right to education suited to the child's needs: (1) "minimum protection," (perhaps more properly labeled the new, old substantive due process or the new, new equal protection); (2) a constitutionally guaranteed

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133. See McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968); Kurland, supra note 2, at 583; notes 46 & 89 supra.
135. That does not, however, mean that courts cannot promulgate and enforce other manageable standards affecting resource allocation, and more important aspects of education. See Serrano, supra note 46, at 133; School Segregation, supra note 36, at 15-20.
benefit of adequate education to justify the massive, compulsory inter-
vention that schooling is in the child's life, and (3) the new equal
protection. Professor Michelman argues that the Supreme Court's
actual "new" concern (at least during the Warren stewardship) is with
the establishment of those minimum standards necessary to insure ac-
cess to the means of minimally satisfying certain "basic wants." The
concern is with deprivation not discrimination, provision not equali-
ization. This concern for "minimum protection" finds its roots as
much in substantive due process—unconscionable deprivation of "life,
liberty or property"—as in equal protection. Hence, education, with
its compulsory overtones and as an aspect of First Amendment free-
doms, becomes an obvious candidate as a "basic want" in the scheme
of the minimum protectionist. After all, the state's massive restraint
on a child's liberty, by compelling attendance upon school for six hours
a day, 180 days a year, for up to ten years, can only be justified
if some minimal benefit is guaranteed to flow therefrom.

That concern merges into the second basis for the substantive con-
stitutional right to adequate education suited to the child's needs: if
criminals in penitentiaries are entitled to minimal standards of rehabili-
tation and if unfortunate persons "civilly" committed involuntarily
to various state institutions are entitled to minimal standards of care

138. COONS, supra note 33, at 320; Developments in the Law—Equal Protection,
139. Michelman, supra note 35, at 13. See also Kurland, supra note 2, at 591;
cases cited note 40 supra (Justice Harlan's emerging view).
140. Professor Michelman, however, accepts that both deprivation and provision
are determined, at least in part, by a comparison with what the rest of society has, or
can afford; hence, what constitutes "minimum" protection does not purport wholly to
avoid concern for equality.
141. Cf. Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971); Wayne County
Jail Inmates v. Wayne County Bd. of Comm'rs. No. 173217 (Mich. Cir. Ct. May 25,
(E.D. Ark. 1970). This emerging right "to be free from harm" may apply to any
person in any state institution, even if commitment is in some sense "voluntary."
See New York State Ass'n for Retarded v. Rockefeller, Civil No. 72-356 (S.D.N.Y.
1973). In terms of actual relief, such a negative right may lead to relief more nearly
targeted to the constitutional wrong than an affirmative "right to treatment" theory.
Cf. note 142 infra.
1972): "Adequate and effective treatment is constitutionally required because, absent
treatment, the hospital is transformed 'into a penitentiary where one could be indefi-
nitely convicted for no offense.' [Citations omitted]. The purpose of involuntary
hospitalization for treatment purposes is treatment and not mere custodial care or pun-
ishment. This is the only justification, from a constitutional standpoint, that allows
and treatment, so too, the innocent child committed to a minimum ten year sentence of school should be entitled to a benefit: an adequate education regardless of different abilities and capacities. That concern merges into the fundamentality and suspect classification inquires of the new equal protection: where education—a good so fundamental as to be made compulsory—is to be meted out differentially on the basis of stigmatizing classifications, it must be done so that the children are provided an education sufficiently tailored to the child’s needs as to guarantee some minimal benefit.  

Potential Impact of Establishment of a Substantive Right to Education Suited to the Child’s Needs

As educators now have little capacity to set specific minimum standards for what constitutes an adequate education for every child, courts should be careful about framing decrees which set affirmative minimum standards, based either on resource input or measured outcome for the child. Moreover, a general order to provide a minimally adequate education tailored to the child’s needs imposes no greater duty on school authorities than a requirement to act in “good faith” and rationally in the fair process commanded by the Constitution for school classification. In particular cases, however, the fair process of school classification may reveal educational practices so illegitimate, inequitable, or racially discriminatory as to require further judicial redress in the specific controversy.

civil commitments to mental institutions. . . .” Because the only constitutional justification for civilly committing a mental retardate, therefore, is habilitation, it follows that once committed, such person is possessed of an inviolable constitutional right to rehabilitation. Stated another way, absent such rehabilitation and education, civil commitment, or arguably compulsory education, is punishment for a “status” without proof of any overt, proscribed act, unconstitutional under Robinson v. California, 370 U.S. 660 (1961).

143. As Professor Michelman has suggested, however, “there is a strong ducks-and-drakes element in this approach, since nothing seems to prevent the legislature from simply abandoning compulsory attendance.” (Draft on file with Paul R. Diamond.)

144. The lack of standards for education generally may not be present in the context of adequate care and treatment in the institutional setting: there, minimal standards are both essential and more capable of present promulgation. Cf. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1972). Moreover, in the school setting, with respect to specific physical, psychiatric and medical disorders which can be treated, a similar situation may exist. See note 19 supra.

Finally, recent developments do suggest that specific programs of education and training, which provide measurable benefits, can be matched on a fairly regular basis with many of the most severely handicapped exceptional children. Absent other (or new) proof, however, I still happen to believe that education is mostly hard work, art,
In that respect *Vought v. Van Buren Public Schools*¹⁴⁶ is instructive. Initially, the district court commanded that a hearing be accorded the student before expulsion for distributing an underground newspaper which contained a few swear words. School authorities dutifully held a hearing and expelled the student. Yet the hearing revealed that other literature in the school library and curriculum contained the same swear words used for the same purpose, although with an arguably different effect on some of their infrequent readers, especially the school administrators and school board. Upon reapplication to the court, the judge found the grounds for the dismissal so arbitrary as to be insufficient to justify the expulsion and ordered the student reinstated.

A similar process of examining the substance of school classifications is the primary modus operandi of both the “substantive” and procedural” articulation of the right to education. There is no significant difference in actual impact on the process or substance of school classification: in both, the process of school classification remains the vehicle, admittedly imperfect—but eventually self-correcting—to provide an adequate education for each child. The substantive right “needs” approach merely aggrandizes the more modestly stated right to some education. Under either statement the individualized process may reveal circumstances which show that the child’s present or contemplated placement either totally deprives him of education or makes him the subject of total miseducation.¹⁴⁶ If the school authorities and the hearing officer fail to act upon such evidence, redress may still be obtained, on a case by case basis, from the court, with continuing jurisdiction, under either standard.¹⁴⁷

politics, association and, at times hopefully, a little joy. None of these are likely subjects for specific substantive guidelines which can be generalized by the court. (Some of my concerns with respect to constitutional adjudication of the adequacy issue may not be as relevant to state court actions sounding in tort on behalf of individual children. In these actions, although the end result may be pressure on school authorities to provide more adequate education, the judicial intervention is limited to imposing damages for the failure to provide children with the minimal skills requisite to existence at this time and implicitly or explicitly promised by the state compulsory systems of education.)

¹⁴⁶. See note 87, *supra* and note 147 *infra*.
¹⁴⁷. Such cases, however, might have systematic effects. For example, consider a possible decree requiring bilingual education in the case of a failure to provide any education to children speaking only Spanish but taught only in English. See *United States v. T.E.A.*, C.A. No. 5281 (E.D. Tex., filed Dec. 6, 1971). Consider also a possible decree requiring proportional representation on a racial basis in advanced classes upon a showing that existing substantial disproportion is not adequately justified by nonracially discriminatory reasons. Cf. *Townsend v. Swank*, 404 U.S. 282,
Operationally, therefore, the distinction between the substantive right to adequate education suited to the child's needs, as compared with fair procedure coupled with the right to some education, is without real difference. In such circumstances the sounder, more honest jurisprudential course for the court is to trumpet the less glamorous procedural right; this course is preferable to aggrandizing a somewhat chimerical substantive right to an education suited to every child's needs, whose success depends primarily on full implementation of procedural rights and enforcement of the right to some education. 148

Conclusion

The constitutional right to education will be formed by the judicial establishment and enforcement of the right to some education and

292 n.8 (1971); Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972). Finally, consider the sweeping and salutary implications of combining this "procedural" approach with a "substantive" attack on the segregation of children into separate residential institutions, schools or even classes on the purported basis of, for example, mental retardation, physical handicap, or speech impairment. To the extent that these classifications are unrelated to actual handicap and have been used historically to subject a definable class of politically powerless persons to unequal treatment and stigmatizing isolation, they are "suspect," and the resulting segregation will be unconstitutional if any less segregative alternative is available. See Burt, "Beyond the Right to Treatment: Strategies for Judicial Action to Aid the Retarded," paper presented to President's Committee on Mental Retardation 1973 Conference, "The Mentally Retarded Citizen and the Law"; Dimond, "Analysis of Right to Education and School Classification Advocacy," paper presented to Organizational Meeting of the Children's Defense Fund (both on file with Paul R. Dimond).

148. My concern over judicial restraint in this area—and the concern of others with the efficacy of such a strictly procedural approach—may also be accommodated by a second approach. What we are dealing with at this stage of the analysis is not so much right as remedy: upon a showing of violation, how can an equity court insure that every child has the opportunity of some education (at least as long as the state has made that opportunity generally available to others)? The trial court, as in school desegregation cases, could therefore do the following: (1) require school authorities to submit plans for implementation to eradicate the violation and all its effects on the children affected and prevent its recurrence in the future; (2) permit plaintiffs to submit objectives and propose alternatives; (3) hold a hearing on the plans; (4) order or approve a plan; and (5) retain jurisdiction and require filing of appropriate reports to permit the parties to apply for further relief upon a showing of either the inadequacy of the plan or changed circumstances. Cf. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968). Such an approach is familiar to the judiciary and litigants but has not yet been tried generally in the area of school classification here discussed. It permits attention to the circumstances of each locality and case and requires an appropriate reconciliation—on a case by case basis—of the concerns over judicial restraint and complete relief. The merits of this approach are therefore sufficient to require its full use in future exclusion cases.
the procedural due process rights to hearing prior to placement, periodic review, and ascertainable standards tailored to the special circumstances and importance of school classifications. That constitutional right to education will provide each family with the realistic opportunity to fight meaningfully for a decent education for each of their children. The process established is individual and can recognize and serve individual differences, all in the context of the essential similarity of each child as a potentially functioning human and responsible citizen.

The constitutional right to education will also enable schoolmen and the body politic to inform the many educational, political, and fiscal decisions which abound in schooling by collective learning from individual hearings. Each state will be forced to confront both diverse needs and yet deal effectively with the capacity of each child. Families will have a weapon more powerful than the ballot box, "community control," and "free choice" over all aspects of schooling: they are guaranteed treatment as clients—in the highest sense of the word—who must be served fairly, openly and well rather than ruled.

Beyond that, it is conceivable that the consumers of educational services will join forces, not only to insure the effective operation of the hearing process for each child, but collectively to reform the political substance of schooling and pass a new culture, or test of culture, to the next generation of children. By focusing on the right to education of those children who are arguably least capable, we might even begin to accept the vast potential in every child. After all, almost every child can learn to use and respond to symbols, even speak: that feat is greater than any other known to mankind, yet it is within the grasp of almost every child. When we begin to understand the capacity of every child for development, we may even begin to learn that character, not I.Q., matters most on the job, at the capitol, and in the schoolhouse, as well as at home. By finally serving those who have been called ineducable by our schoolmasters heretofore, we may all gain a little wisdom, and a better system of schooling.
